The European Antitrust Review

2013

Published by Global Competition Review
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Recent EU developments in the telecoms, media and IT sectors

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Introduction

EU antitrust enforcement in 2012 has seen the spotlight shine particularly brightly on the telecoms and media sectors as the European Commission (the Commission) attempts to grapple with the particular challenges posed by these high-technology and fast-moving dynamic markets.

The telecoms and media industries are indeed characterised by rapid innovation, which results in the entry of new technologies, products and firms that can completely leapfrog the positions of existing market players and quickly attract customers and suppliers. As a result, established operators are under constant threat from innovating operators, unless the entry of such new technologies or operators is impeded in some way by arrangements, exclusionary practices or restrictions on access to input that are critical for competition.

These characteristics are relevant to competition analysis in two specific ways. On the one hand, the application of competition law needs to properly take into account the fact that some form of temporary market power may be necessary in order to achieve the efficiencies associated with innovation. On the other hand, it may be particularly important in order to protect and preserve competitors' incentives and opportunities to innovate to ensure that operators with market power do not impede the ability of new technologies to emerge on to markets. The fact is that rapid technological progress does not necessarily correspond to low entry barriers, especially if users find it costly to switch to new brands or products that are incompatible with the established technology. Against this background, competition enforcement policy needs to strike the right balance between preventing the creation or entrenchment of market power to the detriment of future competition, and not undermining undertakings' incentives to invest and innovate. This may raise complicated trade-offs that do not necessarily have an easy policy resolution.

It is evident that markets cannot be left to address these challenges and competing interests on their own. Yet, it is vital that the Commission limits itself to intervening only when it is absolutely necessary to prevent the stifling of innovation and competition on the merits. In such cases, the speed of intervention then becomes critical in order to keep markets open and the incentives to innovate high. Thus, the Commission's approach to its enforcement policy should not be to apply competition rules any less strictly but rather more cautiously, while still preserving the flexibility to adapt to new markets and products.

Enforcement policy in the telecoms sector

The telecoms industry has posed several types of challenges for the enforcement of EU competition law over the years.

Hutchinson 3G Austria/Orange Austria

At a conference in Washington in September this year,[1] Commissioner Almunia emphasised that concentration is a major challenge for competition control in the telecoms industry. He recognised that consolidation at EU level can be beneficial if it increases efficiency but noted that DG Competition is wary of transactions that would increase concentration in already concentrated markets.

In June of this year, the Commission decided to open an in-depth investigation into Hutchinson's proposed takeover of Orange Austria[2] that would see a merger of the two smallest mobile phone network operators in the Austrian market, resulting in a reduction of the market players from four to three. Explaining its rationale behind the transaction, Hutchison stated that although still the smallest operator (the proposed transaction would confer a combined market share of less that 25 per cent on the new entity) it can compete more effectively against the 'two dominant incumbent operators' who hold a combined 78 per cent share of the market. However, the Commission's concerns centre around the fact that the proposed transaction would remove Orange as an important competitive constraint on the other operators in the retail market for end consumers in Austria.

In order to allay the Commission's concerns, Hutchison initially offered to grant mobile virtual network operators (MVNO) wishing to enter the Austrian market low-rate wholesale access to its 3G and high-speed LTE network. This original remedy package was subsequently bolstered with Hutchison offering to sell 2x10MHz of 2.6Hz spectrum usage rights along with a reallocation of spectrum in the 800MHz frequency band. The Commission accepted these commitments and should grant conditional clearance to the deal by 21 December 2012.

Although the particularities of the Austrian market may somehow explain the tough approach taken by the Commission, it would like to make this case an exemplary precedent to be used as a reference for the analysis of future merger proceedings in this sector, in particular for operations that reduce the number of operations from four to three.

