Round Up

October – December 2011

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I. Final EU 'Best Practices' antitrust guidelines

On 17 October 2011, the European Commission issued the final version of its 'best practices' antitrust guidelines.[1] The principal purpose of the guidelines is to provide a guide to the day-to-day conduct of antitrust proceedings before the European Commission. The guidelines also provide for an expanded role for the EU's Hearing Officer, whose role has been set out in a new decision that revises the functions and terms of reference of this office.

The guidelines touch on most aspects of EU antitrust proceedings, from the initial assessment of a case to the publication of a decision, including the opening of proceedings, information requests, state-of-play meetings, confidentiality, legal privilege, statements of objections, and the role of the hearing officer.

The guidelines contain a number of changes/innovations since the draft in 2010, which include:

- an indication in the statement of objections of the main relevant parameters for the possible imposition of fines as well as the facts which may give rise to aggravating or attenuating circumstances, and matters which are relevant to the calculation of fines (relevant sales figures, year for the value of such sales);
- more information about the procedure for requests to take into account an inability to pay fines;
- state of play meeting in cartel cases after the oral hearing;
- access to key submissions enhanced; the Commission will provide the parties who are subject to proceedings shortly after the opening of proceedings with the opportunity to review non-confidential versions of other 'key submissions' in addition to the complaint itself; this would include 'significant submissions of the complainant or interested third parties, but not, for example, replies to requests for information';
- instead of just committing to publishing on its website decisions rejecting complaints 'which are of general interest', the Commission now states that it will publish on its website all decisions rejecting complaints or a summary thereof.

II. Decision on the function of hearing officer

The Commission has also issued a decision on the function of the hearing officer.[2] The post of the hearing officer was first established in 1982 in order to enhance impartiality and objectivity in competition proceedings before the Commission. There are currently two EU hearing officers, who are independent of DG Competition (although still being EU officials), and who report directly to the Competition Commissioner.

The role of the hearing officer has been expanded in the following areas:

Legal professional privilege claims—the hearing officer has been given a role to resolve claims that a document is privileged in the context of an antitrust investigation. The undertakings concerned must consent to the hearing officer viewing the relevant information. The hearing officer shall, without revealing the information, inform the Commission of their preliminary view and take steps to promote a mutually acceptable resolution. Where no resolution is reached, the hearing officer may formulate a reasoned recommendation to the competent member of the Commission. The party making the claim shall receive a copy of this recommendation.

Procedural status—if a company which is subject to an investigative measure considers that it has not been properly informed by DG Competition of its procedural status, it may refer the matter to the hearing

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1 Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ (2011) C 308/6. The Commission has tried to address in this final notice the large number of comments it received since its draft guidelines published in January 2011.

2 Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, OJ (2011) L 275/29.

officer for resolution. The hearing officer shall have authority to take a decision that DG Competition will inform the undertaking of their procedural status.

Self-incrimination—where the addressee of a request for information refuses to reply to a question invoking the privilege against self-incrimination, it may refer the matter, in due time following the receipt of the request, to the hearing officer. In appropriate cases, and having regard to the need to avoid undue delay in proceedings, the hearing officer may make a reasoned recommendation as to whether the privilege against self-incrimination applies.

Deadlines for reply to information requests—the hearing officer will decide whether an extension of the time limit for responding to an information request should be granted. The hearing officer will take into account 'the length and complexity of the request for information and the requirements of the investigation'.

III. Cartels and horizontal agreements

A. Cartel fines

During the relevant period, the European Commission has issued recently three cartel fining decisions.

On 12 October 2011, the European Commission fined Pacific Fruit €8.9 million for coordinating reference prices on a weekly basis from July 2004 to April 2005 for bananas imported into Italy, Greece, and Portugal. Chiquita received full immunity from fines under the Commission's Leniency Policy.

On 19 October 2011, the European Commission imposed fines on three producers of special glass used to make cathode ray tubes (Asahi Glass—€45.1 million, Nippon Electric—€43.2 million and Schott AG—€40.4 million) for participation in an illegal cartel. Samsung Corning Precision Materials, received full immunity from fines under the Commission's Leniency Notice. The decision was reached using the settlement procedure.

On 7 December 2011, the European Commission imposed fines on four producers of refrigeration compressors used in refrigerators, freezers, vending machines, and ice-cream coolers (ACC—€9 m, Danfoss—€90 m, Embraco—€54.5 million and Panasonic—€7.6 million) for participation in an illegal cartel. A fifth company, Tecumseh, received full immunity from fines under the Commission's Leniency Notice. The decision was reached using the settlement procedure.

