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Survey

The Application of Article 102 TFEU by the European Commission and the European Courts

Romano Subiotto QC, and David R. Little*

I. Introduction

At the end of 2012, there were a total of 30 active Article 102 TFEU dossiers. We include in this count five cases that were at a preliminary stage, with dawn raids conducted but apparently no further action yet taken.[1] Of the remaining 25 cases in which formal proceedings had been opened, a Statement of Objections had been issued in five proceedings.[2] The Commission closed a number of Article 102 investigations in 2012, including those into protection and indemnity insurance in the marine sector,[3] and into purported individual or joint action to delay market entry of generic medicines (*AstraZeneca/Nycomed*[4] and *Synthon/GlaxoSmithKline*[5]). A complaint into alleged abusive conduct by Numericable was formally rejected *inter alia* because the Commission considered that certain of the impugned practices were the result of technical outages rather than exclusionary conduct and/or were a matter for contract law rather than competition law.[6]

The Commission maintained its recent trend of using the Article 9, Regulation 1/2003 commitments mechanism to informally resolve investigations, including those into *Reuters Instrument Codes*[7] and *Rio Tinto Alcan*.[8] A set of commitments offered by the incumbent electricity provider in the Czech Republic, CEZ, to address concerns relating to access to the Czech wholesale electricity market have been sent out for market testing.[9] Google and the Commission have entered into discussions with a view to developing a set of Article 9 commitments that would bring to an end the Commission's ongoing investigation into the company, which was opened formally in November 2010. Vice-President Almunia recently stated that the two parties had '*substantially reduced [their] differences*' over the course of these discussions.

Key Points

- While the Commission did not adopt any Article 102 prohibition decisions in 2012, commitment proceedings under Article 9 of Regulation 1/2003 and public statements by senior officials shed some light on its likely analytical approach and future enforcement priorities.
- The General Court and/or Court of Justice upheld prohibition decisions in several important judgments, including in *AstraZeneca*, which establishes a new category of abuse consisting in the exclusionary misuse of regulatory proceedings.
- The Courts' rulings are broadly consistent with previous case law and/or the analytical approach described in the Commission's Guidance Paper,

This survey focuses on rulings handed down by the General Court and the Court of Justice (the Commission did not issue any Article 102 prohibition decisions

* Romano Subiotto QC is a partner in the Brussels and London offices, and David Little is an associate in the London office, of Cleary Gottlieb, Steen & Hamilton LLP. The authors wish to thank their colleagues Esther Kelly, Sophie Sahlin, Catherine Fielden, and Caroline Petit for their assistance in preparing this article.

1 Case Nos. 39493—CPUs/PC Retailers; Case 39442—French electricity wholesale market (EDF); and the Commission's investigations into the truck sector (see MEMO/11/29), the rail freight sector (see MEMO/11/152), and container liner shipping. (MEMO/11/307).

2 Case 37985—*PO/DB GVG/SJ (Deutsche Bahn)* (SO issued on October 15, 2001); Case 37663—*B2/Telia* (SO issued on December 19, 2003); Case 39612—*Perindopril (Servier)* (SO issued on 30 July 2012); Case 39523—*Slovak Telecom (and Deutsche Telekom)* (SO issued on 8 May 2012); Case 39939—*Samsung (enforcement of UMTS standards essential patents)* (SO issued on 21 December 2012).

3 <http://europa.eu/rapid/press-release_IP-12-873_en.htm?locale=en> (last accessed 26 March 2013).

4 <http://europa.eu/rapid/press-release_IP-12-210_en.htm?locale=en> (last accessed 26 March 2013).

5 COMP/38.574. The case was closed for administrative reasons, as confirmed in a brief note posted on the DG COMP website. Little is known about the investigation, although it has been reported that Synthon withdrew its complaint.

