VAN BAEL & BELLIS

VOLUME 2017,
Nº 5

May 2017

VBB on Competition Law

| HIGHLIGHTS

MERGER CONTROL: Commission fines Facebook € 110 million for providing misleading information in WhatsApp review

ABUSE OF DOMINANT POSITION: General Court addresses concepts of vexatious action and abuse of regulatory procedure in judgment upholding rejection of complaint brought by Agria Polska and other companies active in the parallel importation of plant protection products

CARTELS AND HORIZONTAL AGREEMENTS: Exotic Fruits (Bananas) cartel case - Commission may use evidence transmitted by national tax authority in antitrust proceedings

VERTICAL AGREEMENTS: European Commission publishes final e-commerce sector inquiry report (consumer goods) – increased enforcement activity on the horizon concerning restrictions on the online sale of goods

INTELLECTUAL PROPERTY/LICENSING: European Commission publishes its final report on the e-commerce sector inquiry (digital content)

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS:

| French Supreme Court annulled a dawn raid after the targeted company was prevented from calling its external counsel

| Important amendments to the German Act against Restraints of Competition

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| MERGER CONTROL

– EUROPEAN UNION LEVEL –

Commission fines Facebook € 110 million for providing misleading information in WhatsApp review

On 18 May 2017, the European Commission fined Facebook € 110 million for providing misleading information under the EU Merger Regulation.

During its merger review of Facebook's acquisition of WhatsApp in 2014, the Commission examined whether Facebook might be able to technically integrate or combine the separate user networks of Facebook and WhatsApp into one, substantially larger network. Third parties suggested to the Commission that it would be relatively easy for Facebook to implement such technical integration. However, Facebook submitted both in its merger notification and in response to a specific request for information that integration of Facebook users' accounts with WhatsApp users' accounts would pose significant technical difficulties.

The transaction was ultimately cleared by the Commission in October 2014. WhatsApp later implemented updates to its terms of service and privacy policy in August 2016, including the possibility of linking WhatsApp users' phone numbers with Facebook users' identities. Following this update, the Commission took the preliminary view that Facebook had provided it with misleading information during the merger review (see VBB on Competition Law, Volume 2016, No. 12, page 4).

Further to an investigation, the Commission has now concluded that Facebook was aware during the merger review that it was technically possible to automatically match Facebook and WhatsApp users' identities. The Commission considered that Facebook's information provided during the review was at least negligent and fined it € 110 million. The amount of the fine was apparently lower than it could have been, as the Commission took into account the extent of the cooperation provided by Facebook during the investigation, including by acknowledging the infringement in its response to the Statement of Objections and by waiving its procedural rights to have access to the file and to an oral hearing. The case is noteworthy as this is the first time that the Commission has fined a company for providing incorrect or misleading information under the current version of the EU Merger Regulation adopted in 2004.

Also, in a separate case, on 11 May 2017, the Italian Competition Authority fined WhatsApp € 3 million for a violation of Italian consumer law as it deemed that WhatsApp unlawfully "forced" its users to accept new terms of use and to agree to share personal data with Facebook in the August 2016 update.

Advocate General Kokott recommends that only a change of control leading to a full-function joint venture is subject to the EU Merger Regulation

On 27 April 2017, Advocate General ("AG") Kokott delivered an important (albeit non-binding) opinion in the context of a preliminary reference request to the Court of Justice of the European Union ("ECJ") from Austria's Supreme Court seeking clarification as to whether a change of control of an existing business which is not "full-function" from sole to joint control is subject to the EU merger control regime. In her opinion, AG Kokott finds that the transfer of an existing business from sole control by one company to joint control by the self-same company and another company unrelated to it constitutes a 'concentration', and would thus be subject to the EU Merger Regulation, only where the joint venture resulting from that transaction performs on a lasting basis all of the functions of an autonomous economic entity. In other words, only a change of control resulting in an independent market-facing joint venture (*i.e.*, a full-function joint venture) triggers an EU filing obligation. In the words of the AG: "After all, if an establishment does not have an autonomous presence on the market, it follows that any change in the control structure of that establishment cannot have the effect of changing the structure of that market."

The case is noteworthy as it is the first in which the ECJ has had to consider the meaning of the EU Merger Regulation in the context of a preliminary reference request from a national court.

– MEMBER STATE LEVEL –

AUSTRIA/GERMANY

New transaction value notification thresholds in Austria and Germany

The new transaction notification thresholds applicable in Austria and Germany respectively are discussed at pages 23 and 25 of this Newsletter.

HUNGARY

Hungarian Competition Authority withdraws merger clearance and imposes fines following provision of misleading information

On 2 May 2017, the Hungarian Competition Authority ("HCA") withdrew its decision authorising Infineon Technologies to acquire control of Cree Fayetteville, Inc. The HCA also imposed a procedural fine of approximately € 250,000 on Infineon for providing misleading information.

Previously, on 10 January 2017 the HCA granted Infineon Technologies approval to acquire sole control of Cree Fayetteville, Inc. However, according to the HCA, during the merger review Infineon Technologies provided misleading information in relation to the size of the markets and the market shares of the groups of undertakings affected by the concentration. Accordingly, the HCA imposed a fine of approximately € 250,000, withdrawn its approval decision and ordered a full investigation of the transaction.

SPAIN

Spanish Competition Authority red cards Telefónica for breach of 2015 merger commitment

On 10 May 2017, the Spanish Competition Authority ("CNMC") held that Telefónica breached one of the commitments entered into with the CNMC in April 2015 during its merger review of Telefónica's acquisition of DTS. The commitment at issue required Telefónica to offer other private TV providers wholesale access to its premium content to enable them to effectively compete.

The CNMC has now found that Telefónica significantly overcharged its competitors Vodafone, Telecable and Total for wholesale access to certain football channels provided in the 2015/2016 season (*i.e.*, Canal + Liga and Canal + Partidazo). Accordingly, the CNMC ordered Telefónica to compensate those competitors for paying an excessive price when purchasing wholesale access to those premium channels. Press reports suggest that compensation payments may amount to over € 25 million. At the same time, the CNMC also granted Telefónica the right to recover additional amounts from other competitors who had paid a lower price than they should have done in order to access the premium channels. Telefónica announced that it will appeal the CNMC's decision to the Spanish courts.

– OTHER DEVELOPMENTS –

EUROPEAN UNION: On 18 May 2017, the European Commission issued a a Statement Objections alleging that the Dutch based telecom operator, Altice, breached its obligations under the EU Merger Regulation by early implementation of its acquisition of PT Portugal before notification or approval by the Commission. Such conduct is commonly referred to as "gun jumping".

Altice notified to the Commission its plan to acquire PT Portugal in February 2015. Under the EU Merger Regulation, a transaction with an EU dimension must be notified to the Commission prior to being implemented, and the parties involved may not implement the transaction prior to clearance from the Commission. Although the Altice/PT Portugal transaction was ultimately cleared subject to conditions on 20 April 2015, the Commission now takes the preliminary view that the purchase agreement enabled Altice to exercise decisive influence over PT Portugal before notification or clearance of the transaction. The case will be watched closely as the Commission has (to date) never fined a company for gun-jumping practices where the parties notify a transaction but, prior to obtaining the Commission's approval, take actions that breach the standstill obligation. In both Electrabel (see VBB on Competition Law, Volume 2009, No. 6) and Marine Harvest (see VBB on Competition Law, Volume 2014, No. 7), the parties closed the deal long before notifying the Commission. As such, these are arguably "failure to file" cases more than true gun-jumping cases.

| ABUSE OF DOMINANT POSITION

– EUROPEAN UNION LEVEL –

General Court addresses concepts of vexatious action and abuse of regulatory procedure in judgment upholding rejection of complaint brought by Agria Polska and other companies active in the parallel importation of plant protection products

On 16 May 2017, the General Court offered guidance on the concepts of vexatious action and abuse of regulatory procedure in the context of a judgment upholding a Commission decision to reject a complaint brought by Agria Polska and four other companies active in the parallel importation of plant protection products ("PPP"), primarily from Poland to Germany and Austria.

As far as Article 102 TFEU is concerned, the complaint in question alleged that manufacturers and distributors of PPP held a position of collective dominance on the market, which they abused by pursuing a coordinated campaign of making false claims to Austrian and Polish authorities with the intention of eliminating the complainants from the market. Those claims primarily related to alleged violations of regulations applicable to PPPs, as well as provisions relating to tax. In addition, the complaint alleged that, irrespective of the existence of a collective dominant position, one of the undertakings involved (Raiffeisen Ware Austria AG, "RWA") held a dominant position and infringed Article 102 TFEU by engaging in the same type of conduct.

Before the General Court, the complainants argued *inter alia* that the Commission, in assessing the complaint, had made a manifest error by refusing to apply the principles governing the concepts of vexatious action and abuse of regulatory procedure developed in the case law on abuse of dominant position, namely Case T-111/96 *ITT Promedia v Commission* and Case T-321/05 *AstraZeneca v Commission*.