B. Compatibility of the EU judicial review system with human rights

On 8 December 2011, the Court of Justice of the European Union (CJEU) dismissed KME's appeals against the General Court's judgments, which rejected its applications for annulment or for a reduction in fines for a cartel in industrial tubes.[3]

One of KME's arguments was that the General Court had infringed its fundamental right to full and effective judicial review contrary to the requirements of the principle of effective judicial protection enshrined in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and in Article 47 of the Charter of Fundamental Rights of the European Union.

In its judgments, the CJEU did not refer to the ECHR. The CJEU noted that the review provided for by the Treaties involves a review by the Courts of the European Union of both the law and the facts, and that the Courts have the power to assess the evidence, to annul a contested decision, and to alter the amount of a fine. It held that this review of legality, supplemented by the unlimited jurisdiction in respect of the amount of fine, was not contrary to the requirements of the principle of effective judicial protection in Article 47 of the Charter.

To reach this conclusion, the CJEU developed, however, a series of *obiter dicta*, which reinforce the trend towards a stronger judicial review. We see these as being more in line with the forthcoming accession of the EU to the ECHR. Although it is not possible here to discuss further these important judgments, the following CJEU's statements should be emphasised: '*In carrying out such a review, the Courts cannot use the Commission's margin of discretion . . . as a basis for dispensing with the conduct of an in-depth review of the law and of the facts. The review of legality is supplemented by the unlimited jurisdiction . . .*' and '*. . . although the General Court repeatedly referred to the 'discretion', the 'substantial margin of discretion' or the 'wide discretion' of the Commission, . . . such references did not prevent the General Court from carrying out the full and unrestricted review, in law and in fact, required of it*' (points 102, 103, and 109 of the judgment in case C-272/09 P).

There is no doubt that these latest developments in the case law will attract even more attention towards this important topic.

3 Case C-272/09P *KME Germany AG, KME France SAS and KME Italy SpA v European Commission* and Case C-389/10 P *KME Germany AG KME Germany AG, KME France SAS and KME Italy SpA v European Commission*. See also Case C-386/10 P *Chalkor AE Epexergasias Metallon v European Commission* (appeals against two General Court judgments in Cases T-21/05 and T-25/05).

C. Brochure on antitrust compliance

On 23 November 2011, the European Commission issued a brochure for businesses on antitrust compliance, entitled 'Compliance matters—What companies can do better to respect EU competition rules'. The Commission describes the brochure as 'a sort of competition highway code', and encourages business to 'look at this brochure as a road safety brochure ahead of the holiday period'. The brochure explains the importance of competition compliance, and sets out the key elements that should be included in a compliance strategy.

IV. Vertical agreements

A. Technology transfer agreements

On 6 December 2011, the European Commission issued a questionnaire to seek views to inform its review of the EU technology transfer block exemption (TTBER')[4] and its accompanying guidelines. The questionnaire aims to gather feedback on stakeholders' experience of applying the current rules in practice, so that the Commission can consider whether these rules should be modified when they expire on 30 April 2014.

The Commission has also published a report prepared for it by external consultants on the assessment of potential anticompetitive conduct in the field of intellectual property rights and the assessment of the interplay between competition policy and IPR protection.

B. The prohibition of on-line sales—Pierre Fabre

On 13 October 2011, the CJEU ruled that the prohibition of on-line sales to ensure that high quality personal care products are sold in pharmacies with a qualified in-store pharmacist constitutes a restriction of competition 'by object' under EU law.[5] This judgment further supports the general EU rule set out in the recently revised EU vertical restraints guidelines that a supplier must allow its goods to be sold on-line.

This is a preliminary ruling following a request by the Paris Court of Appeal which had to judge on an appeal by Pierre Fabre against a fined adopted by the French competition authority for infringement of both EU and French competition law by prohibiting on-line sales as a result of requiring its distributors to sell its products only in brick and mortar stores with a trained pharmacist present.

The CJEU had to clarify whether Pierre Fabre's prohibition of internet sales could be regarded as anticompetitive by 'object'. Categorisation of a restriction as anticompetitive by 'object' is significant under EU law. It means that the restriction is almost inevitably viewed as a 'per se' infringement.

