Main developments in Abuse of Dominance enforcement (September 2014 – October 2015)

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This article provides an overview of developments from September 2014 to October 2015 in the case law and practice in the field of abuse of dominance. A common theme emerging from both EU and national cases is that dominance often stems from special or exclusive rights granted to a particular operator and that the abuse arises from leveraging this privileged position to distort competition in activities open to competition. *Post Danmark (II)* is a good illustration.[1] The Danish postal operator benefitted from exclusive rights covering a large part of the market. It implemented a retroactive rebate system whereby the rebates were calculated on the basis of overall purchases across the reserved and liberalized segments. The system thereby leveraged reserved volumes into the competitive segment. As illustrated by this and other cases summarized and discussed in this article EU competition law has an important role to play in preventing dominant undertakings benefitting from State intervention from distorting competition in activities open to competition.

1. Selected judgments of the EU Courts

1.1 Post Danmark (II)

In Case C-23/14 *Post Danmark (II)* the EU Court of Justice, in response to a request for a preliminary ruling, revisited one of the most hotly debated issues in EU competition law, namely the treatment under Article 102 TFEU of rebates linked to the customer's purchasing behavior. The facts were fairly straightforward. Post Danmark held a share of approx. 95% in the delivery of bulk mail in Denmark. 70% of the bulk mail market was covered by Post Danmark's statutory monopoly on delivery of mail under 50 gm. Post Danmark offered most of its customers a standardised retroactive rebate of 6-16% applicable to purchases made during a reference period of one year. The rebates applied without distinction to mail falling within and outside the scope of Post Danmark's monopoly rights. The rebate scheme covered the majority of customers on the market.

The Court of Justice made clear that the rebate in question was neither an exclusivity rebate nor a quantity rebate. The rebate was not conditional on exclusivity or quasi-exclusivity; nor was it solely linked to the volumes purchased. Such a retroactive rebate scheme based on purchases during a reference period must be assessed in light of all relevant circumstances to gauge its likely effects on competition. For instance, the fact that the rebate scheme covers the majority of customers on the market may constitute a useful indication as to the extent of that practice and its impact on the market, which may bear out the likelihood of an anti-competitive exclusionary effect. However,

1 Case C-23/14 *Post Danmark A/S v.Konkurrencerådet* ECLI:EU:C:2015:651.

the Court held that it was not justified to establish an appreciability (*de minimis*) threshold for the purposes of determining whether there is an abuse of a dominant position since there may be cases where any further weakening of competition may be abusive. It follows that market coverage is a relevant factor but that there is no absolute threshold below which abuse cannot be found.

The Court held further that there is no legal obligation to always apply the as-efficient-competitor test before finding abuse. That said, recourse to the as-efficient-competitor test in cases involving rebate schemes is by no means excluded. The test is one tool amongst others for the purposes of assessing whether a rebate scheme is abusive. Specifically as regards the European Commission's Article 102 Guidance, which sets out a version of the as-efficient-competitor test to assess the competitive effects of rebates,[2] the Court held that in accordance with its nature the Guidance merely sets out the Commission's approach as to the choice of cases that it intends to pursue as a matter of priority; accordingly, the administrative practice followed by the Commission is not binding on national competition authorities and courts.

> The as-efficient-competitor test is not relevant when a dominant firm leverages a statutory monopoly

In the specific circumstances of the case, the Court rejected the application of the as-efficient-competitor test. Post Danmark held a very high market share and benefitted from structural advantages conferred, *inter alia*, by that undertaking's statutory monopoly, which applied to 70% of mail on the relevant market, making the emergence of an as-efficient competitor practically impossible. In those circumstances, the presence of a less efficient competitor might contribute to intensifying the competitive pressure on that market and, therefore, to exerting a constraint on the dominant undertaking.

