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JURISDICTIONS COVERED IN THIS ISSUE

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| MERGER CONTROL

– MEMBER STATE LEVEL –

FRANCE

French Competition Authority fines Altice and SFR € 80 million for gun-jumping

On 8 November 2016, the French Competition Authority (FCA) fined Altice (trading as Numericable) and SFR Group € 80 million for the coordination of commercial behaviour prior to obtaining French merger control clearance. The FCA decision is ground-breaking as it imposes the highest fine ever in Europe for 'gun-jumping' practices.

Similar to the merger control rules in many other jurisdictions, French merger control rules prohibit merging parties from engaging in commercial coordination prior to obtaining merger control clearance of notifiable transactions. The FCA found that Altice and SFR breached this stand-still obligation in two cases: (i) the acquisition by Altice of SFR, which was conditionally cleared by the FCA on 30 October 2014 following an in-depth review, and (ii) the acquisition by Altice of OTL (trading as Virgin Mobile), which was unconditionally approved by the FCA on 27 November 2014.

As regards the SFR acquisition, the FCA found that, prior to obtaining merger clearance, Altice's senior management reviewed and approved SFR's bid for developing a fibre optics network and the renegotiation of a major agreement on sharing mobile networks between SFR and Bouygues Telecom. Moreover, the FCA concluded that, prior to receiving clearance, Altice directly intervened in SFR's commercial policy, tariffs and pricing policy on broadband high-speed internet access and relevant promotions. In addition, the FCA concluded that Altice and SFR established a coordinated strategy to launch a new 'white-label' range of high-speed broadband before obtaining merger clearance.

As regards the OTL acquisition, the FCA concluded that Altice imposed its own strategic decisions on OTL prior to obtaining merger clearance. The FCA also determined that the general manager of OTL began to exercise his functions within the SFR-Numericable group regarding new projects during the suspension period.

The level of the € 80 million fine for gun-jumping is unprecedented in European merger control. Indeed, the highest fine ever imposed by the European Commission for gun-jumping infringements was € 20 million (on Marine Harvest in 2014 and Electrabel in 2009). The Altice/SFR case serves as a stark reminder of the need for merging parties to carefully manage integration planning of transactions that require merger control approval.

PORTUGAL

Portuguese Court upholds decision to block transport merger

On 31 October 2016, the Portuguese Competition Court confirmed the Portuguese Competition Authority's decision to prohibit the merger between the Arriva and Barraqueiro groups in 2005. Both parties are active in rail and road transport on routes between Lisbon and Setubal. The Portuguese Competition Court confirmed that the Competition Authority had correctly identified competition concerns on the Lisbon-Setubal route, given that the acquisition would have essentially resulted in a merger to monopoly, with the merged entity having a 96% market share on this route.

– OTHER DEVELOPMENTS –

LUXEMBOURG: On 31 October 2016, the Luxembourg Competition Council published an opinion that favours the introduction of a voluntary merger control regime. Luxembourg is the only EU Member State that does not yet have a merger control regime.

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ABUSE OF DOMINANT POSITION

– MEMBER STATE LEVEL –

BELGIUM

Belgian Competition Authority rejects request for suspension of merger in the brewing sector

On 21 November 2016, the Competition College of the Belgian Competition Authority ("BCA") rejected a request of Brouwerijen Alken-Maes ("Alken-Maes") to suspend the acquisition of Brouwerij Bosteels ("Bosteels") by Anheuser-Busch InBev NV ("AB InBev").

AB InBev's takeover of Bosteels was not subject to prior notification to, and approval by, the BCA since Bosteel is a small independent brewery with a turnover in Belgium well below the pertinent notification threshold of € 40 million.

Alken-Maes still requested the suspension of the acquisition and argued before the BCA that even if this acquisition was not caught by merger control rules, it had to be reviewed under Article IV.2 of the Code of Economic Law and Article 102 of the Treaty on the Functioning of the European Union, which both prohibit the abuse of a dominant position. Alken-Maes contended that the acquisition constituted an abuse of AB InBev's dominant position as it would enable AB InBev to acquire the brand Triple Karmeliet, thus significantly strengthening its dominant position. Therefore, Alken-Maes requested the BCA to adopt interim measures suspending the implementation of the concentration.

The BCA first noted that Belgian competition law does not explicitly provide that antitrust rules do not apply to concentrations.