The CJEU held that 'a contractual clause requiring sales of cosmetics and personal care products to be made in a physical space where a qualified pharmacist must be present, resulting in the ban on the use of the internet for those sales, amounts to a restriction by object ... where ... it is apparent that, having regard to the properties of the products at issue, that clause is not objectively justified' (point 47 of the judgment). The CJEU noted that it has already not accepted the need to provide individual advice to the customer and to ensure his protection against the incorrect use of products to be an acceptable justification for the prohibition of on-line sales in the context of non-prescription medicines and contact lenses. The CJEU also noted that the mere need to maintain a prestigious image could not be sufficient justification for a prohibition of on-line sales. The CJEU stated that it was for the Paris Court of Appeal to examine whether the prohibition of on-line sales in this case could be justified by a legitimate aim. It also stated that it did not have sufficient evidence before it to assess whether the prohibition satisfied the conditions in Article 101 (3) TFEU, and that it was for the Paris Court of Appeal to examine this question.

V. Abuse of dominant position

A. Solvay appeals

This case has been occupying the European administrative and judicial authorities for over 20 years now. This is the second time that the CJEU has dealt with this case in its appellate jurisdiction.[6] On 25 October 2011, the CJEU handed down its judgments on the appeals lodged by Solvay against the General Court's judgments

4 Regulation 772/2004.

5 Case C-439/09 *Pierre Fabre Dermo-Cosmétique v Président de l'Autorité de la Concurrence, and others.*

6 The proceedings were as follows in the abuse case: a 1990 Commission decision was annulled in 1995 (Case T-32/91), the appeal by the Commission was dismissed in 2000 (Case C-288/95 P) and the second decision imposing a fine in 2000 was challenged by Solvay, its application dismissed by the General Court in December 2009, the judgment (Case T-57/01) of which was appealed in this case by Solvay (Case C-109/10 P). The cartel case followed parallel proceedings until the 2009 judgment (Case T-58/01) under appeal (Case C-110/10 P). One should note that Solvay also made an application to the European Court of Human Rights on 26 February 2010 (against the 27 Member States since the European Union has not yet acceded to the ECHR).

of December 2009,[7] which largely upheld European Commission decisions finding that Solvay had breached Articles 102 (and 101) TFEU. The CJEU held that the Commission must provide the undertaking concerned with the opportunity to examine all the documents in the investigation file that might be relevant for its defence. The Commission admitted that it had mislaid some files and that it was unable to draw up the list of documents of these files as the indexes to those binders could not be found. The CJEU held that it could not be excluded that Solvay could have found in the missing files evidence that would have enabled it to offer an interpretation of the facts different from the interpretation offered by the Commission, which could have been of use for its defence. The CJEU noted that there were not just a few missing documents, the content of which could be reconstructed from other sources, but entire files that could have contained key documents.

VI. Mergers

A. Notification date priority rule

There have been two recent merger decisions that confirm the Commission's practice of taking the date of notification as determinative for its substantive assessment in situations where it is reviewing two transactions concerning the same markets simultaneously. In M.6214 *Seagate Technology/HDD Business of Samsung Electronics*, Seagate filed its notification one day before Western Digital in M.6203 *Western Digital/Viviti Technologie* (although Western Digital started its pre-notification discussions with DG Competition before Seagate). Seagate's acquisition was assessed without reference to Western Digital's transaction, while Western Digital's transaction was judged as if the consolidation brought about by the Seagate transaction had already occurred. Whilst both cases entered into a Phase 2 investigation, the Western Digital transaction had a more difficult clearance path, not receiving clearance until 23 November and subject to divestments. The Seagate transaction in contrast was cleared on 19 October unconditionally. These cases underline the importance of not delaying notifications, especially in consolidated markets where other transactions are on the horizon.

B. Multi-jurisdictional mergers—best practices on cooperation

On 9 November 2011, the European Commission announced that it and the heads of EU national competition authorities had agreed a set of best practices on cooperation in merger review. The best practices' stated aim is to enhance cooperation in merger cases where the EU Merger Regulation does not apply and where the merger needs to be notified in more than one EU Member State. The document discusses a number of areas for the facilitation of the merger review process, including the exchange of certain basic non-confidential information, the alignment of timetables, regular contacts with regard to timing and decisions to open in-depth investigations, and discussions on substantive analysis such as market definition or possible anticompetitive effects. Merging parties and third parties are encouraged to provide waivers of confidentiality to all authorities where the merger is reviewable, and the documents attach a model confidentiality waiver form.

C. Revised best practices for US–EU cooperation in merger investigations

On 14 October 2011, the Federal Trade Commission (FTC), the Department of Justice's Antitrust Division, and the European Commission published revised best practices for cases where the Commission and a US agency are reviewing the same merger. The best practices document updates a previous 2002 version.

