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MERGER CONTROL

– EUROPEAN UNION LEVEL –

European Commission conditionally clears Discovery's acquisition of Scripps

On 6 February 2018, the European Commission conditionally approved the proposed acquisition of Scripps by Discovery. Both Discovery and Scripps are active primarily as providers of pay-TV channels to TV distributors in Europe.

The Commission was concerned that the deal risked increasing Discovery's bargaining power vis-à-vis TV distributors in Poland as it would acquire certain important channels for distributors' pay-TV channel packages. In particular, Scripps owns a Polish media company called TVN, which operates the "crucial" news channel TVN24. The Commission considered that the acquisition of TVN24 would give Discovery the ability and incentive to impose the licensing of its entire TV channel portfolio on TV distributors, which would have allowed Discovery to increase its licensing fees to the detriment of Polish consumers.

To address the Commission's concern, Discovery committed to making TVN24 and its sister channel TVN24 Bis available to current and future TV distributors in Poland for a period of 7 years at a reasonable fee determined by reference to comparable agreements. In light of this commitment, the Commission cleared the transaction in Phase I.

Interestingly, the Commission rejected a request from Poland to refer the merger to the Polish Competition Authority for assessment under Polish competition law. The Commission concluded that, given its extensive experience in assessing cases in the media sector, and the need to ensure consistency in the application of merger control rules in this sector across Europe, the Commission was better placed to deal with this case.

– MEMBER STATE LEVEL –

AUSTRIA

Austrian Cartel Court fines two companies for gun jumping

On 9 February 2018, the Austrian Competition Authority ("BWB") announced that the Austrian Cartel Court had, at the request of the BWB, fined two companies for failure to notify two separate transactions. In both cases, the transactions occurred several years ago and were later notified, reviewed and approved in Phase I by the BWB in 2017. In the first case, the Austrian Cartel Court imposed a fine of € 185,000 on Stahl Lux 2, a chemicals firm, for failure to notify the acquisition of a leather chemical business in 2014. In the second case, the Austrian Cartel Court imposed a fine of € 40,000 on Comparex, an IT services provider, for failure to notify the acquisition of Datalog Software in 2012.

THE NETHERLANDS

Dutch Court dismisses Vodafone challenge to KPN's acquisition of Reggefiber

On 14 February 2018, a Dutch Commercial Court of Appeal dismissed an appeal by Vodafone against the 2014 clearance by the Dutch Competition Authority ("NMA") of KPN's acquisition of Reggefiber.

On 31 October 2014, the NMA conditionally cleared the acquisition by KPN of sole control of a fibre communications network from Reggefiber, even though the NMA found that KPN would have had the incentive to increase unbundled wholesale access prices to the network post-transaction. However, the NMA considered that sector-specific rules imposed by the Dutch telecommunications regulator would limit the anti-competitive effects of the transaction as it imposed a maximum price cap for such unbundled wholesale access.

Vodafone, a rival telecommunications operator, challenged the NMA's merger approval decision. On 12 May 2016, the lower Rotterdam District Court dismissed Vodafone's appeal and upheld the NMA's decision. Vodafone then appealed the case to the Commercial Court of Appeal.

In its recent judgment on appeal, the Commercial Court of Appeal held that the NMA had been entitled to assume that the maximum price cap for unbundled wholesale access to the network was sufficient to remedy concerns of excessive prices. The Court also noted that the maximum price cap had been calculated by reference to costs reasonably incurred by KPN for offering unbundled wholesale access to its network. Accordingly, the Court rejected Vodafone's appeal.

– OTHER DEVELOPMENTS –

GERMANY: On 23 February 2018, the German Federal Cartel Office ("FCO") announced that two rivals in the horticultural industry, Raiffeisen Waren-Zentrale Rhein-Main and Landgard Blumen & Pflanzen, withdrew their notification of a joint venture after the FCO raised concerns that the joint venture would have enjoyed a dominant position on the relevant market in North Rhine-Westphalia.