However, the BCA held that an acquisition that is not subject to merger control can only be assessed *prima facie* under the rules prohibiting the abuse of a dominant position if there are possible restrictions on competition that can be distinguished from the mere effect of the concentration and might by themselves be qualified *prima facie* as an abuse of a dominant position.

The BCA found that Alken-Maes had not sufficiently proven that the concentration restricted competition in a way that was distinguishable from the mere effect of the concentration. Therefore, there was no behaviour which could, as such, be considered *prima facie* as an abuse of AB InBev's dominant position requiring the adoption of interim measures. The BCA concluded that, if such restrictions were to take place, the BCA would then tackle them as appropriate.

ITALY

Italian Competition Authority fines Aspen € 5 million for excessive pricing

On 29 September 2016, the Italian Competition Authority ("ICA") issued a decision fining Aspen Pharmacare ("Aspen") € 5 million for abusing its dominant position contrary to Article 102 TFEU and Article 3 of Law No. 287/90 (the Italian Competition Act) by charging excessive prices for the supply of certain cancer-treating drugs.

The market concerned related to the commercialisation in Italy of drugs containing particular active ingredients considered essential to treat some types of cancer. These so-called "Cosmos" drugs are categorised in the Italian healthcare system in such a way that their prices are regulated by agreement between the rights holder and the Italian Medicines Agency ("AIFA") while their costs are borne by the Italian health service. Aspen is the sole pharmaceutical firm holding the rights to commercialise these drugs in Italy since acquiring them from GlaxoSmithKline in 2009.

According to the ICA, Aspen took advantage of its position as sole distributor to leverage a favourable deal with AIFA at the expense of purchasers. In this respect, the ICA found that Aspen adopted an aggressive negotiating strategy against the AIFA during 2013-2014. It first requested AIFA to re-categorise Cosmos drugs so that their prices would no longer be regulated by agreement and would instead be set freely by manufacturers, with the costs being borne by patients, as opposed to the national health system. When AIFA refused, Aspen demanded a substantial upward revision of prices as an alternative. To reinforce its bargaining power, it caused a shortage of Cosmos drugs in the Italian pharmaceutical market by preventing their parallel import through the use of a stock/quota allocation system. It also

threatened to terminate supply of the drugs to Italy if negotiations were to fail.

The ICA found that AIFA was obliged to accept the unfair price conditions imposed by Aspen due to the irreplaceable and life-saving nature of the Cosmos drugs, and this led to an increase in prices from around 300% to 1500% higher than the "old" prices applied by GlaxoSmithKline.

The ICA applied the two-part test in *United Brands*, concluding that the difference between the costs incurred and the prices charged was excessive.

First, the ICA analysed the difference between the new prices of the Cosmos drugs and their production costs, and concluded that it was significant. In its analysis, the ICA also took note of the absence of investment costs sustained by Aspen in order to improve the quality and innovation of the products or to promote their commercialisation.

Second, the ICA considered whether the significant difference could be justified. Taking into account: (i) the life-saving nature of the Cosmos drugs; (ii) the characteristics of the Aspen holding; (iii) the dearth of pro-competitive effects; and (iv) the damage perpetrated against the purchasers, the ICA concluded that the difference could not be justified. Aspen's conduct, therefore, met both of the requirements under the *United Brands* test.

– OTHER DEVELOPMENTS –

EUROPEAN UNION: On 23 November 2016, the European Commission published on its website its decision of 20 September 2016 against Altstoff Recycling Austria Aktiengesellschaft ("ARA") for abuse of a dominant position on the Austrian waste management market. A summary of the decision was provided in VBB on Competition Law, Volume 2016, No. 9.

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CARTELS AND HORIZONTAL AGREEMENTS

– EUROPEAN UNION LEVEL -

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

Summary of Significant Case Development

Advocate General Kokott recommends dismissing appeal in Southern European Banana cartel case

On 17 November 2016, Advocate General ("AG") Kokott delivered her opinion on an appeal lodged before the European Court of Justice ("ECJ") by Pacific Fruit (and its parent companies) against a judgment of the General Court ("GC") upholding the European Commission's decision finding an illegal price-fixing cartel in relation to bananas sold in Greece, Italy and Portugal (see VBB on Competition Law, Volume 2015, No. 6).