The General Court, however, did not fault the Commission's view that these principles would not apply in the present case because the manufacturers and distributors of PPP at issue had merely informed the national administrative and criminal authorities of alleged violations, while those authorities retained discretion to decide whether to pursue the claims made. Conversely, the administrative and judicial authorities concerned in both *ITT Promedia* and *AstraZeneca* had no discretion to decide whether it was appropriate to follow up on the proceedings initiated by the dominant undertakings in those cases.

In the General Court's view, this distinction meant that the Commission could, without committing a manifest error of assessment, find that the likelihood of establishing an infringement in the present case was low because it was not clear that the conduct would be considered an abuse of a dominant position within the meaning of the previous case-law. The General Court also emphasised the need to adopt a restrictive approach towards finding an infringement in cases alleging vexatious litigation and abuse of regulatory procedures to ensure that the general rule of access to the courts is not frustrated.

European Commission initiates investigation into Aspen Pharma over alleged excessive pricing of cancer medication

On 15 May 2017, the Commission announced that it has opened a formal investigation into whether Aspen Pharma ("Aspen") has abused its dominant position on the market for five life-saving cancer medicines by charging excessive prices in breach of Article 102 TFEU and Article 54 of the European Economic Area (EEA) Agreement.

The investigation will cover the pricing practices of Aspen for five niche cancer medicines in all of the EEA except Italy, where Aspen has already been fined € 5 million by the Italian competition authority in September 2016 (see VBB on Competition Law, Volume 2016, No. 11).

The Commission said it launched the investigation on the basis of information indicating that Aspen imposed very significant and unjustified prices of up to several hundred percent, following Aspen's acquisition of the medicines from GlaxoSmithKline after their patent protection had expired. There are also reports that Aspen threatened to withdraw the medicines in question from some Member States' markets, and had actually done so in others.

The Commission has said that it is pursuing the investigation as a matter of priority.

CARTELS AND HORIZONTAL AGREEMENTS

– EUROPEAN UNION LEVEL –

In this section, we give a factual overview of significant case developments at EU level, and then provide a more detailed analysis of important substantive or procedural developments addressed in these cases.

Summary of Significant Case Developments

Advocate General Tanchev recommends upholding judgment in Gas Insulated Switchgear cartel case

On 26 April 2017, Advocate General Tanchev delivered an opinion in which he recommended upholding a General Court ("GC") judgment, which dismissed the claims brought by Toshiba and Mitsubishi Electric against the re-imposition of fines amounting to approximately € 36 million. These fines were re-imposed by the European Commission for the companies' participation in the *Gas Insulated Switchgear* cartel case (see VBB on Competition Law, Volume 2016, No. 1) (Case C-180/16, *Toshiba v Commission*).

In particular, AG Tanchev took the view that the GC had not erred in finding that the Commission did not need to issue a new Statement of Objections prior to the re-adoption of the 2012 *Gas Insulated Switchgear* decision (see below Section 1.2). AG Tanchev also considered that the General Court had been correct to find that the Commission had not breached the principle of equal treatment when calculating the fine imposed on Toshiba. Finally, the AG concluded that Toshiba's fine should not be reduced to reflect its level of participation in the infringement because that issue had already been decided in the course of the appeal of the original 2007 *Gas Insulated Switchgear* decision.

Court of Justice of European Union dismisses appeal in Exotic Fruits (Bananas) cartel case

On 27 April 2017, the Court of Justice of the European Union ("ECJ") dismissed an appeal lodged by banana importer Pacific Fruit (and its parent companies) against a judgment of the General Court ("GC"), which upheld the European Commission's decision finding that Pacific Fruit had participated in an illegal price-fixing cartel for bananas sold in Greece, Italy and Portugal (see VBB on Competition Law, Volume 2015, No. 6) (Case C-469/15 P, *FSL and Others v Commission*).

In particular, the ECJ rejected Pacific Fruit's challenge to the Commission's reliance in its decision on documents collected and transmitted by the Italian customs and finance police, on the grounds that the company had not established that such transmission, whose lawfulness is governed by national law, had been declared unlawful by a national court (see Section 1.2). In addition, the ECJ confirmed that Pacific Fruit's conduct restricted competition by object (See Section 1.2).

Court of Justice of European Union confirms General Court's judgment in Heat Stabilisers cartel case

On 27 April 2017, the Court of Justice of the European Union ("ECJ") dismissed an appeal brought by Akzo Nobel against a judgment of the General Court ("GC") in connection with the *Heat Stabilisers* cartel case (Case C-516/15 P, *Akzo Nobel v Commission*).

In particular, the ECJ rejected Akzo Nobel's claim that the annulment of the fines imposed on its two subsidiaries (*i.e.*, Akzo GmbH and Akzo BV) following the expiration of the limitation period in relation to the conduct of these subsidiaries should have led to the annulment of the fine imposed on it as a parent company (see below Section 1.2).

Advocate General Szpunar recommends dismissing appeal against General Court's judgment in TV and Computer Monitor Tubes cartel case

On 18 May 2018, Advocate General ("AG") Szpunar recommended dismissing appeals lodged by LGE and Philips against judgments delivered by the General Court ("GC") in relation to the *TV and Computer Monitor Tubes* cartel case (Joined cases C-588/15 P, *LG Electronics v Commission* and C-622/15 P, *Koninklijke Philips Electronics v Commission*).

AG Szpunar focused his Opinion on the issue of whether the rights of defence of LG and Philips, as parent companies of a joint venture, had been breached. In the case at hand, the Commission had addressed a Statement of Objections to LG and Philips, but not to their joint venture (whose conduct was at issue in the contested decision), as that entity had since gone into insolvency. In his Opinion, AG Szpunar concluded that the Commission's decision not to formally attribute liability for the infringement to the joint venture, as well as not to address the Statement of Objections to it, did not constitute an irregularity capable of undermining LGE and Philips' rights of defence.

Analysis of Important Substantive and Procedural Developments

Gas Insulated Switchgear cartel case – rights of defence not breached following issue of letter of facts rather than Statement of Objections under certain circumstances

Under Article 10 of Regulation 773/2004 relating to the conduct of proceedings by the European Commission pursuant to Articles 101 and 102 TFEU, prior to adopting an infringement decision, the Commission must notify the relevant parties in writing of the objections raised against them through issuing a Statement of Objections ("SO").

In the *Gas Insulated Switchgear* cartel case, the Commission issued an SO in April 2006 and subsequently adopted an infringement decision in 2007. On appeal, the General Court ("GC") partially annulled the 2007 decision in so far as it concerned Toshiba on the ground that the Commission had infringed the principle of equal treatment by using different reference years for the Japanese and the European producers involved in the infringement to calculate the starting amounts of their fines (see VBB on Competition Law, Volume 2011, No. 7).

Before re-adopting the decision imposing recalculated fines, the Commission had sent Toshiba a so-called "letter of facts", stating that it intended to adopt a new decision compliant with the fine calculation method indicated by the GC. Toshiba lodged an appeal against the re-adopted Commission decision before the GC, which was dismissed (see VBB on Competition Law, Volume 2016, No. 1). Toshiba argued before the Court of Justice of the European Union ("ECJ") that the GC had erred in law in holding that, by issuing a letter of facts instead of a new SO before readopting the decision, the Commission had not infringed its rights of defence.

In his Opinion, Advocate General ("AG") Tanchev endorsed the view of the GC. The AG considered that the Commission was not required to issue another SO before adopting a new decision, on the grounds that the annulment of the first decision had no effect on the validity of the SO, the content of which was still lawful. AG Tanchev recalled that it is settled case-law that annulment of an EU decision does not necessarily affect its preparatory acts. The AG conducted his analysis in light of the GC's grounds for dismissing the Commission's first decision, namely the use of different reference years for assessing the basic amount of the fine, which led to unequal treatment for Toshiba. The AG explained that, as the SO did not contain any indication that different years should be used as a benchmark, the GC had rightly concluded that the actual content of the SO was not called into question. Therefore, the annulment of the decision did not have any effect on the validity of the SO.

The AG distinguished his Opinion from that of AG Wahl in the Feralpi case (see VBB on Competition Law, Volume 2016, No. 12). In *Feralpi*, the original decision in the *Italian concrete reinforcing bar* case had been adopted under the procedure of the Treaty establishing the European Coal and Steel Community (the "ECSC Treaty"). In contrast, the re-adopted *Italian concrete reinforcing bar* decision was adopted under Regulations 1/2003 (implementing the rules in Articles 101 and 102 TFEU) and 773/2004. AG Wahl considered that the procedure followed by the Commission in its re-adoption of the decision did not comply with the provisions set out in Regulations 1/2003 and 773/2004 which, as a result, deprived the parties of the opportunity to present their views during an oral hearing and thus breached their rights of defence.

