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Recent EU Developments in the Media, Telecoms and IT Sectors

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Technological developments and innovation in the fast-moving and dynamic telecoms, media and IT markets have continued to pose new challenges for the European Commission (the Commission) in the past year. The Commission is tasked with ensuring that consumers are provided with choice so they can decide between services based on their merits and preserving incentives for firms to innovate, so that consumers can benefit from new or better services in the future. Indeed, the fewer restrictions consumers have, the more popular the products and services of the industry will become. This increase in consumer base is likely to encourage new companies to enter the market with innovative products, thereby increasing competition and innovation as incumbent vendors are spurred into improving their market position through product differentiation.

Interestingly, the EU General Court cited the quickly evolving and fast growing markets of this sector in its December 2013 judgment upholding the Commission's decision of October 2011 to clear the acquisition of Skype by Microsoft.[1] The Court confirmed that the Commission was correct in finding that even on the narrow market for video communications on Windows-based PCs only, *Microsoft/Skype*'s high combined market share of 80–90 per cent was not particularly indicative of competitive strength in a fast-growing market and that, insofar as video communications services are offered free of charge, any attempt to increase prices would encourage consumers to switch supplier. Furthermore, it found that in such a rapidly evolving market where strong competitors are present, account should also be taken of the increasing use of mobile phones and tablets, where Microsoft was a relatively small player.

However, the fact remains that the unprecedented scale and rapid pace of developments in these sectors do 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. Indeed, sectors in continual evolution such as the media and telecoms markets benefit in particular from transparency and openness in order to ensure the possibility of new entrants and also avoid consumer-lock in. In this respect, standards play a crucial role since they tend to increase competition and allow lower output and sales costs, thus benefiting consumers.

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. Navigating the dynamics of these evolving markets is indeed a complex task, but addressing the challenges that these markets pose remains crucial for an effective competition policy.

The move towards consolidation in the telecoms sector

On 11 September 2013, the European Commission published a proposed legislative telecoms package (the Connected Continent package) containing proposals for EU-wide and roaming-free mobile plans; simpler rules to help companies invest more and expand across borders; the first ever EU-wide protection of net neutrality; as well as the abolishment of premiums for international phone calls within Europe.

The proposed reform aims to remove the obstacles to a single market for telecoms and incentivise the sector to invest in new technologies and services. The proposal seeks to reduce administrative burdens related to gaining authorisation to operate, coordinate radio-spectrum assignment at EU level, and increase network capacity. It will also lead to the elimination of premiums on international call and on incoming calls when roaming.

The reform has been strongly championed by the Commission, including by Commissioner Almunia who expressed his belief that Europe's competitiveness would greatly benefit if dynamic and innovative players could operate in a truly EU-wide telecoms market.[2] Indeed, he recalled that Europe's telecoms markets remain fragmented and spectrum allocations, regulations and enforcement are still very much national affairs.

In this context, while recognising that consolidation at EU level can be beneficial if it increases efficiency, DG Competition is wary of transactions that would increase concentration in already concentrated national markets. The recent acquisitions of O2 Ireland by Hutchison and of KPN's E-Plus business in Germany by Telefónica are illustrative of the Commission's approach in this respect.

O2 Ireland/Hutchison

Following an in-depth investigation, the Commission conditionally approved the acquisition of Telefónica Ireland's mobile telecommunications business (O2 Ireland) by Hutchison 3G (H3G) in May 2014. The merger combines the second and the fourth-largest mobile network operators (MNOs) in Ireland, creating the number two operator with a 37.5 per cent share of the national telecoms market.

After its in-depth investigation, the Commission was concerned that the acquisition would weaken the 'aggressive' competitiveness prevailing in the Irish market since it would remove an important competitive constraint in the form of H3G, leaving the merged entity with two competitors Vodafone and Eircom (holding 40 per cent and 20 per cent of the market respectively). The Commission identified two particularly problematic areas: the retail mobile services market for end consumers and the wholesale market for network access and call origination.