The judgment in *Post Danmark (II)* makes clear that ordinarily an assessment of a range of factors is required before it may be concluded that a retroactive rebate scheme it is likely to have anticompetitive effects and therefore is abusive. However, special considerations apply when a dominant firm operates a rebate scheme that leverages volumes covered by a statutory monopoly. In the case at hand, 70% of demand was reserved to Post Danmark as a matter of law while remaining volumes were subject to competition due to EU liberalization measures. By including reserved volumes in the rebate calculation, competitors were structurally disadvantaged. As explained by the Court, due to this leveraging of volumes, for 25 of Post Danmark's largest customers, representing approximately one-half of the volume of transactions on the relevant market during the period at issue, approximately two-thirds of mail sent in the form of direct advertising mail not covered by the monopoly could not be transferred from Post Danmark to the competitor Bring Citymail without an adverse impact on the scale of the rebates. The judgment is in line with past cases in which the EU Courts have kept a close eye on whether dominant firms benefitting from monopoly rights leverage benefits derived from those rights into liberalized segments of the market. In *Ufex* and *UPS* the General Court made clear that cross-subsidisation between reserved and liberalized activities raise issues under Article 102 TFEU, if the funds used were obtained by abusive means, e.g. from excessive or discriminatory prices or from other unfair practices in its reserved market.[3]

1.2 Slovenská Pošta

This is one of the rare cases in which the Commission applied Article 106 TFEU relating to Member State measures favouring public undertakings and granting special and exclusive rights.[4] The Com-

2 European Commission Communication – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ [2009] C 45/7, paras. 39-44.

3 Case T-175/99 *UPS Europe* ECLI EU:T:2002:78, para. 55, and Case T-60/05 *Union française de l'express (UFEX)* ECLI EU:T:2007:269, para. 155.

4 Article 106(1) TFEU provides: "In the case of public undertakings

mission found that amendments to Slovakia's Postal Law infringed Article 106(1) in conjunction with Article 102 TFEU because they extended without objective justification Slovenská Pošta's monopoly in traditional mail services to the market for the delivery of hybrid mail and limited the availability of related downstream services. In Case T-556/08 *Slovenská pošta v Commission*, the General Court dismissed Slovenská Pošta's appeal.

The General Court rejected Slovenská Pošta's claim that that the Commission had incorrectly defined the market. The Commission was not bound by the general guidance in its Postal Notice when defining the relevant market.[5] And even if it were, the Commission did not depart from the high-level principles set out in the Notice. To make its claim, Slovenská Pošta needed to prove manifest error in the Commission's assessment, which it had failed to do. The General Court also dismissed Slovenská Pošta's claim that the Commission had infringed the principle of legal certainty and legitimate expectations by deviating from earlier administrative practices and the Postal Notice. While the Commission risks breaching general principles of law where it publicly adopts rules of conduct and departs from them, the Commission did not depart from the Postal Notice in this instance. Further, because the Commission is not bound by its previous decisions, Slovenská Pošta could not form legitimate expectations on this basis.

The General Court confirmed that the Postal Law extended Slovenská Pošta's monopoly in traditional mail services to the neighboring market for hybrid mail services. It reiterated that Article 106(1) TFEU is breached where an undertaking cannot avoid abusing its dominant position merely by exercising its exclusive right. There is no need to show actual abuse. The potential for abuse is sufficient.[6] Building on the *Höfner and Elser* case law,[7] the General Court held that the prohibition of Article 106(1) TFEU covers situations where an undertaking is unable to satisfy demand for a service covered by a statutory extension of its exclusive rights and the provision of the service by private corporations is rendered impossible by the statute. The General Court agreed with the Commission that there was separate demand for those additional services which Slovenská Pošta would not be able to satisfy and that the extension of Slovenská Pošta's exclusive rights to hybrid mail services deprived users of access to these additional services. The General Court also rejected Slovenská Pošta's claim that the State measure was justified under Article 106(2) TFEU services of general economic interest.[8] While the Commission's Postal Notice contains a presumption that exclusive rights are *prima facie* justified under Article 102(2) TFEU, the General Court considered that such justification is not applicable when the relevant services have been liberalized and the functioning of the universal service, which the exclusive rights aim to protect, is not endangered.