AG Tanchev specifically stated that AG Wahl's reasoning could not be applied in the present case because the same procedural rules (*i.e.*, Regulations 1/2003 and 773/2004) were applicable throughout the whole procedure in the *Gas Insulated Switchgear* cartel case and, as a result, the parties' rights of defence were not breached.

Exotic Fruits (Bananas) cartel case - Commission may use evidence transmitted by national tax authority in antitrust proceedings

Under Article 12(1) of Regulation 1/2003, for the purpose of applying Articles 101 and 102 TFEU, the European Commission and the competition authorities of the Member States have the power to provide one another with and use evidence on any matter of fact or of law, including confidential information. Article 12(2) of Regulation No 1/2003 adds that the information exchanged for that purpose shall only be used as evidence in respect of the subject-matter for which it was collected by the transmitting authority.

In its appeal, Pacific Fruit argued before the Court of Justice of the European Union ("ECJ") that the General Court ("GC") had infringed essential procedural requirements and its rights of defence by endorsing the use of the evidence transmitted to the Commission by the Italian customs and finance police. Pacific Fruit claimed that the Commission should have been prevented from using the documents other than in relation to the subject matter for which they were collected by the national authority.

In the case at issue, the Commission had initiated antitrust proceedings against Pacific Fruit on the basis of notes that had been obtained by the Italian customs and finance police in the course of a criminal investigation and which the Italian authorities had, subsequently, transmitted to the Commission. On appeal, the GC ruled that the Commission could validly use this evidence in its investigation under the EU competition rules (See VBB on Competition Law, Volume 2015, No. 6).

In its judgment, the ECJ upheld the GC's assessment and confirmed the admissibility of evidence transmitted to the Commission by the Italian customs and finance police. The ECJ held that, for the purposes of proving a cartel, the Commission can rely on and use as evidence documents that were legally transmitted by national authorities, other than competition authorities, as long as the transmission was not unlawful under national law.

The ECJ's position is in line with Advocate General Kokott's Opinion in the case (see VBB on Competition Law, Volume 2016, No. 11). In endorsing the Advocate General's view, the ECJ recalled that Article 12 of Regulation 1/2003 pursues the specific objective of simplifying and encouraging cooperation between the authorities within the European Competition Network by facilitating the exchange of information. Therefore, Article 12(1) and (2) of that Regulation could not be interpreted, as Pacific Fruit contended, as preventing the Commission from using information transmitted by national authorities other than competition authorities on the sole ground that that information was obtained for other purposes. The ECJ considered that such a rule would excessively hamper the role of the Commission in its task of supervising the proper application of EU competition law.

Exotic Fruits (Bananas) cartel case - no extensive examination of economic and legal context required if anti-competitive object is readily apparent

According to established case law, agreements with an anti-competitive object are those which, by their very nature, can be regarded as being harmful to the proper functioning of normal competition. Thus, where the anti-competitive object of the agreement is established, it is not necessary to examine its actual effects on competition. In order to determine whether an agreement reveals in itself a sufficient degree of harm to competition for it to be considered a restriction of competition by object, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms part.

In its appeal to the Court of Justice of the European Union ("ECJ"), Pacific Fruit argued that the General Court ("GC") had failed to sufficiently examine the economic and legal context of the contested conduct. In its recent judgment, the ECJ dismissed this ground of appeal. It recalled that Pacific Fruit had taken part in a price-fixing cartel and noted that this represents a particularly serious restriction of competition. In line with AG Kokott's Opinion (see VBB on Competition Law, Volume 2016, No. 11), the ECJ emphasised that the GC's analysis of the economic and legal context of which the practice forms part could therefore be limited to what is strictly necessary to establish the existence of a restriction of competition by object.

Furthermore, and again in line with the opinion of AG Kokott, the ECJ found that the arguments relating to the economic and legal context of the case put forward by Pacific Fruit were not relevant for the purpose of determining whether the conduct had an anticompetitive object. It noted that some of those arguments, such as the argument that the European banana market was subject to a common organisation at the time of the infringement, instead called into question the very existence of the agreement.

As a result, the ECJ upheld the GC's ruling that the infringement could be characterised as a restriction of competition by object.

Heat Stabilisers cartel case – liability of parent company for subsidiary whose conduct is time-barred

Under EU competition law, a parent company may be held liable for the anticompetitive cartel behaviour of its subsidiaries. However, questions have arisen surrounding the concept of a single economic unit and the exact scope of a parent company's liability for the wrongful actions of its subsidiaries, in particular where the liability of the subsidiary in an infringement is time-barred. In *Akzo Nobel*, the Court of Justice of the European Union ("ECJ") has clarified this question, reaching a different conclusion to Advocate General Wahl in the case (see VBB on Competition Law, Volume 2017, No.1),

In its judgment, the ECJ dismissed the appeal brought by parent company, Akzo Nobel, as regards its participation in the *Heat Stabilisers* cartel. In its decision, the Commission had divided Akzo Nobel's participation in the cartel into three separate infringement periods. With regard to the first infringement period, the Commission found that a subsidiary of Akzo Nobel, Akzo GmbH, had participated in the infringement relating to tin stabilisers, and a second subsidiary of Akzo Nobel, Akzo BV, had been involved in an infringement relating to the ESBO/esters sector. In the second infringement period, the Akcros Chemicals partnership into which had been consolidated the heat stabilisers production and sales activities of the Akzo Group, participated in the infringement. As to the third infringement period, Akcros Chemicals, which had absorbed the business of the Akcros Chemicals partnership, was found to have directly participated.

On appeal, the General Court ("GC") found that the Commission's power to impose fines on Akzo Nobel's two subsidiaries in relation to the first period of infringement was time-barred (pursuant to Article 25(1)(b) of Regulation No 1/2003), but that it did not affect Akzo Nobel's liability for its subsidiaries' conduct during that period (see VBB on Competition Law, Volume 2015, No. 7). Before the ECJ, Akzo Nobel argued that the fact that the imposition of any fine on its two subsidiaries was time-barred should have led to the annulment of its fine, as the parent company, for the first period of the infringement.

Importantly, the Commission had not found that Akzo Nobel participated in the infringement directly during the first period, but only through its subsidiaries. In support of its claim, Akzo Nobel relied upon the judgment in *Total v Commission*, in which it was held that if the liability of a parent company is purely derivative of its subsidiary, the parent company "*must, in principle, benefit from any reduction in the liability of its subsidiary which has been imputed to it*". The ECJ, therefore, examined whether the application of the limitation period with regard to its two subsidiaries absolved Akzo Nobel from liability with respect to the first infringement period.

The essence of the ECJ's judgment contains two findings. First, the ECJ held that since Akzo Nobel formed a single economic unit with its two subsidiaries under EU competition law, it was considered to have engaged in the anticompetitive activities itself during the first infringement period. Second, the fact that Akzo Nobel continued its participation in the infringement beyond the first infringement period justified assessing its liability differently to that of its subsidiaries. Although Akzo Nobel's subsidiaries' participation ended on 28 June 1993, Akzo Nobel continued its participation in the single and continuous infringement beyond that period, up until March 2000. Accordingly, even though the Commission's power to impose penalties on the two subsidiaries was time-barred, this did not prevent it from holding Akzo liable for the first infringement period.

The ECJ's findings are interesting because, in certain circumstances, the liability of a parent company may go beyond that of its subsidiaries even though its liability is purely derivative. This finding appears to expand the reach of the liability of a parent company for the conduct of its subsidiaries.

– MEMBER STATE LEVEL –

BELGIUM

Belgian Competition Authority sanctions bid-rigging cartel in public contracts for railway infrastructure

On 2 May 2017, the Belgian Competition Authority ("BCA") found that ABB, AEG, Siemens, Schneider and Sécheron had engaged in a cartel in the context of public tenders organised by government-owned railway network company Infrabel and imposed fines amounting to a total of € 1,779,000.

Infrabel had first concluded a framework agreement with selected firms in order to define the terms and conditions of future public tenders concerning electrical installations and equipment.

The BCA found that, when these tenders were later launched, ABB, AEG, Siemens, Schneider and Sécheron decided together which party should win each bid and submitted quotations with prices determined in such a way that Infrabel would choose the designated winner. These practices started in August 2010 (as regards Sécheron and Siemens) and in February 2011 (as regards ABB, AEG and Schneider) and produced effects until 30 June 2016, i.e., long after the last evidence of collusion of 1 July 2014. The BCA decided that the duration of the infringement should also include the duration of its effects on the market.

Interestingly, the BCA also pointed to the behaviour of some of Infrabel's own employees, who disclosed information that made the market more transparent. This information included: (i) information on Infrabel's current and future projects; (ii) sensitive information on future tenders, Infrabel's budget for future projects and competing bidders' prices; and (iii) Infrabel's preferences for specific suppliers in local geographic areas. The BCA considered that this constituted a mitigating circumstance in favour of the cartelists and therefore granted a reduction in the fines.