HUNGARY: On 25 January 2018, the Hungarian Competition Authority ("GVH") fined BLT Group for implementing its acquisition of three camping site businesses from Balatontourist in 2017, prior to obtaining the GVH's merger clearance. The fine amounts to approximately € 17,000, which was the lowest possible amount of the fine for this type of infringement.

ABUSE OF DOMINANT POSITION

– MEMBER STATE LEVEL –

GERMANY

German Federal Court of Justice rules that Edeka's request for "wedding rebates" was abusive

On 23 January 2018, the German Federal Court of Justice ruled that there might be an abuse under competition law if a company asks a dependent company for wedding rebates that are not objectively justified.

The underlying facts of the case are as follows. After the acquisition of supermarket chain Plus by Edeka in 2008, Edeka prompted suppliers of sparkling wine to grant it the same preferential conditions and benefits that they had granted Plus prior to the merger, as well as other bonuses. In 2014, the Federal Cartel Office ("FCO") decided that demanding such "wedding rebates" without justification constituted an abuse of economic dependence (see VBB on Competition Law, Volume 2014, No. 7).

In this respect, it will be recalled that the German Act against Restraints of Competition prohibits not only the abuse of a dominant position but also the abuse of relative market power and economic dependence. It is abusive to invite or induce a dependent company to grant advantages without any objective justification.

In 2015, the Higher Regional Court of Düsseldorf annulled the FCO's decision (see VBB on Competition Law, Volume 2015, No. 11) because it saw no indication that Edeka's suppliers were economically dependent, stating that the suppliers had countervailing market power due to their size and the fact that they provided "must-stock" products. This judgment was then appealed by the FCO to the German Federal Court of Justice.

In its judgment dated 23 January 2018, the German Federal Court of Justice set aside the judgment of the Higher Regional Court of Düsseldorf, and thereby upheld the FCO's assessment. Unlike the Higher Regional Court of Düsseldorf, the Federal Court of Justice held that a countervailing market power could not be inferred from the fact that the suppliers were big companies. Reviewing the factual situation, the German Federal Court of Justice found instead that these suppliers were dependent on Edeka. In this regard, it noted that the suppliers of sparkling wine generate between 10% and 40% of their total turnover with Edeka, and were unlikely to be able to redirect such sales to other supermarkets at short notice. In contrast, the turnover share of sales of sparkling wine of each individual producer for Edeka was negligible and brand loyalty of customers in relation to sparkling wine was low (with customers more likely to buy a different product than go to a different supermarket). The Federal Court of Justice further held that successful contract negotiations by the suppliers of sparkling wine did not indicate that they had countervailing market power and were not dependent on Edeka.

The Federal Court of Justice also found that Edeka had demanded advantages without objective justification. Edeka requested more favourable contract and payment terms based on a comparison of its own purchase conditions with those of Plus. According to the Federal Court of Justice, there is no objective justification for requiring the selective transfer of past individual conditions to a current contract without taking into account the other conditions that had previously been agreed upon in this context.

Moreover, the Federal Court of Justice found that Edeka's request for a "partnership compensation" (by which the suppliers were to share part of the costs for the refurbishment of stores) amounting to 4% of the suppliers' turnover with Plus was unjustified. In this context it was noted that Edeka had neither offered to earmark the partnership compensation for investments in relation to the supplier or its goods nor had it offered a guarantee to list or purchase their products for a certain duration.

The present ruling was handed down very shortly after the FCO's intervention in a similar case of "wedding rebates". Following the merger clearance between furniture chain XXXLutz and Möbel Buhl in November 2017, XXXLutz had asked its suppliers to retroactively apply contract conditions agreed between them also to purchases made by Möbel Buhl since 1 January 2017. According to a press release of 11 January 2018, XXXLutz did not further pursue its claims after the FCO informed the furniture chain of its assessment that there was no objective justification for such demands.

Both decisions show that the FCO and German courts do not shy away from a case-by-case assessment of contract conditions in order to assess whether there is an abuse of economic dependence. When driving hard negotiations, special care has to be taken with respect to the reasons for the demands and the consideration offered. Furthermore, the stronger the market power, the higher the risk that such demands will be considered an abuse.