The 'patent wars' among mobile-device firms

A further focus of the Commission in 2012 has been the so-called ongoing 'patent wars' among mobile-device firms. In this regard, Commissioner Almunia has announced his resolve to use antitrust enforcement to prevent the holders of standard-essential patents (SEPs) from holding up the entire industry with the threat of banning products of competitors from the market.[3]

Under the Commission's guidelines on horizontal cooperation agreements, standard setting organisations require the owners of patents that are essential for the implementation of a standard (such as 3G) to commit to licensing these patents on fair, reasonable and non-discriminatory (FRAND) terms. Such commitments are designed to ensure effective access to standardised technology. They prevent patent holders from making the implementation of a standard difficult by refusing to license or requesting excessive fees after the industry has been locked into the standard or by charging discriminatory royalties.

At the beginning of this year, the Commission opened a formal investigation to assess whether Samsung had abusively, and in contravention of a commitment it gave in 1998 to the European Telecommunications Standards Institute (ETSI), used certain of its

SEP rights to distort competition in European mobile device markets. Such commitments were given to ETSI by many patent holders when the 3G mobile and wireless telecommunications system standards were adopted in Europe.

The investigation comes after Samsung sought injunctive relief in 2011 against various member states' courts against competing mobile device makers based on alleged infringements of certain of its patent rights, which it declared essential to implement European mobile telephony standards.

Moreover, in further support of its pledge to ensure that undertakings fully honour their FRAND commitments, it was recently announced that the Commission has sent requests for information to Apple and Samsung concerning the enforcement of SEPs against competitors.

Google/Motorola Mobility

The often tumultuous relationship between IP and competition rights was also examined in February this year when the Commission unconditionally cleared the proposed acquisition of Motorola Mobility, a developer of smartphones and tablets, by Google, the world's largest internet search and search advertising company and developer of the Android mobile operating system.[4] Under the transaction, Google acquired Motorola Mobility's mobile device hardware business as well as Motorola Mobility's patent portfolio, including a number of SEPs for technologies such as 3G.

According to Google, the rationale behind the transaction was not the acquisition of Motorola Mobility's mobile device hardware business, but rather its patent portfolio. This patent portfolio, in the words of Google, would enable it to 'better protect the Android ecosystem from vexatious patent litigation'.[5]

Regardless of this seemingly laudable intent, the Commission examined whether Google would be in a position to use Motorola's SEPs to obtain preferential treatment for its services, including search and advertising. Google's argument was that in the future it will be constrained by the FRAND commitment previously given by Motorola Mobility.

The Commission noted, however, that a FRAND commitment cannot be considered as a guarantee that an SEP holder will not abuse its market power. Nevertheless, the Commission found that Google's ability to use Motorola Mobility's SEPs to significantly impede effective competition would appear to be seriously limited in respect of a number of market participants who already have a license or a cross-license to Motorola Mobility's SEPs. In this respect, Google would be limited by contract law if it were to attempt to interfere with the terms of those licenses.

The Commission also analysed whether Google would likely be able to prevent Motorola's competitors from using the Google Android operating system. The Commission found that any constant favouring of Motorola Mobility would risk jeopardising Google's mobile search and advertising revenues as it would most likely alienate other OEMs and entice them to turn to alternatives.

Shortly after the Commission's unconditional clearance of the *Google/Motorola Mobility* transaction, Microsoft and Apple lodged complaints with the Commission against Motorola Mobility alleging that it had violated its irrevocable commitments made to standard setting organisations to license its SEPs on FRAND terms. More specifically, it is claimed that by seeking and enforcing injunctions against Apple and Microsoft's signature products such as iPhone, iPad, Windows and Xbox on the basis of patents it had declared essential to producing standard-compliant products, Motorola failed to honour its commitments. The investigation is still ongoing at the time of print. The Commission has, however, been careful to note that the approved acquisition of Motorola Mobility by Google was without prejudice to potential antitrust concerns related to the use of SEPs.

Mobile commerce

Another area that has been the subject of particular scrutiny by the Commission is that of mobile commerce. Here again, Commissioner Almunia has expressed the need to be 'especially vigilant, because it is important to keep this market open and the incentives to innovate high'.[6] Indeed, in April 2012 the Commission opened Phase II proceedings into the proposed creation of a joint venture in the UK between Vodafone, Telefónica and Everything Everywhere.