H3G on the other hand, argued that the Irish mobile market has 'one clear dominant market leader with the other three operators lagging behind'. In its view, the acquisition of O2 Ireland would provide it with the 'scale and financial strength necessary to compete aggressively in the market' and allow it to compete better with the market leader, Vodafone. It also argued that the transaction was key to it achieving the scale necessary to invest in state-of-the-art Long Term Evolution infrastructure in Ireland.

Nevertheless, to allay the Commission's concerns, H3G submitted commitments based on two components.

First, H3G offered a package aimed at ensuring the short-term entry of two mobile virtual network operators (MVNOs). Under its commitments, H3G will sell up to 30 per cent of the merged company's network capacity to two MVNOs in Ireland at fixed payments. The decision leaves open the possibility for them to become a full mobile network operator at a later stage. Second, H3G committed to continuing and expanding its network-sharing agreement with Irish rival Eircom, which, following the deal, will be the weakest of Ireland's remaining mobile network operators.

On the basis of these commitments the Commission cleared the proposed transaction on 28 May 2014.

Telefónica Deutschland/E-Plus

E-Plus and Telefónica are mobile network operators and provide mobile telecommunications services to end consumers in Germany, as well as in related markets such as the wholesale of network access and call origination. The proposed transaction would combine two of the four mobile networks in Germany and create a player of similar size to the currently two largest operators, Deutsche Telekom and Vodafone.

In December 2013, the Commission announced it had opened an in-depth investigation into the proposed acquisition. The Commission's main concerns were that the merger would remove E-Plus and Telefónica as important competitive forces from the market and change their incentives to compete. Likewise, the incentives of Deutsche Telekom and Vodafone to compete aggressively would decrease. Finally, following the merger, the remaining MNOs could have a reduced incentive to allow MVNOs to access their network. According to the Commission, prospective and existing MVNOs and service providers would have less choice of host networks and hence weaker negotiating power to obtain favourable wholesale access terms.

One characteristic of the German market is that MVNOs already have a significant presence in the market. In addition, timely MNO entry appears to be very unlikely. As a result, the remedy package submitted by Telefónica primarily aims at ensuring the short entry or expansion of MVNOs and improving their competitive position on the German market. In particular:

- Telefónica will have to make 30 per cent of its network capacity available to one or several (up to three) MVNOs in exchange for upfront payments. As these wholesale agreements will have to be concluded and approved by the Commission before Telefónica can complete the acquisition of E-Plus, this remedy will be implemented with a high degree of certainty and will preserve competition already in the short term. In addition, the minimum capacity that the MVNOs will have to commit to upfront is significant. This will give them incentives to fill that capacity by competing aggressively to acquire subscribers.
- Telefónica will also extend existing wholesale agreements and offer 4G services to all interested non-MNOs players in the future. This remedy will improve the position of MVNOs to whom one of the parties currently grants wholesale access for 2G and 3G services. In addition, the opportunity to be granted access to 4G services will improve the negotiation position of MVNOs in relation to other MNOs.

The remedy package also aims at lowering the barriers to entry on the German market in order to facilitate the potential entry and development of a new MNO. Telefónica will therefore offer to divest spectrum and certain assets either to a new MNO entrant or one of the upfront MVNOs.

The Commission cleared the proposed transaction on 3 July 2014.

Both the Irish and German decisions confirm that, as stated by Commissioner Almunia on several occasions, there is no magic number for MNOs in a given national market and that '4 to 3' mergers can proceed provided adequate remedies, tailored to address the competition concerns specific to that market, are proposed. In this respect, the remedies accepted in both the Irish and German cases mark a departure from previous merger clearances, including Hutchison's purchase of Orange in Austria in 2013. In particular, the Commission did not require remedies designed to ensure the immediate entry of a new MNO but accepted instead commitments aimed at removing the elements that preclude MVNOs from competing on an equal footing with MNOs as well as at increasing their incentives to compete.

The 'patent wars' among mobile-device firms

The so-called smartphone patent wars, where holders of standard-essential patents (SEPs) sought to ban competitors' products from the market on the basis of their SEPs, have once again seen the connection between intellectual property and competition policy closely scrutinised.