ABB was the first firm to blow the whistle on this case and therefore obtained immunity from fines under the leniency programme. Four natural persons also requested – and obtained – immunity from prosecution. Additionally, Siemens and AEG secured respectively 50% and 30% reductions from fines under the BCA's leniency programme. Although not a leniency applicant, Sécheron obtained a decrease of its fine on account of its cooperation during the investigation, pursuant to para. 29 of the Belgian Fining Guidelines.

Schneider was apparently in a peculiar situation: the BCA considered that, "due to the specific circumstances of this case", the immunity application filed by a former Schneider employee had established Schneider's participation in the cartel while making it impossible for Schneider to seek leniency itself. In an apparent effort to compensate this lost chance to seek leniency, the BCA reduced Schneider's fine by an undisclosed amount.

On the other hand, Siemens' fine was increased twice: the first time to sanction Siemens' role as the ringleader of the cartel and the second time in order to increase the deterrent effect of the fine, with the BCA noting that Siemens' worldwide turnover reached € 79,6 billion in 2016.

Finally, the fines imposed by the BCA were reduced by 10% as the cartel participants agreed to settle the case.

The BCA imposed a fine of € 357,000 on AEG, € 19,000 on Sécheron, € 432,000 on Schneider and € 971,000 on Siemens.

It is worth noting that this decision closely follows the publication by the BCA of a guide raising awareness of bid rigging and helping procurement managers of public bodies identify and to prevent collusive behaviour of potential suppliers. The BCA also made it clear earlier this year that public procurement constitutes one of its enforcement priorities for 2017.

Since this decision was adopted by the BCA in the context of a settlement procedure, it cannot be appealed and is thus final.

SPAIN

Spanish Competition Authority imposes fines on Madrid Bar Association for market-sharing practices

On 4 May 2017, the Spanish National Competition Authority ("CNMC") imposed fines totalling € 180,000 on the Madrid Bar Association for dividing markets for the provision of free legal services and of services as a public defender.

Spanish legislation entrusts regional bar associations with the competence to regulate access to these two markets within their respective geographical areas.

In its decision, the CNMC found that, since 2011, the Madrid Bar Association had been requesting lawyers to reside and be professionally established in its geographic area in order to be able to provide free legal services and to be appointed as public defenders in that area. The CNMC concluded that the Madrid Bar Association had breached Article 1 of the Spanish Competition Act (the Spanish equivalent to Article 101 TFEU) by (i) limiting consumers' choice; (ii) geographically partitioning the market; and (iii) applying dissimilar conditions to lawyers registered with other Bar Associations. The Madrid Bar Association attempted to justify its conduct as being a guarantee of proximity and to ensure immediate availability of legal services. However, that argument was rejected by the CNMC, which found that the measures were clearly disproportionate to achieve those objectives.

| VERTICAL AGREEMENTS

– EUROPEAN UNION LEVEL –

European Commission publishes final e-commerce sector inquiry report (consumer goods) – increased enforcement activity on the horizon concerning restrictions on the online sale of goods

On 10 May 2017, the European Commission ("Commission") published its final Report on the e-commerce sector inquiry ("the Report"), aimed at identifying business practices in the sector that might restrict competition and limit consumer choice.

The Report consists of two documents: (i) a 16-page summary; and (ii) a 298-page Staff Working Document, and considers issues arising from the sale of consumer goods and the supply of digital content separately. The results are based upon evidence gathered from 1 900 companies operating in e-commerce of consumer goods and digital content, in addition to analysing around 8 000 distribution and license contracts.

This article focuses on the Report's analysis of (physical) consumer goods. The Report's treatment of digital content is considered separately in this edition of the Newsletter (see page 18).

The Report largely mirrors the preliminary report (see VBB on Competition Law, Volume 2016, No. 9) in that it identifies various practices, found to be used to varying degrees, that either do, or may, raise competition law concerns, but it stops short of advocating any changes to the Vertical Agreements Block Exemption Regulation ("VABER"), which is due for renewal in 2022.

Businesses should, therefore, play close attention to its findings as it sets the tone for future possible investigations and actions, both in the specific product areas subject to the sector inquiry and more generally.

More specifically, the Report contains important indications of the Commission's likely approach with respect to a number of practices used by (mainly) suppliers in relation to the online sale of goods, including:

- Online pricing restrictions/recommendations
- Restrictions on cross-border sales
- Selective distribution systems
- Online marketplace restrictions
- Parity clauses
- Restrictions on the use of price comparison tools & online search engines
- Use of data

Online pricing restrictions/recommendations

The Commission outlines that the growth of e-commerce has led to increased price transparency. Whilst this benefits the consumer by helping it find the best deal online and by fuelling price competition, the Report also recognises the potential downsides of these trends. In particular, it highlights: (i) the risk of free-riding between on and offline channels (both where customers use pre-sale services of brick and mortar shops before purchasing the product online, and where they search the product online before purchasing in the brick and mortar shop); and (ii) the potential adverse effect on competition generated by non-price factors, namely quality, brand image and innovation. The Commission notes how both manufacturers and retailers consider it essential to address free-riding, and to maintain the incentives for retailers to invest in high quality services by creating a level playing field between offline and online channels. It also recognises that incentivising investment in quality and innovation, and controlling brand image and positioning, are key for most manufacturers to ensure their mid to long term viability.

The Report does not, however, suggest that this enhanced risk of free riding and effect on non-price competition is likely to make it easier to justify pricing restraints. It limits itself to repeating that agreements that establish a minimum or fixed resale price or price range (which equate to retail price maintenance) are considered to be restrictions by object under Article 101 TFEU and "hardcore" restrictions within the meaning of Article 4(a) of the VABER, and that only maximum prices and truly non-binding price recommendations are exempted by the VABER.

It notes that 42% of retailers who responded to the Commission's inquiry reported to be subject to contractual pricing limitations/recommendations, and that such restrictions were "*by far the most widespread restrictions reported by retailers*". This is not in itself surprising, or necessarily concerning, as recommended retail prices are very common in practice and, as the Report acknowledges, are considered important to communicate quality and brand position. Nonetheless, the Report claims that various retailers have confirmed the use of retail price maintenance by manufacturers (presumably going beyond mere recommendations), and this may well trigger enforcement action.

The Report illustrates the Commission's potential concerns about the use of software to frequently monitor online retail prices, making it easier to detect deviations from manufacturers' pricing recommendations and even potentially deterring retailers from departing from them. Such pricing software may enable price transparency which can facilitate or strengthen collusion amongst retailers. However, no proposed measures are suggested in order to tackle this concern.

The Report furthermore notes that respondents to the Inquiry had concerns relating to the EU rules on dual pricing. In an e-commerce context, dual pricing involves manufacturers charging different wholesale prices for the same products to the same retailer, depending on whether the products are to be sold online or offline. Dual pricing is generally considered to be a hardcore restriction under the VABER, and is apparently very rarely used. However, the Report notes that such restrictions may be exempted under Article 101(3) of the TFEU on an individual basis, for example where a dual pricing arrangement would be indispensable to address free-riding. The Commission might intend to indicate some greater signs of flexibility with respect to dual pricing, but the possibility of justifying the practice on the grounds of efficiencies is already recognised in the Vertical Guidelines (paragraph 64).

Restrictions on cross-border sales

A substantial minority (36%) of respondent retailers stated that they do not sell cross-border for at least one of the relevant product categories in which they are active. In addition, 38% of respondent retailers collect information on the location of customers in order to implement geo-blocking measures (*i.e.*, to restrict sales to customers in other Member States).

The Report confirms that firms are free do decide whether or not to sell across borders and, in the absence of a dominant market position, the EU competition rules do not limit the right of firms to unilaterally apply geo-blocking measures. Therefore, geo-blocking measures implemented by undertakings that manufacture goods and sell them through their own website fall outside the scope of Article 101 TFEU. But, if geo-blocking measures result from an agreement or concerted practice (which is not a genuine agency agreement between two undertakings), they may fall within the scope of Article 101(1) TFEU. The Report notes that 11% of retailers are subject to contractual cross-border sales restrictions in at least one product area in which they are active, and that some of these restrictions may raise concerns.

The Report summarises the approach to territorial restrictions under the VABER, noting that distributors may be restricted from making active sales into an exclusive territory or to an exclusive customer group that is either (i) reserved to the supplier or (ii) allocated by the supplier to another distributor. On the other hand, restrictions on passive sales, even into an exclusively reserved or allocated territory or customer group, will constitute hardcore restrictions, as they would grant the distributor absolute territorial protection. Furthermore, all territorial restrictions within a selective distribution system (whether relating to active or passive sales) are hardcore restrictions.

The Report indicates evidence of the use of the following territorial restrictions which raise concerns regarding their compatibility with Article 101 TFEU, and may amount to hardcore restrictions under Article 4 of the VABER:

- Certain suppliers contractually restrict their retailers' ability to sell both actively and passively to customers outside their Member State of establishment, or to customers located in certain Member States.