Telefónica UK, Vodafone UK and Everything Everywhere (a joint venture created by the merger of T-Mobile UK and Orange UK that was cleared by the Commission in March 2010) – are three of the four mobile network operators in the UK. The newly created joint venture will provide various mobile commerce services to business, including mobile payment transaction services, mobile marketing services, and associated data analytics.

In deciding to proceed with an in-depth investigation, Commissioner Almunia stated:

> *The Commission is in favour of any initiative that will develop the promising mobile commerce sector in Europe and bring new and innovative payment and interactive advertising experience to consumers. At the same time, we need to make sure that competing services can keep emerging on this market, so that incentives to innovate remain and customers get the best mobile commerce services at the best cost.*[7]

In its Phase II investigation the Commission therefore examined whether following the creation of the JV, markets would remain open so that a number of competing solutions would be able to merge without undue obstacles, to the benefit of consumers. The Commission unconditionally approved the transaction since it found that the JV did not raise competition concerns due to the fact that alternatives were very likely to emerge in the near future and thus the JV would not have a first-mover advantage that would allow it to tip the market.

Enforcement policy in the media and IT sectors

The Commission's enforcement activity in the media and IT industry has been particularly high this year. In particular, the investigations initiated by the European Commission into the practices of such household names as Microsoft, Google and Apple illustrate its commitment to keeping digital markets level and open.

The Microsoft saga

The Commission recently announced that it has sent a statement of objections to Microsoft for violating its settlement agreement to provide Windows users with a choice screen between internet browsers.[8] Back in December 2009, Microsoft ended the antitrust investigation of the Commission when it pledged to offer a 'choice screen' that would allow users to easily pick their preferred web browsers. The Commission had made these commitments legally binding on Microsoft.

However, it recently emerged that Microsoft has not kept its commitments as it admitted to having failed to roll out the choice screen with the version of Windows released in February 2011, meaning that for around one and a half years millions of users in the EU have not seen the choice screen.

As director general Italianer pointed out in a recent speech in New York,[9] commitment decisions are only effective if the companies strictly adhere to their undertakings. As a result of Microsoft's breach, the Commission is now considering a strengthening of their monitoring mechanisms in all commitment cases.

On top of these proceedings to investigate the potential non-compliance with the browser choice commitments, Almunia has also demanded that Microsoft 'unpin' the Internet Explorer icon from the new Windows 8 welcome screen and erase warning messages to users who choose to switch browsers.

Google

The Commission's investigation that it launched in November 2010 into Google's conduct in search and search advertising centers around four concerns where Google's business practices may be considered as abuses of dominance.

First, in its general search results, Google displays links to its own vertical search services differently than it does for links to competitors. Secondly, the Commission is concerned that Google may be copying original material from the websites of its competitors such as user reviews and using that material on its own sites without their prior authorisation. This may have a negative impact on competitors' incentives to invest in the creation of original content for the benefit of internet users. The Commission's third concern relates to the de facto exclusive nature of the agreements between Google and its partners on the websites of which it delivers search advertisements. These agreements effectively require the partners to obtain most or even all of their requirements of search advertisements from Google. Lastly, the Commission is concerned about the restrictions that Google imposes on the portability of online search advertising campaigns from Google's auction-based advertising platform AdWords, to the platforms of competitors. The contractual restrictions that Google imposes on software developers may in fact be preventing them from being able to efficiently transfer search advertising campaigns across AdWords and other platforms for search advertising.

Although currently ongoing, Almunia has openly stated that these fast-moving markets would particularly benefit from a quick resolution of the competition issues.[10] In fact, in May of this year, Commissioner Almunia publicly appealed to Google to offer remedies pursuant to article 9 of Regulation 1/2003.[11] Indeed, allaying the Commission's concerns by means of a commitment decision would allow for a speedier resolution as it would avoid the Commission having to pursue formal proceedings with a statement of objections and the subsequent adoption of a decision imposing fines and remedies. The Commission has repeatedly stated that it recognises the need for quick enforcement in fast-moving markets and it must ensure that it strictly adheres to this objective so that innovation in high-tech markets is not constrained by unnecessarily lengthy proceedings.