The best practices establish a key objective that when the US agencies and the European Commission are reviewing the same merger, both have an interest in reaching, insofar as possible, consistent, or at least non-conflicting, outcomes.

The best practices set out procedures in four distinct areas.

- *Communications between reviewing agencies*—the reviewing agencies should contact one another promptly upon learning of a merger that appears to require review in both the USA and the EU. This may lead to a tentative timetable for regular inter-agency consultations at key stages.
- *Coordination on timing*—merging parties are encouraged to discuss timing with the reviewing agencies as soon as feasible, and to provide the anticipated dates for filing in each jurisdiction. The best practices also: encourage parallel filings in the USA and the EU; note that facilitation by the parties of the coordination of investigations is particularly important in cases of US second request with remedies and EU Phase I with commitments; state that after the issuance of a second request in the USA and the

7 Case C-109/10 P *Solvay SA v European Commission* and Case C-110/10 P *Solvay SA v European Commission*.

opening of a Phase II investigation in the EU, the parties can further facilitate coordination of the investigation by using the timing flexibility provided for in the respective procedures (e.g. negotiating a timing agreement with the reviewing US agency, or in the EU requesting to extend the review period by up to 20 working days); and actively warn against filing and gaining a decision in one jurisdiction before the other.

- *Collection and evaluation of evidence*—coordination may start in DG Competition's pre-notification phase, and includes sharing publicly available information, discussing the respective analyses at various stages of an investigation (market definitions, assessment of competitive effects and efficiencies, theories of competitive harm, and empirical evidence to test those theories), and views on remedial measures and relevant past investigations and cases. In addition, the reviewing agencies may discuss and coordinate information or discovery requests to the merging parties and third parties, including exchanging draft questionnaires to the extent permitted by local law. As soon as feasible after the parties inform the reviewing agencies of a merger that requires review by both the US agencies and the European Commission, the staff of the reviewing agencies should enter into discussion with the merging parties with a view to receiving confidentiality waivers from the merging parties normally at DG Competition's pre-notification stage. Reviewing agencies may also request that third parties waive confidentiality.
- *Remedies/settlements*—the reviewing agencies should strive to ensure that remedies do not impose inconsistent or conflicting obligations on the parties. Reviewing agencies should share draft remedy proposals and participate in joint discussions with the merging parties, prospective buyers, and trustees.

D. Third-party rights in merger proceedings—test-achats

On 12 October 2011, the General Court found that an application by a Belgian consumer group, ABCTA, for the annulment of the European Commission's decision approving conditionally the EDF/Segebel merger was inadmissible.[8] The GC considered that the locus standi of third parties concerned by a merger must be assessed differently depending on whether they rely on defects affecting the substance of a decision (the 'first category'), or submit that the Commission infringed procedural rights which are granted to them by the acts of EU law governing the monitoring of mergers (the 'second category').

With respect to the first category, the GC found that ABCTA was not individually concerned by the Commission's clearance decision. ABCTA was affected only by reason of their 'objective and abstract status as energy consumers' (point 33 of the judgment). The clearance decision did not affect ABCTA by reason of certain attributes which are peculiar to it or by reason of a factual situation which differentiated ABCTA from all other persons.

With respect to the second category, the GC ruled that the right to be heard is subject to two conditions: first, the merger must relate to goods or services used by final consumers, and, second, an application to be heard by the Commission during the investigation procedure must actually have been made in writing by the association. Although ABCTA satisfied the first condition, it did not satisfy the second condition. ABCTA wrote to the Commission two months prior to the notification expressing its concerns about the merger, but had not applied for its right to be heard following the notification of the merger. The GC noted that to rule otherwise would place an unnecessarily heavy burden on the Commission, as otherwise it would be under an obligation to consider comments outside the strict timetable established by the EU Merger Regulation.

ABCTA also challenged the Commission's decision to reject a request from the Belgian competition authorities for partial referral of the merger. The GC recalled that a third party is entitled to challenge a Commission decision to uphold a national competition authority's referral request. However, it held that third parties are not entitled to challenge a non-referral request. This is because the procedural rights and judicial protection that EU law confers are not in any way jeopardised by a non-referral decision. This contrasts with a referral decision, where third parties are deprived of the opportunity of review by the Commission of the lawfulness of a transaction.

VII. State aid

A. State aid rules for banks

On 6 December 2011, the European Commission published its Communication on the application from 1 January 2012 of State aid rules to support measures in favour of banks in the context of the financial crisis.