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 developments addressed.

Summary of Significant Case Developments

Court of Justice dismisses appeals in freight forwarding cartel case

On 1 February 2018, the Court of Justice of the European Union ("ECJ") delivered four judgments dismissing the appeals brought by participants involved in the air freight forwarding cartel.

By way of background, in 2012, the European Commission adopted a decision in which it found that a number of undertakings had fixed pricing mechanisms and surcharges for a variety of freight forwarding services, which the Commission considered to amount to four distinct infringements of the EU competition law rules: (i) the "New Export System" cartel relating to customs pre-clearance; (ii) the "Advanced Manifest System" cartel relating to the advance transmission of data on shipped goods; (iii) the "Currency Adjustment Factor" cartel relating to currency risks associated with the Chinese renminbi; and (iv) the "Peak Season Surcharge" cartel relating to temporary rate adjustments at certain times of high demand. The Commission imposed fines on corporate entities in the following groups in relation to these infringements: Kühne + Nagel, Schenker, Deutsche Bahn, Panalpina World Transport, Ceva and EGL. On 29 February 2016, the General Court ("GC") upheld the fines imposed by the Commission (see VBB on Competition Law, Volume 2016, No. 3). All of the companies appealed against the GC's judgments.

In its judgments on appeal, the ECJ held that the General Court correctly concluded that the Commission was entitled to base its calculations on the value of sales associated with freight forwarding services as a package of services on the trade routes concerned, rather than only on the turnover generated from the surcharges concerned by the cartel agreements. The ECJ also found that the cartels had an appreciable effect on trade between Member States (see section below) and that the cartel activities did not fall within the exemption for the transport sector from the application of Regulation 17/62. Finally, the ECJ rejected arguments in relation to the attribution of liability of the fines imposed and pleas concerning the alleged disproportionate and unequal nature of the fines (Cases C-261/16, *Kühne + Nagel International*, C-263/16, *Schenker*, C-264/16, *Deutsche Bahn* and C-271/16 P, *Panalpina World Transport*).

European Commission imposes € 395 million fine on maritime car carriers for cartel behaviour

On 21 February 2018, the European Commission announced that it had adopted a decision under the cartel settlement procedure fining maritime car carriers a total of € 395 million. The companies involved in the decision, namely CSAV, "K" Line, MOL, NYK and WWL/EUKO, were found to have been involved in a cartel in the market of intercontinental transport of vehicles between Europe and other continents.

According to the Commission's press release, from October 2006 to September 2012, the carriers agreed to maintain the *status quo* in the market and to respect each other's traditional business on certain routes and with certain customers. They also allegedly quoted artificially high prices, or did not quote at all, in tenders issued by vehicle manufacturers.

The investigation started following an immunity application submitted by MOL, which was exempted from fines. In addition to the 10% fine reduction received under the Settlement Notice, the other carriers also received fine reductions under the Leniency Notice ranging from 20% for WWL-EUKOR to 50% for "K" Line. The Commission imposed fines ranging from over € 7 million on CSAV to over € 141 million on NYK.

European Commission imposes total fines of € 76 million on spark plugs suppliers

On 21 February 2018, the European Commission announced that it had imposed fines totalling € 76 million on a number of manufacturers for participating in a cartel concerning the supplies of spark plugs to car manufacturers in the EEA from 2000 to 2011. The Commission adopted its decision under the cartel settlement procedure. The companies involved in the cartel were Bosch, Denso and NGK.

Spark plugs are automotive electric devices in petrol car engines which deliver high voltage electric sparks to the combustion chamber. According to the Commission's press release, the companies exchanged commercially sensitive information, agreed on prices to be quoted to certain customers, agreed on the share of supplies to specific customers and agreed to respect historical supply rights. This coordination took place through bilateral agreements between Bosch and NGK and between Denso and NGK.

