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2013: The Wind of Change?

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I. INTRODUCTION

"The wind of change is blowing through this continent. Whether we like it or not …"[2]

2013 has the potential to be a year of significant change for European antitrust law. Aside from anticipated policy developments in the areas of State Aid, Merger Control, Collective Redress, and Free Trade, it seems likely that a number of important cases, currently under investigation by the European Commission, may progress or be decided in 2013. This article seeks to summarize and anticipate certain (but by no means all) of the most important likely developments in 2013.[3]

II. POLICY REFORM

Vice-President and Commissioner for Competition Joaquín Almunia has already signaled the areas of antitrust law which he considers ripe for policy change.[4] In short, these are (1) the continued "modernization" of State Aid laws, (2) the reform of merger control policy, (3) the facilitation of collective redress for antitrust cases; and (4) the introduction of antitrust considerations in the U.S.-EU Free Trade Agreement.[5] Each of these is considered in turn below.

A. State Aid

The process of "modernizing" European State Aid law began in May 2012 with the announcement of the State Aid Reform Plan.[6] Since then, the European Commission has made

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[2] Extract from British ex-Prime Minister Harold MacMillan's speech to the Parliament of South Africa in 1960 regarding the proposed independence of certain British controlled territories.

[3] Note that this article does not contain observations on likely antitrust law developments in countries outside the European Union, but recognizes that these are likely to be equally, if not more, interesting (e.g. it will be interesting to see (1) whether MOFCOM and antitrust authorities in Europe and the United States will be able to reconcile their diverging approaches to remedies in merger control cases, and (2) how the Competition Appellate Tribunal of India will handle the spate of appeals before it of cartel decisions adopted by the Competition Commission of India). Similarly, given the inherent timing uncertainties, this article does not address whether important judgments of the European courts (*e.g.*, judgment in relation to the *Intel* abuse of dominance case and in relation to appeals by third parties of clearance decisions in *Thomson/Reuters* and *Oracle/Sun*) will be rendered in 2013.

[4] *See* The role of competition policy in times of crisis, Speech by Joaquín Almunia, Vice President of the European Commission responsible for Competition Policy to the American Chamber of Commerce on December 6, 2012.

[5] Vice-President Alumnia did not mention in his December 2012 speech the review of the Technology Transfer Block Exemption Regulation and Guidelines, but it is possible that the Commission will consult on proposals during 2013.

[6] *See* Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions EU State Aid Modernisation (Sam), which can be found at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52012DC0209:EN:NOT

two concrete proposals, which either have been, or shortly will be, sent to the European Council and the European Parliament for consideration, with a view to adoption in 2013 (in part because relevant secondary legislation and guidelines are due to expire shortly):

- First, a proposal to exempt certain additional categories of aid (namely aid to culture, aid for compensating damages caused by natural disasters, aid for innovation, aid for forestry, aid to compensate the damage caused by adverse weather conditions in fisheries, aid for amateur sports, as well as certain types of aid for transport and for broadband infrastructure) from prior notification to the European Commission. This proposal, if adopted, would require amendments to the Enabling Regulation[7] and the General Block Exemption Regulation;[8] and
- Second, a proposal to amend certain provisions of the Procedural Regulation[9] relating to complaints handling (so as to allow the Commission to set priorities for complaints handling) and information gathering tools.

2013 should see these proposals (or a version of these proposals) being implemented. In addition, 2013 will also likely see changes to the thresholds of *de minimis* regulation[10] (i.e. the regulation permitting aid below a specified threshold over a period of three years to be exempt from notification) provided it is shown that the current thresholds no longer correspond to market conditions. The European Economic and Social Committee ("EESC") proposes that the ceiling for *de minimis* aid should be raised from EUR 200,000 to EUR 500,000 given that aid below this level may benefit SMEs and, in any event, would have limited impact on the functioning of the EU Internal Market.[11]

If the above proposals are adopted, Member States may be expected to bear a greater burden of enforcing State Aid principles in appropriate cases (e.g. those that are newly block exempted). Put differently, Member States would *de facto* have greater responsibility in relation to the granting and control of state aid.[12] Given such control is not grounded in specific legal instruments, and that this could lead to the slightly awkward situation whereby a Member State is required to police aid that it itself proposes to give, thought will need to be given to (1) appropriate methods of convincing Member States to enforce State Aid principles, and (2) ensuring appropriate separation of powers and review. Several approaches could be considered in order to limit this type of risk to the minimum:

[7] Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State Aid.

