

European Enforcement Update: Developments in the Enforcement of Article 102 TFEU

Frances Murphy, Bingham McCutchen LLP

The last quarter of 2013 saw the enforcement of the competition rules against abuses of dominance focus exclusively on matters already under investigation by the European Commission (the "Commission"). No new proceedings concerning alleged abuses of dominance in breach of Article 102 TFEU¹ were initiated. Accordingly, the Commission's enforcement activities relative to Article 102 TFEU remained on the sectors of key priority to it such as financial services, energy, telecommunications, information and communication technologies ("ICT"), transport, and pharmaceuticals.

European Commission

New investigations

No new investigations concerning an alleged abuse of a dominant position in breach of Article 102 TFEU were initiated by the Commission.

Closed Investigations

In the last quarter of 2013, the Commission closed two TFEU Article 102 investigations using Article 9 of Regulation 1/2003 (the "**Regulation**"). Under Article 9, the Commission may conclude an antitrust investigation by deciding to accept legally binding commitments that have been offered by the companies concerned to close the investigation – a so-called "Article 9 Commitment decision". Since the entry into force of the Regulation in 2003, the Commission has taken 31 Article 9 Commitment decisions, 20 of which related to Article 102 TFEU investigations.

Deutsche Bahn

The two cases that were closed by the Commission both concerned *Deutsche Bahn*². They were closed by the Commission on 18 December 2013 by the simultaneous adoption of Article 9 Commitment decisions.

The cases against Deutsche Bahn concerned its pricing system for traction current. Following a preliminary assessment, the Commission was concerned that Deutsche Bahn may have abused its dominant position on the market for the provision of traction current in Germany, in particular by offering

discounts that only railway companies in its group could achieve fully. To allay the Commission's concerns Deutsche Bahn offered to introduce a new pricing system for traction current that would apply uniformly to all railway companies and should enable other electricity providers to supply traction current to railway companies directly. The Commission market tested Deutsche Bahn's proposals and the responses it received indicated that the market was largely receptive to them. Accordingly, the Commission proceeded to fine tune the commitments in negotiations with Deutsche Bahn and then to formally adopt them on 18 December 2013.

Under the Article 9 Commitment decisions, DB Energie will, with effect from 1 July 2014, grant electricity providers access to its network for supplying traction current enabling electricity providers not belonging to the DB Group to supply traction current to railway companies directly. DB Energie will also introduce a new pricing system for traction current that will apply uniformly to all railway companies and should enable other electricity providers to supply traction current to railway companies.

Under the new pricing system Deutsche Bahn will charge separate prices for electricity and for access to the traction current grid and will apply a single price for electricity without any discounts. In addition, for a year commencing from July 2014, DB Energie will grant a reduction of 4% on the price of traction current to all railway companies not belonging to the DB Group, based on the total amount they were invoiced by DB Energie in the preceding year.

Deutsche Bahn is required under the Article 9 Commitment decisions to provide the Commission with the data necessary for the Commission to be able to monitor and assess whether the amounts charged by DB Energie under the new pricing system may lead to a margin squeeze.

The Commission considers that the Article 9 commitments address its competition concerns since the commitments will ensure that railway companies immediately benefit from lower prices until the effects of increased competition can set in. The lower prices for traction current will contribute to ending the margin squeeze. The commitments will also restore the ability of railway companies to compete with Deutsche Bahn on the rail freight and long distance passenger markets. In addition, the commitments will enable electricity providers not belonging to the Deutsche Bahn Group to supply traction current to railway companies directly.

Ongoing commitment proceedings

Commitment proceedings are ongoing in three cases concerning a suspected breach of Article 102 TFEU. Of these, one is in the final stages of the market testing phase (*Google*), one is at an intermediary stage (*Samsung*) and one is at the very preliminary stage (*Gazprom*).

¹ Article 102 of the Treaty on the Functioning of the European Union ("TFEU") provides: "any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited".

² See Case 39.678 *Deutsche Bahn I* and Case 39.731 *Deutsche Bahn II*. They were reported on in the Spring and Fall 2013 editions of this newsletter.

Once the Commission has determined that a case may be one that could be resolved by way of an Article 9 Commitment decision, the Commission will test the commitments being offered by the parties under investigation with various third parties (typically customers and competitors), to assess the extent to which the commitments are thought likely to rectify the competition concerns.

Google

The Commission and Google continue to wrangle over the commitments that were offered by Google in April 2013 with the Commission pressing for further concessions from Google.