- Certain suppliers appear to restrict active sales by distributors outside a designated territory, irrespective of whether other territories have been exclusively allocated to other distributors or reserved to the supplier;

- Certain manufacturers appear to restrict passive sales into territories that have been exclusively allocated to other distributors or reserved for the supplier;

- Certain suppliers operating a selective distribution system across several Member States appear to be limiting the ability of authorised retailers to actively and passively sell to all customers within those Member States;

- A few manufacturers combine the appointment of an exclusive distributor for a certain territory at the wholesale level with a selective distribution system operated across several Member States, and limit the ability of the appointed wholesalers to actively sell to all authorised distributors within the Member States in which the selective distribution network is operated.

Enforcement action could follow in respect of some of these restrictions, although, as the Vertical Guidelines demonstrate, they will not always infringe the competition rules (for example, paragraph 63 of the Vertical Guidelines indicates the circumstances in which the restriction on active sales by exclusive wholesalers in a selective distribution system will meet the conditions of Article 101(3)).

Selective distribution systems

The Report suggests that the growth of e-commerce has resulted in manufacturers using selective distribution systems to a greater extent than previously in order to better control the distribution of their products, with 19% of surveyed manufacturers having introduced a selective distribution system in the last ten years. Selective distribution is used by more than half of surveyed manufacturers in the product categories of clothing and shoes, cosmetics and healthcare, consumer electronics, and household appliances.

The Report sees no reason to change the freedom given to manufacturers by the VABER to operate either qualitative or quantitative selective distribution systems regardless of the type of product, and to freely choose the criteria they apply for admission to their networks. The Report does voice specific potential concerns where there is a requirement on retailers to operate a brick and mortar shop which excludes online-only retailers (pure players) without justification. Although requirements on distributors to have a brick and mortar shop are considered to comply with the VABER, withdrawal of the benefit of the block exemption may be considered where such a requirement does not have a justified nexus to distribution quality and/or potential efficiency and is essentially a mechanism to exclude pure players. Again, this is not a new approach, and is provided for in the Vertical Guidelines (paragraphs 176 & 179).

Online marketplace restrictions

The legal assessment of restrictions on the use of marketplaces by authorised retailers is currently subject to a degree of uncertainty pending the upcoming ruling of the European Court of Justice in *Coty*.

The Report nonetheless confirms the Commission's pre-existing view that even an absolute prohibition on sales through marketplaces is not (at least generally) a hardcore restriction and, therefore, is exempted by the VABER. This is because a marketplace ban does not generally amount to a *de facto* total ban on the use of the internet as a means of marketing, and therefore does not fall within the scope of the *Pierre Fabre* ruling. The Commission considers such a ban as a restriction on how a retailer sells over the internet, and not on *where* or *to whom* it sells (thereby falling outside Art. 4(b) of the VABER).

This view is based on the factual results of the Commission's investigation, which support the conclusion that retailers are not reliant on marketplaces in order to make internet sales, particularly because they can sell through their own websites. The Report noted that only 4% of retailers sell online exclusively through marketplaces, whereas more than 90% use their own online shop. As a result, these types of restrictions cannot "*at this stage*" be said to restrict the effective use of the internet as a sales channel.

According to the Report, restrictions on the use of marketplaces are not uncommon. 18% of retailers reported to have agreements with their suppliers containing such restrictions. Germany was the Member State with the highest proportion of retailers (32%) experiencing marketplace restrictions, followed by France (21%). Restrictions on the use of marketplaces are mostly found in selective distribution agreements and typically involve branded goods (without being limited to luxury or complex or technical goods).

The Commission concludes that, despite the above, this does not mean that absolute marketplace bans are necessarily compatible with European competition law. For example, the protection of the VABER may be lost in a particular case depending on the market situation and where there is an insufficient justification under Article 101(3).

The Commission also notes that a limited number of retailers are subject to a complete ban on selling over the internet, which is clearly a hardcore restriction.

Parity clauses

There has been increasing divergence in the manner in which European national competition authorities and legislators are treating price parity clauses imposed by large online travel agents (see VBB on Competition Law, Volume 2017, No. 4). The Staff Working Document briefly considers parity clauses where applied by online marketplaces. The legal analysis is very limited. Importantly, however, it confirms the Commission's view that parity clauses in vertical agreements are exempted by the VABER, provided that the parties' market shares do not exceed 30% and that no hardcore restrictions within the meaning of Article 4 of the VABER are included in the agreement. Where market shares exceed 30%, and an individual assessment is required, the Report notes that parity clauses can have pro and anticompetitive effects: they may have the benefit of preventing free-riding, but they may also reduce incentives for retailers to compete and create barriers to entry and expansion. They will therefore be assessed on a case-by-case basis.

Price comparison tools & online search engine restrictions

The use of price comparison tools by retailers is relatively widespread, with 36% of retailers reporting to have supplied data feeds regarding their products to price comparison tool providers in 2014. The Report indicates that bans on the use of price comparison tools potentially restrict the effective use of the internet as a sales channel, and may amount to a hardcore restriction of passive sales under Article 4(b) and (c) of the VABER where they are not linked to quality criteria,. However, restrictions on price comparison tools which are based on objective qualitative criteria are covered by the VABER.

The Report therefore advocates a stricter approach to restrictions on the use of price comparison tools than to restrictions on sales through marketplaces, without directly explaining why this is justified. Indeed, applying the Commission's reasoning in respect of marketplace restrictions, both types of restrictions could be said to relate to how products are sold online, as opposed to *where* and *to whom* products may be sold. In support of this, the Report does not view price comparison tools as a distinct sales channel, but as offering retailers "*the ability to present and advertise their online offerings to a wider audience*", in addition to increasing the "*findability of the online offering and generate traffic to the retailer's own website*".

In addition, the Report briefly comments on the use of search engines as an important means of increasing customer visits to retail websites, and restrictions imposed by manufacturers on the use by retailers of manufacturers' brand names for online marketing. The Commission notes that restrictions on the use by retailers of the trademarks of certain manufacturers in order to obtain preferential listings on search engine paid referencing sites (such as Google Adwords) would raise concerns should they "*restrict the effective use of the internet as a sales channel by limiting the ability of retailers to direct customers to their website*", although no further guidance is provided as to how to assess when this would be likely. In contrast, restrictions on the use by retailers of the manufacturer's name in the retailers' own domain names does not raise concerns as it prevents confusion.

Use of data

While it was not a central part of the inquiry itself, the Report's consideration of data issues provides some interesting insight. Its findings illustrate that the collection, processing and use of large amounts of data ("big data") is becoming increasingly important in e-commerce. In particular, big data analytics in e-commerce can lead to improved multi-channel integration, more efficient processes, reduced inventory and the creation of new features and services.

However, the Report also highlights possible competition concerns relating to data-collection and usage.

The Report outlines that the exchange of competitively sensitive data (such as relating to prices or quantities sold) between marketplaces and third party sellers, or between manufacturers and retailers, may lead to competition concerns where these parties compete. This could be the case where manufacturers who sell directly online through their webstores ask their authorised distributors for competitively sensitive data, as this could be used for anti-competitive purposes.

Comment: greater convergence and increased enforcement?

The goal of the Commission seems to be greater convergence in the application of the rules for distribution arrangements in the context of more vigorous enforcement against classic hardcore restrictions.

First, there has been increasing uncertainty and divergence in the treatment of vertical agreements throughout the EU relating to certain e-commerce issues. The inconsistent approaches towards "parity clauses" and bans on distributors using online marketplaces illustrate a need for clear guidance, cooperation and consistent application of EU competition law. However, the Report's findings demonstrate a continued conflict between the Commission's position and, in particular, the position of the German Courts/Federal Cartel Office ("FCO"). The Commission's position that absolute marketplace bans are not considered to be hardcore restrictions contrasts with the German hostility toward such restrictions in the FCO's 2015 ASICS decision, and the Higher Regional Court of Frankfurt's *Deuter* ruling (See VBB on Competition Law, Volume 2016, No. 2). The Report notes that it will broaden dialogue with national competition authorities within the European Competition Network on e-commerce issues in order to contribute to the consistent application of EU competition rules. It is anticipated that the forthcoming *Coty* judgment will assist in providing further guidance in this area.

Second, although the Report's findings may not significantly expand upon the stance taken in the VABER and the Vertical Guidelines, it does assist in mapping the future enforcement agenda of the Commission. With publication of the Report, Commissioner Vestager stated the findings "*help us to target the enforcement of EU competition rules in e-commerce markets*". Increased enforcement in this sector could already be observed in February 2017 when the Commission announced it had opened investigations into consumer electronics pricing, PC video games and holiday accommodation (see VBB on Competition Law, Volume 2017, No. 2). Of further interest is the fact that, in its press release announcing the final Report, the Commission named a number of companies active in clothing and other retail sectors that have apparently already changed their practices in light of the Report's findings. In addition, on 6 June 2017 the Commission announced that it was opening proceedings against Guess concerning various distribution practices, including cross-border sales restrictions, cross-selling bans among members of a selective distribution system, internet sales restrictions and resale price restrictions. With these powerful signals that increased enforcement appears to be inevitable and in light of the Report's overall findings, businesses should carefully re-consider the terms of their distribution agreements.