In her opinion, AG Kokott has recommended that the ECJ dismiss all grounds of appeal put forward by the appellant, including whether the Commission unlawfully relied on evidence transmitted to it by the Italian tax authority in the establishment of the infringement and whether the Commission had to carry out an extensive examination of the economic and legal context of an infringement that restricts competition by object (see Section 1.2 below) (Case C-469/15 P, *FSL Holdings and Others*).

Analysis of Important Substantive and Procedural Developments

Southern European Banana cartel case: Commission may use evidence transmitted by national tax authority in antitrust proceedings

In her opinion, AG Kokott restated the principle that national law governs the lawfulness of the gathering of evidence by national authorities and the transmission of such evidence to the Commission. The EU judicature accordingly has no jurisdiction to rule on the lawfulness of a measure adopted by a national authority. However, according to the AG, this does not mean that, in antitrust proceedings, the Commission or the EU Courts may knowingly rely on evidence that was clearly obtained in breach of essential procedural requirements. The right to good administration and the right to a fair trial, as enshrined in the Charter of Fundamental Rights, require that the EU institutions carry out at least a summary examination of how the evidence was obtained in the light of all the circumstances of the particular case of which they are aware. AG Kokott opined that, in administrative antitrust proceedings, the Commission must ensure that the evidence in question was neither unlawfully gathered by the national authorities nor unlawfully transmitted to it. The GC must also check the evidence against those criteria in the case of a challenge on these grounds.

In the present case, the Commission had initiated antitrust proceedings against Pacific Fruit on the basis of notes that had been obtained by the Italian tax authority in the course of a criminal investigation and which it had, subsequently, transmitted to the Commission. In the judgment under appeal, the GC ruled that the Commission could validly use this evidence in its investigation under the EU competition rules.

In her opinion, AG Kokott agreed with the GC and considered that, under EU competition law, reliance on particular items of evidence could only be precluded on the ground that the use of the evidence was prohibited. The use of evidence could be prohibited either if it was obtained in breach of an essential procedural requirement or if it was to be used for an unlawful purpose. AG Kokott concluded that this was not the case here for several reasons. First, the evidence had been transmitted lawfully to the Commission by the relevant national authority since transmission had not been prohibited by an Italian court and the evidence had been forwarded with the authorisation of the competent Italian prosecutor's office. Second, the evidence transmitted by the Italian tax authority was not used for an unlawful purpose, since the scope of Article 12(2) of Regulation 1/2003 is confined to the exchange of information between the competition authorities at EU and national levels. Nor does that article enshrine a general principle of law to the effect

that evidence which was not originally gathered for the purpose of a competition law investigation could never subsequently be used for that purpose. Lastly, the use of evidence for a purpose other than that for which it was gathered could only be precluded if EU or national law prescribed an intended purpose for the gathering of such evidence, which was not the case here.

Finally, with respect to the alleged violation of the applicants' rights of defence, AG Kokott found that the applicants had been granted access to the evidence at issue and had been given the opportunity to comment on it.

In light of the above, AG Kokott concluded that the Commission could lawfully rely in the context of its antitrust proceeding on the evidence transmitted by the Italian tax authority.

Southern European Banana cartel case: No extensive examination of economic and legal context required if anti-competitive object is readily apparent

In her opinion, AG Kokott restated that agreements with an anti-competitive object are those which by their very nature have the potential of restricting competition. Thus, where the anticompetitive object of the agreement is established, it is not necessary to examine its actual effects on competition. In order to determine whether an agreement between undertakings reveals a sufficient degree of harm 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, Pacific Fruit argued that the GC had failed to sufficiently examine the economic and legal context of the contested conduct. AG Kokott disagreed. Referring to the ECJ's judgment in *Toshiba Corporation v. Commission* (Case C-373/14 P), she considered that the level of detail with which the GC must examine the economic and legal context depends on the nature of the contested conduct. As the anti-competitive conduct was readily apparent in the case at hand, which involved the exchange of sensitive information in relation to price setting, AG Kokott considered that the GC's analysis could be limited to what was strictly necessary to establish the existence of a restriction of competition by object. In this regard, AG Kokott warned that "[t]*he fundamental difference between restrictions of competition by effect and by object [...] would become blurred if the competition authorities and the courts [...] were required to carry out an extensive examination of the economic and legal context even in the case of collusive practices between undertakings which are self-evidently anticompetitive*".