Under patent law, companies own the exclusive rights to their innovations for a specific period of time. Patent holders whose technology is essential to implement a specific industry standard (standard-essential patents) are supposed to license it under fair, reasonable and non-discriminatory (FRAND) terms. Such commitments are designed to 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-in to the standard or by charging discriminatory royalties.

In the past year, the Commission has continued its commitment to ensuring that standards are not misused and has pursued several competition law cases aimed at avoiding such misuse.

The most recent Commission cases in this area are the *Motorola* and *Samsung* decisions, which concern the seeking of injunctions on the basis of SEPs. The Commission considers that seeking injunctions is generally a legitimate remedy against a patent infringer. However, if the SEP holder has a dominant position and has committed to license on FRAND terms, it expects to be compensated for its SEPs through licensing revenue rather than by using these patents to exclude competitors by seeking injunctions.

Samsung: enforcement of ETSI SEPs

In January 2012, 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. The Commission's case centres around whether seeking an injunction against rivals, including Apple, for using SEPs amounts to a breach of Samsung's commitment to license on FRAND terms which may have enabled it to extract higher royalty rates or delay the launch of rival products.

Following the Commission's investigation, Samsung committed to refrain from seeking injunctions in Europe on the basis of SEPs for mobile devices for a period of five years against any potential licensee of these SEPs who agrees to accept a specific licensing framework. This licensing framework consists of a mandatory negotiation period of up to 12 months, and if the negotiation fails, third-party determination of FRAND terms by either a court, if one party chooses, or arbitration if both parties agree. According to the commitments

agreed, if the parties raise concerns about the validity or infringement of the licensed SEPs, the judges or arbitrators will have to take those into consideration. In the Commission's view, the commitments therefore enable a 'safe harbour' for negotiations. On 29 April 2014, the Commission rendered the commitments legally binding.

In a statement accepting the conditions, Commissioner Almunia stated:

> *The protection of intellectual property and competition are both key drivers of innovation and growth. This is why it is essential that intellectual property is not misused to the detriment of healthy competition and, ultimately, of consumers.*

Motorola Mobility

On the same day the Samsung settlement was announced (29 April 2014) the Commission found that Motorola Mobility's decision to both seek and enforce an injunction against Apple in Germany on the basis of a smartphone SEP it had committed to license on FRAND terms was a violation of EU competition law.

The violation centred around Motorola Mobility's injunction against Apple, which was deemed a 'willing' licensee since it agreed in October 2011 to let a court decide what the appropriate royalty rate should be for Motorola Mobility's GSM technology. The Commission also found it anti-competitive that Motorola insisted, under the threat of the enforcement of an injunction, that Apple give up its rights to challenge the validity or infringement by Apple's mobile devices of Motorola SEPs.

The Commission ordered Motorola to eliminate the negative effects resulting from its conduct but did not impose a fine on Motorola, noting that national courts have reached different conclusions in SEP cases and that there is no EU case law covering such injunctions.

With the *Motorola* case and the *Samsung* settlement, the Commission sought to bring much-needed clarity for companies as to how the Commission approaches potential competition abuses involving SEPs. However, it is unlikely that the potential for disputes between SEP holders and licensees will be fully eliminated since the assessment of whether a company is a 'willing' licensee is, ultimately, subjective. Indeed, the Commission has itself acknowledged that willingness in the safe harbour framework need be decided on a case-by-case basis.

Microsoft/Nokia

The Commission also encountered SEP-related issues in the *Microsoft/Nokia* merger.

On 4 December 2013, the Commission unconditionally cleared the proposed acquisition of most of Nokia Corporation's devices and services business (the D&S business) by Microsoft Corporation. The D&S business mainly produces and sells smartphones and feature phones.

The Commission's assessment focused on the effects of the acquisition on competition in the field of smart mobile devices (including smartphones and tablets). It also investigated a number of vertical relationships between the merged entity's activities in the downstream market for smart mobile devices and Microsoft's upstream activities in mobile operating systems (OS), mobile applications (apps), and enterprise mail server software and related communication protocols.