6 Case No COMP/39.892—*Numericable- Luxembourg*.

7 Case No COMP/39.654—*Reuters Instrument Codes*.

8 Case No COMP/39.230—*Rio Tinto Alcan*.

9 Case COMP/39.727—*ČEZ and others*. The non-confidential text of the proposed commitments is available at <http://ec.europa.eu/competition/antitrust/cases/dec_docs/39727/39727_1734_9.pdf> (last accessed 26 March 2013).

in 2012). However, a notable feature of Article 102 enforcement during 2012 was the Commission's use of informal channels and non-abuse proceedings to develop its thinking on issues relevant to future Article 102 cases. Most notably, in its *Google/Motorola Mobility*[10] merger investigation, the Commission considered at length how holders of standard-essential patents might use their IPR to exclude rivals. The theme was subsequently explored in several presentations by senior officials.[11] In these communications, the Commission has stated that an SEP holder may restrict competition where it uses injunctions or the threat of injunctions to extract higher rates or a broader cross licence from a willing licensee than would otherwise have been possible (or to otherwise exclude that willing licensee).[12] There may be circumstances where the right holder can entirely legitimately refuse to license its rights, such as where the licensee is not negotiating in good faith. Having developed its thinking in this area, the Commission in December issued a Statement of Objections to Samsung concerning alleged infringements of Article 102 in enforcing patents essential to the UMTS standard. The Commission has indicated informally that it is looking into several further complaints relating to the exclusionary use of IPR by patent holders. This is likely to be a focus for the Commission's work over the coming year.

The cases summarised below include: two preliminary rulings on issues referred by Member State courts (*Post Danmark*, *Compass-Datenbank*); two ECJ rulings dismissing appeals in their entirety (*Tomra*, *AstraZeneca*); and the General Court's judgment dismissing Telefonica's appeal against the Commission's decision in *Wanadoo Espana/Telefonica*. As in 2011, the cases cover a range of theories of harm: pricing and discrimination in *Post Danmark*; rebates in *Tomra*, margin squeeze in *Telefonica*, misuse of regulatory proceedings in *AstraZeneca*, and refusal to supply in *Compass-Datenbank*. Although the cases addressed different theories of harm and very different factual contexts, some recurring themes and issues emerge. Before summarising each of these cases, we make a number of observations on these common themes and on the contribution of the judgments to the Article 102 case law more generally.

The Commission's 2009 Guidance Paper has been referred to, although not always followed, in several Commission decisions, Court rulings, and AG Opinions.[13] Where the Guidance Paper has been cited but not followed this is because it was issued after the initiation of Commission proceedings or the adoption of the contested Commission decision. Similarly, in *Tomra*, the ECJ followed a strict analysis of loyalty rebates that is not consistent with the 'effects-based' analysis proposed in the Guidance Paper. As the ECJ explained, '*[although] the Guidance provides for a comparative analysis of prices and costs . . . the Guidance, published in 2009, has no relevance to the legal assessment of a decision, such as the contested decision, which was adopted in 2006*'. There is a further tension between the Guidance Paper and 2012 case law in *Telefonica*. Although the Guidance Paper grouped margin squeeze and refusal to supply in the same section (implying that margin squeeze is a variety of constructive refusal to supply), in *Telefonica* the General Court stated explicitly that '*it is the margin squeeze [not the excessive upstream or predatory downstream price] that, in the absence of any objective justification,* is in itself capable of constituting an abuse' (emphasis added). This is consistent with the ECJ's 2011 rulings in *TeliaSonera* and *Deutsche Telekom*. Whether there is an abusive margin squeeze is determined by reference to the spread between two vertically related prices, regardless of whether either or both prices were themselves excessive, discriminatory, or predatory. The tension seems formal rather than substantive. The Guidance Paper and *TeliaSonera/Deutsche Telekom/Telefonica* line of case law both provide that in certain specific cases (eg where the dominant company's position upstream results from special or exclusive rights) there is no need to show indispensability in order to establish a margin squeeze, despite it being a necessary element of an abusive refusal to supply.

Measuring anticompetitive effects and harm to consumers is an area of some contention in Article 102

10 Case No COMP/M.6381—*Google/Motorola Mobility*, Commission decision of 13 February 2012.

11 See, for example, the following speeches by Vice-President Almunia: 'Competition Enforcement in the Knowledge Economy' (Fordham, 20 September 2012); 'Antitrust Enforcement: Challenges Old and New' (St. Gallen, 8 June 2012); Competition Policy for the Post-Crisis Era' (Washington DC, 30 March 2012). See also Director General Italianer, 'Innovation and Competition' (Fordham, 21 September 2012) and 'Innovation and Competition Policy in the IT Sector: the European Perspective' (Beijing, 26 June 2012).