The judgment confirms that State measures breach Article 106(1) TFEU when they lead to monopolization of a market in favor of an incumbent firm benefiting from exclusive rights in a neighboring market, particularly where the incumbent is unable to meet demand when other firms could. It also confirms that statutorily granted exclusive rights will not benefit from the presumption of legitimacy under the Postal Notice if they concern a market that has previously been liberalized. The Member State must demonstrate that the restriction of competition resulting from monopolization measures is necessary to finance the universal service. The judgment mirrors *Post Danmark (II)*. Market liberalization cannot be undermined by conduct and measures that seek to extend a residual statutory monopoly to the liberalized sector.

1.3 Huawei/ZTE

Abuse of dominance issues are rarely global in nature. More often than not differences between systems lead to distinct enforcement focuses. Standard-essential patents (SEPs) are an exception. In recent years enforcement authorities and

and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109."

5 Notice from the Commission on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services [1998] C 39/2.

6 See in this regard, Case C-553/12 P *Commission v DEI* ECLI EU:C:2014:2083.

7 Case C-41/90 *Höfner and Elser* ECLI EU:C:1991:161, para. 31.

8 Article 106(2) provides: "Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union."

courts across the globe have looked into the conduct of SEPs holders and considered *inter alia* the circumstances in which it may be abusive to seek a permanent injunction against potential licensees that produce under a formal standard to which the patents relate. This was the issue before the EU Court of Justice in Case C 170/13 *Huawei Technologies v ZTE*, in response to a request for preliminary ruling. Huawei owned patents that it had declared essential to ETSI's LTE/4G standard and made a commitment to license third parties on fair, reasonable and non-discriminatory (FRAND) terms. Huawei and ZTE entered into licensing negotiations but were unable to agree on the terms. ZTE continued marketing products operating under the standard and Huawei sought an injunction in Germany on the basis that ZTE was infringing one of its SEPs.

The clear starting point under EU competition law is that holders of intellectual property rights are entitled to exercise their property rights to exclude third parties. It is only in exceptional circumstances that the exercise of an exclusive right linked to an intellectual-property right may involve abusive conduct under Article 102 TFEU. However, in *Huawei* the EU Court of Justice distinguished this case law due to the specific circumstances in which SEPs status is obtained. Huawei's patent was essential to a formal standard established by a standardisation body, rendering its use indispensable to all competitors wanting to manufacture products that comply with the standard. Because of the standard, third parties could not work around the patent. Moreover, SEP status was obtained only in return for an irrevocable promise to licence on FRAND terms. In those circumstances, the Court of Justice held that a refusal by the proprietor of the SEP to grant a licence may, in principle, constitute an abuse within the meaning of Article 102 TFEU.

In order to avoid abuse, SEPs holders must comply with certain requirements that seek to balance the parties' interests and ensure that licensees willing to take a license on FRAND terms are not excluded from the market or charged un-FRAND royalties. First, the SEP holder must give notice or engage in prior consultation with the alleged infringer (even if the SEPs have already been used by the alleged infringer). The holder must also specify the SEPs relied upon and the way in which they have been infringed. Secondly, after the alleged infringer has expressed its willingness to conclude a licensing agreement on FRAND terms, the SEPs holder must make a specific, written offer for a licence on FRAND terms, specifying, in particular, the amount of the royalty and the way in which that royalty is to be calculated. If the alleged infringer does not accept the offer, it may rely on the abusive nature of an action for a prohibitory injunction or for the recall of products only if it has submitted to the SEPs holder, promptly and in writing, a specific counter-offer on FRAND terms. The alleged infringer must also provide appropriate security, for example by providing a bank guarantee or by placing the amounts necessary on deposit. By contrast, the alleged infringer is not precluded from challenging, in parallel to the negotiations relating to the grant of a licence, the validity of the SEPs and/or the essential nature of those patents to the standard or from reserving the right to do so in the future.

As the European Commission did in prior decisions,[9] the EU European Court of Justice sets out a process for determining FRAND royalties in the specific context of SEPs where patent holders contribute patented technology to formal technical standards such as mobile communications standards.[10]

The Court establishes a process for determining FRAND but leaves many questions unanswered

9 Case COMP/39.939 – *Samsung – Enforcement of UMTS standard essential patents* (2014) and Case COMP/39.985 – *Motorola – Enforcement of GPRS standard essential patents* (2014)

10 The *Huawei* judgment does not impinge on the rights for holders of non-SEPs to refuse to license and to seek injunctions against infringers subject to the existing case law on abusive refusals to deal.