Concerning the vertical relationships, as Microsoft's market share in the mobile OS space was considered as being limited, the Commission assumed that Microsoft was expected to need to continue to rely on third-party device suppliers to compete with Android and Apple's platform.

The Commission also found that Microsoft was unlikely to have the incentive to restrict the supply of its mobile apps such as its Office suite apps and its communication app Skype, to competing providers of smart mobile devices. Additionally, the investigation revealed that Microsoft would not be able to restrict the interoperability of competing smart mobile devices with Exchange Server, Microsoft's enterprise mail server software, because of the contractual terms of their current licences to Microsoft patents covering the communication protocol that manages synchronisation of email, calendar and contacts between smart mobile devices and Microsoft Exchange.

The Commission concluded that the transaction would not raise any competition concerns, particularly as there were only modest overlaps between the parties' activities, and the links between Microsoft's mobile operating systems, mobile applications and enterprise mail server software with Nokia's smart mobile devices were unlikely to lead to competitors being shut out from the market.

However, some industry players have voiced concerns regarding potential anti-competitive conduct that might arise from the conduct of Nokia, following the transaction, in the licensing of the patent portfolio for smart mobile devices which it has retained.

This was acknowledged by Commissioner Almunia during an IP summit held in Paris on 9 December 2013.[3] According to him:

> *since Nokia will retain its patent portfolio, some have claimed that the sale of the unit would give the company the incentive to extract higher returns from this portfolio. These claims fall outside the scope of our review. When we assess a merger, we look into the possible anti-competitive impact of the company resulting from it. We cannot consider what the seller will do. If Nokia were to take illegal advantage of its patents in the future, we will open an antitrust case.*

The Commission nevertheless clearly stated that it will remain vigilant and closely monitor Nokia's post-merger licensing practices under EU antitrust rules, in particular article 102 TFEU.

The Google investigations

As one of the Commission's most high-profile investigations comes to a close – Google's alleged abuse of its search engine to favour its own business – at least two other antitrust investigations into the search provider's conduct seem to be on the horizon.

In a letter sent to his fellow Commissioners on 11 June 2014, Almunia is said to have revealed that the Commission was prepared to investigate 'many allegations, the various practices that they cover, and the new types of markets that are affected' mentioning social networks, streaming and mobile apps as areas that could all face scrutiny.

Additionally, the Commission will reportedly decide on whether or not to open a formal investigation into the Google Android mobile device by the beginning of August this year.

Google Search

In March 2013, the Commission officially informed Google of its preliminary conclusion that four types of practices in search and search advertising may violate EU competition rules prohibiting the abuse of a dominant position.

The first competition concern relates to the favourable treatment, within Google's web search results, of links to Google's own specialised web search services as compared to links to competing specialised web search services. Users are generally not aware of this

promotion of Google's offer within the search results, leading to the Commission's concern that this practice unduly diverts traffic away from Google's competitors towards Google's own services.

The second concern relates to the use by Google, without consent, of original content from third-party web sites in its own specialised web search services. This may reduce competitors' incentives to invest in the creation of original content.

The third concern centres around the conditions on publishers preventing them from displaying search advertisements from Google's competitors on their websites.

Finally, the fourth competition concern relates to 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.

On 3 April 2013, Google submitted its first set of remedies. The feedback received from the market test was, however, largely negative and the Commission therefore requested Google to significantly improve its proposals. Google offered changes to its commitments in October 2013 on which the Commission again sought feedback through a market test. The Commission noted that the issue that received the most criticism related to vertical search concerns with respondents stating that the links to rivals that would be displayed for certain categories of specialised search services were not visible enough. Overall, the Commission was still not satisfied that the second round of proposals fully addressed their competition concerns and called on Google to submit an improved proposal.