E-books antitrust investigation

Another ongoing investigation of the Commission in an emerging fast-growing market relates to the practices of five international publishers and Apple in the market for e-books. In particular, the Commission is concerned about a possible concerted attempt to raise the retail prices of e-books. The Commission is also examining certain terms of the agency agreements entered into by these five publishers and retailers for the sale of e-books in the EEA.[12]

Initially, the Commission and the UK's Office of Fair Trading had investigated in parallel. In the UK alone, the market share of e-book sales doubled in one year and is expected to triple by 2015. The Commission is also carrying out its investigation in close cooperation with the Department of Justice in the US. This has allowed the Commission to discuss with the parties concerned solutions for both the EEA and US.

Indeed, one of the characteristics of the digital industry is that it has the ability to reach and affect users worldwide at breakneck speed. It is therefore all the more important to fight against market fragmentation at EU level and improve transparency. Moreover, the evolution of competition policy should reflect the trend of globalisation. As Commissioner Almunia recognised:

> *Globalisation is one of these trends, perhaps a hallmark of our time, and it is our responsibility as policy-makers and enforcers to draw all its consequences for our decisions and for our practice. One of these consequences is the growing need for companies to reach the size required to play in today's global markets.*[13]

Universal Music Group/EMI Music

A further industry engulfed by the digital revolution has been the recorded music industry. As recognised by Commissioner Almunia:

> Record companies have always developed in pace with the technology and the latest developments – such as digital recordings, audio files, and online platforms – are completely changing their business.[14]

Just one day after the Commissioner made those comments, the Commission conditionally approved the proposed acquisition of EMI's recorded music business by Universal Music Group, the world's leading record company.[15]

The Commission focused its investigation in this case on the markets for digital music as, although sales of CDs and other physical music still account for the majority of sales in the EEA, digital sales are increasing and are widely expected to overtake the sale of physical music in the near future.[16] The Commission's concerns over the transaction as initially notified were that it would have allowed Universal to significantly worsen the licensing terms it offers to digital platforms that sell music to consumers. In particular, the Commission looked at the markets where record companies license their music to digital retailers such as Apple and Spotify.

To meet the Commission's concerns, Universal committed to divest EMI's Parlophone label as well as sell EMI's 50 per cent stake in its popular compilation JV. It also committed to not include most favoured nation (MFN) clauses in its favour in any new or renegotiated contract with digital customers in the EEA for 10 years.

Conclusions

As can be seen from the above, the age old challenge of maintaining effective competition while still preserving incentives to innovate is still as prevalent as ever.

The nascent markets of mobile communication and the digital industries are evolving at breakneck speed and it is crucial to guaranteeing effective competition that the European Commission adapts its enforcement policy to reflect such a fast-evolving environment. Understanding the dynamics of these markets is indeed a complex task but addressing the challenges that these markets pose is crucial for competition policy.

In addition, the need for quick enforcement in these fast-moving markets is more apparent then ever. Commitment decisions are particularly favoured by the Commission in order to reach a speedy resolution, yet as we see from the Google case, proceedings can still take several years. Given that the Commission has repeatedly rec-

ognised the need for quick enforcement so as to limit any negative impact on innovation, it is seems all the more surprising that it only awards interim measures in very limited cases.

Overall, while the principles of competition must still be maintained, enforcement should be limited to when it is absolutely necessary and should be as speedy as possible so as to avoid any chilling effects on innovation.

Indeed, it is imperative that the Commission stays ahead of the curve as we enter into one of the most exciting, revolutionary eras for businesses and consumers alike.

* *The authors are grateful to Louise Macnab for her valuable contribution to the preparation of this article.*