Furthermore, AG Kokott advised the ECJ to disregard the contextual factors to which Pacific Fruit referred in an attempt to demonstrate that the exchange of information was not detrimental to competition. In particular, she noted that the fact that the EU's common agricultural policy provided for an organisation of the market in bananas did not amount to a "*carte blanche*" for practices which impaired competition. Moreover, she considered the frequency of the exchange of sensitive information between competitors to be irrelevant, as well as their (allegedly small) market share and the (allegedly small) size of the market. Accordingly, in the AG's view, the GC had not infringed Pacific Fruit's rights of defence by not carrying out a detailed analysis of the economic and legal context in which the contested conduct took place.

– MEMBER STATE LEVEL –

SLOVAKIA

Slovak Supreme Court upholds fines in bid-rigging cartel in road construction sector

On 2 November 2016, the Slovak Supreme Court upheld a 2006 decision by the Slovak Antimonopoly Office ("SAO") to impose fines totalling € 45 million on six construction companies (Mota-Engil, Doprastav, Skanska, Inzenierske stavby Kosice, Strabag and Betamont) for their involvement in a bid-rigging cartel affecting road construction in Slovakia. The Supreme Court overturned the 2008 judgment of the Regional Court in Bratislava, which had annulled the SAO's decision on the grounds that there was no clear evidence of anti-competitive behaviour and that the amount of the fine was not properly set (see VBB on Competition Law, Volume 2008, No. 12). The Supreme Court considered that the companies had in fact coordinated their bids in a tender for the construction of an eight-kilometre section of motorway between Mengusovce and Jánovce, in breach of Slovak and EU competition laws.

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SPAIN

Spanish Competition Authority imposes fines in security logistics sector

On 16 November 2016, the Spanish Competition Authority imposed fines totalling € 46.44 million on two high-end security companies, Loomis and Prosegur, and fines of € 52,600 each on two company directors, for their participation in anticompetitive practices in the security logistics sector between 2008 and 2015. In particular, the companies were found to have exchanged sensitive commercial information, allocated markets and fixed prices.

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| VERTICAL AGREEMENTS

– MEMBER STATE LEVEL –

AUSTRIA

Austrian Parliament further impedes Booking.com commitments

On 21 April 2015, the French Competition Authority, in coordination with the European Commission, the Italian and the Swedish competition authorities, obtained commitments from Booking.com to alter its commercial practices aimed at, inter alia, limiting the scope of so-called 'wide' parity clauses. Such clauses impose obligations on hotels to offer through Booking.com the lowest available room prices, maximum room availability and most favourable booking and cancellation conditions. 'Narrow' parity clauses prohibit hotels from displaying on their own websites prices lower than the prices displayed on Booking.com's portal, without restricting the right of hotels to offer rooms at a lower price on other hotel booking portals. The competition authorities had concerns that wide parity clauses would result in a reduction in competition amongst online hotel booking portals.

The commitments prevented Booking.com from using wide parity clauses. On the basis of the commitments, hotels could therefore offer other booking portals lower prices than those displayed on Booking.com (see VBB on Competition Law, Volume 2015, No. 5). Such commitments were subsequently deemed sufficient by other national competition authorities to alleviate competition concerns.

The apparent resolution provided by these commitments is now being undermined by individual action in various EU Member States. In August 2015, France passed the 'Macron Law' which prohibited all price parity clauses. Also in 2015, the German Federal Cartel Office (FCO) prohibited Booking.com from applying narrow as well as wide parity clauses (see VBB on Competition Law, Volume 2016, No.1), thereby adopting a more restrictive approach than other national competition authorities had done in accepting the commitments. The Swedish commitments are now being challenged in court by Vista.se in Stockholm.

On 20 November 2016, the Austrian Parliament adopted changes to competition legislation making price parity clauses between hotels and online travel agencies illegal. The change restricts narrow clauses and will permit hotels to offer higher prices to online travel agencies, compared to the rates offered on their own websites. The European Technology and Travel Services Association is reported to be filing a complaint against the Austrian government with the European Commission. The Austrian Parliament's move underscores a divergence in the treatment of these clauses across the EU. In seeking to deal with this issue, the European Competition Network is expected to publish a report on the effectiveness of the settlements in the coming months.

DENMARK

Opel Danmark fined for price fixing

On 8 November 2016, Opel Danmark was fined DKK 8.25 million by the Danish Competition Authority for setting the mini-mum resale price of used rental and showroom cars sold by dealers between mid-2010 and February 2014. The Danish Competition Authority welcomed the fact that Opel had vol-untarily reported its conduct which came to light through the operation of its compliance programme. Opel's use of the compliance programme resulted in a fine reduction.