Click here to view the Report

Click here to view the accompanying Staff Working Document

European Commission accepts Amazon commitments to remove most favoured nation clauses from e-book distribution agreements

On 4 May 2017, the European Commission ("Commission") announced that it had accepted, pursuant to Article 9 of Regulation (EC) No.1/2003, to make binding commitments that Amazon offered ending the use of parity clauses in distribution agreements with electronic book ("e-book") publishers. These commitments will apply for a five year period and will cover any e-book in any language which is distributed by Amazon in the EEA.

The Commission previously had concerns with clauses which gave Amazon the right: (i) to be notified of more favourable or alternative terms offered by publishers to its competitors; and/or (ii) to be granted terms and conditions at least as favourable as those offered by publishers to its competitors (see VBB on Competition Law, Volume 2017, No. 1). In addressing the Commission's concerns, Amazon has specifically agreed:

- Not to enforce: (i) relevant clauses requiring publishers to offer Amazon similar non-price and price terms and conditions as those offered to Amazon's competitors; or (ii) any such clauses requiring publishers to inform Amazon about such terms and conditions;

- To allow publishers to terminate e-book contracts that contain Discount Pool Provisions (*i.e.*, a clause linking discount possibilities for Amazon to the retail price of a given e-book on a competing platform);

- Not to include, in any new e-book agreement with publishers, any of the clauses mentioned above, including Discount Pool Provisions.

If Amazon breaches any of these commitments, the Commission could impose a fine of up to 10% of Amazon's total annual turnover, without having to establish a violation of the EU competition rules. In its press release announcing acceptance of Amazon's final commitments, it states that these "*will help ensure that innovation for e-books by publishers and other third parties can benefit companies other than Amazon and protect effective competition for e-books to the benefit of consumers*."

| INTELLECTUAL PROPERTY/ LICENSING

– EUROPEAN UNION LEVEL –

European Commission publishes its final report on the e-commerce sector inquiry (digital content)

On 10 May 2017, the European Commission published its final report on its e-commerce sector inquiry (the "Report") in which it identifies business practices that may restrict competition and limit consumer choice in relation to consumer goods and digital content. The Report is accompanied by a voluminous Staff Working Document, which summarises the main findings of its sector inquiry and incorporates comments submitted by stakeholders during the public consultation. The findings of the Report largely mirror those of the Commission's initial findings which were published in September 2016 (See VBB on Competition Law, Volume 2016, No. 9).

The Commission's findings are based on evidence gathered from nearly 1,800 companies operating in e-commerce of consumer goods and digital content and involve around 8,000 distribution contracts.

Consumer goods are discussed in the section of this newsletter covering vertical agreements.

With respect to digital content, the Report focuses on the online provision of audio-visual and music products. It focuses on the relationship between digital content providers, which offer digital content to consumers or provide services for third parties to offer content to consumers, and right holders. The availability of attractive licensed content is found to be the main driver of competition among digital content providers, and the terms of content licenses define the main parameters of competition among the digital content providers. The Commission focused its findings on the following licensing practices, which it considers raise potential concerns:

- *Territorial restrictions and geo-blocking*: Territorial restrictions relate to the geographic area or areas in which the digital content providers may lawfully offer the licensed product. The Report finds that rights are to a large extent licensed on a national basis and, apparently as a consequence of the territorial restrictions included in licences, a majority of digital content providers use geo-blocking measures to restrict access to their online digital content services from another Member State. It also noted that the extent to which online digital content service providers resort to geo-blocking varies considerably from one Member State to another (ranging from 46% in Italy to 83% in the UK), as well as from one category of content to another (*e.g.*, TV, series, films or sporting events). While the Commission does not draw any specific conclusions in the Report as regards the legality (or not) of geo-blocking, the Commission considered in its initial findings on geo-blocking (see VBB on Competition Law, Volume 2016, No.3) that geo-blocking may create barriers that may hinder cross-border e-commerce. Furthermore, digital geo-blocking is currently subject to competition law enforcement action in the areas of Pay-TV (see VBB on Competition Law, Volume 2017, No. 2) and video games (see VBB on Competition Law, Volume 2016, No. 8) , as well as legislative initiatives in the form of the Portability and Geo-blocking Regulations.

- *Duration of licensing agreements*: The Report reveals that licensing agreements of relatively long duration are common (50% of the agreements last more than three years and 23% of them more than five years). According to the Commission, the long duration of these agreements may make it more difficult for new players to enter the market or for existing players to expand their current commercial activities.

- *Technological scope of licensed rights*: The Report indicates that the rights licensed to the digital content provider may be split according to the transmission technology (such as online, mobile or satellite) and the reception technology (such as TV sets, computers and streaming devices). Licences may also include usage rights' limitations (such as at home use, mobile use and streaming). The Report also notes that the bundling of technology is common (*i.e.*, rights for online transmission of digital content are commonly licensed together with the rights for other transmission technologies). According to the Commission, this may hinder existing operators and new entrants from competing and developing new services. Bundling may be a particular concern where it leads to a restriction of output, *i.e.* where acquired rights are not exploited.

- *Payment structures*: The Report analyses the various payment structures applied by right holders, including minimum payments which may, on the one hand, serve as a barrier to smaller providers and new entrants, but which may nonetheless sometimes enable right holders to share risks more efficiently.

The Commission also found that exclusivity is often used in relation to the licensed rights, but expressed the view that this is not problematic in and of itself. However, when coupled with contractual restrictions on cross-border passive sales, it might be detrimental to competition. Any assessment of these licensing practices under EU competition rules would have to take into account the characteristics of the content industry, the legal and economic context of the licensing practice and / or the characteristics of the relevant product and geographic markets.

On the basis of its findings, the Commission will seek to enforce EU competition law rules against the most widespread and problematic business practices that have emerged as a result of the growth of e-commerce The Commission also plans to broaden the dialogue with national competition authorities within the European competition network to ensure a consistent application of EU competition laws with respect to e-commerce business practices.

The Commission's final Report on its e-commerce sector inquiry is available here.

The Commission's accompanying Staff Working Document is available here.

– MEMBER STATE LEVEL –

UNITED KINGDOM

English High Court delivers judgment in FRAND royalty case

On 5 April 2017, Justice Birss of the English High Court of Justice issued a judgment in a license dispute involving Standard Essential Patents ("SEPs") opposing Unwired Planet, a US based patent assertion entity, against Huawei, a Chinese telecommunications company.

Unwired Planet sued Huawei for infringement of a number of UK patents, which it had acquired from Ericsson as part of a portfolio comprising about 2,000 patents, and which were considered as essential to the 2G, 3G and 4G wireless telecommunications standards developed under the auspices of the European Telecommunications Standards Institute ("ETSI"). As Ericsson had participated in the development of the standards under ETSI, any SEP patent acquired from it would be encumbered by Fair, Reasonable and Non-Discriminatory ("FRAND") commitments to ETSI. Separate technical trials between the parties had taken place to determine whether the asserted patents were valid, and whether the patents were essential to the standards. The present case related to issues of competition law, FRAND, injunctions and damages.

Justice Birss made the following findings in light of the specific circumstances of the case, including:

- *There is one FRAND rate applicable to any given SEP under a given set of circumstances*.

- *The FRAND license is worldwide, rather than country by country*. In the present case, Unwired Planet had offered Huawei a worldwide license for the asserted SEPs, which Huawei considered as unreasonable as it had only requested licenses covering the UK. In assessing the reasonableness of Unwired Planet's worldwide license offer, Justice Birss noted that the vast majority of the SEP licenses in the industry were granted on a worldwide level. Justice Birss also pointed out that both parties were global companies active in most jurisdictions. Against this backdrop, Justice Birss concluded that a "*licensor and licensee acting reasonably and on* *a willing basis would agree on a worldwide license*" and that country-by-country licensing would be highly inefficient for two large multinational companies. Under these circumstances, Justice Birss concluded that a FRAND license in the present case had to be worldwide.

- *There is no abuse of dominance in the present case*. In Huawei v ZTE (See VBB on Competition Law, Volume 2015, No. 7), the Court of Justice of the European Union ("ECJ") provided a general framework for SEP holders and licensees to follow when negotiating a FRAND license to avoid the SEP holder being found to abuse its dominant position under Article 102 TFEU. In the present case, Justice Birss concluded that a SEP holder would not be abusing its dominance under Article 102 TFEU if it were to offer a rate that is at least somewhat higher than the true FRAND rate, so long as the rate is not excessive. In order words, Justice Birss considered that an abuse of dominance would not be found unless an offer "*is so far above FRAND as to act to disrupt or prejudice the negotiations themselves*".

