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- EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility
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EUROPEAN COMPETITION LAW REVIEW - ISSUE 12 2017

EUROPEAN COMPETITION LAW REVIEW

Volume 38: Issue 12 2017

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[2017] 12 ECLR

711671

SWEET & MAXWELL

2017 Volume 38 Issue 12
ISSN: 0144-3054

European Competition Law Review

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Filling Huawei's gaps: the recent German case law on Standard Essential Patents 538
The *Huawei* ruling identified the steps that owners and users of SEPs will have to follow in negotiating a FRAND royalty. Compliance with the code of conduct will shield patent holders from the gaze of competition law and, at the same time, will protect implementers from the threat of an injunction. The licensing framework provided by the CJEU is aimed at increasing legal certainty and predictability for the whole standardisation environment. Nevertheless, the judgment has been criticised because a relevant number of issues are left unresolved. In this scenario the activities of national courts in filling the gaps left by the CJEU deserve the utmost consideration. This article will seek to explore the approach developed at national level post *Huawei*, focusing on the German judicial experience.

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The increasing importance of cloud services over recent years within the current socio-economic climate and its peculiar competitiveness, which is becoming more and more clear, inspired this analysis, with the purpose of identifying the legal tools to boost its development. Getting interoperability through standardisation leads to identifying a technological basis from where to develop the market, allowing the operators to invest in research and development in a more focused way. From this perspective, the article shows that the use of open source licences for the computing codes used to access the distribution platforms appears to be the most suitable solution to safeguard the author's creative work and, all the while, to support the increased offer of contents accessible through cloud platforms.

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The article argues that the sentences imposed on 31 May 2017 by the Central Criminal Court in the commercial flooring bid-rigging cartel case and the methodology used in setting those sentences seriously under-enforces competition law in Ireland. The sentence imposed on the individual responsible for initiating and participating in the bid-rigging cartel was only three weeks wages or €7,500. No gaol sentence was imposed. The undertaking was fined €10,000; the value of the rigged tenders it won totalled €556,000. The Court's reasoning does not justify such low sanctions. Increased legislative fines and prison terms suggest an increase, not a decrease, in sanctions compared with earlier cartels. Recent case law indicates a custodial sentence. If the Court had put greater emphasis on general as compared to specific deterrence the sanctions would have been substantially greater. If the sentences imposed by the Central Criminal Court are not successfully appealed as being unduly lenient and appropriate sentencing guidelines developed, then the prospect for competition law enforcement in Ireland is grim. In particular, the effectiveness of the Cartel Immunity Programme, a vital tool for cartel detection and prosecution, will be severely damaged.

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- a case analysis or comment on a legislation; or
- as a full length article of 5,000 words maximum.

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Book review proposals can be sent to our Book Review Editor at: gblanke@alumni.lse.ac.uk.

This journal may be cited as [2017] E.C.L.R. (followed by the page number).

Volume 38 (2017) Annual Subscription (12 Issues): United Kingdom £1,649, Europe £1,709/EUR 2,355, Rest of World £1,709/$2,612. Annual Subscription (12 Issues and bound volume): United Kingdom £2,025, Europe £2,100/EUR 2,893, Rest of World £2105/$3,216.

Orders by email to: TRLUKI.orders@thomsonreuters.com.

The European Competition Law Review is published in 2017 by Thomson Reuters, trading as Sweet & Maxwell. Thomson Reuters is registered in England & Wales, Company No.1679046. Registered Office and address for service: 5 Canada Square, Canary Wharf, London, E14 5AQ.

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Computerset by Sweet & Maxwell. Printed and bound in Great Britain by Hobbs the Printers Ltd, Totton, Hampshire.

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Authority/CCPC which does not attract widespread support and may even require, according to some commentators, a change in the Irish Constitution which would involve a referendum among Irish voters.

The report also shows that the CCPC takes an active part in the international networks involved in competition law enforcement including attending 24 European Competition Network meetings, six OECD meetings and four International Competition Network meetings.

In the area of consumer protection, the report identifies telecommunications, motor vehicles/personal transport and clothing/footwear/accessories issues as being the top three issues in terms of consumer contacts with the CCPC.

The CCPC was established in 2014 by way of a combination of the Competition Authority and the National Consumer Agency. The report just published indicates that the CCPC is still working on the integration of the agencies. This arduous integration process must be a distraction for the CCPC so hopefully this report will mark the last which deals with the integration process. It is a fortunate agency to have a growing number of staff.

No enforcement agency is always successful. If it is entirely successful in bringing civil or criminal cases then it is only taking the easy cases. So the CCPC should not be deterred from taking the more difficult cases. It has suffered setbacks (including since the publication of this report (e.g., the Irish Cement judgment of the Supreme Court in 2017) but there is a great deal in this report to indicate hope and progress in terms of competition and consumer protection enforcement in Ireland.

The 2016 report shows an impressive and sustained increase in the activity level of the CCPC. There were some years when it underachieved compared to its previous and potential performance levels. The CCPC still suffers from being ranked in the lowest grouping of competition agencies internationally according to the *Global Competition Review* and having been criticised by various politicians (which, according to some, may be a badge of honour for a competition agency!) but this report indicates that there is a real sense of increased and sustained activity and a "turning of the corner" by the Irish agency.