If the standard is successful, SEPs holders benefit from wide adoption of their technology. The *quid pro quo* for being included in the standard, is a promise to license on FRAND terms – a facially clear concept. However, in practice it is no easy matter to determine whether a claimed royalty reflects the intrinsic value of the contributed technology or simply the market power conferred by the standard. The process laid down by the Court of Justice seeks to avoid that a willing licensee is either excluded from the market or forced to accept un-FRAND royalties due to the threat of an injunction. It also seeks to avoid that a willing licensor is deprived of the right to seek an injunction against an unwilling licensee and that legitimate claims for damages are protected. The judgment addresses important issues but is not the last word on SEPs and FRAND. For instance, the Court requires that the licensor must specify the way in which that royalty is to be calculated but does not determine what constitutes an appropriate royalty base such as the price of the product as a whole or the components that incorporates the patented technology (smallest salable unit), an issue that had been discussed extensively in U.S. case law.[11]

2. Selected decisions of the European Commission

2.1 Slovak Telekom

Slovak Telekom, the incumbent telecoms operator in Slovakia, owns the only fixed copper network in the country. In Case COMP/39523 *Slovak Telekom* the Commission adopted a prohibition decision with fines under Article 102 TFEU which is quite rare. In recent years, years most abuse of dominance cases have been concluded by the adoption of commitments decisions under Article 9 of Regulation 1/2003.

The Commission found that Slovak Telekom had a dominant position on the market for access to unbundled local loops (ULL) within Slovak Telekom's network. While there were other competing networks in Slovakia (e.g., fibre, fixed wireless access, mobile broadband), the Commission considered that access to these networks was currently not offered by the owners of the alternative networks and that these networks suffered from technical limitations that would prevent alternative operators from offering a similar level of quality throughout Slovakia as over Slovak Telekom's ULL.

In accordance with the EU regulatory framework for electronic communications and pursuant to a regulatory decision of the Slovak telecoms regulator, Slovak Telekom was required to give alternative operators ULL access within its network. The Commission found that Slovak Telekom had set unfair terms and conditions in its Reference Unbundling Offer (RUO), to render unbundled access to the local loop unviable for alternative operators, thereby delaying, making difficult or preventing their entry in the retail broadband market. In particular, the Commission considered that Slovak Telekom (i) withheld from alternative operators network information necessary for the unbundling of the local loop, (ii) artificially reduced the scope of Slovak Telekom's unbundling obligation, and (iii) set unfair terms and conditions in its RUO (burdensome procedures, unnecessary fees, etc.). The Commission also found that Slovak Telekom engaged in abusive margin squeeze. The Commission considered that an equally efficient competitor using Slovak Telecom's ULL wholesale access was facing significant negative margins and could not replicate profitably the retail broadband portfolio of Slovak Telekom on a lasting basis.

In analyzing the abusive nature of Slovak Telekom's conduct, the Commission declined to take into account the fact that Slovak Telekom's network did not appear indispensable for alternative operators to compete in the retail broadband market. In doing so, the Commission relied on the *TeliaSonera* case law which provides that the indispensability test developed in *Bronner* does not apply to "*conduct which consists in supplying services or selling goods on conditions which are disadvantageous or on which there might be no purchaser*".[12] While the Commission is not required to show that a wholesale input is indispensable to compete on a downstream market, the Court in *TeliaSonera* found that the question whether a wholesale input is indispensable may nevertheless be relevant when assessing the likely effects of a margin squeeze.[13]

Slovakia was – and still is – one of the Member States with the highest level of infrastructure-based competition. Infrastructure based

11 See e.g. *VirnetX, Inc. v. Cisco Systems, Inc.* (Fed. Cir. 2014).

12 Case C-52/09 *TeliaSonera* ECLI:EU:C:2011:83, para. 55.
13 *Id.*, para. 69.

competition is generally considered to be preferable to competition based on the incumbent's network because it enables alternative operators to differentiate their products and therefore to offer greater choice, lower prices, and higher quality. However, the Commission considered that absent Slovak Telekom's exclusionary conduct, it is likely that competition would have been even more effective.[14] The Commission's reasoning is based on the "ladder of investment" theory that underlies the telecommunications regulatory framework and which postulates that alternative operators need to be able to progressively invest in different forms of access to the incumbent's network (wholesale broadband access, ULL) before rolling out their own infrastructure.