The Commission's investigation commenced in 2010 and is concerned with the extent to which Google may be abusing its dominant position in the markets for web search, online search advertising and online search advertising intermediation in the European Economic Area ("EEA").

In March 2013 the Commission formally notified Google of its preliminary conclusions, raising four antitrust concerns:

- (i) The prominent display, within Google's web search results, of Google's own specialised web search services as compared to competing specialised web search services (i.e. services allowing users to search for specific categories of information such as restaurants, hotels or products). First, users are not aware of the promotion of Google's services within the search results. Second, competitors' results that are potentially as relevant are significantly less visible and even sometimes not directly visible to users - they are more difficult for the user to find, for instance because the user has to scroll down the screen to see them or has to go to a subsequent search results web page.

The Commission's concern was that this practice unduly diverted traffic away from Google's competitors in specialised search towards Google's own specialised search services, by reducing the ability of consumers to find a potentially more relevant choice of specialised search services.

- (ii) The use by Google without consent of original content from third party web sites in its own specialised web search services.
- (iii) Agreements that oblige third party web sites ("publishers") to obtain all or most of their online search advertisements from Google.
- (iv) Contractual restrictions on the transferability of online search advertising campaigns to rival search advertising platforms and the management of such campaigns across Google's Adwords and rival search advertising platforms.

The Commission expressed the concern that the above practices could harm consumers by reducing choice and

stifling innovation in the fields of specialised search services and online search advertising.

On 3 April 2013, Google proposed commitments comprising a package of measures intended by Google to address the Commission's four concerns. Google proposed that for a period of five years and three months, Google would (1) clearly label promoted links to its own specialized search services so that users can distinguish them from natural web search results; (2) offer all websites the option to opt-out from the use of all their content in Google's specialized search services while ensuring that any opt-out does not unduly affect the ranking of those websites in Google's general web search results; (3) no longer include in its agreements with publishers any written or unwritten obligations that would require them to source online search advertisements exclusively from Google; and (4) no longer impose obligations that would prevent advertisers from managing search advertising campaigns across competing advertising platforms.

On 25 April 2013 the Commission sought feedback from stakeholders on these commitments through a market test. The commitments received what the Commission described as "very negative" feedback. As a result the Commission called upon Google to improve its proposals significantly. On 30 September 2013, Google submitted a revised set of commitments which, following further market testing by the Commission in October 2013, the Commission rejected as insufficient and required Google to improve on them.

On 31 January 2014, Google submitted revised commitments and took an unusual step of unilaterally publishing them. In the ordinary course proposed commitments are confidential as between the party under investigation and the Commission and are only put into the public domain if the Commission proceeds to market test them.

On 5 February 2014, the Commission announced that it thinks Google's revised commitments address the Commission's four concerns in full and are therefore sufficient to settle the Commission's investigation. The Commission believes Google's revised commitments to be sufficient because Google has accepted to guarantee that whenever it promotes its own specialised search services on its web page (e.g. for products, hotels, restaurants, etc.), the services of three rivals, selected through an objective method, will also be displayed in a way that is clearly visible to users and comparable to the way in which Google displays its own services. This principle will apply not only for existing specialised search services, but also to changes in the presentation of those services and for future services.

In addition, Google shall:

- (i) give content providers an extensive opt-out from the use of their content in Google's specialised search services if they so wish, without being penalised by Google.



- (ii) remove exclusivity requirements in its agreements with publishers for the provision of search advertisements; and
- (iii) remove restrictions on the ability for search advertising campaigns to be run on competing search advertising platforms.

Google's commitments would cover the European Economic Area (EEA) for 5 years and compliance with its commitments would be supervised by an independent monitoring trustee.

The Commission's stated intention to accept Google's revised commitments, and then without further market testing, has been widely criticised by stakeholders and by some EU officials.

The revised terms of settlement will now have to be put through the final stages of the formal procedure by the Commission before they are formally adopted. That procedure could take a few months.

*Samsung*³

The case against Samsung was opened by the Commission in 2012. In September 2013, Samsung offered commitments in an endeavour to allay the Commission's concerns that Samsung was acting abusively in breach of Article 102 TFEU. On 17 October 2013, the Commission commenced market testing of a draft Article 9 Commitment decision.

The Commission considers that, in the specific circumstances of this case, recourse by Samsung to injunctions as a remedy for patent infringements, may be abusive where standard essential patents ("SEPs") are concerned and the potential licensee is willing to enter into a licence on Fair, Reasonable and Non-Discriminatory ("FRAND") terms. The Commission considers that such legal action can distort FRAND licensing negotiations and allow SEP holders to impose licensing terms which a licensee would not agree to absent the threat of having its products excluded from the market.

