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VBB on Competition Law

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MERGER CONTROL

– EUROPEAN UNION LEVEL –

European Commission conditionally clears Bayer's acquisition of Monsanto

On 21 March 2018, the European Commission conditionally approved the acquisition of Monsanto by Bayer. The parties' activities overlap in the supply of seeds, pesticides and digital agriculture.

In order to obtain approval, Bayer has committed to: (i) divest its entire vegetable seed business and all related R&D; (ii) divest almost the entirety of its global broadacre seeds and trait business and all related R&D; (iii) divest its glufosinate assets and three important lines of research for non-selective herbicides; and (iv) license a copy of its worldwide current offering and pipeline on digital agriculture. Digital agriculture uses new technologies, such as satellite and weather data, to recommend to farmers how to best manage their fields.

It has been announced that Bayer will sell the divested businesses to BASF. The Commission has not yet formally approved BASF as the buyer and needs further evidence on BASF's ability and incentives to run and develop the divested businesses in order to replicate Bayer as an active competitor of the merged entity.

The decision highlights the rigour with which the Commission assesses potentially problematic transactions. During its review, the Commission reportedly looked at more than 2,000 different product markets and electronically reviewed 2.7 million internal documents. Such a detailed review inevitably takes time and delays completion of major transactions. In Bayer/Monsanto, the deal was first announced in September 2016 and notified to the Commission on 30 June 2017. In part, this delay may have been caused by the Commission's unique practice of effectively requiring the parties to engage in extended pre-notification consultations for which there is no deadline. In complex cases, this pre-notification period can significantly delay the parties' notification to the Commission. Once notified, the Commission's review period is subject to prescribed deadlines.

Finally, the Bayer/Monsanto deal generated considerable opposition from environmentalists and other civil society groups. On 22 August 2017, the EU Competition Commissioner, Margrethe Vestager, took the unusual step of publishing an open letter in response to more than 50,000 petition emails, 5,000 postcards and numerous tweets expressing numerous concerns regarding health, safety, the environment and consumer protection. Ms Vestager stressed that such concerns were outside of the merger review framework, but that DG Comp would carefully investigate the petitioners' concerns about prices, choice and innovation.

Celanese and Blackstone abandon joint venture in face of EU competition concerns

On 19 March 2018, Celanese and Blackstone announced that they would abandon their plan to form a joint venture for the supply of acetate tow, which is used to make cigarette filters and other products.

According to the European Commission, the transaction raised serious doubts in respect of the worldwide market (excluding China) for the supply of acetate tow, as it might reduce competition in an already highly concentrated market. It was reported that the Celanese/Blackstone deal would combine the world's second- and third-largest manufacturers of acetate tow and generate revenue of approximately US$1.3 billion. Interestingly, unconditional merger approval was granted in China, Mexico, Russia and Turkey. According to the parties, however, the Commission required excessive divestitures that would have undermined the benefits of the transaction.

This withdrawal highlights that the Commission continues to challenge a significant number of transactions, without formally issuing a prohibition decision. Official statistics published to February 2018 show that while the Commission has only formally prohibited 27 transactions since 1990, more than 180 deals have been withdrawn after being notified to the Commission for approval during this period. While parties do withdraw merger notifications for other non-competition reasons (see VBB on Competition

Law, Volume 2016, No. 5), it is worth recalling that the number of prohibition decisions alone do not tell the full story in terms of the number of deals that the Commission ultimately prevents.

– MEMBER STATE LEVEL –

BELGIUM

Brussels Court of Appeal annuls decision to lift Kinepolis merger commitments

On 28 February 2018, the Brussels Court of Appeal upheld an appeal in the long-running Kinepolis legal saga in the Belgian cinema industry.

This case stretches back to a merger clearance decision of the Belgian Competition Authority ("BCA") in November 1997 imposing certain commitments on Kinepolis, including requiring Kinepolis to notify and obtain approval from the BCA prior to any form of business growth (including any increase in the number of screens or seats operated by Kinepolis). In May 2017, the BCA partially lifted the bulk of these commitments. However, the decision to partially lift the commitments was appealed by competitors of Kinepolis.

By its latest decision, the Brussels Court of Appeal has upheld the competitors' appeal on the grounds that the BCA provided inadequate reasoning to partially lift the commitments.