8 Case T-224/10, *Association belge consommateurs test-achats ASBL v European Commission.*

The Banking Communication, Recapitalisation Communication, Restructuring Communication and Impaired Assets Communication will remain in place during 2012, due to the increased financial tensions caused by the sovereign debt crisis (only the Restructuring Communication had to be prolonged since it originally expired on 31 December 2011).

To reflect changes in market conditions, the Communication provides new guidance on ensuring adequate remuneration for capital instruments that do not bear a fixed return. It also explains how the Commission will undertake a proportionate assessment of the long-term viability of banks in the current constantly adjusted market conditions. Finally, the Communication introduces a revised methodology for ensuring that the fees payable in return for State guarantees are sufficient to limit the aid involved to the minimum.

B. Tax regime in Gibraltar

On 15 November 2011, the CJEU annulled a judgment of the General Court and upheld a European Commission decision, which found that a proposed Gibraltar tax reform was materially selective and constituted State aid.[9]

Under the tax reforms, companies would only be liable to tax if they (i) occupied business premises on Gibraltar ('Business Property Occupation Tax' (BPOT)); or (ii) employed staff in Gibraltar ('payroll tax'). Furthermore, a company's liability to BPOT and payroll tax was capped at 15 per cent of a company's profits.

The Commission considered that the proposed tax reforms: (i) favoured off-shore companies, which do not have a physical presence on Gibraltar and would not be liable to pay tax; and (ii) favoured companies with low profits compared to the number of their employees and the premises they occupy due to the 15 per cent cap.

At first instance, the General Court annulled the Commission's decision on the basis that the Commission had not followed the correct analytical method for identifying the 'normal' tax regime applicable in Gibraltar and, consequently, had failed to demonstrate that the reforms derogated from that regime.

On appeal, the CJEU confirmed that the 15 per cent cap on liability was not selective, as it applied to all companies. The fact that the extent to which a company could benefit from the cap depended on the 'random event that the undertaking in question is unprofitable or very profitable during the period of assessment' was insufficient to characterise the measure as selective.

In respect of the impact of the reforms on off-shore companies, however, the CJEU held that the General Court erred by concentrating solely on the analytical method adopted by the Commission without considering the possible effects of the tax reforms. As such, the General Court had excluded, from the outset, the possibility that the tax exemption for off-shore companies could be classified as selective.

Following an analysis of the tax reforms, the CJEU concluded that the BPOT and payroll taxes were materially selective, as they created a system under which it was inevitable that off-shore companies—in contrast to on-shore companies—would be exempt from tax liability.

C. Deutsche Post—admissibility

On 13 October 2011, the CJEU annulled orders of the General Court which held as inadmissible appeals by Deutsche Post and the Federal Republic of Germany.[10] The applicants were seeking the annulment of a European Commission decision that required Germany to provide information relating to State aid proceedings concerning Deutsche Post. The CJEU held that the General Court had erred in finding that an information injunction decision under Article 10(3) of Regulation 659/1999 was not an act that could be the subject of an annulment action. The CJEU held that this type of decision produces independent binding legal effects and so is challengeable. The CJEU also held that Deutsche Post was directly and individually concerned by the injunction decision.

On 8 December 2011, the General Court dismissed an application by Deutsche Post for the annulment of a European Commission decision to open a State aid formal investigation procedure in relation to aid granted to Deutsche Post.[11] The Court held that the application was inadmissible since the decision was not a challengeable act. The decision did not create independent legal effects as it related to the same measures concerning which the Commission had opened a formal investigation leading to a decision in 2002. The 2002 decision had not closed the investigation in relation to the measures in question, and so the second de-

9 Joined Cases C-106/09 P and C-107/09 P, *European Commission v Government of Gibraltar and United Kingdom.*

10 Joined Cases C-463/10 P and C-475/10 P, *Deutsche Post AG and Federal Republic of Germany v Commission.*

11 Case T-421/07, *Deutsche Post AG v European Commission.*

cision to open a formal investigation neither altered the scope of the aid measures nor the legal situation of Deutsche Post.

D. France Télécom

On 8 December 2011, the CJEU confirmed the judgment of the General Court finding that France Télécom had received unlawful and incompatible State aid.[12] The CJEU confirmed that France Télécom did benefit from an advantage directly attributable to the specific features of the special tax regime applied to it, even though the exact amount of aid granted under that regime had to be determined by reference to certain factors unrelated to the regime. The case involved a dual categorisation, in which the existence of an advantage was firstly attributable to a fixed element forming part of the special tax regime applied to France Télécom as opposed to the general law regime, and, secondly, to a variable element which depended on external factors, such as the location of France Télécom's premises or land in the various local authorities and the tax rate applicable in the authorities concerned.