To address the Commission concerns, Samsung has offered commitments comprising a package of measures whereby it will commit for a period of five years not to seek injunctive relief in the EEA in relation to any of its SEPs that relate to technologies in smartphones and tablets against any company which agrees to and complies with a particular licensing framework. The licensing framework will comprise a negotiation period not to exceed 12 months and a third party determination of FRAND terms by either a court or arbitrator, as agreed by the parties. If the parties cannot agree on the means of determination, the parties will have to submit to arbitration.

³ *Samsung*, Case C-39939, Enforcement of UMTS standards essential patents.

*Gazprom*⁴

The EC opened its investigation of Gazprom in September 2012.

Gazprom, is a state-owned Russian producer and supplier of natural gas. The Commission suspects *Gazprom* may be abusing its dominant position in upstream gas supply markets in Central and Eastern European Member States by:

- hindering the free flow of gas across Member States and thereby dividing the markets for gas;
- preventing the diversification of the supply of gas; and
- engaging in unfair pricing practices by linking the price of gas to oil prices.

The case has been met with political resistance from Russia. Following the announcement of the Commission's investigation, the Russian President Vladimir Putin, signed a decree whereby "strategic" companies operating abroad may not pass information to foreign regulators without first seeking clearance from Moscow. However, EU competition laws apply to all companies active in the EU, irrespective of their ownership. Despite the political posturing on 13 December 2013, *Gazprom* is understood to have offered a package of commitments to the Commission in lieu of the Commission continuing with its investigation into *Gazprom*'s conduct. The Commission has not yet proceeded to market test *Gazprom*'s commitments and the Commission is understood to be continuing to work on its written case against *Gazprom* that would be set out in a Statement of Objections ("SO"). An SO is not a public document.

Other ongoing Article 102 TFEU investigations

Energy

The Commission has continued to focus on the recently liberalized markets in Central and Eastern Europe.

There are still two ongoing cases in the gas sector, one concerns OPCOM and the other concerns Bulgarian Energy Holdings.

*OPCOM*⁵

OPCOM is the operator of the only power exchange in Romania. The Commission is investigating whether *OPCOM* and its parent company *Transelectrica* may be abusing its dominant position by discriminating against companies on the basis of their nationality or place of establishment. This is by *OPCOM* requiring that all participants on the spot markets on the power exchange hold a Romanian VAT registration and consequently be established in Romania. On 30 May 2013,

⁴ *Gazprom*, Case C-39,816 - Upstream gas supplies in Central and Eastern Europe.

⁵ *OPCOM and Transelectrica/ Romanian Power Exchange*, Case- 39.984.



the Commission announced that it had sent a SO to OPCOM and Transelectrica, setting out its written case that in the Commission's opinion OPCOM's requirement discriminates against foreign traders and inhibits competition on the Romanian electricity market. If OPCOM is not able to allay the Commission's concerns and if the Article 9 Commitment decision route is not embarked on for any reason, the Commission will proceed to a formal finding of an abuse of dominance violation.

Bulgarian Energy Holdings⁶

Bulgarian Energy Holdings, its gas supply subsidiary Bulgargaz, and its gas infrastructure subsidiary Bulgartransgaz (together "BEH") own key gas infrastructures in Bulgaria. The Commission is investigating whether BEH may be abusing its dominant market position in the wholesale electricity market by hindering competitors from accessing key gas infrastructures in Bulgaria. The Commission is concerned that BEH may be preventing potential competitors from accessing (1) the Bulgarian gas transmission network and the gas storage facility by explicitly or tacitly refusing or delaying access to third parties and (2) the main gas import pipeline by reserving capacity that is consistently not used, without releasing it on the market.

Oil and biofuel sectors⁷

The Commission continues with its market investigation into the oil and biofuel sectors. The Commission has concerns that certain companies active in and providing services to the crude oil, refined oil products and biofuels sectors may be preventing others from participating in the price assessment process, with a view to distorting published prices.

Telecoms

Slovak Telekom

The Commission's investigation of Slovak Telekom a.s. ("ST") and its parent company, Deutsche Telekom AG, continues. The Commission thinks that ST may have refused to supply unbundled access to its local loops and wholesale services to competitors, and may have imposed a margin squeeze on alternative operators by charging unfair wholesale prices, all in violation of the EU antitrust rules on abuse of dominance. Deutsche Telekom may be liable for the conduct of its subsidiary.