> Network-to-network competition is preferable to access-based competition

Finally, the Commission found that Deutsche Telekom had the ability and in fact had exercised decisive influence over Slovak Telekom and was therefore liable for the infringements as a parent company. On that basis, the Commission imposed a fine of EUR 38,838,000 jointly and severally on Slovak Telekom and Deutsche Telekom. The Commission also imposed a separate fine of EUR 31,070,000 on Deutsche Telekom because it had already committed a similar infringement in 2003.[15]

2.2 Magyar Suzuki Corporation

In Case COMP/40.072 – *Magyar Suzuki Corporation*, the Commission rejected a complaint by a Suzuki car distributor, Auto Team 4x4 s.r.o, alleging that Suzuki had infringed i.a., Article 102 TFEU. The complainant argued that there is a separate market for the sale of Suzuki cars in Slovakia. It also stated that the Commission should assess Suzuki's dominance within its relationship with Auto Team since Auto Team sourced the majority of the cars it sold from Suzuki.

The Commission relied on its previous decisional practice and pointed out that a brand-specific product market definition (limited to Suzuki) is not appropriate. The Commission typically delineates relevant markets in the car sector based on engine size or vehicle dimensions and takes into accounts factors such as price, image, and the amount of extra accessories. Even the narrowest market definition does not divide the overall market for new cars along brand lines. Moreover, according to the Commission, there are reasons to believe that the relevant geographic relevant market is becoming EEA-wide.

The Commission found that even in Slovakia Suzuki's position was very limited and could not result in dominance in the Slovakian market for passenger cars, regardless of how narrowly the market is divided based on objective non-brand specific criteria. The purpose of Article 102 TFEU is to protect competition on the market and not as such to address economic dependence in contractual relationships.[16]

3. Selected decisions of national competition authorities and courts

3.1 GDF Suez

EU gas and electricity markets have gradually been opened up to competition. However, markets in a number of Member States remain subject to price regulation that hampers the development of competitive markets. In France, GDF Suez is subject to public service obligations to supply gas under regulated tariffs. While customers are free to choose between market-based prices and regulated tariffs, many customers have not moved away from regulated tariffs. GDF Suez has a data base of all its customers (regulated and liberalized). The database includes information on *e.g.* customer identity, the number of metering points, annual consumption and consumption profile. The information was used for the purpose of making market-based

14 This is in line with prior cases such as *British Airways* where the General Court found that the fact that British Airways' comeptitors gained market share during the infringement period did not mean that Bristish Airways' conduct did not have any anticompetitive effect. The Court considered that it was possible that absent British Airways' conduct, the market shares of competitors would have increased even more, sse Case T-219/99 *British Airways v Commission* ECLI:EU:T:2003:343, para. 298).

15 Case C-280/08 P *Deutsche Telekom v Commission* ECLI:EU:C:2010:603.

16 See in this regard, recital 9 to Regulation 1/2003.

offers to customers, including those on regulated tariffs, and was not shared with competitors.

In its judgment of 31 October 2014, the Cour d'Appel de Paris upheld a decision of the French Competition Authority finding that it was abusive for GDF Suez' to use data on regulated tariff customers for the purpose of making market-based offers to these customers without sharing the same data with competitors. It was difficult and expensive to replicate the database and the data conferred a significant competitive advantage on GDF Suez. Moreover, this competitive advantage did not result from the dominant firm's own efforts in a competitive market. It resulted from GDF Suez' historical position in France and its exclusive right and obligation to supply under the regulated tariff scheme. As a result of the enforcement action, GDF Suez was required to share customer data with competitors, enabling them to make offers on an equal footing.