- *The SEP holder can directly enforce FRAND royalty rates without having resort to competition law*. Justice Birss ruled that a FRAND undertaking to ETSI is a legally enforceable obligation, which any licensee can rely on against the SEP holder. This is because, according to him, FRAND commitments should be viewed as "*public, irrevocable and enforceable*" on the grounds of public policy. He also considered that the boundaries of FRAND and competition law are not the same: a rate may be above the FRAND level, but not contrary to competition law unless it is clearly excessive.

- *The FRAND royalty rate should be based on the value of the licensed patents, rather than on the size or other characteristics of the licensee*. There is a general consensus that, to comply with the non-discrimination prong of a FRAND commitment, an SEP holder must treat similarly situated licensees in a similar manner. Justice Birss did not understand this requirement as meaning that an SEP holder could charge different royalty rates based on the size or market share of the licensee, but rather that "*all licensees who need the same kind of license will be charged the same kind of rate*", irrespective of the size of other characteristics of the licensee;

- *A licensee cannot challenge a license granted on FRAND terms* if it subsequently turns out that a similarly situated licensee negotiated a lower royalty rate, unless the difference was such as to distort competition between the two licensees;

- *Justice Birss offers two possible methods for calculating the FRAND royalty*. The first method is based on an analysis of comparable license rates while the second stems from a top-down analysis of the total aggregate royalty that should be attributable to the standards and the SEPs concerned;

- *Injunctive relief should be granted*. Justice Birss considered that an injunction to prevent Huawei from infringing Unwired Planet's patents should be granted because: (1) Unwired Planet had established that Huawei infringed valid patents; (2) Huawei was not prepared to accept a license on terms the judge considered as FRAND; and (3) Unwired Planet was not in breach of competition law. A future hearing date has been set to consider the specific issue of the injunction.

The lasting implication of the present judgment on SEPs remains to be seen. However, it has the merit of trying to determine the level of FRAND royalties and assessing the parties' contractual and competition law obligations resulting from FRAND commitments.

STATE AID

– OTHER DEVELOPMENTS –

EUROPEAN UNION: On 17 May 2017, following two public consultations (see VBB on Competition law, Volume 2016, No. 3, p. 16 and No. 10, p. 10), the European Commission ("Commission") announced that it had approved an amendment to Regulation 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (General Block Exemption Regulation ("GBER")). The revised GBER exempts, for the first time, state aid to airports and ports from prior Commission approval and widens the existing exemptions for state aid for culture, multi-purpose sports arenas and the EU's outermost regions.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– MEMBER STATE LEVEL –

AUSTRIA

Significant changes to Austrian Competition Law

Important amendments of the Austrian Cartel Act ("Kartellgesetz") and the Austrian Competition Act ("Wettbewerbsgesetz") were adopted on 24 April 2017. Importantly, the amendments introduce an additional notification threshold based on the value of the transaction. The amendments also introduce changes to public enforcement rules and implement the EU Damages Directive in Austrian law.

1. Merger Control

The amendments to the Austrian Cartel Act introduce an additional notification threshold, which is based on value of a transaction. As in Germany, the aim is to catch in particular acquisitions of start-up companies in the digital economy where the target does not generate a large turnover but may nevertheless have a competitively significant position in the market.

Under the existing rules, which remain applicable, notification is required when the following three cumulative turnover criteria are met by the undertakings concerned in the last financial year preceding the concentration:

- the combined worldwide turnover of the undertakings concerned exceeded € 300 million;
- the combined Austrian turnover of the undertakings concerned exceeded € 30 million; and
- each of at least two undertakings concerned achieved a worldwide turnover exceeding € 5 million.

However, even if the above three turnover thresholds are met, an exemption from the notification requirement applies if:

- only one of the undertakings concerned achieved turnover in Austria exceeding € 5 million; and
- the other undertakings concerned achieved a combined worldwide turnover of € 30 million or less.

Under the new notification threshold, a notification will also be required if the following four cumulative conditions are met:

- the combined worldwide turnover of the undertakings concerned exceeds € 300 million;
- the combined Austrian turnover of the undertakings concerned exceeds € 15 million;
- the value of the "consideration" received by the seller, *i.e.*, the purchase price and the value of any assets and other monetary values received by the seller for the transaction, exceeds € 200 million; and
- the target undertaking is active in Austria to a significant extent.

According to the explanatory comments accompanying the new legislation, the requirement of significant activity of the target in Austria may be met if, for example, the target has a subsidiary or branch office in Austria, or if the services provided by the target are widely used in Austria (*e.g.* high frequency of web traffic). However, the explanatory comments offer only limited guidance, so that difficulties in making the assessment can be expected in practice. The new notification threshold will become effective on 1 November 2017.

Furthermore, the filing fee for merger notifications has been increased from € 1,500 to € 3,500 as of 25 April 2017.

2. Public enforcement rules

The amendments provide the FCA with additional enforcement powers for antitrust investigations concerning inspections at the premises of undertakings ("dawn raids"). Under the new legislation, which entered into force on 25 April 2017, the FCA is now also empowered to access and inspect any electronic documents which may be accessed at or from the company's premises. The Austrian Cartel Court is authorized to impose fines for failure to grant access to electronic data that is accessible from the premises covered by the search warrant.

The rights and obligations of the FCA to report on pending as well as closed cases has been extended. Until recently, decisions of the Austrian Cartel Court made upon request by the FCA were published only if the court had ruled that there was an infringement of competition law and imposed a fine on the defendant. Under the new regime, all decisions, *e.g.* cease and desist orders as well as negative decisions on procedure or on the merits, will also be published as soon as they are final. In addition, the FCA will have to publish all requests submitted to the court to initiate proceedings against an alleged infringer.

FRANCE

European Court of Human Rights rules that inspections by French Competition Authority are compatible with Article 8 ECHR

On 13 April 2017, the European Court of Human Rights ("ECtHR") dismissed an application made by Janssen-Cilag, the French subsidiary of US pharmaceutical company Johnson & Johnson, concerning inspections carried out by the French Competition Authority ("FCA") at the company's premises on 5 and 6 May 2009. In particular, the ECtHR held that the national competition authority's inspection powers did not breach the European Convention on Human Rights ("ECHR"), as the inspection was carried out in accordance with the law and pursued a legitimate aim (*Janssen Cilag S.A.S v France* (no. 33931/12)).

By order of 29 April 2009, a French judge of the Nanterre Tribunal authorised the FCA to conduct search and seizure operations at Janssen-Cilag's premises, pursuant to Article L.450-4 of the French Commercial Code. During the inspection, FCA officials seized a number of documents and computer files. Janssen-Cilag subsequently lodged an appeal before the Versailles Court of Appeal. The Court of Appeal partially set aside the order for the seizure of three files, on the grounds that it was unclear from the inventory and the written report of the inspection whether the documents contained in those files fell under the scope of the inspection authorisation issued by the Nanterre Tribunal judge. The Court of Appeal found the inspection to have been otherwise lawful. A subsequent appeal by Janssen-Cilag was dismissed by the French Supreme Court (*Cour de Cassation*).

In its application before the ECtHR, Janssen-Cilag first relied on Article 6(1) ECHR (right to a fair trial), read in conjunction with Article 8 ECHR (right to respect for the home and correspondence), and argued that the principle of client-attorney privilege was infringed in respect of searches carried out on the computer directories of the company's legal department. Janssen-Cilag also complained about the excessive quantity of documents seized, including the entire mailboxes of employees. Secondly, the company argued that the number of lawyers to assist the company during the inspection had been unlawfully restricted, in breach of Article 6(3) ECHR, resulting in only three lawyers having to supervise six FCA teams. Finally, Janssen-Cilag argued that its right to a fair trial and the right to an effective remedy (Article 13 ECHR) had been breached, as it did not obtain a proper review of the manner in which the inspection had been carried out.

The ECtHR decided to examine the applicant's first plea under Article 8 ECHR alone, rather than in conjunction with Article 6(1) ECHR. The ECtHR relied on its previous ruling in *Vinci Construction et GTM Génie Civil et Services v. France* (nos. 63629/10 and 60567/10, 2 April 2015), in which it held that while inspections carried out pursuant to Article L.450-4 of the French Commercial Code interfered with the rights set out in Article 8 ECHR, that interference was "in accordance with the law" and pursued a legitimate aim. The ECtHR applied the same reasoning in the present case, stating that the inspection carried out at Janssen-Cilag's premises had the aim of gathering evidence of an abuse of a dominant position and of anticompetitive practices, which the ECtHR did not consider to be disproportionate under Article 8 ECHR. The Court then noted that the three lawyers that were present during the inspection had been in a position to familiarise themselves with at least some of the documents seized and to discuss the seizure. The Court also recalled that each FCA team was accompanied by a company representative.