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| INTELLECTUAL PROPERTY/ LICENSING

– EUROPEAN UNION LEVEL –

Council of the European Union adopts general approach on proposed regulation to address geo-blocking

On 28 November 2016, the Council of the European Union ("Council") agreed on its general approach for the adoption of a draft Regulation proposed by the Commission in May 2016 to ban unjustified geo-blocking between Member States. Geo-blocking refers to commercial practices whereby online providers prevent users from accessing and purchasing digital content services offered on their website based on the location of the user in a Member State different from that of the provider (see VBB on Competition Law, Volume 2016, No. 3).

The Council largely endorsed the Commission's proposal which aims to remove discrimination based on customers' nationality, place of residence or place of establishment in relation to access, prices, sales or payment conditions when buying products and services in other EU countries. However, the Council provided amendments as regards the scope of the Commission's proposal, which would only apply to "unjustified" geo-blocking, and would not apply to a situation purely internal to a Member State. The Council also specified that the rules applicable in the field of copyright and neighbouring rights should not be affected. The Council's proposed text will be used as its common position to start negotiations with the European Parliament and the Commission under the EU's ordinary legislative procedure.

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| STATE AID

– EUROPEAN UNION LEVEL –

AG Wahl confirms irrelevance of the *Altmark* conditions for compatibility assessment under Article 106(2) TFEU

On 10 November 2016, Advocate General Wahl delivered his opinion in case C-660/15, Viasat Broadcasting UK Ltd ("Viasat") v European Commission (the "Commission"). The case concerns aid granted to the Danish public broadcaster TV2/Danmark ("TV2") for the execution of public service obligations. In particular, the case raises the issue of the distinction between the assessment of the existence of state aid and the compatibility of such aid in relation to services of general economic interest.

In its second decision relating to the measures granted to TV2, the Commission found that the measures constituted state aid within the meaning of Article 107(1) TFEU, since the measures did not comply with each of the four conditions laid down in the *Altmark* judgment, *i.e.*, the landmark judgment on services of economic interest. The Commission however found that the aid was compatible with the internal market within the meaning of Article 106(2) TFEU.

Both TV2 and Viasat, a commercial television broadcaster, appealed the Commission's decision before the General Court ("GC"). The GC partly upheld the action brought by TV2 and dismissed the action brought by Viasat. Both judgments were appealed before the European Court of Justice ("ECJ"). The opinion of Advocate General Wahl of 10 November 2016 concerns the appeal brought by Viasat against the GC's judgment in the Viasat case.

According to Viasat, the Commission ought to apply the *Altmark* conditions when considering whether aid can be declared compatible under Article 106(2) TFEU. As the GC had rejected this argument, Viasat claimed in its appeal that the lower court had erred in law

Advocate General Wahl, in his opinion, proposes that the ECJ dismisses the appeal. In accordance with the GC's view, the Advocate General confirms that the *Altmark* conditions are relevant for determining whether an advantage has been granted and therefore, whether a measure constitutes state aid pursuant to Article 107(1) TFEU. By contrast, contrary to Viasat's claims, the *Altmark* conditions have no bearing on the assessment of the compatibility with the internal market under Article 106(2) TFEU. In this context, Advocate General points out that if a measure fulfils the *Altmark* conditions, it would not constitute state aid within the meaning of Article 107(1) TFEU and there would, consequently, be no reason to consider applying Article 106(2) TFEU.

The opinion of Advocate General Wahl is interesting because the ECJ is called upon to consider for the first time the relationship between Article 106(2) and Article 107(1) TFEU as regards the application of the *Altmark* conditions.

– OTHER DEVELOPMENTS –

EUROPEAN UNION: On 25 November 2016, the European Commission launched a public consultation on the review of the Code of Best Practice on the conduct of state aid control proceedings ("Code"). The Code, which entered into force on 1 September 2009, provides guidance on the day-to-day conducts of state aid procedures, e.g. as regards pre-notification contacts and the exchange of information. The review of the Code intends to reflect amendments brought to the state aid framework, in particular the Procedural Regulation, and experience gained with the implementation of the Code. Stakeholders are invited to comment by 25 February 2017 at the latest.

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