12 Case No COMP/M.6381—*Google/ Motorola Mobility*, para. 107.

13 See, eg, Case COMP/39.402—*RWE Gas Foreclosure*, Commission Decision of 18 March 2009; Case COMP/C-3 /37.990—*Intel*, Commission Decision of 13 May 2009; Case COMP/39.530—*Microsoft (Tying)*, Commission Decision of 16 December 2009; Case C-549/10 P, *Tomra Systems and Others v Commission*, Judgment of the Court of 19 April 2012; Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB*, Opinion of Advocate General Mazák of 2 September 2010; Case C-109/10 P, *Solvay SA v European Commission*, Opinion of Advocate General Kokott of 14 April 2011; Case C-549/10, *Tomra Systems and Others v Commission*, Opinion of Advocate General Mazák of 2 February 2012.

theory and case law. While it is well-established that actual or potential anticompetitive harm is sufficient (a fact that the court in *Telefonica* confirmed), it is less clear whether this assessment is subject to a *de minimis*/materiality threshold. Consistent with an effects-based analysis, the Guidance Paper does not stipulate a threshold at which foreclosure is deemed anticompetitive, instead listing factors relevant to assessing the magnitude of alleged foreclosure effects (eg, percentage of total sales affected by the conduct). Although the Guidance Paper was not applicable in *Tomra*, the ECJ in that case also declined to establish a threshold. Instead, the ECJ confirmed the General Court's and Commission's reasoning that '*by foreclosing a significant part of the market, the Tomra group had restricted entry to one or a few competitors and thus limited the intensity of competition on the market as a whole.*' On the facts, 40 per cent of the market was considered a substantial portion. But the ECJ's emphasis on the freedom of customers to benefit from whatever degree of competition is possible leaves open the possibility that anticompetitive foreclosure could be found at a much lower threshold on different facts.

Consistent with the overriding competition law aim of promoting efficiency, the rules on abuse of dominance have been developed with a view to prohibiting conduct that might enable a company to exclude an equally or more efficient rival. The consideration of the 'as efficient competitor' test in *Telefonica* and *Post Danmark* is consistent with the 2011 judgments in *TeliaSonera* and *Deutche Telekom*, confirming that:

- Not every exclusionary effect is necessarily detrimental to competition. Competition on the merits may lead to the marginalisation of less efficient competitors (*Post Danmark*, para. 22).
- In assessing an alleged pricing abuse, competition authorities may use the dominant company's costs as a benchmark but not the costs of its competitors (*Telefonica*, para. 190), although other factors such as the dominant company's strategy are also relevant (*Post Danmark*, para. 28).
- Where the dominant company's prices cover its costs in large part, an equally efficient competitor will be able to compete without suffering losses that are unsustainable in the long term (*Post Danmark*, para. 38).

Article 102 does not define what constitutes an abuse and the ECJ's ruling in *Deutsche Telekom* confirmed that the four categories of abuses listed therein are not exhaustive. Nevertheless, while Article 102 cases need not be pigeon-holed into an existing category of abuse, previous cases have tended to fall within one of the established groups. Major expansions of the concept of abuse have been infrequent. The *AstraZeneca* ruling is therefore significant in confirming the Commission's and General Court's identification of a distinct form of abuse consisting in the misuse of regulatory proceedings by providing '*objectively misleading*' statements to applicable regulatory bodies in order to exclude rivals. The ECJ confirms, further, that it is not necessary to show fraud or intent to deceive on the part of the dominant company in order to establish this abuse. It will be interesting to see how the authorities at the EU and Member State levels, and complainants, seek to apply this theory of harm both within and outside the context of pharmaceutical proceedings.

We have not included in this survey the General Court's recent ruling in *Microsoft*,[14] on the ground that it focuses principally on procedural issues. The appeal arose from the periodic penalty payment imposed by the Commission on Microsoft under Article 24 of Regulation 1/2003, for failure to comply with a remedy imposed in an earlier prohibition decision (the first time the Commission had made use of this power). In its judgment, the General Court upheld the Commission's decision but reduced slightly the fine imposed on Microsoft. The ruling confirms that significant financial penalties may be imposed for non-compliance even where there could in theory have been some reasonable disagreement as to the precise meaning of the remedy's terms (in this case, the meaning of '*reasonable rates*'). On the facts, the General Court held that Microsoft could have assessed correctly itself the reasonableness of the terms on which it provided access to its indispensable interoperability information. Contrary to Microsoft's assertions, the Commission was not required to specify an access fee in its remedy and Microsoft could not rely on the appointment of a monitoring trustee as proof that any remuneration paid by licensees under the remedy would have been reasonable.