[8] Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation).

[9] Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty.

[10] Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid.

[11] *See* http://www.eesc.europa.eu/?i=portal.en.int-opinions.23584.

[12] *See* Preliminary Draft Opinion of the Section for the Single Market, Production and Consumption on the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: EU State Aid Modernisation (SAM) COM(2012) 209 final.

- Strengthening transparency by way of reporting obligations on the Member States. An annual report on the application of the *de minimis* regulation and the General Block Exemption Regulation could be published and made available on the Commission website.
- The financial risk of illegality or incompatibility is borne by the aid beneficiary alone, which is obliged to repay the amount concerned together with interest. The financial liability of the Member States could therefore be increased; for example, by imposing a fine on the "public authority" that granted the aid in question.
- The creation of independent national agencies responsible for state aid policy could be considered. Those agencies would act as a contact point both for the Commission and for firms.
- The Commission should conduct more effective ex post monitoring and should actively promote best practices.[13]

It will be interesting to see whether and if so how these proposals are incorporated but indications from Member States are that the ride will not be smooth.[14]

B. Merger Control

In merger control, the European Commission has made clear its intention to "fine-tune and improve" the way that it reviews qualifying mergers.[15] Specifically, Vice-President Almunia hopes to "further simplify merger procedures, in particular with respect to transactions that clearly pose no problems to competition," make "smoother and shorter" the procedures used to refer cases from EU countries to the Commission, and consider further "the enforcement gap" in the area of the acquisition of non-controlling minority shareholdings.[16]

The Vice-President's recognition that the merger control processes at the European Commission need to be simplified and made more efficient is a welcome development. All too often, pro-competitive transactions are delayed or decelerated by rigid adherence to the specific requirements of the Commission's notification template (the Form CO) and by questions that do not readily go to the analysis of the competitive effects of a transaction. Even simplified notifications require one or more rounds of pre-notification discussions with the Commission Case Team, thereby slowing down the speed at which pro-competitive transactions can deliver positive benefits (such as efficiencies) to the consumer and increasing transaction costs.

Efforts to streamline the process and make reviews shorter and more targeted in appropriate cases are a welcome development. That said, it is not only transactions "that clearly pose no problems to competition" that would benefit from fine-tuning. The current demands of a merger control review by the Commission are notoriously exacting, in particular data requests by the Chief Economist's Team. The Commission might be encouraged to consider whether there are ways to reduce the cost to undertakings (both in terms of time and actual cost) also in

[13] *Id.*

[14] *See* Comments made by the UK Secretary of State for Business, Innovation, and Skills (Vince Cable) on January 11, 2013 at King's College, London on *The Modernisation of State Aid Rules.* http://www.kcl.ac.uk/newsevents/news/newsrecords/2013/01Jan/EU-Commissioner-speaks-at-Kings.aspx

[15] *See* Almunia, *supra* note 4.

[16] *Id.*

complex cases without affecting the scope or rigor of its reviews. For example, where merger control reviews are being conducted with multiple competition authorities around the world, thought could be given to ways in which the requests could be harmonized or consolidated (especially in cases where the authorities are signatories to a mutual cooperation treaty).[17]

The focus on the process of merger control referrals from Member States to the Commission is, in large part, a result of the Commission's 2009 Review of the EU Merger Regulation.[18] That Review contained concerns expressed by stakeholders (including competition authorities in Member States) that the referral process was cumbersome, time-consuming, costly, legally uncertain, and under-employed. The Vice-President's focus on this as an area of policy change priority is therefore understandable, but given that the process, in general terms, works well,[19] this can only be seen as a marginal upgrade and not as a significant modification.

The focus on the alleged "*enforcement gap*" is, however, peculiar given that there is, as yet, insufficient theoretical or empirical evidence to show that anticompetitive effects are likely to occur in practice as a result of minority shareholdings and, in any event, no reason to believe that *ex post* competition tools are insufficient to deal with the issues that arise.[20] In addition, in Member States where the acquisition of minority interests are reportable (e.g. the United Kingdom), experience shows that in practice few such transactions lead to concerns[21] and, in any event, the ability for Member States to review such transactions partially plugs any enforcement gap. These arguments would suggest that any perceived enforcement gap may not be significant and it would seem sensible to conduct a robust analysis of this area before invoking legislative change that would potentially add unmerited cost to the European taxpayer and to the business community more generally.