Like *Post Danmark (II)*, the judgment addresses a form of leveraging of exclusive rights that distorts competition in a liberalized sector. The judgment also reflects the Commission's view in its Guidance on Article 102 TFEU that when the market position of the dominant undertaking has been developed under the protection of special or exclusive rights or has been financed by state resources, there may be good reason to deviate from the normal conditions for finding an abusive refusal to deal.[17]

> Access to user data may be necessary for competition to function

3.2 SNCF

In Case 14-D-11 *SNCF*, the French Competition Authority took the view that the incumbent train operator in France abused its dominant position by favouring its own subsidiary in the distribution of train tickets in France.[18] SNCF benefits from a legal monopoly in the operation of trains in France and thus enjoys a dominant position in this market. Train tickets are distributed through two main channels: by VSC (on its website voyages-sncf.com), a wholly owned subsidiary of SNCF, and by authorized travel agents. The alleged abuse took several forms:

- First, unlike travel agents whose compensation was specified in an agreement concluded by SNCF and the National Trade Union of Travel Agents, VSC benefited from a special compensation mechanism that favoured VSC in the leisure segment.[19]
- Second, the cost of access to WDI, an IT system enabling access to SNCF's database, was discriminatory since the price per unit was much higher for smaller operators. The difference in treatment raised barriers to entry and was not considered justified.
- Third, VSC had obtained access to information about competitors through other entities of the SNCF group, which was likely to confer an unjustified competitive advantage on VSC.
- Fourth, VSC benefitted on an exclusive basis for almost a year from a new route search engine designed by the SNCF group to run on the SNCF database. The Authority explained that in a sector where retail prices are regulated, any technical differentiation aimed at improving the reliability and completeness of the search results was likely to constitute a strategic competitive advantage, all the more so since the database was an essential facility.
- Fifth, SNCF's website did not provide any information about timetables but referred instead to VSC's website voyages-sncf.com. Potential clients seeking information about train timetables were redirected to VSC's site, which gave an unfair competitive advantage to VSC.

17 European Commission Communication – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ [2009] C 45/7, para. 82.

18 Autorité de la concurrence, Décision n° 14-D-11 du 2 octobre 2014 relative à des pratiques mises en œuvre dans le secteur de la distribution de billets de train.

19 See in this regard also *Sport TV*. On 11 March 2015, Lisbon's Court of Appeal upheld a 2013 decision by Portugal's Competition Authority fining Sport TV for abuse of dominance in the premium sports pay-TV market. The authority found that Sport TV had concluded contracts for the distribution of Sport TV channels that included discriminatory conditions for equivalent services. The pricing policy of Sport TV favoured one particular pay-TV market retailer, Zon, which formed part of the same undertaking as Sport TV.

- Finally, the distribution system put in place by SNCF required travel agents to disclose its business customers to SNCF in order to benefit from negotiated prices, thereby conferring an informational advantage.

SNCF offered a number of commitments to address the Authority's concerns. First, SNCF undertook to align the compensation mechanism of VSC with that of travel agents. Second, SNCF promised to adjust the costs of access to the WDI IT platform. Third, SNCF committed to ensure that confidentiality is strictly respected between VSC and the other entities of the SNCF group so that the former does not have access to information about its competitors. Fourth, SNCF committed to implement a programme enabling travel agents to participate in the experimentation of new distribution tools, offers or functionalities. Fifth, SNCF undertook to present timetables on its own website instead of directing users to the Voyages-Sncf.com booking platform. Finally, SNCF committed to put in place a system that monitors the evolution of the costs of its distribution platform for business customers. These commitments were accepted by the Authority.

The French Competition Authority's intervention is in line with past European Commission cases. In *Air France (CRS)* the Commission decided to initiate proceedings against Air France for providing Amadeus, a computerized reservation system ("CRS") that it partly owned, with more accurate information and on a timelier basis than competing CRSs. After Air France adopted a code of good behavior, offering all CRSs identical information on equal terms, the Commission decided to close its investigation.[20] In *Deutsche Bahn*, the Commission found (and the General Court confirmed) that Deutsche Bahn engaged in discriminatory conduct by charging lower prices for rail transport services to Transfracht (a transport service company 80% owned by Deutsche Bahn and operating from German ports) and higher prices to competing service providers transporting containers from Belgian and Dutch ports to German customers.[21]