UNITED KINGDOM

CMA clears hospital merger due to patient benefits

On 15 March 2018, the UK's Competition and Markets Authority ("CMA") cleared a merger between Derby Teaching Hospitals Foundation Trust and Burton Hospitals Foundation Trust on the basis that the merger is expected to result in substantial patient benefits, which outweigh potential competition concerns. Although the CMA found that patients would have less choice for some services, it also found that both hospitals were resource-constrained such that the merger would enable them to use their resources much more effectively for patients across a wide range of specialities. According to the CMA, it placed significant weight on advice received from the UK's National Health Service ("NHS"), which strongly supported the merger. This is the second time the CMA has cleared an NHS hospital merger on the basis of patient benefits at the 'Phase 1' stage.

CARTELS AND HORIZONTAL AGREEMENTS

– EUROPEAN UNION LEVEL –

European Commission imposes fines totalling € 253 million on producers of capacitors

On 21 March 2018, the European Commission announced that it had adopted a decision fining eight Japanese producers of capacitors a total of € 253,935,000. The companies addressed by the decision, namely Elna, Hitachi, Holy Stone, Matsuo, NEC Tokin, Nichicon, Nippon Chemi-Con, Ruycom and Sanyo, were found to have been involved in a cartel for the supply of aluminium and tantalum electrolytic capacitors between 1998 and 2012.

Capacitors are electrical components that store energy electrostatically in an electric field and are used in a wide number of electric and electronic products.

According to the Commission's press release, the producers of capacitors exchanged commercially sensitive information in the context of multilateral meetings, trilateral and bilateral contacts. The information exchanged allegedly related to future prices, pricing intentions, as well as future supply and demand information. In some instances, the Commission stated that the companies concluded price agreements and monitored their implementation. The Commission reported that the meetings and contacts took place mainly in Japan but that the cartel conduct was implemented worldwide, including in the European Economic Area.

The investigation started following an immunity application submitted by Sanyo, which was exempted from fines. A number of companies received fine reductions for their cooperation under the Leniency Notice, namely Hitachi (35%), Rubycon (30%), Elna (15%) and NEC Tokin (15%). The fines imposed on Elna, Nippon Chemi-Con and Rubycon were capped at 10% of their total turnover, which is the maximum allowed under the 2006 Fining Guidelines. The Commission imposed fines ranging from over € 782,000 on Holy Stone to over € 97 million on Nippon Chemi-Con.

– MEMBER STATE LEVEL –

GERMANY

German Competition Authority fines another undertaking in harbour towage service cartel case

On 26 February 2018, the German Federal Cartel Office ("FCO") published a case report in which it stated that Schleppreederei Kotug had been fined € 4.5 million for its participation in the harbour towage service cartel case which involved market sharing agreements in several German ports between 2000 and 2013. Fines had already been imposed on three other harbour towage service providers (see VBB on Competition Law, Vol. 2017, No. 12). This brings the total fines imposed by the FCO to € 17.5 million. As the four companies settled the case, the fining decisions have become final.

Ten medium-sized wholesalers of sanitary, heating and air conditioning equipment fined € 23 million

According to a case report of the German Federal Cartel Office ("FCO") published on 16 March 2018, the FCO has fined ten medium-sized wholesalers active in the sanitary, heating and air conditioning sectors a total of € 23 million for having jointly recommended gross list prices between 2005 and 2013.

The fines against nine companies (namely, Dekker & Detering Beteiligungsgesellschaft, Elmer, Heinrich Schmidt, J.W. Zander, Kurt Pietsch, Mosecker, Otto Bechem, Reinshagen & Schröder and Wiedemann) as well as against one individual were issued between December 2015 and March 2016 (see VBB on Competition Law, Vol. 2016, No. 3). In February 2018, a fine on Hermann Bach was imposed.

As members of the Calculation Committee of the "Mittelstandskreis Sanitär NRW" (MKS NRW), the competing wholesalers jointly calculated recommended gross list prices, which they recommended to each other. These prices were then published in their sales catalogues to purchasing craftsmen in the area of North Rhine-Westphalia and the neighbouring Federal States.

The MKS NRW had been established in the 1970s, when associations of small and medium-sized companies were exceptionally allowed to issue recommendations to their members under the German Act against Restraints of Competition ("GWB"). The relevant provision exempted associations of small or medium-sized companies provided that, inter alia: (i) the recommendations were addressed to a limited group; (ii) the recommendations served to improve the competitiveness of the parties vis-à-vis large-scale enterprises; (iii) the recommendation was explicitly labelled as non-binding; and (iv) no economic, social or other pressure was applied to enforce them.