In February 2014, a final set of commitments were submitted by Google. This third package of commitments focuses on how Google will ensure that rival specialised search services can compete fairly with Google's services. In summary, they ensure:

- that Google advertises the relevant products of three rival search companies alongside its own vertical search results so that it is clearly visible to users. This concession represents a significant change from two previous offers which proposed to display links to rival services on its search page. With regards to the selection of the services of three rivals, where Google does not charge for inclusion in its specialised search service, rivals will not be charged to participate in the rival links and instead will be chosen based on their ranking in natural search. Conversely, where Google charges merchants for inclusion in its specialised search service, the three rivals will be chosen on the basis of an auction mechanism from a set of sites that have submitted a bid for the relevant keyword;
- that competing search companies can opt out of the way Google uses their content in its own offerings; and
- the removal of search advertisement exclusivity provisions in Google's agreements with websites and restrictions on porting advertising campaigns away from Google to one of its competitors.

The concessions would be legally binding for five years and an independent monitoring trustee will oversee their implementation.

On 5 February 2014, Almunia announced that he believed these final proposals alleviated the competition concerns and considered them sufficient to settle the case without formal sanctions. In so doing, he recalled the fact that no antitrust authority in the world had obtained such concession.

The Commission wrote to all the complainants explaining why it believes Google's offer is capable of addressing the concerns, and the complainants now have the opportunity to make their views known to the Commission before it takes a final decision as a whole. A decision is expected by the end of the Commission's current mandate in autumn 2014.

The case marks the first time the Commission has investigated the online search market. The sector is particularly fast moving since online search itself is constantly evolving. Indeed, as the Commission itself pointed out, since it started the investigation, the way search results are presented and the kind of services provided have changed many times.[4] Indeed, the initial complaint focused on static devices, but in the meantime mobile devices have become increasingly relevant, which has led not only to the introduction of new search services but also to changes in the way users access and interact with existing ones.

In this context, Commissioner Almunia has on many occasions stated that such fast-moving markets benefit in particular from a quicker resolution of the competition issues (ie, a commitment procedure pursuant to article 9 of Regulation 1/2003 rather than the more adversarial route of a formal statement of objections and subsequent appeals). Nevertheless, the Commission's investigation has still lasted to date for more than three-and-a-half years and it will be imperative to ensure that in such a dynamic market the commitments will retain their relevance.

Google Android

On 9 April 2013, Fairsearch – a coalition of specialised search and technology companies that includes Microsoft, Oracle and Nokia – filed a formal complaint with the Commission on the grounds of abuse of a dominant position concerning its practices related to its mobile operating system Android. Android is licensed by handset makers including HTC, Samsung and LG for their phones and tablets.

The complaint alleges that Google uses deceptive conduct to lock out competition in the mobile phones sector. The main issue centres around the way in which Google bundles its suite of services with Android: if a phone manufacturer wishes to build an Android phone that offers Google Search or YouTube, the manufacturer is forced to pre-load an entire suite of Google mobile services and award them prominent default placement on the phone. In this respect, the complaint refers to the Commission's landmark ruling on Microsoft's media player and website browsers to show that a dominant company's preloading of new products confers a considerable advantage over rivals.

The other issue is that of Google's distribution method. FairSearch characterises the giving away of Android for free as predatory, arguing that it 'makes it difficult for other providers of operating systems to recoup investments in competing with Google's dominant mobile platform'.

The Commission will reportedly decide whether or not to open a formal investigation into the Android mobile device by the beginning of August.

Contaxe complaint and other investigations

On 25 May 2014, Contaxe, a Swiss-based provider of online advertising services, filed an antitrust complaint against Google alleging that the search provider bundles services with its 'dominant search engine', diverts and controls internet traffic through Android and the Chrome browser, and manipulates advertising terms.

At the time of writing, the Commission has yet to comment directly on this case; however, in his letter of 11 June 2014 to the College of Commissioners, Almunia referred to additional complaints 'lodged in recent weeks' that fell into at least three broad areas concerning the ways that Google was said to:

- use its video catalogue to help give YouTube an unfair advantage;
- use its AdWords product to sell advertising space; and
- use another advertising product called AdSense.

The letter also referred to complaints relating to Google's use of images from third-party websites and, more recently, a potential complaint about the pressure Google is putting on independent music labels to extract better terms in its negotiations for a new streaming product on YouTube.

