

CLIENT ALERT

European Antitrust Developments - Dec. 2012 to Mar. 2013

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Welcome to Crowell & Moring's first quarterly update on European antitrust developments. Below we have provided concise and easily-digestible summaries of the top 5-10 European antitrust developments arising out of the EU and the following key jurisdictions: Germany, UK, France, Belgium and the Netherlands. Where available, we will provide links to the matters for further information. If you would like more detail on any of these developments – or you have any other comments on the service – do get in touch and let us know.

Mergers

1) European Commission, *Hutchison 3G Austria/Orange Austria (M.6497, 12 December 2012)* – the Commission approved Hutchison 3G's acquisition of Orange's mobile telephony business in Austria after a Phase II investigation and subject to commitments. This despite the parties having a combined market share of only around 22% and the new entity being only the No.3 in the market. Commitments included the divestment of radio spectrum and the grant of network access. [Press release](#).

2) European Commission, *UPS/TNT (M.6570, 30 January 2013)*– the Commission prohibited the proposed acquisition of TNT Express by UPS, the third merger prohibition in VP Almunia's term and only the fourth since 2004. As in *Hutchinson* above, the merged company would not have been the largest in the market. However, the merger reduced the number of competitors in several national markets from 4 to 3 or 3 to 2. The Commission rejected commitments from the parties when a suitable upfront purchaser for divested assets was not proposed. [Press release](#).

3) European Commission, *Ryanair/Aer Lingus III (M.6663, 27 February 2013)* – a fourth merger prohibition under Almunia. This time relating to Ryanair's third unsuccessful attempt to obtain Commission clearance to acquire Aer Lingus. An extensive commitments package including the divestiture of assets and the transfer of slots was rejected over doubts that it was sufficient to preserve pre-merger levels of competition on affected routes. [Press release](#).

Abuse of Dominance

4) Germany, *Lufthansa (B 9-96/09, 17 December 2012)* – Lufthansa gave formal commitments to the Bundeskartellamt abandoning clauses in their corporate client flight program that obliged corporate clients to provide competitively sensitive data of flights booked with Lufthansa's competitors, including their pricing and discount conditions.

5) Belgium, *Electrabel (7 February 2013)* – the Belgian Competition Council issued a Statement of Objections accusing Electrabel of abuse of dominance by, among others, withholding generating capacity on the Belgian market. Interestingly, the damages caused by the abuse have been estimated by the authority. [Press release](#).

Cartels and Other Antitrust

6) France, *Bang & Olufsen* (n° 12-D-23, 12 December 2012) – the French Competition Authority fined the French subsidiary of Bang & Olufsen and its Danish parent €900,000 for prohibiting online sales by the approved distributors in its selective distribution system. Proceedings had been stayed pending the judgment of the Court of Justice on the preliminary reference in Case C-439/09 *Pierre Fabre* (13 October 2011) in which the Court held that "*a clause in a selective distribution contract banning the distributors from selling the products online amounts to a restriction of competition by object, unless that clause is objectively justified.*" On 31 January 2013, in the case from which the reference was made, the Paris Court of Appeal upheld the original fine on Pierre Fabre. [Press release](#) (English); [Full text](#) (French).

7) European Commission, *Microsoft* (AT.39530, 6 March 2013) – the Commission imposed a €561 million fine on Microsoft for failing to comply with its commitments to offer users a browser choice screen: the first ever Commission fine for non-compliance with a commitments decision. While the breach was acknowledged to be the result of a "technical error," it went on for over 14 months and was reported to the Commission by Google. Commissioner Almunia has subsequently commented publicly that he received no explanation why this error was not detected for such a long period of time. He also indicated that in future the Commission is likely to insist that compliance with commitments is monitored by an independent trustee even in simple cases. [Commission Decision](#).

8) UK, *Mercedes-Benz UK Ltd.* (CE/9161-09, 27 March 2013) – the Office of Fair Trading imposed fines of £2.8 million on Mercedes-Benz and four distributors of its commercial vehicles for cartel infringements, including market-sharing, illegal information exchange and price coordination. Mercedes-Benz was found to have facilitated the unlawful hub-and-spoke arrangements. All the parties, except one, settled with the OFT.

9) Germany, *cement cartel* (KRB 20/12, 26 February 2013) and *liquefied gas cartel* (VI-4 Kart 2-6/10 [OWi], 15 April 2013) – in the cement cartel case, the German Federal Supreme Court held that the 10% limit for fines imposed on undertakings under the German Act against restraints of competition constitutes an indication of the highest appropriate fines for the most serious infringements rather than a simple cap on fines as under EU competition law. The implication would appear to be that in less serious cases fines must stay well below the 10% level. In a separate case, the Higher Regional Court Düsseldorf increased the cartel fines imposed by the German competition authority on some individual liquefied gas suppliers by up to 85% leading to a total of €244 million. [Crowell & Moring client alert](#).

Damages actions

10) Netherlands, *TenneT/ABB* (BZ0403, 16 January 2013) – the court of Arnhem issued the first judgment by a Dutch court addressing substantive issues in a follow-on cartel damages claim. ABB Ltd., and its main Dutch subsidiary ABB B.V were found, in principle, jointly and severally liable in damages for their participation in the gas insulated switchgear cartel. Although the Dutch subsidiary was not an addressee of the European Commission Decision in relation to the cartel, it was found liable on the basis that it was, or should have been, aware of the infringement. While the court found that the claimant, TenneT, was very likely to have suffered loss, proof of loss and quantification of damages will be dealt with in a separate hearing. [Full text](#) (Dutch).

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