II. Summary of case law

This Section provides a chronological review of the rulings handed down by the General Court and Court of Justice concerning the enforcement of Article 102 TFEU during the calendar year 2012.

14 Case T-167/08—*Microsoft Corp. v Commission*, Judgment of the Court of 27 June 2012.

A. Case C-209/10 *Post Danmark A/S v Konkurrenceradet*

On 27 March 2012, the ECJ issued an opinion following a reference for a preliminary ruling from the Supreme Court of Denmark (*Hojesteret*), considering whether selective price cuts by a dominant universal service provider may constitute an abuse of a dominant position.

The Danish court's request arose out of a dispute between Post Danmark and Forburger Kontakt (FK), competitors in the supply of postal services in Denmark. Post Danmark was a regulated monopoly for the delivery of 'regular mail,' that is, letters and parcels (within certain standard weight limits) sent to named addressees. Post Danmark was also active in the fully liberalised 'bulk mail' segment, that is, the delivery of promotional and marketing materials with no named addressee sent to residential customers. Post Danmark used the same distribution network for both sets of mail.

Competition in the supply of bulk mail clients was organised around yearly tenders. During the tender for 2003, Post Danmark won a number of FK's largest current clients, including national supermarket chains, by offering more favourable rates than FK. Post Danmark did not extend these offers to other customers. The Danish competition authority and later the Danish lower court found that Post Danmark had engaged in anticompetitive selective discounting and predatory pricing in the bulk mail segment, cross-subsidised by its dominant position in the regular mail segment.

A number of issues had been resolved prior to the referral by the Danish court to the ECJ: the Danish court found that Post Danmark was dominant in the regulated sector and that its selective pricing practices were unrelated to economies of scale. The Danish court also determined that there was no evidence Post Danmark had intentionally sought to eliminate competition. Accordingly, applying the *AKZO* test (ie, that prices below average total costs but above average variable costs are abusive only if they are part of a plan for eliminating a competitor), the Danish Court found that Post Danmark had not engaged in predatory pricing.

On appeal, Post Danmark argued that the *AKZO* rule as applied by the Commission in *Deutsche Post AG* required the competition authority to show Post Danmark had an intent to drive its competitor from the market. (In *Deutsche Post AG*, the Commission held that a dominant universal service operator active in reserved and liberalised market segments will be found to have unlawfully cross-subsidised its activities in the latter where its prices were lower than its incremental costs in that segment.) The Danish competition authority disagreed, arguing that it was not absolutely necessary to show intent in order to establish a discriminatory pricing abuse where the dominant company's prices were lower than average total costs but higher than average incremental costs.

The Danish court therefore asked the ECJ to clarify when a dominant company's policy of charging low prices to certain of its competitors' customers may be considered an exclusionary abuse and, specifically, whether a price below average total costs but above average incremental costs could be abusive absent exclusionary intent.

The ECJ reviewed the Danish competition authority's methodology for calculating the 'average incremental costs' of the non-reserved service, noting that this analysis considered not only fixed and variable costs attributable solely to the non-reserved segment but also a portion of common costs attributable to both the reserved and non-reserved segments. The ECJ approved this calculation, stating that '*in the specific circumstances of the case*' the Danish court's estimate reflected '*the great bulk of the costs attributable*' to the non-reserved activity.

The ECJ recalled that not every exclusionary effect was necessarily detrimental to competition. Competition on the merits may, by definition, lead to the marginalisation of less efficient competitors. Less efficient competitors, the ECJ argued, are less attractive to consumers in relation to, *inter alia*, price, choice, quality, or innovation. The ECJ found that the prices charged by Post Danmark to one national supermarket chain, while below average total costs, nevertheless allowed Post Danmark to cover its incremental costs of supplying that customer. The ECJ held that where a dominant company is recovering the bulk of its costs relating to the service supplied, it will generally be possible for an 'equally efficient competitor' to remain in the market without suffering unsustainable losses. Accordingly, an abuse could not be inferred merely from evidence that the dominant company had priced below average total costs but above average incremental costs. Rather, it was necessary to examine whether the dominant company's pricing policy resulted in an actual or likely exclusionary effect and was without objective justification. In this regard, the ECJ observed that FK had remained in the market following the alleged abusive conduct and had even succeeded in winning back the business of the supermarket chain concerned. The ECJ added that the Danish court should take into account whether Post Danmark's conduct could be objectively justified by countervailing efficiencies.