Notes

1 Joaquín Almunia, vice president of the European Commission responsible for Competition Policy, 'Perspective from the European Commission: Competition as a tool for sustainable recovery', sixth Annual Global Antitrust Enforcement Symposium, Georgetown Law, Washington DC, 19 September 2012.
2 Case COMP/M.6497, Hutchinson 3G Austria/Orange Austria, currently under investigation.
3 Joaquín Almunia, 'Competition policy for the post-crisis era', Lewis Bernstein memorial lecture, Washington DC 30 March, 2012.
4 Commission decision of 13 February 2012, COMP/M.6381 Google / Motorola Mobility.
5 Ibid, section 86.
6 Joaquín Almunia, 'Competition policy for the post-crisis era', 30 March, 2012.
7 See Commission press release, 13 April 2012, reference: IP/12/367.
8 See Commission press release, 24 October 2012, available here: http://europa.eu/rapid/press-release_IP-12-1149_en.htm
9 Alexander Italianer, 'Innovation and competition', Fordham University, New York, 21 September, 2012.
10 Statement of VP Almunia on the Google antitrust investigation, Brussels, 21 May 2012.
11 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p 1–25.
12 See Commission press release available at: http://ec.europa.eu/commission_2010-2014/almunia/headlines/ebooks_en.pdf.
13 Joaquín Almunia, 'Presenting the Competition Policy Work Programme for 2013/14', ECON Committee European Parliament, 8 October 2012.
14 Fordham University/New York City, 20 September 2012.
15 Commission decision of 21 September 2012, COMP/M.6458 Universal Music Group/EMI Music.
16 See Commission press release available at: http://europa.eu/rapid/press-release_IP-12-999_en.htm.

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Gide Loyrette Nouel is the only international law firm to have originated in France. Founded in Paris in 1920, the firm now operates from 24 offices in 19 countries. It has more than 700 lawyers, including 110 partners, drawn from 50 different nationalities. Gide Loyrette Nouel offers some of the most respected specialists in each of the various sectors of national and international finance and business law. In each of its offices in Europe, Asia, North America, Africa and the Middle East, the firm puts its comprehensive knowledge of local markets, its regional expertise and the resources of an international law firm to the service of its clients.

Gide Loyrette Nouel is active in all aspects of French and European economic law, including competition law (merger control, concerted practices, state aids, abuse of a dominant position and vertical restraints), distribution law, the law relating to publicity, product liability, international trade (anti-dumping, anti-subsidies, safeguards and WTO), EU regulatory law (including agriculture and food law) and customs law. Its economic and European law practice group, comprising 50 lawyers based in Paris and Brussels, handles both contentious and non-contentious matters, and regularly represents clients before French commercial and disciplinary or criminal jurisdictions. It is also in constant contact with both national and Community-wide regulatory authorities. The firm's Brussels office provides an effective means of access to the European institutions. Its lawyers regularly appear as advocates before the Court of First Instance and the Court of Justice in Luxembourg.

Stéphane Hautbourg

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Stéphane Hautbourg advises French and international companies in EU, French and Belgian competition law, including merger control, antitrust, state aid and competition litigation.

Stéphane has a very strong track record in merger control. Major cases in which he has been involved include *Safran/SNPE*, *SNCF/Eurostar*, *Orange UK/T-Mobile UK*, *Pernod Ricard/V&S*, *SEB/Moulinex* and *TotalFina/Elf*.

Stéphane also regularly advises companies in behavioural matters. He assisted several electro-intensive industrial companies in all antitrust issues raised by the setting up of a joint venture for the joint purchasing of electricity (Exeltium) and Areva in the investigation opened by the European Commission in relation to non-compete and confidentiality clauses applicable between Siemens and Areva following Siemens' exit from their joint venture Areva NP.

In the field of state aid, Stéphane obtained the annulment of the European Commission's decision in a state aid case involving France Télécom and the public statements made in its favour.

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Admitted to the Brussels and Paris Bars, Laurent Godfroid specialises in European and competition law (mergers, restrictive trade practices, abuse of dominant position and state subsidies) and is a member of the competition/international trade practice group. Laurent has developed significant expertise in the fields of rail and air transport, the media and the internet. He mainly acts before the European Commission and the European jurisdictions based in Luxembourg.

Laurent recently represented the SNCF before the European Commission regarding Eurostar and Keolis deals, and is currently working on a case of abuse of dominant position brought by the European Commission against Google.

Laurent holds an LLM in international law from the University of Leicester (UK) as well as an LLM in European Law from the College of Europe (Bruges).

As from 1 January 2013, Laurent Godfroid will become the third partner in the Brussels competition practice.

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