# SUMMARIES

## Rule-making in the context of Article 102 TFEU

*Bill Allan*

The control of single-firm behaviour has been the principal subject for competition policy debate over the past decade, most particularly in Europe where the doctrinal divisions appear to be the most acute. This article discusses why the lack of certainty in rule-making under Art 102 TFEU is a cause for concern, followed by a brief consideration of ways in which it can be ameliorated. Thereafter the article considers the reasons for the persistence of uncertainty produced by the Art 102 rule-making system. Having discussed the substantive and procedural ways in which the lack of certainty may be addressed, the article suggests that, as a matter of structure, Art 102 is ill-adapted to precise rule-making. As a matter of practice, institutional and commercial incentives favour the disposition of cases by means that are not well-adapted to filling the gap in rule-making. It is nevertheless a matter of substantial public importance that the rules derived from Art 102 are calibrated as clearly and carefully as possible. That requires a focus from all the institutions not only on *ex post* case disposition but also on *ex ante* rule-making, through individual decisions and other instruments such as the Commission's 'soft law' mechanisms.

## Enforcement of standard-essential patents and abuse of dominance: The *Samsung*, *Motorola* and *Huawei v ZTE* cases

*Viktoria HSE Robertson*

Both the European Commission and the Court of Justice of the European Union (CJEU) are currently dealing with cases that revolve around the conditions under which the enforcement of standard-essential patents (SEPs) through injunctions constitutes the abuse of a dominant position under Article 102 TFEU. The article reviews these cases and examines their current state of play. It finds that the Commission – in its *Samsung* and *Motorola* investigations – appears to pursue a relatively strict approach under which SEPs may not be enforced through injunctions where the alleged infringer is willing to enter into a licence based on fair, reasonable and non-discriminatory (FRAND) terms. In its *Orange-Book-Standard* decision, the German *Bundesgerichtshof*, on the other hand, seems to slightly favour SEP owners in its approach. In order to clarify the conditions for finding an abuse of a dominant position under EU competition law, a German court has lodged a preliminary reference with the CJEU (*Huawei v ZTE*), essentially asking whether to follow the Commission's or the German *Bundesgerichtshof*'s interpretation on this issue.

SUMMARIES

## Airlines: Antitrust developments in 2013 and emerging trends

*Tadeusz Gielas*

This article discusses several key antitrust developments in Europe concerning the airline sector, notes similarities and differences between parallel European and Australian developments in 2013, and reflects on the potential antitrust policy implications of the increasingly global interconnectedness of airline networks. Three topics are discussed: (1) the 'failing firm' defence (applied in *Olympic/Aegean II* and *Virgin/Tiger*); (2) the commercial importance of an airline's ability to attract investment from other airlines and the relevance of non-controlling minority shareholdings (arising in *Ryanair/Aer Lingus* and also concerning two Australian airlines); and (3) antitrust regulators' developing approaches for analysing and approving airline acquisitions and alliances, and the formulation of appropriate remedies to address competition concerns (arising in *US Airways/American Airlines*, *Delta/Virgin Atlantic*, the *A++* joint venture, and four Australian transactions).

## Access to evidence in market investigations

*James Webber and Savas Manoussakis*

The 'gist' standard by which access to evidence is granted to parties in market and merger investigations is inferior to the access to the file in Competition Act investigations. This distinction is rooted in differing historical developments rather than policy. Despite fewer rights of access to evidence, parties in market investigations face increasingly severe consequences – as the recent trend toward divestment remedies in the *Aggregates* and *Private Healthcare* market investigations shows. This article considers the issues around access to evidence in market investigations – particularly in the light of the CAT's judgments in *BMI Healthcare* and *Eurotunnel*.

## Access to the regulator's file in cartel damages actions

*David Ashton and David Henry*

Probative evidence of antitrust harm is a *sine qua non* for a successful antitrust damages action. Such evidence will often find itself in the file of the Commission or a national competition authority. With the recent *Netherlands v Commission* ruling, however, the proverbial bar has been raised for having sight of key documents under the Access to Documents Regulation. In addition, unless and until the proposed directive on damages actions is adopted, claimants seeking access from an NCA to highly sought-after leniency documents, at least, remain at the mercy of the judge against the vagaries of the ECJ rulings in *Pfleiderer* and *Donau Chemie*.

## Broadening the scope for follow-on damages under the Competition Act – *WH Newson Holding Ltd and Others v IMI plc and Others*

*Lauren Dingsdale*

This case note summaries the recent Court of Appeal decision in *Newson* which held that a claim under s 47A of the Competition Act 1998 can be founded not only on a breach of statutory duty but also on the common law tort of conspiracy. The author suggests that the decision is significant for two reasons: (i) it emphasises the Competition Appeal Tribunal's current inability to go beyond an infringement decision; and (ii) the decision may have ramifications for conspiracy law in general.

## Risk modelling and antitrust risk assessment in light of UK cartel enforcement policy

*Ben Rusch*

Even minor changes in enforcement policy may have significant ramifications for risk assessment and risk modelling purposes. Companies' risk management policies and compliance programmes must become more sophisticated and forward-looking in order to address a slowly shifting landscape when it comes to competition law enforcement.

## The effective use of screening tools to detect cartels

*Robin Noble and Aline Blankertz*

Hardcore cartels generally seek to increase profits at the expense of their consumers by deviating from competitive behaviour, while avoiding detection and punishment. Econometric screens, if designed well, can be a useful tool in detecting such deviations from competitive patterns, and can thereby help to improve cartel enforcement. Moreover, they can reduce the extent to which cartels are able to restrict competition covertly.