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[17] Issuance of this form of request may require a waiver from the merging parties, but given the realizable benefits, one could see why parties would be prepared to do so.

[18] *See* Report on the functioning of Regulation No 139/2004, Communication From The Commission To The Council, June 18, 2009, which can be found at http://ec.europa.eu/competition/mergers/studies_reports/report_139_2004_en.pdf. *See* also Staff Working Paper Accompanying The Communication From The Commission To The Council Report On The Functioning Of Regulation No 139/2004 {Com(2009) 281 Final}, which can be found at http://ec.europa.eu/competition/mergers/studies_reports/staff_working_paper_report_139_2004_de.pdf.

[19] *See* Report on the functioning of Regulation No 139/2004, Communication From The Commission To The Council, June 18, 2009, ¶¶17 and 18.

[20] *See* Francisco Enrique Gonzalez-Diaz, *Minority Shareholdings And Interlocking Directorships: The European Union Approach*, 1(1) CPI ANTITRUST CHRON. (Jan 10, 2012); F. Enrique Gonzalez-Diaz, *Minority Shareholdings and Creeping Acquisitions*, Fordham University School of Law 38th Annual Conference: International Antitrust & Law Policy (September 7 - 8, 2011); and Ruchit Patel, *BIS Reforms to the UK Merger Regime: An Opportunity Missed,* 11(2) COMPETITION L.J. (2012).

[21] In the United Kingdom, the only transaction involving the acquisition of a minority interest reportable under the Enterprise Act 2002 which the U.K. competition authorities considered gave rise to competition concerns is *British Sky Broadcasting Group PLC / ITV PLC* (http://www.competition-commission.org.uk/our-work/directory-of-all-inquiries/bskyb-itv). But note that an investigation is pending into Ryanair's minority interest in Aer Lingus (http://www.competition-commission.org.uk/our-work/ryanair-aer-lingus). The review by the Competition Commission of Newscorp's acquisition of BSKYB was on media plurality grounds. *See* http://www.competition-commission.org.uk/assets/competitioncommission/docs/2011/news-corporation-bskyb/11_07_13_news_corp_tor.pdf.

C. Collective Redress and Access to Evidence

The focus on access to justice in cartel cases is certainly not new. Proposals for private damages actions for competition infringements were first consulted upon by the former European Commissioner for Competition (Neelie Kroes) in a Green Paper issued in 2005. The Green Paper identified some of the main obstacles preventing victims of competition law infringements from bringing actions for damages in the Member States (including *inter alia* whether the absence of a collective redress mechanism dissuaded small claims[22] and whether increased access to evidence is required for claimants).[23]

In 2008 the European Commission published a White Paper, containing specific proposals to overcome legal and procedural hurdles within the Member States' rules governing antitrust actions for damages. In relation to collective redress, the Commission noted that there was a clear need for mechanisms which allow the aggregation of the individual claims of victims of antitrust infringements.[24] It proposed two complementary mechanisms of collective redress in the field of antitrust:

- Representative actions, which are brought by qualified entities, such as consumer associations, state bodies, or trade associations, on behalf of identified or, in rather restricted cases, identifiable victims. These entities are either (1) officially designated in advance or (2) certified on an ad hoc basis by a Member State for a particular antitrust infringement to bring an action on behalf of some or all of their members; and
- Opt-in collective actions, in which victims expressly decide to combine their individual claims for harm they suffered into one single action.

As regards access to evidence, the Commission proposed that across the European Union a minimum level of disclosure *inter partes* for antitrust damages cases should be ensured.[25] The access to evidence issue has, to some extent, been addressed in the *Pfleiderer* judgment (which held that a person who has been adversely affected by an infringement of EU competition law and is seeking to obtain damages should not be precluded from being granted access to documents relating to a leniency procedure involving the perpetrator of that infringement) and

[22] *See* Green Paper - Damages actions for breach of the EC antitrust rules {SEC(2005) 1732 ¶ 2.5.

[23] *See* Green Paper - Damages actions for breach of the EC antitrust rules {SEC(2005) 1732}, ¶ 2.1.

[24] *See* White paper on damages actions for breach of the EC antitrust rules {SEC(2008) 404} {SEC(2008) 405} {SEC(2008) 406}, p. 4.