Internet connectivity services⁸

The Commission continues with its investigations of each of Deutsche Telekom, Orange and Telefónica concerning the

internet connectivity services they each provide. The investigations were commenced by way of on-site inspections of the premises of each of the companies by the Commission. Internet connectivity allows market players (such as content providers) to connect to the internet so as to be able to provide their services or products at the retail level.

Transport

The only case still under investigation in the transport sector following the closure of the *Deutsche Bahn* case, is the Commission's investigation of *AB Lietuvos geležinkeliai* ("LG"). This concerns the suspected removal by LG, the incumbent railway operator in Lithuania of a railway track connecting Lithuania to Latvia. The Commission is concerned that the removal of the track would limit customer choice and limit new entrants and would thereby comprise an abuse of LG's dominant position in Lithuania.

Digital economy

The Commission's investigation of Motorola concerns Motorola's use of injunctions to control the use of its SEPs. The Commission is concerned that in circumstances where Motorola has given commitments to license those SEPs on FRAND terms, injunctive action against to control the use of its SEPs would constitute abusive conduct in violation of Article 102 TFEU. Similarly, the Commission's investigation of *The MathWorks Inc.*, continues. Here the Commission is investigating whether MathWorks is acting abusively by refusing to provide a competitor with end-user software licences and accompanying interoperability information for "Simulink" and "MATLAB". Such a refusal would prevent the competitor from lawfully reverse-engineering in order to achieve interoperability with Simulink and MATLAB⁹.

Waste management

The Commission continues with its investigation of ARA, a waste management company in Austria. The Commission has issued an SO setting out its preliminary view that ARA may have abused its dominant position on the markets for the management of packaging waste (mainly packaging made of plastic and metal) in Austria by hindering competitors from entering or expanding in these markets. The Austrian government recently submitted a new draft waste law to the Austrian parliament aiming at opening up the markets for the management of packaging waste to competition. The Commission nevertheless thinks that competition has been prevented by ARA's behaviour and wants to ensure that the legal possibility of market entry will ultimately translate into effective competition. If ARA is not able to allay the Commission's concerns and if the Article 9 Commitment decision route is not embarked on for any reason, the

⁶ *Bulgarian Energy Holdings*, Case -39.849 BEH Gas

⁷ Case 40.054 Oil and Biofuel Markets.

⁸ *Deutsche Telekom*, Case- 40.089 Internet Connectivity, *Orange*, Case- 40.090 Internet Connectivity, and *Telefónica*, Case- 40.092 Internet Connectivity.

⁹ See the Spring and Fall 2013 editions of the newsletter for prior reports on these cases.

Commission will proceed to a formal finding of an abuse of dominance violation

Pharmaceutical/Generics

Servier¹⁰

The Commission continues to investigate Servier and several of its generic competitors. The Commission has issued an SO setting out its written case against Servier that Servier has abused its dominant position in relation to perindopril by inducing its generic challengers to conclude patent settlements and rendered generic market entry for perindopril more difficult or delayed market entry by others by acquiring scarce competing technologies to produce Servier's own branded perindopril. If Servier is not able to allay the Commission's concerns and if the Article 9 Commitment decision route is not embarked on for any reason, the Commission will proceed to a formal finding of an abuse of dominance violation.

European Court of Justice

There have been no developments in any of the three pending cases reported in Spring and Fall 2013 editions of this newsletter, the *Greek Lignite* appeals; in *Ink-jet printer manufacturers* and in *Telefónica* respectively.¹¹

Conclusion

We are likely to see a continued use by the Commission of Article 9 Commitment decisions as the means by which investigations by it of suspected competition law violations are concluded. Over the last few years the majority of investigations concerning suspected dominance abuses have been concluded by way of commitment decisions. The Commission thinks that its use of the commitment procedure has allowed it to process cases it has under investigation more efficiently and to right perceived wrongs more quickly. Others consider the approach to be harmful (1) to legal certainty since it precludes the development of reliable case precedent and (2) to customers and consumers harmed by the competition law violation since the absence of a formal finding of infringement against the company under investigation makes it much more difficult for those customers and consumers to seek damages for their loss.

For more information, please contact:

Frances Murphy
London
+44.20.7661.5357
frances.murphy@bingham.com

¹⁰ *Servier*, Case - 39.612 Perindopril

¹¹ Case C-553/12 - European Commission v DEI and Case C-554/12 - European Commission v DEI; Case C-56/12 - European Federation of Ink and Ink Cartridge Manufacturers (EFIM) v European Commission; and Case C-295/12P - Telefónica S.A. and Telefónica de España, S.A.U. (OJ 2012 C-295/12).