Denso received full immunity from fines under the Leniency Notice for being the first company to inform the Commission of the existence of the cartel. NGK and Bosch had their fines reduced by 42% and 28% respectively for cooperating with the Commission, in addition to the 10% fine reduction granted under the Settlement Notice. The Commission imposed fines of over € 45.8 million on Bosch and € 30.2 million on NGK.

European Commission imposes fines on manufacturers of braking systems

On 21 February 2018, the European Commission announced it had adopted a settlement decision in which it imposed fines totalling € 75 million on a number of manufacturers of braking systems for their involvement in two separate cartels. The companies involved were Bosch, Continental and TRW.

According to the Commission, in both cartels, the companies coordinated their market behaviour by exchanging commercially sensitive information, including on prices. The coordination took place at bilateral meetings, through phone conversations or email exchanges. More specifically, the first cartel, which lasted from February 2007 to March 2011, also concerned discussions of general sales conditions of hydraulic braking systems (HBS) for two car manufacturers, Daimler and BMW. The manufacturers involved were TRW, Bosch and Continental (the "HBS cartel"). The second cartel lasted from September 2010 to July 2011 and related to one specific tender for electronic braking systems (EBS) for Volkswagen (the "EBS cartel"). The companies involved in this infringement were Continental and Bosch.

TRW received full immunity under the Leniency Notice for revealing to the Commission the existence of the HBS cartel. Bosch and Continental had their fines reduced by 35% and 20% respectively for cooperating with the Commission, in addition to the 10% fine reduction received under the Settlement Notice. Ultimately, the Commission imposed fines of over € 44 million on Continental and over € 12 million on Bosch.

Continental was fully exempted from fines under the Leniency Notice for informing the Commission of the existence of the EBS cartel. Bosch was fined over € 19 million for its involvement, the amount of which takes into account a 30% fine reduction for its cooperation under the Leniency Notice and a 10% fine reduction under the Settlement Notice.

Analysis of Important Substantive and Procedural Developments

Freight forwarding cartel case – Effects on trade between Member States

Under EU case-law, anti-competitive agreements and concerted practices fall within the scope of Article 101 TFEU if there a sufficient degree of probability that they may have a direct or indirect effect, actually or potentially, on the pattern of trade between EU Member States.

On appeal before the Court of Justice of the European Union ("ECJ"), Schenker (in case C-263/16 P) and Kühne (in case C-261/16 P) claimed that the alleged infringement in which they were involved did not fall within the scope of Article 101 TFEU. In particular, they argued that the alleged anti-competitive practices: (i) did not affect trade between Member States; and (ii) in any case, did not "appreciably" affect such trade.

With respect to the first point, Schenker and Kühne argued that the New Export System ("NES") cartel (which related to an agreement on a pre-clearance system for exports from the United Kingdom to countries outside the European Economic Area) and the Advanced Manifest System ("AMS") cartel (which related to an agreement on a regulatory requirement for goods to be shipped in the US) were only concerned with trade flows between the EEA and third countries and, therefore, did not fall within the scope of Article 101 TFEU. With respect to the second point, Schenker and Kühne argued that, in any case, the two allegedly anti-competitive practices did not appreciably affect trade between Member States.

As regards the first ground of appeal, the ECJ ruled that the criterion of effect on trade between Member States has to be considered in relation to the relevant product market. It was not disputed that the relevant market in this case related to international air freight forwarding services. The companies involved in the cartels offered freight forwarding services as "a combination of several services as a single package" which covered transport, logistics and administrative operations. These services were sold and purchased not only in the UK but also across the EEA. Therefore, the ECJ ruled that it appeared sufficiently probable that the cartels were capable of having repercussions on the conduct of the freight forwarders in other Member States, where they were also competing with one another, and which were capable of altering the structure of competition within the EU.

The ECJ also dismissed the second ground of appeal stating that the General Court had been entitled to hold that, even assuming that the NES and AMS cartels did not affect the flow of goods between Member States in a significant way, that would not call into question the Commission's conclusion that, because of their effects on the market for freight forwarding services, those cartels were likely to affect trade between Member States in a substantial way.

