

REVIEW OF RECENT DEVELOPMENTS AND POLICY ISSUES IN EU COMPETITION LAW

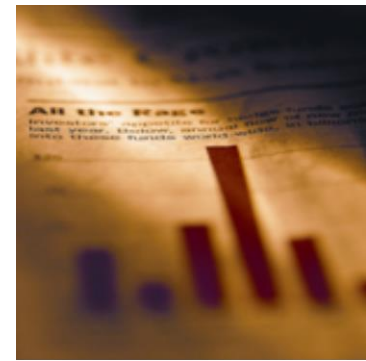
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OR ONE YEAR IN 8 MINUTES...

- A „GREAT” YEAR FOR ARTICLE 102 OF THE TFEU (ABUSE OF DOMINANT POSITION)
- COMMITMENTS AND SETTLEMENTS ON THE RISE
- LEGISLATIVE DEVELOPMENTS (MAINLY TTBER REVIEW)
- EFFECTIVE JUDICIAL REVIEW – AFTER ALL THESE YEARS...

WHAT A YEAR FOR ARTICLE 102 !

- VARIETY OF CASES – VARIETY OF ABUSES
– RULINGS OF THE EUROPEAN COURT, ON-GOING INVESTIGATIONS AND EU COMMISSION DECISIONS
- ABUSES RANGING FROM MARKET FORECLOSURE, MARGIN SQUEEZE, SELECTIVE PRICE CUTTING, EXCESSIVE PRICES, EXCLUSIVITY, „STANDARD ESSENTIAL” PATENT LICENSING (FRAND), MARKET PARTITIONING

ARTICLE 102 CONTINUED...

- A 'somewhat' economic approach...
- Contrast between Tomra ruling of the Court of Justice of the European Union (April 2012) and Post Danmark
- Tomra – foreclosure of a part of the market constitutes abuse
- Post Danmark – selective price cutting not being abusive
- The application of the 'as efficient competitor" doctrine
- Intent matters...
- Guidance of the European Commission on enforcement priorities in applying Article 82 of the Treaty should be treated with caution?

ARTICLE 102

- IBM (maintenance services for IBM mainframes) – closed by commitments
- Standard and Poor's – excessive pricing for International Securities Identification Numbers – closed by commitments;
- Telefonica case – ex ante regulatory approval and margin squeeze
- Thomson Reuters – licensing of Reuters Instruments Codes – closed by revised commitments;
- Protégé International – rejection of complaint
- FRAND cases – Samsung, Motorola
- Rio Tinro Alcan – tying case – closed by commitments
- On going investigations: Google (commitments „on the way”)
- Gazprom – market partitioning in Central and Eastern Europe
- A number of other cases in the energy sector



Commitments – a success story

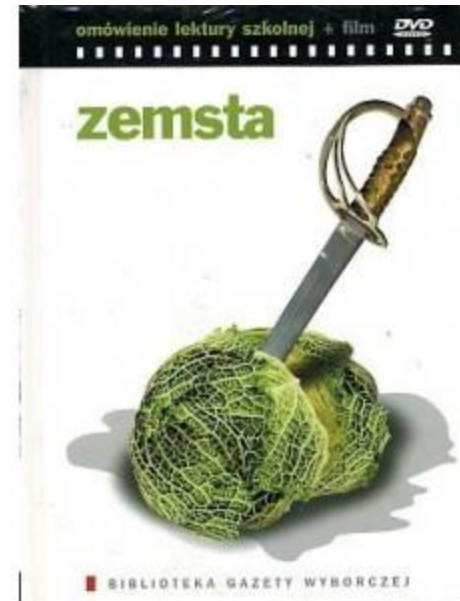
- „Out of 41 decisions taken by the Commission, we have had 15 prohibitions and 26 commitments.”
- „We have seen that article 9 [EU Regulation 1/2003] decisions have been an excellent tool to keep good competitive conditions in the Single Market and that they are a favourite option among companies. It was simply our duty to preserve the integrity and credibility of the system.”
- „One reason is that we too prefer to conclude cases swiftly when this brings the most benefits to the markets. In certain industries – such as high-tech and fast-moving markets – it is important that competition is restored quickly and effectively.”

*Citations from the recent speech of **Joaquín Almunia**, Vice President of the European Commission responsible for Competition Policy*

Brussels, 8 March 2013 „Remedies, commitments and settlements in antitrust”

BUT FOR THE NON-COMPLIANCE...

- On March 6, the Commission imposed a €561 million fine on Microsoft for not complying with the commitments accepted back in 2009 (browser choice window).
- Between May 2011 and July 2012, the screen disappeared in one of the versions of Windows. „In this period, over 15 million users were deprived of the choice and ease-of-use it offered.”
- „We take compliance with our decisions very seriously”



QUICK LOOK AT SETTLEMENTS

- In commitment decisions there is no finding of an infringement and no fines are imposed,
- Companies that settle a cartel case admit responsibility and receive fines.
- Settlements are different from plea bargaining
- Both an investigation tool and an instrument that rewards the cooperation of companies which did not obtain immunity from fines
- Discussions can be held with many participants
- Since 2010 (when settlements were introduced) 6 settlement and 10 non-settlement decisions.
- Latest example – Water Management Products Case June 2012 - involved thirty companies or groups of companies, 24 of which have been fined for a total of over one billion euro.

THE LONG ROAD TO THE NEW TTBER

- CURRENT TECHNOLOGY TRANSFER BLOCK EXEMPTION REGULATION EXPIRES ON 30 APRIL 2014;
- FIRST PUBLIC CONSULTATION IN DECEMBER 2011
- REPORT „ASSESSMENT OF POTENTIAL ANTICOMPETITIVE CONDUCT IN THE FIELD OF IPR’S...” NOVEMBER 2011
- SECOND CONSULTATION OF THE DRAFT TTBER AND THE DRAFT – SUBMISSIONS INVITED UNTIL 17 MAY 2013



NEW TTBER AND GUIDELINES - WHAT IS ACTUALLY NEW

- NEW DEFINITION OF „TECHNOLOGY’
- BROADER DEFINITION OF „TECHNOLOGY TRANSFER AGREEMENTS’
- MODIFIED APPROACH TO MARKET DEFINITION AND MARKET SHARE
- PASSIVE SALES – NO MORE EXEMPTION OF PASSIVE SALES RESTRICTIONS FOR 2 YEARS
- EXCLUSIVE GRANT-BACKS TO BE SUBJECT TO INDIVIDUAL ASSESSMENT
- NON-CHALLENGES AND TERMINATION CLAUSES TREATED MORE SEVERELY
- SETTLEMENT AGREEMENTS
- TECHNOLOGY POOLS

JUDICIAL REVIEW

- KME and CHALCOR cases
- CJEU upheld the current judicial review system of competition cases as in line with the EU Charter of Fundamental Rights (Article 47)
- Only issues of public policy shall be raised by the Court on its own motion BUT what are issues of public policy?
- Court said that the proceedings before the European Courts are *inter partes* the exercise of unlimited jurisdiction does not amount to a review of the Court's own motion
- Parties need to bring evidence ad pleas

Thank you for your attention !

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