Thus, while the Google search saga may be finally reaching its end, it seems likely that Google's antitrust woes are far from over.

Net neutrality and internet connectivity

The Commission's connected continent package includes provisions to introduce net neutrality to the EU, thus ending the blocking and throttling and degrading of services so consumers can enjoy the full internet regardless of their internet subscription.

Although there is no set definition of net neutrality under EU law, the European Parliament's version of the Commission's text (which the Parliament adopted on 3 April 2014) introduces the following definition:

> *net neutrality means the principle according to which all Internet traffic is treated equally, without discrimination, restriction or interference, independently of its sender, recipient, type, content, device, service or application.*

Under the Commission's proposal, clear rules are set out for traffic management which has to be non-discriminatory, proportionate and transparent. Companies would, however, be allowed to differentiate their offers (for example by speed) and compete on enhanced quality of service. In addition, in order to meet end-users' demand for better service quality, the proposal allows content providers to agree deals with internet providers to assure a certain quality of service. Such offers will enable telecom operators to generate additional revenue streams from over-the-top players, content providers, as well as from consumers who are willing to pay for better or faster services. These revenues in turn will enable operators to finance investments into network upgrades and expansion.

The Commission has also identified internet connectivity as another area that competition authorities are looking at. Speaking at a conference in March 2014, Alexander Italianer, director general of DG Competition, recognised the challenges faced by telecoms companies due to internet newcomers who can offer innovative services that rival those of traditional mobile telephone operators, such as voice and video calling and free text messaging.[5] However, traditional operators often own the network over which such content is transmitted and so the newcomers form a threat to their own paid services.

In this respect, the Commission carried out unannounced inspections at the premises of telecoms operators Deutsche Telekom, Orange and Telefónica in July 2013 over potential competition issues concerning internet connectivity. Indeed, the Commission is concerned that these companies may be abusing a dominant position, for example, by degrading the quality or limiting the speed of third-party content, in order to favour their own content.

The French Competition Authority also carried out an investigation into the internet traffic exchange practices of Orange (formerly France Télécom) following a complaint by global internet-traffic carrier Cogent in 2012. The Competition Authority subsequently found that Orange's fee for opening additional interconnection capacity was unfair and ordered it to be more transparent about the relationship between its internet access and internet transit business. In response to the concerns raised by the Authority, Orange offered to define a formal internal protocol with its transit operator business Open Transit, specifying the technical, operational and financial conditions governing the provision of connectivity services in France. The French Competition Authority accepted the proposed remedy and made it binding on Orange. Cogent subsequently contested that remedy to the Paris Appeals Court on the basis that there was no accounting separation between the internet provider of Orange and Open Transit and the remedy was insufficient since it was only an internal protocol. The Appeals Court rejected all of Cogent's claims.

The awaited Intel judgment

In May 2009, the Commission imposed a record fine of €1.06 billion on Intel for having abused its dominant position on the market for x86 central processing units (CPUs).

The Commission considered that Intel was in a dominant position on the ground that it held a market share of around 70 per cent and that it was extremely difficult for competitors to enter the market and to expand as a result of the unrecoverable nature of investments to be made in research and development, intellectual property and production facilities. Given its strong dominant position, Intel was an unavoidable supplier of x86 CPUs and customers had no choice other than to obtain part of their requirements from Intel.

According to the Commission, the abuse was characterised by two main types of practices:

- discounts granted to four major computer manufacturers on the condition that they purchase from Intel all or almost all of their x86 CPUs; and
- payments to three computer manufacturers that were conditional upon their postponing or cancelling the launch of AMD CPU-based products or putting restrictions on the distribution of those products.

Intel appealed the Commission's decision on several grounds, many of which concerned the legal characterisation of the rebates and payments granted by Intel in consideration of exclusive supply. By a judgment adopted on 12 June 2014,[6] the General Court dismissed Intel's appeal in its entirety.

The judgment of the General Court was long awaited. Discounts and rebates are indeed a controversial area in competition law. Whereas it is acknowledged that they may be part of legitimate price competition leading to lower prices for consumers, there is also concern that they may be used by dominant undertakings to exclude competitors and ultimately exploit customers.