– MEMBER STATE LEVEL –

SPAIN

Spanish High Court annuls € 20 million fine imposed on REPSOL

On 22 December 2017, the Spanish High Court (*Audiencia Nacional*) delivered a judgment annulling a 2015 decision adopted by the Spanish Competition Authority ("CNMC") against REPSOL S.A. In its 2015 decision, the CNMC imposed a fine of € 20 million on REPSOL for anticompetitive practices on the market for the distribution of automotive fuel, which included price coordination, the exchange of strategic price information and the conclusion of non-aggression price pacts with some of its competitors in relation to certain of their associated petrol stations.

In its decision, the CNMC found that the anticompetitive conduct was carried out by a distribution subsidiary of the REPSOL group. However, the CNMC adopted the decision solely against REPSOL S.A., and not against its fully-owned subsidiary, which was actually involved in the infringement. The CNMC based its decision on the presumption that REPSOL S.A. exercised decisive influence over the subsidiary during the relevant time, based solely on the fact that it owned 100% of the subsidiary's shares.

On appeal, REPSOL S.A. did not contest the anticompetitive nature of the conduct of its subsidiary, but claimed that the fundamental principle of personal responsibility had been infringed because the CNMC had not addressed its decision to REPSOL S.A.'s subsidiary and because REPSOL S.A. was held solely liable for the infringement committed by its subsidiary. In addition, REPSOL S.A. argued that it was not active on the affected market and merely provided centralised services to the subsidiaries of the REPSOL group.

The High Court recalled its judgment of July 2017 in a similar case, in which REPSOL S.A. had been fined for the conduct of its 99.78%-owned subsidiary, even though only the subsidiary had participated in the infringement and was active on the affected market (see VBB on Competition Law, Volume 2017, No. 8). The High Court agreed with REPSOL S.A. and clarified that, under Spanish law, liability for a competition law infringement can be attributed to the following entities: (i) to the company that actually committed the infringement; or (ii) to the company that committed the infringement and its parent company where the latter exercised actual and decisive influence over the former during the relevant period.

Since the CNMC had held REPSOL S.A. solely responsible for the payment of the fine arising from an infringement attributed to its subsidiary over which it exercised actual and decisive influence, rather than considering REPSOL S.A and its subsidiary jointly liable for such conduct, the Court annulled the CNMC's decision.

The CNMC has announced its intention to appeal against the ruling.

Spanish Competition Authority imposes fines of € 91 million on four banks in interest-rate derivatives cartel case

On 13 February 2018, the Spanish Competition Authority ("CNMC") imposed total fines of € 91 million on four Spanish banks for fixing the prices of interest-rate derivatives associated with syndicated loans between 2006 and 2016. These derivatives are used to protect the interest rate attached to syndicated loans, that is, loans which are shared amongst several banks with the same conditions due to the large amounts they involve.

In particular, the CNMC found that Santander, BBVA, CaixaBank and Sabadell offered to charge their clients "market prices" in relation to interest-rate derivatives when, in fact, they had already agreed beforehand the prices they would charge for those products. The prices were found to be above-market prices.

The CNMC considered the collusion to be a "very serious" infringement of Article 1 of the Spanish Competition Act and Article 101 TFEU and imposed fines of € 31.8 million on CaixaBank, € 23.9 million on Santander, € 19.8 million on BBVA and € 15.5 million on Sabadell.

All four entities have already announced their intention to appeal against the CNMC's decision.

VERTICAL AGREEMENTS

– MEMBER STATE LEVEL –

SPAIN

Spanish Supreme Court voids exclusive-supply agreement previously subject to commitments by the European Commission

Spain's Supreme Court has voided a contract including an exclusive-supply clause in favour of Repsol, following a judgment of the Court of Justice of the European Union ("ECJ") in which the ECJ confirmed that national courts are not precluded from assessing potentially anti-competitive agreements that had previously been subject to a commitments decision by the European Commission.