[25] *See* White paper on damages actions for breach of the EC antitrust rules {SEC(2008) 404} {SEC(2008) 405} {SEC(2008) 406}, p. 5. Specifically, the Commission proposed that (1) national courts should, under specific conditions, have the power to order parties to proceedings or third parties to disclose precise categories of relevant evidence; (2) conditions for a disclosure order should include that the claimant has presented all the facts and means of evidence that are reasonably available to him, provided that these show plausible grounds to suspect that he suffered harm as a result of an infringement of competition rules by the defendant; shown to the satisfaction of the court that he is unable, applying all efforts that can reasonably be expected, otherwise to produce the requested evidence; specified sufficiently precise categories of evidence to be disclosed; and satisfied the court that the envisaged disclosure measure is both relevant to the case and necessary and proportionate; (3) adequate protection should be given to corporate statements by leniency applicants and to the investigations of competition authorities; and (4) to prevent destruction of relevant evidence or refusal to comply with a disclosure order, courts should have the power to impose sufficiently deterrent sanctions, including the option to draw adverse inferences in the civil proceedings for damages.

in cases dealt with by EU Member States,[26] but the interim solutions seem far from adequate (e.g. the solution proposed in the *National Grid* case requires judges to carry out the cumbersome processes of reviewing and inspecting evidence in order to make determinations on disclosure—it is difficult to see how this will be carried out for more extensive disclosure requests).

2013 should see a legislative proposal made to the College of Commissioners on both access to evidence and collective redress.[27] It is too early to tell what that legislative proposal will entail but it will be interesting to see how the Vice-President proposes to address these delicate matters and to assess overlaps with proposals being made at the Member State level.[28]

D. Free Trade Agreement

Discussions between the European Union and the United States on how to further integrate trade relationships are ongoing (e.g. a High-Level Working Group on Jobs and Growth was launched at the EU-U.S. Summit in 2011[29] and the interim report suggests that the focus of the treaty will be the removal or reduction of barriers to trade).[30] Both sides appear to have the common objective of promoting open, fair, and competitive international markets and a comprehensive Free Trade Agreement would bring that objective closer.

Vice President Almunia has made clear his view that any new Free Trade Agreement should include a specific chapter on competition, as that would "set a benchmark" and "send the right message to … commercial partners around the world."[31] If adopted, the provisions would likely have particular impact on state-owned enterprises and government subsidies. The results of EU and U.S. discussions should be known in 2013.

III. CASE-LAW DEVELOPMENTS

2013 should also see progress or a resolution to some of the most important pending antitrust cases currently open at the European Commission, many of which have the potential to set important precedents and frameworks of analysis for future cases.

A. Antitrust

In antitrust, it seems likely that the Commission will progress its ongoing investigations in the pharmaceutical sector. Arguably the most high profile of these cases are the agreements entered into by, respectively, pharmaceutical originator companies Lundbeck and Servier and certain generic companies, which the Commission characterizes as "pay for delay" agreements. The Commission announced in July 2012 that it had reached the provisional view that the originator companies (i.e. Lundbeck and Servier) had separately entered into agreements with

[26] *See* in particular *National Grid v. ABB and others* [2012] EWHC 869 (Ch) ("National Grid").

[27] *See* Almunia, *supra* note 4.

[28] In 2012, the U.K. Government consulted on reform options for private actions in competition law (*See* http://www.bis.gov.uk/Consultations/consultation-private-actions-in-competition-law?cat=closedawaitingresponse) and the French Government announced an intention to introduce a new law on class actions in the first half of 2013.

[29] *See* EU-US Summit: Fact sheet on High-Level Working Group on Jobs and Growth, which can be found at http://europa.eu/rapid/press-release_MEMO-11-843_en.htm.

[30] *See* http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149557.pdf.

[31] *See* Almunia, *supra* note 4.

generic companies, which delayed or prevented the market entry of generic equivalents of Lundbeck's *Cipramil/Celexa* (citalopram) and Servier's *Aceon* (perindopril) following patent expiration.