In its judgment, the General Court distinguished between three types of rebates:

- quantity rebates linked solely to the volume of purchases made. Such rebates are deemed to reflect gains in efficiency and economies of scale made by the undertaking in a dominant position and are generally considered not to have the foreclosure effect prohibited by article 102 TFEU;
- rebates linked to the attainment of individual sales objectives that do not amount to an exclusivity or quasi-exclusivity. In examining whether the application of such rebates constitute an abuse of dominant position, it is necessary to consider all the circumstances and to investigate whether, in providing an advantage not based on any economic service justifying it,

that rebate tends to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market or to strengthen the dominant position by distorting competition; and

- rebates linked to a condition of exclusive or quasi-exclusive supply. These exclusivity rebates are, by their very nature, capable of restricting competition and foreclosing competitors, and therefore constitute an abuse if there is no objective justification for granting it. The Court found that it was not necessary to show that they are capable of restricting competition on a case-by-case basis in light of the facts of the individual case.

The General Court held that the rebates granted by Intel to computer manufacturers were exclusivity rebates capable of restricting competition by their very nature and therefore concluded that the Commission did not have to assess the circumstances of the case in order to show that they actually or potentially had the effect of foreclosing competitors from the market.

The General Court further stated that it was not necessary to examine, by means of the 'as efficient competitor test', whether the Commission correctly assessed the ability of the rebates to foreclose a competitor as efficient as Intel. Even if the competitors were still able to cover its costs in spite of the rebates granted, that would not mean that the foreclosure effect did not exist. Indeed, the grant of an exclusivity rebate by an unavoidable trading partner makes it structurally more difficult for a competitor to submit an offer at an attractive price and thus gain access to the market even if that access is not economically impossible.

This purely form-based approach is contrasted with the one followed by the Court of Justice in respect of other types of pricing practices. For example, in *Post Denmark*, the Court of Justice acknowledged that an effects-based approach should be applied to selective price-cutting behaviour and also supported in this respect the use of the 'as efficient competitor' test.

Conclusions

When looking back over previous years, it is clear that technological developments in the telecoms, media and IT sectors, as well as the rapid development of new technologies, products and firms, have brought with them new challenges for antitrust authorities.

On the one hand, the application of competition law needs to properly take into account the fact that established operators are under constant threat from innovating operators and 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 to ensure that operators with market power do not impede the ability of new technologies to emerge on the market in order to preserve competitors' incentives and opportunities to innovate.

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

Moreover, these sectors need transparency and openness in order to ensure the possibility of new entrants. In this respect, standards play a crucial role as they ensure interoperability, which in turn encourages competition of the merits of technologies. Competition rules should therefore be used to ensure that the benefits of standards materialise. In the meantime, it is also imperative that the Commission strikes the correct balance between the interests of IP holders who should be fairly remunerated for the use of their intellectual property rights, and those of the implementers of standards, who should get access to the standardised technology without being 'held up' through abuses of market power.

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Notes

1 Case T-79/12 *Cisco Systems and Messagenet v Commission*, judgment of 11 December 2013.
2 Joaquín Almunia 'Fighting for the Single Market', Brussels 11 February 2014.
3 Almunia speech during 'Premier cercle' – IP Summit 2013 (Paris), 9 December 2013 'No inherent conflict between IP protection and competition policy'.
4 Joaquín Almunia: Statement on Google Investigation, European Parliament hearing, 1 October 2013.
5 Alexander Italianer 'Competition Policy in the Digital Age', Innsbruck, 7 March 2014.
6 Case T-286/09 *Intel v Commission*, judgment of 12 June 2014.

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Stéphane Hautbourg, resident partner in the Brussels office, focuses his practice on European competition law.

Stéphane has a very strong expertise 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 has been involved in several high-profile cases. He is currently representing Orange before the European courts in the *Financial Measures* case.

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Resident partner in the Brussels office, Laurent Godfroid specialises in European and competition law and is a member of the competition/international trade practice group of the firm. 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).

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