VIII. Looking ahead

A. Minority shareholdings

In a speech in March 2011 at a conference to mark 20 years of the EU Merger Regulation, Commissioner Almunia stated that there 'is probably an enforcement gap' concerning the acquisition of minority shareholdings that do not give rise to a 'change of control' under the EU Merger Regulation. DG Competition is currently reviewing the results of a study (commissioned by DG Competition from an external provider) which has gathered data on minority shareholdings over the last 10 years. An item for review next year will be whether the Commission should propose to amend the EU Merger Regulation to allow for the review of minority acquisitions. Competition regimes, such as the UK and Germany, currently have lower jurisdictional thresholds which allow for the review of minority interests. For example, in Germany acquisitions of less than 25 per cent will be notifiable if they enable the acquirer to exercise a 'competitively significant influence'.

B. Access to leniency documents

In the *Pfleiderer* judgment of 14 June 2011,[13] the CJEU held that EU law does not preclude a third party who has been 'adversely affected by an infringement of EU competition law and is seeking to obtain damages from being granted access to documents relating to a leniency procedure involving the perpetrator of that infringement' (point 32 of the judgment).

The CJEU considered that it is for the national courts to weigh up, on a case-by-case basis, the respective interests in favour of disclosure to third-party claimants of such documents and the protection of that information provided voluntarily by a leniency applicant. Although the Pfleiderer judgment concerned a request to access leniency documents in the case file of a national competition authority, it has revived the debate surrounding access to leniency documents in the European Commission's case file. This is a current issue in the follow-on damages proceedings before the English High Court, which arose out of the European Commission's decision in the gas insulated switchgear cartel,[14] where the claimant is seeking disclosure of various leniency materials in the Commission's filing. The Commission provided the English High Court with an amicus curiae brief on the issue in November 2011.[15] The Commission may consider proposing legislation amending the Modernisation Regulation, or the adoption of a specific regulation dealing with leniency issues, in order to protect the competition authorities of the Member States from judgments handed down by their respective national courts ordering disclosure of leniency documents to an aggrieved third party.

C. Reform of State aid rules

On 20 December 2011, the Commission adopted a new set of rules on services of general economic interest (SGEI). The new package consists of a Communication explaining the EU State aid rules applicable to compensation granted for the provision of SGEI; a Decision under Article 106(3) TFEU explaining the circumstances in which State aid in the form of public service compensation to undertakings that have been entrusted with the operation of SGEI should be deemed to constitute State aid compatible with Article 106(2) TFEU and so exempt from notification to the Commission; a Framework setting out the conditions under which State aid for SGEI not

12 Case C-81/10 P, *France Télécom v Commission*.

13 Case C-360/09, *Pfleiderer v Bundeskartellamt*.

14 *National Grid v ABB* [2011] EWHC 1717. See decision of the Commission of 24 January 2007 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement—Case COMP/F/38.899 *Gas insulated switchgear*.

15 This amicus curia brief was published on the European Commission's website in December 2011.

covered by the Decision can be declared compatible under Article 106(2) of the TFEU. The SGEI-specific de minimis Regulation is expected to be adopted in Spring 2012, after a final round of consultation. This is one of the major novelties of this package and it aims at clarifying that certain minor compensation measures may not be notified under State aid rules before their implementation. The Decision and Framework will replace the existing 2005 Commission Decision and Framework on SGEI.

The 2009 guidelines for the application of the State aid rules in relation to rapid deployment of broadband networks will be replaced by the end of September 2012. The Commission is currently seeking views from stakeholders on the operation and effectiveness of the current guidelines and on whether they require revision in light of market, technological, and regulatory developments. Particular issues raised by the Commission relate to the definition of next generation access networks, the design and imposition of access conditions on subsidised networks, transparency measures, and the role of national regulatory authorities.

The Commission will also review whether to extend or amend its revised guidelines on applying the State aid rules to the granting of rescue and/or restructuring aid to industrial firms in difficulty. These guidelines are due to expire on 9 October 2012. Commissioner Almunia has also stated that 'when market conditions permit', the Commission intends to adopt a new rescue and restructuring regime for financial institutions that will apply when the financial crisis is over.

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