3.3 Entreprise des Postes et Télécommuications (EPT)

In Case 02014-FO-07 *Entreprise des Postes et Télécommunications*, the Luxembourg Competition Authority fined the incumbent telecom operator EPT EUR 2,520,000 for engaging in abusive margin squeeze and offering bundled rebates to its customers. EPT was the dominant player on the markets for fixed communications networks (fixed telephony and broadband) and also had a high share on the market for retail mobile telephone services.
The Luxembourg Competition Authority found that EPT engaged in abusive margin squeeze in relation to the Reference Line Rental Offer and the retail prices charged by EPT to final customers. The Authority considered that it was unnecessary to analyze the effects on competition of the alleged margin squeeze, stating that the effect of the abusive conduct was the insufficient margin between wholesale and retail prices.[22]

The Authority found further that EPT had abused its dominant position by offering bundled rebates. EPT offered a rebate to its customers when they purchased fixed telephony, broadband and mobile services together in a bundle (triple play), leveraging its strong position in fixed telephony and broadband into mobile telephony. The rebates offered by EPT were such that a competitor mainly active in mobile services was unable to compete with the incumbent in these services because it could not viably compensate for the rebates offered by EPT on all three types of services. The Authority found, however, that over time competition between bundles and individual services had been largely replaced by competition between bundles. As a result, the bundled rebates only had anticompetitive effects in the earlier years. For the subsequent period, the Authority applied a separate margin squeeze test to assess whether the incumbent's competitors were able to viably offer bundled rebates when relying on the wholesale offers of the incumbent. No margin squeeze was found.

The approach to bundled rebates reflects that enshrined in the Guidance on the Commission's enforcement priorities in applying Article 102 TFEU to abusive exclusionary conduct by dominant undertakings, which also highlights the importance of

20 See "Commission acts to prevent discrimination between airline computer reservation systems", Press Release IP/00/835.
21 Case T-229/94 *Deutsche Bahn* ECLI:EU:T:1997:155
22 paras. 120-121.

taking bundle-to-bundle competition into account.[23] By contrast, following *TeliaSonera*, it might have been expected that the Authority would have looked more closely at the anticompetitive effects of the alleged margin squeeze before concluding that there was abuse.[24]

3.4 SGAE-Conciertos

In Case S/0460/13 *SGAE-Conciertos*, the Comisión Nacional de los Mercados y la Competencia (CNMC) imposed a fine of EUR 3,103,196 on Sociedad General de Autores y Editores (SGAE) for having engaged in an abusive practice concerning the management of intellectual property rights of authors in relation to the public communication of musical works at concerts in Spain.

The CNMC found that SGAE enjoyed a *de facto* monopolistic position. It was the only collecting society authorized by the Ministry of Culture in Spain. The CNMC found further that the high fees charged by SGAE to artistic promoters for the public communication of musical works at concerts in Spain were abusive within the meaning of Article 102(a) TFEU. The abuse was reinforced by additional actions such as the obligation to obtain a copyright license before making tickets available for sale, the requirement on concert promoters to deposit disproportionate guarantees and the obligation on ticket sales companies to withhold and liquidate the sums owed to SGAE.

The CNMC's assessment was based on a comparison between the level of fees charged by SGAE and those applied by similar organisations in other Member States, reflecting the approach of the European Court of Justice most recently in *OSA*.[25] On that basis, the CNMC concluded that the fees were set at a much higher level than in the majority of Member States without any objective economic justification.