B. Case T-336/07 *Telefónica S.A. and Telefónica de España SA v Commission*

On 29 March 2012, the General Court dismissed an appeal by Telefonica against the decision of the Commission in *Wanadoo Espana/Telefonica*. The Commission's decision found that Telefonica had abused a dominant position implemented in the market for access to broadband Internet in Spain.

In Spain (and across most of the EU), ADSL broadband remains the most common form of broadband Internet connection. ADSL technology enables broadband Internet access via existing copper-line fixed telephone networks without the need for the user to disconnect from the Internet in order to use the fixed line phone. Telefonica, the former Spanish state telecommunications monopoly, operated the only nationwide fixed telephone network in Spain. Telefonica was active in both the retail supply of broadband products to consumers (using ADSL technology) and the wholesale supply of access to competitors wishing to offer retail broadband services to consumers. Competitors wishing to provide ADSL-based retail broadband services could choose between three alternative products offered by Telefonica.

In July 2007, the Commission found that Telefonica had imposed an illegal margin squeeze in the Spanish broadband market from September 2001 to December 2006. Rivals purchasing wholesale broadband access from Telefonica had been left with an insufficient margin on downstream sales to compete with Telefonica in the retail supply of Internet access.

Telefonica challenged the Commission's decision, raising a number of procedural and substantive arguments. These related to: market definition, dominance, the elements required to show an anticompetitive margin squeeze, the effect of the alleged abusive conduct, and the calculation of the fine. The General Court rejected all grounds of appeal.

Telefonica criticised the Commission for having analysed the alleged margin squeeze as a *de facto* refusal to deal. On this basis, Telefonica argued, the Commission ought to have applied the *Bronner* criteria and, in particular, shown that Telefonica's wholesale products were indispensable to competition downstream. The General Court disagreed. The Commission had not treated the alleged margin squeeze as a *de facto* refusal to deal and had stated explicitly that the *Bronner* criteria were not applicable in this case. The General Court went on to confirm that margin squeeze was an abuse in its own right and to define the parameters of this abuse. According to the General Court, a margin squeeze analysis should examine whether there is an unfair spread between two vertically related prices. For this spread to be unfair, it is not necessary to show that the upstream or downstream prices, or both, are excessive, discriminatory, or predatory. Equally, while indispensability of the upstream product might be a relevant factor in considering the effects of the margin squeeze, it is not a prerequisite for a finding of abuse.

The General Court endorsed the Commission's application of the 'equally efficient competitor' test in determining whether the spread between upstream and downstream prices was anticompetitive. The General Court also confirmed that the costs of the dominant company were the relevant benchmark when applying this test and that the Commission was not required to take into account the costs of actual or potential competitors. Finally, the General Court clarified that while an anticompetitive effect must be shown, this anticompetitive effect need not be concrete. It is sufficient that the margin squeeze tends to exclude competitors who are at least as efficient as the dominant undertaking.

Telefonica has appealed the judgment to the ECJ.

C. Case C-549/10 P *Tomra Systems and Others v Commission*

On 19 April 2012, the ECJ dismissed an appeal brought by Tomra Group (Tomra) against a General Court judgment upholding the 2006 decision of the Commission fining Tomra for abuse of a dominant position in the supply of reverse vending machines (RVMs) in Austria, Germany, the Netherlands, Norway, and Sweden. The General Court had found that Tomra's deliberate and multi-faceted exclusionary strategy comprised exclusivity agreements, individualised quantity commitments, and individualised rebate scheme agreements with supermarket chains.

Tomra is a Norwegian producer of RVMs. RVMs are automated machines used for recycling empty beverage containers. The user places the recyclable materials in the RVM feed unit. The container is identified by an imaging camera. The RVM compacts and sorts the beverage container, which can then be transferred to a recycling centre for further processing. The RVM calculates and distributes the refund to the user, typically in the form of a receipt that can be exchanged for cash using a different machine or from the beverage distributor.

On appeal before the ECJ, Tomra argued that the General Court had failed to consider evidence that showed Tomra intended to compete on the merits and that the General Court and Commission had incorrectly characterised Tomra's internal documents as offering evidence of anticompetitive intent. The ECJ observed, first, that the concept of 'abuse' was an objective one and that intent was therefore not a prerequisite for finding an abuse. The dominant company's business strategy was one of several factors that the Commission would take into account and which could inform its assessment of '*the economic rationale of [the undertaking's] behaviour, its strategic aspects and its likely effects*'.