The dispute at stake concerned a lease agreement concluded between certain private individuals and Repsol with respect to a piece of land and a service station, which included a 25-year exclusive-supply obligation towards Repsol and the possibility for Repsol to set maximum retail prices. The contract in question was reviewed in 2006 by the European Commission, which concluded that the excessive duration of the exclusive-supply clause was restrictive of competition. Under the commitment decision adopted by the Commission, Repsol undertook to allow all service stations with which it had signed long-term supply contracts to terminate these contracts, subject to compensation payable to Repsol, and to refrain from concluding similar agreements in the future.

In 2008, and despite the commitments decision, the applicants brought several actions before the Spanish courts requesting the voidance of the contract, arguing that the long-term exclusive-supply obligation and Repsol's ability to set maximum retail prices were anti-competitive. The Supreme Court was ultimately seized of the case, upon which it referred a request for a preliminary ruling to the ECJ, asking, in essence, whether national courts can declare void an anti-competitive agreement when the Commission has previously accepted and declared binding a series of commitments relating to that same agreement.

The ECJ's ruling concluded that national courts have the final say concerning the anti-competitive character of an agreement, irrespective of whether commitments have been agreed upon with the Commission (see VBB on Competition Law, Volume 2017, No. 11).

Following this ruling, the Spanish Supreme Court partially upheld the applicants' claims and voided the controversial agreement, since it considered that the duration of the exclusive-supply clause was excessive. The judgment took into consideration the Commission's assessment in the commitment decision as evidence of the anti-competitiveness of Repsol's practices and found that the disproportionate duration of the exclusivity clauses foreclosed market entry and, hence, restricted competition.

INTELLECTUAL PROPERTY

– EUROPEAN UNION LEVEL –

EU Council adopts Regulation to address unjustified geo-blocking but excludes audio-visual services from its scope

On 27 February 2018, the EU Council adopted Regulation (EU) 2018/302 (published in the Official Journal on 2 March 2018) which aims at addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market. The European Parliament had previously approved this Regulation on 6 February 2018. Geo-blocking has been defined as a practice whereby "*traders operating in one Member State block or limit access to their online interfaces, such as websites and apps, by customers from other Member States wishing to engage in cross-border transactions*" (Recital 1). Importantly, the Regulation aims at providing equal access to online interfaces and goods and services but expressly excludes from its scope "*audio-visual services, including services the principle* [sic] *purpose of which is the provision of access to broadcasts of sports events and which are provided on the basis of exclusive territorial licenses*" (Recital 8). The Regulation as a result does not cover those "*services the main feature of which is the provision of access to and use of copyright protected works or other protected subject matter*" (Article 9.2).

By 23 March 2020 and every five years thereafter, the European Commission will evaluate the impact of the Regulation on the internal market (Article 9.1). The evaluation will include a possible application of the new rules to certain electronically supplied services which offer copyrighted content such as downloadable music, e-books, software and online games (Article 9.2).

The Regulation will enter into force on the 20th day following its publication in the Official Journal and will apply from 3 December 2018. As an exception, Article 6 (agreements on passive sales) will "*apply to provisions of agreements concluded before 2 March 2018 that are compliant with Article 101 TFEU and with any equivalent rules of national competition law from 23 March 2020*".

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– EUROPEAN UNION LEVEL –

General Court confirms refusal to disclose the table of contents of the Commission's file in the EURIBOR cartel

On 5 February 2018, the EU General Court ("GC" or "Court") dismissed the appeal lodged by Edeka, a German supermarket chain, against the decision of the European Commission refusing to disclose the table of contents of its investigation file in the EURIBOR cartel (see VBB on Competition Law, Volume 2013, No. 11). Edeka argued that the Commission's decision breached, *inter alia*, the rules on the public access to documents set out under Regulation 1049/2001 and the right to information on judicial remedies.

In relation to public access to documents, the GC recalled that Article 4 of Regulation 1049/2001 provides limits to the rights to access documents and that there is a general presumption that the disclosure of certain categories of documents, such as those contained in the Commission's file of a proceeding under Article 101 TFEU, may undermine the Commission's investigation as well as the protection of the commercial interests of the parties subject to the investigation. In particular, the GC noted that the table of contents of the investigation file makes it possible to see all the investigatory steps taken by the Commission and may contain relevant and specific information on the content of the Commission's file.