3.5 SEA/CONVENZIONE ATA

According to a concession agreement, SEA was designated sole manager of the Milan Linate and Malpensa airports until 2041, for both aviation activities (management and maintenance of the infrastructures, as well as handling services) and non-aviation activities (commercial services and real estate). At Linate airport, two areas could be identified: an area for Commercial Aviation traffic ("CA") and a second for General Aviation traffic ("GA"). In 1962 SEA granted a sub-concession to ATA Trasporti for the GA facilities management on an exclusive basis as well as the non-exclusive supply of certain ground-handling services through its subsidiary ATA Servizi. In October 2013, Cedicor, a Uruguayan company active in the management of airport infrastructures, lodged a complaint with the Italian Competition Authority, arguing that SEA abused its dominant position in the context of a tender called by SAPAM (in liquidation) for the sale of a 98.3% holding in ATA Trasporti.[26]

The Italian Competition Authority found that SEA had a dominant position both in the CA and GA market (as it was the sole manager of the Milan Linate airport and had the power to terminate the sub-concession agreement for the AG area) and that it implemented a unitary strategy in order to prevent Cedicor's access to the market. The Authority found that having learned that Cedicor had made the best bid, SEA terminated the sub-concession agreement with ATA Trasporti in order to frustrate the bid. SEA then made a second offer to beat Codacor's offer. While SEA had warned ATA in 2011 that it would terminate the sub-concession agreement if certain works were not completed, it took action only when it learned that Codacor presented the best bid.

The Authority held that SEA's conduct was abusive because it resulted in the elimination of competition on the market. It rejected SEA's efficiency defence, referring to the Commission's Guidance according to which exclusionary conduct which maintains, creates or strengthens a market position approaching that of a monopoly can normally not be justified on the grounds that it also creates

23 OJ [2009] C 45/7, paras. 60-61.

24 The EU Court of Justice has made clear that margin squeeze constitutes an abuse within the meaning of Article 102 TFEU only where, given its effect of excluding competitors who are at least as efficient as itself by squeezing their margins, it is capable of making more difficult, or impossible, the entry of those competitors onto the market concerned and that as a result margin squeeze constitutes an abuse within the meaning of Article 102 TFEU, where, given its effect of excluding competitors who are at least as efficient as itself by squeezing their margins, it is capable of making more difficult, or impossible, the entry of those competitors onto the market concerned. See Case C-52/09 *TeliaSonera*, ECLI:EU:C:2011:83, paras. 60 et seq.; and Case C-280/08 P *Deutsche Telekom v Commission* ECLI:EU:C:2010:603, paras. 250 and 251.

25 Case C-351/12 *OSA – Ochranný svaz autorský pro práva k dílům hudebním* ECLI:EU:C:2014:110, para. 87.

26 Case A474.

efficiency gains.[27] The Authority concluded that SEA intentionally and irremediably altered competition "for" the market of GA airport facilities management, as it impeded the entry of Cedicor, an efficient competitor which could have created a valid alterative to the past license holder. SEA's conduct also altered competition "in" the market of GA ground-handling services, as it became the leading operator for the Milan Linate airport. The Authority imposed a fine of EUR 3,365,000.

3.6 Telefonica UK (Packet Media)

Packet Media operates a service enabling its customers to make use of GSM gateways using O2 SIM cards. In June 2015, O2 indicated that it intended to cease supply to SIM cards to Packet Media. Packet Media brought proceedings alleging *inter alia* that O2 would be abusing its dominant position if it were to do so. The High Court granted an interim injunction against O2's decision to suspend the supply of SIM cards to Packet Media on the grounds that O2 had a case to answer for a possible abuse of dominance.

Packet Media initially argued that O2 was dominant in the market for the *termination* of mobile telephone calls and SMS text messages. However, the High Court found that this market had no relevance to the alleged abuse which related to call *origination* services. Packet Media argued that according to *Tetra Pak(II)*,[28] dominance and abuse can be in two different (closely related) markets, but the court did not consider that termination and origination were closely related. Packet Media eventually changed its claim and argued that O2 was dominant also in the market for call origination services.

O2 claimed that its conduct would be objectively justified on three grounds: (i) O2 was entitled to protect the capacity and integrity of its network from the harm caused by GSM gateways; (ii) O2 offered an alternative means of connecting Packet Media customer to the O2 network; and (iii) O2 is entitled to configure its tariffs and sells its SIM card services at a price that is appropriate to the use of the O2 network. The High Court suggested that none of those grounds would altogether remove the possibility that O2 abused its dominant position and that triable issues remained.

27 Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ [2009] C 45/7.

28 Case C-333/94 P *Tetra Pak (II)* ECLI:EU:C:1996:436.