Vice-President Almunia has made his feelings about these agreements clear[32] and if the Commission's provisional findings are confirmed, the decisions would have a potentially significant influence on the way in which originators handle their claims against generic makers. The cases against Lundbeck and Servier are particularly interesting given the judgment of the U.S. Court of Appeals for the Eleventh Circuit in *Federal Trade Commission v. Watson Pharmaceuticals, Inc., No. 12-416*, a "pay for delay" case, in which the Court of Appeals rejected the Federal Trade Commission's contention that Solvay Pharmaceuticals, Inc. paid generic drug makers Watson Pharmaceuticals, Inc., Paddock Laboratories, Inc., and Par Pharmaceutical Companies, Inc. to delay generic competition to Solvay's branded testosterone-replacement drug *Androgel*.[33]

The Commission will also likely progress its open investigations against Cephalon and Teva, which concerns a patent settlement which was concluded in the United States but had worldwide effects, and, according to the Commission, may have had the object of hindering the entry of generic versions of Modafinil in the EEA.[34] Similarly, the Commission should progress its case against Johnson & Johnson and Novartis in the *Fentanyl* case, which concerned contractual practices that allegedly had the object of delaying generic entry into the EEA.[35]

Other high profile cases open at the Commission should also see significant progress in 2013. For example, the open investigation into *Libor*, *Tibor*, and *Euribor* practices ought to progress, in particular given the settlements agreed between financial regulators in the United Kingdom, United States, and Switzerland and, respectively, UBS and Barclays Bank in 2012. Vice-President Almunia has made clear that the case is unlikely to be closed in the near term.[36] The case raises interesting issues, not only of inter-agency liaison and the interplay between competition law and sector specific regulation, but also of the nature and extent of competition enforcement oversight over the financial industry more generally.[37]

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[32] *See* Competition enforcement in the knowledge economy, Speech by Joaquín Almunia, Vice President of the European Commission responsible for Competition Policy at Fordham University/ New York City 20 September 2012, in which Vice-President Almunia stated "These are agreements in which the manufacturer of a branded drug pays another company to keep the generic—and much cheaper—drugs it produces out of the market. Both companies have something to gain in such deals, but you will agree with me that they are not necessarily in the interest of the people and of health care."

[33] The Federal Trade Commission has sought review of the Appeal Court's Judgment by the U.S. Supreme Court and a hearing judgment may also be expected in 2013. *See* http://www.ftc.gov/opa/2012/10/androgel.shtm.

[34] *See* http://europa.eu/rapid/press-release_IP-11-511_en.htm .

[35] *See* Almunia quote, *supra* note 31.

[36] *See* http://www.vieuws.eu/financial-competition/competition-commissioner-almunia-on-the-liboreuribor-case/ *See* also Almunia, *supra* note 31, and the reference to the necessity for a change of culture (http://europa.eu/rapid/press-release_SPEECH-12-629_en.htm).

[37] Note that the Commission has open cases in relation to credit default swaps and issued in 2012 a green paper on payment services (Green Paper, Towards an integrated European market for card, internet and mobile payments, Brussels, January 1, 2012, which can be found at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0941:FIN:EN:PDF).

Other cartel cases, notably those investigations that reached the Statement of Objection stage during 2012 (i.e. *Retail Food Packaging*,[38] *CD and DVD Drives*,[39] and *North Sea Shrimps*[40]) but also those that did not (e.g. *Automotive Wire Harnesses*[41] and *French Water*[42]) ought also to see significant progress in 2013. Given the warning bells of the decision in *Cathode Ray Tubes*[43] (a fine of nearly $2 billion in a market that is effectively defunct notwithstanding downward adjustments for leniency and inability to pay), any notions of a more lenient cartel enforcement regime during the ongoing financial crisis appear misconceived.

B. Abuse of Dominance

2013 ought also to be an interesting year for abuse of dominance cases, especially those in the technology sector. Given the positive indications expressed by Vice President Almunia towards the end of 2012,[44] and the settlement in the United States,[45] it is likely that 2013 will see a resolution to the pending antitrust investigation into Google. Resolution by settlement (i.e. by way of Article 9 of Regulation 1/2003) appears likely to be a timelier solution in a fast-moving technology industry than a drawn out adversarial procedure (under Article 7 of Regulation 1/2003) but, given the number of Article 9 decisions adopted in abuse of dominance cases,[46] it will do little to allay concerns that the absence of case law enables the European Commission increasingly to overreach in enforcement cases.