The ECJ then considered whether the General Court had adequately explained its rejection of Tomra's argument that the agreements at issue did not cover a sufficient portion of total demand to be capable of having a restrictive effect on competition. The ECJ acknowledged that the Commission had not identified a precise market threshold beyond which the conduct would have had an exclusionary effect. However, the General Court had properly approved the Commission's finding that '*by foreclosing a significant part of the market, the Tomra group had restricted entry to one or a few competitors and thus limited the intensity of competition on the market as a whole*'. In this case, as the General Court had observed, '*a considerable proportion (two fifths) of total demand . . . was foreclosed to competition*'. Tomra had argued that a part of the market remained contestable and that this contestable portion was sufficient to accommodate its competitors. The ECJ held that a dominant company could not justify foreclosing a substantial part of the market by showing that a limited contestable portion of the market remained available. On the contrary, '*customers on the foreclosed part of the market should have the opportunity to benefit from whatever degree of competition is possible on the market and competitors should be able to compete on the merits for the entire market and not just for a part of it*.' Moreover, it was not for the dominant company to dictate how many viable competitors could compete for the contestable portion of demand.

Tomra argued that the General Court had committed a procedural error by not taking into account the Commission's failure to establish whether the retroactive rebates led to below-cost prices. Although the ECJ considered this plea admissible, unlike AG Mazak, the court found that it would not in any event have affected the conclusion reached by the General Court. It was not necessary for the purposes of establishing an anticompetitive rebate to show that Tomra had charged prices below its long-run average incremental costs and/or that Tomra's competitors were obliged to ask for negative prices from Tomra's customers. It was sufficient that Tomra's system of loyalty rebates tended to or was capable of restricting competition. The General Court had properly identified a number of factors particular to the rebate scheme indicating that Tomra's loyalty rebates had a 'suction effect' on the contestable portion of demand. Tomra had argued that the Commission and General Court ought to have carried out a '*comparative analysis of prices and* costs' as proposed by the Commission's Guidance Paper. The ECJ, however, dismissed this argument, agreeing with AG Mazak that the Guidance Paper could have no relevance to the legal assessment of a decision adopted several years prior to its publication.

Further grounds of appeal relating to the General Court's characterisation of the agreements as 'exclusive' and the fine imposed on Tomra were also dismissed.

D. Case C-138/11 *Compass-Datenbank GmbH v Republik Österreich*

On 12 July 2012, the Court of Justice handed down a preliminary ruling on a reference from the Oberster Gerichtshof (the Austrian Supreme Court) concerning the interpretation of the concept of an 'undertaking' under Article 102 TFEU. The question arose in the course of proceedings between the Republic of Austria (Austria) and Compass-Datenbank regarding access to data from the Austrian national companies register (the Firmenbuch).

Austrian national law requires a company to publish certain information on its business activities in the Firmenbuch. The general public is authorised to access the data (for a fee) via any one of a number of independent billing agencies, appointed by the State on the basis of qualitative criteria. Both these undertakings and the final consumers that they serve are prohibited from more extensive use of the data, including from creating their own databases using the Firmenbuch information.

Compass-Datenbank, a private company, developed a financial database comprising extracts from the Firmenbuch, supplemented by information gathered from third-party sources. The database was licensed to third-party service providers for a fee. The Austrian government brought an action before the Commercial Court in Vienna, seeking to prevent Compass-Datenbank from storing, reproducing, or transmitting data taken from the Firmenbuch to third parties. Compass-Datenbank sought access to the database, characterising the State's conduct as an unlawful refusal of access to the Firmenbuch data, which it qualified as an essential facility.

Having failed before the Regional Civil Court in Vienna (2006) and the Higher Regional Court in Vienna (2008), Compass-Datenbank appealed to the Austrian Supreme Court. The Austrian Supreme Court asked the Court of Justice to determine whether a public authority acted as an 'undertaking' when storing in a database information reported by undertakings pursuant to their statutory obligations, and where it allowed inspection of the data in return for a fee but prohibited more extensive use. The Austrian Supreme Court asked, further, whether this analysis was affected by the State's reliance on its *sui generis* IPR as creator of the database (consistent with Article 7(1) of Directive 96/9/EC of the European Parliament and of the Council on the legal protection of databases).