The GC also found that Edeka failed to demonstrate the existence of a superior public interest to rebut the presumption that the table of contents is a confidential document. In particular, Edeka alleged that the refusal to disclose the table of contents hindered its right to compensation. It argued that the disclosure of the table of contents would allow it to examine whether the documents listed in the file are necessary to initiate a damages claim. The Court found that Edeka did not establish why the disclosure of the table of contents was necessary for introducing an action for damages and, as a result, ruled that this ground of appeal was unfounded.

With respect to the alleged breach of Edeka's right to information on judicial remedies, the GC found that the Commission had failed to inform Edeka of the judicial remedies that were available against its decision. However, the GC ruled that the Commission's omission did not justify the annulment of the decision, since Edeka's legal situation had not been altered, as shown by the fact that it was able to appeal the Commission's decision.

– MEMBER STATE LEVEL –

AUSTRIA

Austrian Federal Competition Authority revises handbook on leniency programme and launches online whistleblowing system

On 8 February 2018, the Austrian Federal Competition Authority ("FCA") launched an anonymous online whistleblowing system for reporting competition law infringements. The system allows whistleblowers to submit information and documents on cartels and abusive practices while remaining untraceable. It is mainly aimed at company employees who possess information on the violation of competition rules by their employer and at undertakings which have information concerning anti-competitive practices of rival undertakings.

At the same time, the FCA also updated its leniency handbook (English version available) to reflect legislative amendments relevant to the leniency programme, including a leniency privilege in antitrust damages proceedings and immunity from criminal proceedings. Under the leniency privilege, the liability of the first leniency applicant is generally limited to its own direct and indirect customers or suppliers and leniency declarations as defined by the EU Damages Directive shall never be disclosed in damages proceedings. Furthermore, under certain conditions, the employees of a company who have contributed in a significant way to uncover an antitrust infringement in cooperation with a cartel authority may receive immunity from criminal proceedings.

GERMANY

Finance Court of Münster rules against deductibility of EU antitrust fines

Subsequent to a fine imposed by the European Commission in 2010 in the bathroom fittings cartel (see VBB on Competition Law, Volume 2010, No. 6), a German company declared the payment of the fine as a deductible expense, arguing that a provision in the German Income Tax Act allowed this exceptionally if the fine took illegally-gained profits into account and was set to outweigh those profits. The Finance Court of Münster, after seeking the Commission's opinion, dismissed the action. The Court pointed out that such a deduction would have required a deliberate decision of the Commission to consider illegal profits when setting the fine, of which it found no indication.

German Federal Competition Authority launches sector inquiry and publishes paper on online advertising sector

According to a press release dated 1 February 2018, the German Federal Cartel Office ("FCO") has launched a sector inquiry into market conditions in the online advertising sector. The inquiry will focus on the effects of current and future technical developments on the market structure and market potential, and will examine the importance and operating principles of various technical services (such as options for measurements of visibility, data collection, fraud prevention, marketing and procurement of advertisements). It will also assess whether there are so-called "walled gardens", *i.e.* closed platforms or systems on which producers or operators impose user restrictions, and their potential significance. Furthermore, the FCO published a paper on online advertising, which is the third publication in the series of papers on "Competition and Consumer Protection in the Digital Economy". An English version of the paper is available on the FCO's website.

PRIVATE ENFORCEMENT

– MEMBER STATE LEVEL –

FRANCE

Paris Tribunal of Commerce condemns Orange to pay € 346 million in damages

On 18 December 2017, the Paris Tribunal of Commerce condemned Orange (formerly known as 'France Telecom') to pay € 346 million to Digicel (formerly 'Bouygues Telecom Caraïbe'), in order to repair the injury caused by its anti-competitive behaviour.