The Commission's ongoing investigation into Samsung's standard essential patents ought to also progress in 2013. The case reached the Statement of Objections stage shortly before Christmas 2012[47] and the Commission's preliminary view appears to be that recourse to injunctions may be abusive where the patent concerned is a "standard-essential patent" and where the licensee has shown itself to be willing to negotiate a fair reasonable and non-discriminatory license. The rationale for this view appears to be that the recourse to an injunction risks excluding products from a market without justification and may distort licensing negotiations unduly in the SEP-holder's favor. In its press release, and in accompanying documents, the European Commission was at pains to labor the fact that recourse to injunctive relief is not *per se* abusive and that it will only be abusive "in exceptional circumstances." However, if the Commission's objections are confirmed in a decision, the case will likely have extremely important implications for the technology sector and place yet more focus on the

[38] *See* http://europa.eu/rapid/press-release_IP-12-1044_en.htm?locale=en.
[39] *See* http://europa.eu/rapid/press-release_IP-12-830_en.htm?locale=en.
[40] *See* http://europa.eu/rapid/press-release_IP-12-782_en.htm?locale=en.
[41] *See* http://europa.eu/rapid/press-release_IP-12-894_en.htm?locale=en.
[42] *See* http://europa.eu/rapid/press-release_IP-12-26_en.htm?locale=en.
[43] *See* http://europa.eu/rapid/press-release_IP-12-1317_en.htm..
[44] On December 18, 2012, Vice-President Almunia stated that he expects Google to come forward with a detailed commitment text in January that would allow the Commission to end the probe into allegations that the search engine operator discriminates against rivals.
[45] *See* http://www.ftc.gov/opa/2013/01/google.shtm.
[46] Since Regulation 1/2003 came into force, 16 settlement decisions have been adopted under Article 9 of Regulation 1/2003 in abuse of dominance cases. In the same period, only 6 prohibition decisions under Article 7 of Regulation 1/2003 were adopted in abuse of dominance cases.
[47] *See* http://europa.eu/rapid/press-release_IP-12-1448_en.htm

classification of a patent as a standard-essential patent and the level of the royalty requested in the context of determining whether a licensee is "willing" or not.

Aside from representing a continuation of the line of cases that develop "new" categories of "abuse" (e.g. the European Court of Justice has recently confirmed that misleading a patent office can constitute an abuse of dominance),[48] the case also gives rise to questions of more general importance. For example: (1) is it appropriate for competition authorities to intervene in actions between private companies (and if so, under what conditions); (2) are limitations on the use of injunctive relief consistent with the EU Charter of Fundamental Rights (notably does enforcement action by a competition authority infringe upon the very substance of the right); (3) does enforcement action by the European Commission *de facto* deprive Member State courts of their ability to adjudicate (a fact made obsolete now given that Samsung has withdrawn its injunctions in Europe); and (4) what are the implications for other standard-essential patent holders (e.g. Motorola, against whom the Commission has an open case), in particular where they settle their disputes before the issuance of a Statement of Objections. Google's consent decree with the FTC may provide some indication as to the way these questions may be addressed in the future.[49]

Also in the technology sector, 2013 may see fresh enforcement action against Microsoft, for alleged failure to comply with its 2009 browser commitments to offer users a choice screen enabling them to easily choose their preferred web browser.[50] The breach appears to have occurred in the context of the roll out of the Windows 7 Service Pack 1, which was released in February 2011. Public announcements from Microsoft do not seem to suggest that the browser commitments were in fact complied with, which suggests that 2013 may see the first ever fine issued for failure to comply with Article 9 commitments.

Outside of the technology industry, 2013 should also see advancement in relation to the open investigations into the power industry (e.g. investigations into Romanian power exchange, Bulgarian Energy, and Gazprom) and a continuation of the Commission's Digital Agenda (including its objective to effectively eradicate differences between national and roaming tariffs by 2015 and its harmonization regulation designed to reduce the cost of deploying high speed broadband networks across the European Union).[51]

IV. CONCLUSION

As shown by the policy and case developments summarized above, the wind of change will blow through Europe in 2013. Whether we like it or not.

[48] *See* Court of Justice Judgment in Case C-457/10 P *AstraZeneca v. European Commission*, judgment of December 6, 2012.

[49] *See* http://www.ftc.gov/os/caselist/1210120/130103googlemotorolado.pdf .

[50] *See* Case 39530 *Microsoft (Tying)*, Commission decision of December 16, 2009.

[51] *See EU to foster unified telecoms market*, http://www.ft.com/cms/s/0/45b58128-5d74-11e2-ba99-00144feab49a.html#axzz2HyYRXAXC