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PROCEDURE

Dawn raids—Railway maintenance companies

Anti-competitive practices; Dawn raids; National competition authorities; Portugal; Railway companies

On 25 July, the Portuguese Competition Authority (PCA) announced that it had carried out a new set of dawn raids in nine railway maintenance companies, with registered offices in Lisbon and Porto, due to suspicions of anti-competitive practices in the railway maintenance sector. In order to safeguard the investigation, the PCA has submitted the proceedings to judicial secrecy. According to the information released, this antitrust proceeding was initiated following a complaint lodged as a result of a campaign against bid-rigging in public procurement launched by the PCA in 2016.

In line with its website, the PCA has now raided 36 entities since the beginning of 2017, including undertakings operating on the river cruises, driving instruction, retail, retail distribution and insurance sectors.

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Portugal

ANTI-COMPETITIVE PRACTICES

Driving schools—Statement of objections

Anti-competitive practices; Driving instruction; National competition authorities; Portugal; Pricing; Statements of objections

The PCA adopted, on 27 July, a statement of objections against the Portuguese Association of Driving Schools (APEC) and its President for allegedly preventing, restricting or distorting competition in the driving schools' market.

Considering the evidence collected during the dawn raids that took place last January, the PCA believes that APEC has been setting minimum prices for more than 170 driving schools located in Setúbal and the Greater Lisbon area since September 2016.

APEC's President also faces charges due to the fact that the PCA is convinced that he was aware of the anti-competitive practice and took no measures to prevent or stop it.

The addressees of the statement of objections were now notified to exercise their rights of defence.

It should be recalled that in November 2016, the PCA published a Guide for Associations of Undertakings, available at its website, that provides guidance for associations of two undertakings and their members by describing the decisions and behaviour to avoid in order to ensure that competition rules are upheld.

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ANTI-COMPETITIVE PRACTICES

Public transport—Lake Bled—Opinion

Anti-competitive practices; Lakes; Monopolies; National competition authorities; Ports; Public transport; Slovenia; Transparency

In August 2017, the Slovenian Competition Protection Agency (the AVK) issued an opinion in accordance with cl.71 of the Prevention of Restriction of Competition Act (Zakon o preprecevanju omejevanja konkurence (ZPOmK-1)) regarding the process of obtaining the right for the use of water as a port on Lake Bled and the process of obtaining the consent and conditions for the performance of public transport on Lake Bled. Since according to cl.64 of ZPOmK-1 the Government, state authorities, local community authorities and holders of public authority may not restrict the free performance of undertakings on the market, the AVK has the competence to issue an opinion on the influences of their acts on the competition. Abovementioned restrictions of the free performance of undertakings on the market are deemed to be general and individual legal instruments that, in contravention to the Constitution and the law, restrict free trade in goods and services, free entry into the market or free performance on the market, or that prevent competition in any other way.

AVK assesses that at the moment, the holder of the navigability licence and its members have a monopolistic position in the relevant market, as a consequence of the regulation which provides for the permits and licences to be the condition for the performance of these services. While the water, nature and heritage protection which are the reasons behind the current legislation are considered public as well as expert interest of the highest level, the abovementioned measures, in AVK's opinion, are too prejudicial to the constitutional right to free economic initiative due to the fact that the conditions and eligibility as well as the process for the acquisition of the water right and all other necessary permits are not transparent and indiscriminate enough.

AVK's opinion is based also on the fact that at the moment the service providers are all offering their transport services at the same (high) price, while the independent competitor offered a much lower price for the same services (but was due to the legislation not able to obtain the relevant rights and permits). Such competition would lead both to better services as well as lower prices for the end users.

In the AVK's opinion, the process of obtaining the water right is not transparent, standardized or indiscriminate and as such restricts the competition in the market of public transport on Lake Bled, whereas such legislation is not justified with public interest. The same applies to the process of obtaining the consent and conditions for the performance of public transport on Lake Bled. Furthermore, in AVK's opinion, issuance of the water permit for a period of 30 years is holding back or completely precludes the entry into the market of public transport on Lake Bled. Consequently, AVK suggests the change of relevant legislation and invites the Slovenian Water Agency to, after the change of the legislation, review the possibility of withdrawal or change of the current water permit(s), issued under the current legislation.

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LEGISLATION

Competition Act—Proposed amendments

Concentrations; National competition authorities; Notification; Sweden

The Swedish Government has proposed changes to the Swedish Competition Act regarding the decision-making power for concentrations. The proposal was submitted to the Council of Legislation on 17 August 2017. The Government proposes that the Swedish Competition Authority (SCA) will become the first decision-making body for concentrations notified to the SCA, while the Patent and Market Court would be competent to review the SCA's decisions on appeal.

The proposal entails a change from the current decision-making procedure for concentrations, which has been in force since 1993, where the Patent and Market Court is the first decision-making body. When a concentration has been notified, the SCA will decide whether to approve the concentration or whether to carry out an in-depth "special investigation". After such an in-depth investigation, the SCA may bring a court action requesting a prohibition.

The motivation for the proposed change is, inter alia, that it will improve the effective use of the SCA's and the courts' resources. From 1 November 2008 to 31 December 2015, the SCA has brought court actions only five times, four of which saw the parties abandon the merger instead of pursuing the court case. The Government further emphasises that decision-making power for the SCA will contribute to quicker decision-making, which is positive for merger parties as well as for the market.

The Patent and Market Court of Appeal, that was asked to comment on the proposal, considered, in contrast to the Government, that concentrations are of such a character that the first decision-making capacity should remain with the courts, since prohibitions of concentrations are onerous measures that affect not only individual companies but potentially also the market at large. The Government, however, points out that the SCA already has decision-making power in cases of abuse of a dominant position and that these assessments are similar. The Government considers that the SCA has acquired substantial experience of merger review and is competent in this area.

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Mannheimer Swartling