Orange was previously found to have infringed French and EU competition rules in a decision of the French Competition Authority ("FCA") dated 9 December 2009. This decision concerned anticompetitive practices Orange implemented in the French West Indies and French Guyana when the mobile phone market was opened to competition in the year 2000. Orange then enjoyed a monopoly situation and put in place several practices to retain its customers. This decision was appealed to the Paris Court of Appeal and to the French Supreme Court twice, but was ultimately confirmed – with a reduction of the fine – on 6 January 2015.

Digicel initiated its claim for damages in 2012, but that was put on hold until the FCA decision was finally confirmed. Digicel argued that it was entitled under French law (*i.e.* then Article 1382 of the French Civil Code) to claim damages since it could prove (i) a fault, (ii) an injury, and (iii) a causal link between the fault and the injury. Digiciel alleged that the injury it suffered amounted to € 594 million.

The Paris Tribunal of Commerce stated that breaches of competition rules are to be considered as "fault" for the purpose of Article 1382 of the French Civil Code. It awarded Digicel € 179.94 million on the ground that it demonstrated an injury caused by Orange's abusive fidelity practices. The Tribunal simply stated that the methodology and evaluation used by the claimant for defining this particular injury were "*rational*" and "*coherent*". The amount of the reparable injury was finally raised to € 346 million after the Tribunal brought the sum due up to date by applying an annual interest rate of 10.4% calculated since 10 March 2009.

Orange immediately announced its intention to appeal this judgement of the Paris Tribunal of Commerce. It is interesting to compare this judgement with another judgement from the Paris Tribunal of Commerce dated 16 March 2015, in which 'Outre Mer Telecom' – a competitor of Orange in the French West Indies and French Guyana – applied for damages on the same grounds as Digicel. While the complainant was awarded € 8 million at the first instance level, this sum was reduced by the Paris Court of Appeal in its judgement dated 10 May 2017, to € 2.6 million plus interest.

UNITED KINGDOM

UK Court applies broad 'qualified effects' test developed in Intel in iiyama private action for damages

On 16 February 2018, the Court of Appeal of England and Wales applied the qualified effects test (*i.e.* the test according to which EU competition law can be applied to conduct outside the EU which has an immediate, substantial and foreseeable effect within the EU) as a basis for grounding territorial jurisdiction in a private action for damages.

By way of background, the European Commission fined producers of liquid crystal displays (LCDs) and cathode ray tubes (CRTs) for entering into cartel agreements and infringing the competition rules in 2010 and 2012. On the basis of the Commission decisions, iiyama, a computer monitor seller, launched separate actions for damages against a number of CRT and LCD producers in the English courts. As a preliminary issue, the defendants argued that iiyama could not base its actions for damages on Article 101 TFEU (and Article 53 EEA) since the CRT and LCD producers did not sell their products to the claimants within the EU. Rather, in most cases, the LCD and CRT producers would first supply the products to entities outside the EU, which in turn would sell the products internally to a claimant holding company also outside the EU, which would then supply the products to claimant subsidiary companies within the EU for onward sale and distribution. By two separate orders, the High Court reached divergent views on whether the indirect purchases from the CRT and LCD producers fell within the scope of EU competition law. The Court of Appeal combined the actions on appeal.

By its judgement, the Court of Appeal has now decided that iiyama has an arguable case on the issue of territoriality and that each of the lawsuits should therefore go to trial to examine this issue further. The Court of Appeal considered the case law of the EU Court of Justice ("ECJ") on the territorial scope of the EU competition rules, including the recent judgement in *Intel*. The Court of Appeal concluded that the ECJ's recent judgement in *Intel* made it clear "beyond argument" that the qualified effects test "provides an alternative basis for grounding the territorial jurisdiction" and "provides substantial support for the argument that a worldwide cartel which was intended to produce substantial indirect effects on the EU internal market may satisfy the qualified effects test for jurisdiction". The Court of Appeal added that "whether or not the [qualified effects] test is satisfied will depend on a full examination of the intended and actual operation of the cartel as a whole".

The judgement of the Court of Appeal may be subject to further appeal.

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