The ECJ recalled that an undertaking is any entity engaged in an economic activity, irrespective of its legal status and the way it is financed. The State acted as an undertaking where it offered goods or services on a given market, but did not act as an undertaking when exercising its public powers, since the exercise of such powers was by nature a non-economic activity. The ECJ held that the collection of companies' data in a database and the maintenance and making available of those data to the public could not be distinguished from the exercise by the State of its public powers. It therefore did not constitute an economic activity. The State's remuneration for the service provided did not change this conclusion, since the remuneration was required by law. Although the independent billing agencies were entitled to charge a supplementary fee, these entities (whose conduct was not at issue) were clearly separate from the State.

The classification of the activities of the State as non-economic in nature was also not altered by the State's reliance on its *sui generis* IPR in order to enforce restrictions on the use of the data. The public entity was not required by law to authorise re-use of the data. Accordingly, provided that the remuneration received by the public entity was limited and inseparable from the activity of making those data available, reliance on IPR to restrict use of the data could not be considered an economic activity.

The referring court had also asked whether the essential facilities doctrine developed in *RTE and ITP*[15] and *IMS Health*[16] extends to circumstances where there is no 'upstream market' because the data at issue were collected and stored in the context of a public authority activity. However, in light of the Court of Justice's conclusions, this issue was left open.

The ruling of the Court of Justice comes at a time when the Commission is seeking to encourage the growth of the EU 'knowledge economy' by facilitating cross-border access to digital content, including public sector information. In addition to studies undertaken at the national level,[17] an expert group on public sector information established by the Commission has been examining legal and economic aspects of access to and re-use of public sector information.[18] In December 2011, the Commission presented a package of measures including a proposal for a revision of the Directive on the re-use of public sector information,[19] which proposes, inter alia, to limit the fees that may be charged by public authorities for access to such data.[20]

E. Case C-457/10 P *AstraZeneca AB and AstraZeneca plc v European Commission*

On 6 December 2012, the ECJ dismissed an appeal brought by AstraZeneca (AZ) against a General Court ruling upholding the Commission's decision of June 2005, in which the Commission fined AZ €60 million for having abused its dominant position on the market for proton pump inhibitors (PPIs) used for gastro-intestinal diseases. The Commission found that AZ had misused pharmaceutical marketing procedures in order to exclude competition from generic alternatives to, and parallel imports of, its Losec drug. The drug inhibits proton pump cells in the stomach from producing acid, and is therefore used in the treatment of stomach ulcers.

The alleged abuse consisted of AZ: (i) providing misleading information to patent offices that prevented the patent offices from correctly identifying the date of Losec's first marketing authorisation, which induced

15 Joined Cases C-241/91 P and C-242/91 P, *RTE and ITP*, Judgment of the Court of 6 April 1995.

16 Case C-418/01, *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG*, Judgment of the Court (Fifth Chamber) of 19 April 2004.

17 See, eg, OFT861, 'The Commercial Use Of Public Information (CUPI)', December 2006, available at: <http://www.oft.gov.uk/shared_oft/reports/consumer_protection/oft861.pdf> (last accessed 26 March 2013).

18 Public Sector Information Group Portal, available at: <http://ec.europa.eu/information_society/policy/psi/facilitating_reuse/psigroup/index_en.htm> (last accessed 26 March 2013).

19 Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information, OJ 2003 L 345/90.

20 COM 2011/877 of 12 December 2011, available at: <http://ec.europa.eu/information_society/policy/psi/docs/pdfs/directive_proposal/2012/en.pdf> (last accessed 26 March 2013).

the patent offices to issue supplementary protection certificates (SPCs) that could be used by AZ to delay entry from generic alternatives; and (ii) deregistered marketing authorisations for Losec capsules in countries where suppliers of generic alternatives had applied for marketing authorisations, which deprived these suppliers of the opportunity to use a faster, less onerous authorisation procedure.

The General Court upheld the Commission's decision in a judgment handed down in July 2010, although the General Court commuted AZ's fine to around €52.5 million. Following a further appeal by AZ, the Advocate General Mazak issued an Opinion to the Court of Justice recommending that AZ's appeal be rejected. The Court followed the AG's Opinion.

On appeal, AZ had challenged the General Court's review of evidence on the definition of the relevant product market. AZ pointed to evidence that it claimed demonstrated a strong competitive relationship between PPIs and H2 blockers, a second group of treatments capable of inhibiting acid production in the stomach. For example, PPI blockers had been prescribed in place of H2 blockers over time in a gradual manner suggesting that H2 blockers exercised considerable competitive constraint on PPIs. AZ argued that the General Court, in disregarding this evidence, had failed to conduct a proper analysis of the relevant product market over time and that, had the General Court done so, it would have concluded that the relevant product market was broader than PPIs alone.