However, this exemption was abolished with the entry into force of the seventh amendment of the GWB in July 2005. Consequently, according to the FCO, the participants should have reassessed and discontinued their anti-competitive conduct. All the companies involved settled the case except for Hermann Bach, which appealed against the decision before the Higher Regional Court of Düsseldorf.

SPAIN

Spanish Competition Authority fines parcel delivery companies € 68 million for participating in market sharing and customer allocation cartel

On 8 March 2018, the Spanish Competition Authority ("CNMC") adopted a decision in which it imposed fines totalling € 68 million on ten parcel delivery companies for their involvement in a market sharing and customer allocation cartel on the markets for courier and business-parcel delivery services, in breach of Article 101 TFEU and its Spanish equivalent. The companies involved include CEX, FedEx, UPS, DHL, TNT, MBE, Tourline, GLS, ICS and Redyser.

The investigation was initiated following a leniency application submitted by GLS, which disclosed that it had agreed with its competitor Correos Express ("CEX") not to address or offer services to each other's customers. During the dawn raids carried out at CEX premises, the CNMC discovered an entire network of anti-competitive agreements across the parcel delivery sector which involved ten competing companies. In particular, the CNMC found that, in the courier and business parcel delivery markets, it is common for companies to reach collaboration agreements in order to strengthen their distribution capacities. In this context, competitors usually (i) included non-compete clauses in those collaboration agreements; or (ii) concluded parallel verbal non-aggression agreements. As a result of those arrangements, parcel delivery companies agreed not to offer services to each other's clients, even potential clients, therefore sharing the market among them.

The amount of the fines imposed took into consideration the long duration of these agreements (some of which were in place for over ten years).

Spanish Competition Authority fines several Bar associations for recommending fees to members

On 12 March 2018, the Spanish Competition Authority ("CNMC") imposed fines totalling € 1.45 million on nine regional Bar associations for distributing recommended price lists amongst their members, in breach of Article 1 of the Spanish Competition Act.

In its decision, the CNMC analysed, in particular, whether the lists contained indicative prices only or if, on the contrary, they constituted anti-competitive price listings. The CNMC ultimately found that the fee recommendations were anticompetitive in part because of the detailed way in which they were structured (i.e., they were structured in various detailed brackets to which variable percentages were applied).

VERTICAL AGREEMENTS

– MEMBER STATE LEVEL –

GERMANY

German Federal Court of Justice rules on action by automotive repair workshop claiming right to be admitted to authorised repair networks

On 23 January 2018, the German Federal Court of Justice ruled on an action brought by a car repair shop (the claimant) against the general importer of Jaguar and Land Rover vehicles (the defendant). The importer operated a selective distribution system for the servicing of its vehicles. Effective in May 2013, the importer had terminated its existing service network contracts, offering new contracts to many of the previously authorised repair shops, but not to the claimant. The claimant then unsuccessfully brought a claim to be admitted as an authorised workshop, arguing, among other things, that the importer had abused its dominant position by refusing the repair shop access to the network.

The Higher Regional Court of Frankfurt had held on appeal that the importer was not dominant, since the relevant service market was not brand-specific and, as a result, rejected the claim. The Federal Court of Justice has now overturned the appeal court's ruling and referred the case back to the appeal court for reconsideration.

The Federal Court of Justice assessed the case under the rules on abuse of dominance and found that the appeal court had not sufficiently shown why the relevant upstream market (i.e., the market on which repair shops, on the demand side, request from manufacturers, on the supply side, resources used for the provision of repair and maintenance services) should be defined as not being brand specific.

The Federal Court of Justice instructed the appeal court to take into consideration the market conditions on the downstream market where the repair shop offers repair services to its customers because the conditions on the downstream market can influence how the upstream market should be defined. In particular, the appeal court should consider whether it is economically viable for repair shops to service Jaguar and Land Rover vehicles even if they do not have the status of an authorised repair shop. If this is not the case, the upstream market has to be defined as brand specific. In making this assessment, the court should consider whether it is technically possible for the repair shop to provide such services, e.g., whether it may source original spare parts from other authorised repair shops. In addition, it should consider whether an unauthorised repair shop can realistically expect to receive orders from customers, taking into account customers' own expectations including their emotional sensitivities.