Concerning the judicial review of the inspection, the ECtHR considered that the French Court of Appeal conducted an effective review of Janssen-Cilag's arguments and that therefore the rights sets out in Article 8 ECHR had been safeguarded. The ECtHR noted that the national judge had confirmed that Janssen-Cilag had the possibility to identify the documents it considered confidential and to request for those documents to be returned, in line with Article L.450-4 of the French Commercial Code, and had not claimed that any documents that it had specifically identified as confidential were wrongly seized. The ECtHR therefore concluded that the provisions of Article L.450-4 had been effectively applied, and dismissed the first plea. The Court dismissed the pleas in respect to Articles 6(1), 6(3) and 13 ECHR as manifestly ill-founded, due to the lack of any appearance of a violation of the rights and freedoms set out in those provisions.

French Supreme Court annulled a dawn raid after the targeted company was prevented from calling its external counsel

On 4 May 2017, the Criminal Chamber of the French Supreme Court ruled that investigators of the French competition authority infringed Samsung Electronics' defence rights by not allowing employees to call their lawyers upon notification of the dawn raid warrant (*Cass. Crim. n°16-81.071*).

In 2013, during a duly authorised dawn raid, inspectors prevented employees of Samsung Electronic to contact any outside person, including lawyers, before all offices were sealed in order to secure the place and prevent loss of evidence. The lawyers arrived at Samsung Electronics' premises only several hours later.

The company challenged the dawn raid operation before the Paris Court of Appeals which concluded that, although the company should have been allowed to call its lawyers upon notification of the dawn raid warrant, no formal act or search activity other than sealing the premises was accomplished by the inspectors before the lawyers arrived. It concluded that, pursuant to the case-law of the Supreme Court (*i.e.*, *Cass. Crim. n°15-83.437*), the dawn raid operation should be upheld since no injury was caused to the company.

On appeal, the Supreme Court reversed. It held that "for proceedings related to competition law infringements, the rights of defence may be exercised by the premises occupant upon notification of the dawn raid warrant," and consequently annulled the dawn raid.

In separate judgements rendered on the same day, the Supreme Court upheld the dawn raids carried out at other companies subject to the same resale price maintenance investigation (*i.e.*, Darty, Electrolux France, Electrolux Home products of France). In these cases, the appellants claimed that a warrant can only be delivered if there are specific indications of illegal practices, a condition which arguably was not met in the case at hand. The Supreme Court recalled that a warrant can be issued if there are suspicions of a competition law violation, and that evidence of illegal practices is not required, since dawn raids are precisely intended to collect evidence. Samsung Electronics also pleaded this ground in front of the Supreme Court in its own appeal and similarly failed.

GERMANY

Important amendments to the German Act against Restraints of Competition

Germany recently adopted the 9th Amendment to the Act against Restraints of Competition (the "Amendment"). The Amendment implements the EU damages directive, and brings about a number of additional, important changes to German competition law.

1. *Merger Control: Introduction of a new, value based notification threshold*

Under the former rules, a planned concentration has to be notified to the German Federal Cartel Office if certain turnover thresholds (the "turnover test") are met by the undertakings concerned. A planned concentration has to be notified if, in the last business year preceding the planned transaction:

- the combined aggregate worldwide turnover of all the undertakings concerned exceeded € 500 million; and
- the turnover achieved in Germany by at least one undertaking concerned exceeded € 25 million; and

- the turnover achieved in Germany by another undertaking concerned exceeded € 5 million.

In addition to this turnover test, which remains applicable, the Amendment has introduced an alternative notification threshold which triggers a pre-merger notification requirement in Germany. Pursuant to the new threshold, if the turnover criteria indicated in points 1 and 2 above are met, but the target company (or business) to be acquired does not meet the € 5 million domestic turnover threshold indicated in point 3 above, a planned concentration still has to be notified in Germany if:

- the value of the transaction exceeds € 400 million, and

- the target company (or business) is active in Germany "to a significant extent".

The rationale for this new test is to catch in particular acquisitions of start-up companies which do not (yet) achieve much turnover but which have a significant market presence, such as certain ies in the digital economy. For example, Facebook's 2014 acquisition of WhatsApp was a concentration where the target (WhatsApp) did not meet the turnover threshold of € 5 million in Germany and which therefore was not notifiable in Germany. This transaction presumably would have required a notification in Germany under the new notification threshold considering to the high transaction value (USD 19 billion) and the fact that WhatsApp has many users in Germany and is therefore likely would have been considered as being active in Germany "to a significant extent".

However, the application of the new test criteria to individual cases is likely to raise questions in practice. According to the Amendment, the transaction value is the value of the consideration which the seller will obtain from the acquirer in connection with the concentration, including the purchase price and any other assets obtained as well as the value of any liabilities taken over by the acquirer. For some transactions, however, the total value of the consideration obtained may not always be easy to determine.

The question whether the target has a "significant activity" in Germany is also subject to interpretation. The German government's explanatory memorandum for the Amendment states that relevant activity in Germany will exist where, by way of example, the target company's services (including services provided free of charge) are used by users in Germany or where the target company carries out research and development activities in Germany. Such activity will be considered significant, if, for example, the target has developed an "app" that is used by at least one million users in Germany. The explanatory memorandum further states that, where the user targeted by the "app" is more limited, the activity of the target in Germany may be considered significant even if the number of actual users is less than one million.

Considering the lack of legal certainty, it can be expected that in the future more companies will decide to submit precautionary notifications of their planned concentrations to the German Federal Cartel Office, in order to avoid the risk of exposure to fines for failure to notify a notifiable transaction.

2. *Legal clarification of relevant criteria for the assessment of markets*

The Amendment also adopts certain criteria regarding the definition of relevant markets and the assessment of the market position of undertakings, which are largely already applied in the practice of the German Federal Cartel Office. It clarifies that a relevant market can also exist where the services on the market are provided free of charge. This is relevant primarily with regard to multilateral markets of the digital economy, such as internet platforms (*e.g.* hotel booking or real estate sales platforms, whose offers may be accessed free of charge).

As regards the assessment of the market position of undertakings, in particular of a dominant market position, the Amendment stipulates that, especially with regard to multilateral markets, criteria such as direct and indirect network effects, the parallel use of competing services (so-called "multi-homing"), economies of scale related to network effects, an undertaking's access to competitively relevant data and the competitive pressure to innovate can also be taken into account when assessing dominance.

3. *Other important changes introduced by the Amendment*

- Extension of liability for competition law infringements to controlling parent company

Under the German competition rules, a legal entity is liable for competition law infringements committed by a natural person – an officer, managing director or other – who acted for the legal entity concerned. On the other hand, a fine could only be imposed on the controlling parent company of the legal entity liable for the infringement if it is established that the controlling parent company knew about the infringing acts of its subsidiary or should have known about these acts. The Amendment eliminates this knowledge requirement. It introduces the EU competition law concept whereby the controlling parent company and the entities it controls form a "single economic unit," and provides that the controlling parent company can be held liable and fined for competition law infringements committed by a controlled entity.

- Liability of successor companies for competition law infringements

The Amendment also closes a legal loophole regarding successor liability for competition law infringements. Under the previous rules, a legal entity that had committed a competition law infringement was sometimes able to avoid a fine through restructuring, as the newly formed company could under certain conditions invoke that it was not the legal successor of the infringer. The Amendment stipulates that an undertaking that has taken over or continues the economic activity of the entity which committed the competition law infringement can be held liable for such an infringement.

IRELAND

Irish Supreme Court confirms unlawfulness of electronic search during dawn raid

On 29 May 2017, the Irish Supreme Court dismissed an appeal by the Irish Competition and Consumer Protection Commission ("CCPC") against an April 2016 judgment of the Irish High Court 2016 which found that the CCPC acted unlawfully during a dawn raid conducted against Irish Cement in May 2015 (see VBB on Competition Law, Volume 2016, No. 4, p. 13).

By unanimous decision, the Irish Supreme Court confirmed that the CCPC acted *ultra vires* the Irish Competition Act when seizing a complete copy of the mailbox of the Managing Director of Irish Cement during the dawn raid. The Irish Supreme Court found that the disproportionate, indiscriminate and untargeted scope of the electronic search (which seized approx. 380,000 computer files) breached Irish Cement's constitutional rights and could not be justified on the grounds of urgency or other extenuating circumstance. In the judgment of Justice MacMenamin, the conduct of the CCPC is said to have breached Irish Cement's right to privacy protected under both the Irish Constitution and Article 8 of the European Convention on Human Rights. The Irish Supreme Court granted Irish Cement an injunction restraining the CCPC from reviewing or examining any of the documents seized by it.

The case is noteworthy as it strongly criticises the method by which the CCPC conducted its competition law investigation using electronic dawn raids. Irish regulators will need to adopt a much greater degree of proportionality, transparency and specificity when conducting electronic dawn raids. For example, this may involve (a) disclosing the search warrant prior to conducting the search, (b) more fully describing the period, products and personnel under investigation, and (c) using a keyword search to limit seizure to relevant documents. These actions enable a company under investigation to properly exercise its right to effective judicial review of the warrant and scope of documents subject to search and seizure.

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