The ECJ dismissed this ground of appeal, finding that the General Court had properly considered the interaction of the two products over the entire period at issue. The General Court had, for example, taken note of expert evidence that suggested the two products were used to treat different forms of gastrointestinal conditions. The General Court had also carried out an appropriate, detailed analysis of the evolution of the substitution between the two products over the entire period at issue, including several years prior to the infringement. The ECJ added that, contrary to AZ's argument, the General Court had taken due consideration of the apparent inertia of doctors in their prescribing practices. The General Court had found that this inertia reflected the speed of accumulation and dissemination of information on the properties and potential side-effects of PPIs rather than qualitative similarities with H2 blockers. In light of this evidence, the General Court was fully entitled to hold that there was no basis for presuming a causal link between the gradual nature of the increase in sales of PPIs and a competitive constraint exercised by H2 blockers over PPIs.

In its appeal, AZ also argued that the General Court had misinterpreted the concept of 'competition on the merits' in the context of patent-related dealings. Specifically, the General Court should not have dismissed as irrelevant AZ's good faith, reasonable interpretation of the company's obligations with respect to the rules governing supplementary protection certificates for medicinal products. At the time, AZ had argued before the General Court, there was considerable ambiguity about whether AZ was entitled to the supplementary certificates. AZ argued before the ECJ that there were compelling policy and legal reasons why deliberate fraud or receipt should be required to establish an abuse in such circumstances.

The ECJ recalled that the concept of abuse was an objective one, and therefore the absence of intentional fraud or deceit on the part of AZ could not be relevant. After reviewing at length the General Court's examination of AZ's conduct, the ECJ concluded that AZ's conduct was characterised by the notification to the patent offices of highly misleading representations and by a manifest lack of transparency as regards the existence of certain technical authorisations. By these representations, AZ deliberately attempted to mislead the patent offices and judicial authorities in order to keep for as long as possible its monopoly on the PPI market. This fell outside the scope of competition on the merits. Even if AZ had reached the conclusion that its conduct was reasonable and defensible, the onus was on AZ to disclose to the patent offices all the information that was relevant to those offices' assessment of which authorisations should be granted. The ECJ held that AZ's ground of appeal was tantamount to arguing that where an undertaking in a dominant position considers that it can, in accordance with a legally defensible interpretation, lay claim to a right, it may use any means to obtain that right, and even have recourse to highly misleading representations with the aim of leading public authorities into error. This approach, the ECJ held, was manifestly inconsistent with competition on the merits and the specific responsibilities of dominant undertakings. The ECJ added that although AZ had been unsuccessful in implementing its strategy in certain countries, this did not preclude a finding of abuse which could be shown where conduct had the potential to produce anticompetitive effects.

AZ further argued that the exercise of a legal right to withdraw marketing authorisations did not constitute conduct tending to restrict competition and/or that maintaining a market authorisation would have imposed unduly onerous pharmaco-vigilance obligations on it. The ECJ held that dominant undertakings have a special responsibility not to misuse regulatory procedures with the purpose of hindering the introduction of generic products and parallel imports, unless they have an objective justification for doing so. The ECJ held that since AZ was not protecting its legitimate interest, its conduct did not constitute competition on the merits. The fact that the withdrawal of market authorisations may have been permitted under the regulatory procedures was immaterial. Although, in theory, burdensome pharmaco-vigilance obligations could have served as a possible objective justification for AZ's conduct, AZ's pleadings had not demonstrated to the requisite degree that maintaining the marketing authorisations would have been unduly burdensome.

By its final ground of appeal, AZ argued, with respect to the deregistration of its marketing authorisations, that the General Court was wrong to find that the 'mere' exercise of a right lawfully granted under EU law could be abusive. Such conduct could only amount to an abuse in exceptional circumstances where there was an elimination of all effective competition. By contrast, a propensity to distort competition was insufficient. In support of its argument, AZ drew an analogy with the narrow circumstances in which the ECJ in *IMS Health* considered compulsory licensing to be justified. The ECJ dismissed AZ's argument, holding that the deregistration of a marketing authorisation was not equivalent to a property right. Consequently, placing restrictions on a dominant company's ability to use its power to deregister a marketing authorisation in order to impair entry by rivals could not be considered to constitute an expropriation or compulsory licence.

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