The Federal Court of Justice distinguished this case from *MAN* (see VBB on Competition Law, Volume 2011, No. 4). In *MAN*, the Federal Court of Justice had found that it is not indispensable for a repairer to have the status of an authorised repairer in order to operate on the market for the repair and service of commercial vehicles and, therefore, that the market should not be defined as brand specific. According to the Court, this conclusion, which was based on the fact that most repair services for commercial vehicles were carried out by non-authorised workshops, cannot necessarily be assumed to apply to repair services for high-end passenger vehicles. Instead, an assessment must be made taking into account the demands, expectations and habits of car owners (for example, whether owners of Jaguar or Land Rover passenger vehicles are willing to pay higher prices to have their vehicles repaired by an authorised repair shop even after the expiry of the contractual guarantee). Such expectations and habits will be reflected in the customers' demand-related behaviour. Therefore, if it can be shown that most repairs for the passenger vehicles are performed by independent repair shops instead of by authorised repair shops, the status of authorised repair shop will not be considered indispensable.

The present ruling specifies that relevant market shares shall primarily be calculated based on the respective turnover of repair shops (in and outside the authorised repair network), instead of the numbers of orders placed with them. In addition, the turnover attributable to workshop services which do not require the knowledge and expertise that can typically only be acquired by specialising in a specific brand has to be weighted less.

In addition, the Federal Court of Justice further elaborated on the burden of proof to demonstrate the indispensability of being admitted as an authorised repair shop. Although this generally lies with the repair shop, it might shift to the opposing party where only it has access to the underlying data on the relevant market and can be reasonably expected to provide further details.

On the main issue in the case, the Federal Court of Justice clarified that, if the assessment shows that the market is brand specific, the defendant is dominant and may not - without objective reasons - deny access to the network of authorised repair shops if the claimant fulfils the qualitative requirements.

With the present judgment, the Federal Court of Justice confirmed its ruling of January 2016 on admittance to Jaguar's authorised repair network, which was only published after the decision of the appeal court was rendered in the present case. In overturning in that case a judgment of the Higher Regional Court of Frankfurt, the Federal Court of Justice already attributed particular importance to the expectations, demands and habits of end customers of high-end passenger vehicles. That case was referred back to the Higher Regional Court of Frankfurt, which has since decided the case (in a judgment which has not been published) and whose decision is currently again under appeal before the Federal Court of Justice.

INTELLECTUAL PROPERTY/LICENSING

– OTHER DEVELOPMENTS –

EUROPEAN UNION: On 12 March 2018, the Council of the European Union adopted conclusions on the enforcement of intellectual property rights in Europe. The Council welcomed the European Commission's comprehensive intellectual property package of 29 November 2017 (see VBB on Competition Law, Volume 2017, No. 12) which covers a broad range of intellectual property issues, including civil enforcement of intellectual property rights, the development of open standards that rely on standard essential patents, the use of new technologies and the fight against counterfeiting and piracy.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– EUROPEAN UNION LEVEL –

European Commission and EU Court of Justice publish activity statistics

On 22 March 2018, the European Commission published updated statistics on its cartel decisions. The figures published include the total fines imposed by the Commission each year since 2014 (including figures adjusted following European Court judgments). The publication lists the ten highest total cartel fines per case and the ten highest cartel fines per undertaking since 1969. It also lists the number of undertakings involved in cartel decisions and the number of decisions taken by the Commission for each year since 2014. Interestingly, the statistics also show the fines imposed on undertakings as a percentage of their global turnover. These statistics are available here. The next day, the Court of Justice of the EU ("ECJ" or "Court") also published statistics reporting on the Court's judicial activities for 2017. According to the Court's press release of 23 March 2018, 1,656 cases were brought before the ECJ and the General Court in 2017, while 1,594 were closed the same year.

Before the ECJ, a new record number of registered cases was established with 739 cases introduced in 2017, while 699 cases were completed. The average duration of appeal cases before the ECJ increased to 17.1 months, which, according to the press release, is explained by the completion of a number of complex competition cases.

Before the General Court, the duration of proceedings was reduced by 13% as compared to 2016, with an average duration of 16.3 months. The press release emphasises that there has been a 40% decrease in the duration of cases before the General Court in the course of the past five years. The press release of the ECJ is available here.

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