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Highlights

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vbb@vbb.com
www.vbb.com

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Chaussée de La Hulpe 166
Terhulpsesteenweg
B-1170 Brussels – Belgium

Phone: +32 (0)2 647 73 50 vbb@vbb.com
Fax: +32 (0)2 640 64 99 www.vbb.com

MERGER CONTROL

– EUROPEAN UNION LEVEL –

Commission imposes record € 125 million fine on Altice for gun jumping

On 24 April 2018, the European Commission fined Altice, a Dutch-based telecom operator, € 125 million for procedural infringements of the EU Merger Regulation.

By way of background, on 9 December 2014, Altice entered into an agreement to acquire sole control of PT Portugal. Altice notified the Commission of its plan to acquire PT Portugal in February 2015. The transaction was cleared subject to conditions on 20 April 2015. Later, the Commission alleged that Altice had breached EU rules through implementation of its acquisition of PT Portugal before notification or approval by the Commission (see VBB on Competition Law, Volume 2017, No. 5). Such conduct is commonly referred to as "gun jumping".

The Commission found that Altice infringed both the prior notification obligation of a concentration under Article 4(1) of the EU Merger Regulation, and the stand-still obligation under Article 7(1) of the EU Merger Regulation. First, the transaction agreement provided Altice with the legal right to exercise decisive influence over PT Portugal by granting Altice veto rights over decisions concerning PT Portugal's ordinary business. Second, Altice actually exercised decisive influence over aspects of PT Portugal's business by giving PT Portugal instructions on how to carry out a marketing campaign and by seeking and receiving detailed commercially sensitive information about PT Portugal outside the framework of any confidentiality agreement. The Commission considered that Altice's breach of its procedural obligations was, at least, negligent.

The Commission's fining decision has no impact on its April 2015 conditional clearance of the Altice/PT Portugal transaction. However, the case demonstrates the seriousness with which the Commission regards procedural violations of the EU Merger Regulation and is notable for two reasons. First, it is the highest ever fine imposed by the Commission for procedural infringements of the EU Merger Regulation, being larger than the previous highest fine of € 110 million fine imposed on Facebook in May 2017 for providing misleading information to the Commission. Further, this is the first case in which a company has been fined, in part, for a breach of the standstill obligation that did not result purely from a failure to notify but also from sharing commercially sensitive information. Previously, the Commission imposed fines for breach of the standstill obligation in *Marine Harvest* where the breach arose when the parties failed to notify the transaction. Finally, Altice has publicly announced that it intends to appeal against the fine.

– MEMBER STATE LEVEL –

LITHUANIA

Lithuanian Competition Council decides retailer failed to find suitable buyer for 17 divested stores

On 18 April 2018, the Lithuanian Competition Council ("LCC") found that Rimi, a grocery and consumer goods retailer, failed to properly fulfil a merger commitment. Previously, on 18 October 2017, the LCC approved Rimi's acquisition of its competitor, Palink, on condition that Rimi divest 17 retail stores to suitable buyers.

In its latest decision, the LCC evaluated the financial and other resources of the potential buyers of the 17 retail stores. The LCC assessed their experience in managing similar-sized retail businesses and existing supply conditions. Finally, the LCC considered the ability of the proposed buyers to maintain and develop retail businesses in all of the stores which would compete with Rimi. Based on its analysis, the LCC did not consider that the buyers proposed by Rimi were suitable to ensure "sustainable and effective competition" in the relevant local retail markets in Lithuania. According to the LCC, Rimi and Palink cannot complete the transaction until they have successfully implemented the merger remedies and eliminated the competition concerns identified by the LCC.

POLAND

PKP Energetyka abandons railway power deal after facing merger scrutiny

On 18 April 2018, the Polish Competition Authority ("PCA") announced that PKP Energetyka had withdrawn the notification of its planned acquisition of Elester-PKP. Both companies are active in the markets for traction power engineering in Poland. Such markets comprise the supply of various goods and services needed to power electrical railways. Previously, on 20 December 2017, the PCA publicly announced it had raised specific concerns that the transaction might reduce competition in the market for components of traction power substations and electronic earth fault protection systems supplied to the Polish railway power grid operator. The PCA was concerned that the transaction would result in a price increase on these markets. As a result of the notification being withdrawn, the PCA will no longer investigate the proposed merger.

ABUSE OF DOMINANT POSITION

– EUROPEAN UNION LEVEL –

ECJ rules on requirements to establish price discrimination by dominant undertaking, endorsing necessity of assessing all the relevant circumstances

On 19 April 2018, the Court of Justice of the European Union (the "ECJ") delivered a judgment holding that investigations of price discrimination under EU competition law should involve an examination of all the relevant circumstances of the case in order to assess whether there is a "competitive disadvantage" (Case C-525/16, *Meo – Serviços de Comunicações e Multimédia*).

The ECJ delivered its judgment in response to a request for a preliminary ruling from the Portuguese Tribunal for Competition, Regulation and Supervision in a dispute between MEO (a branch of Portugal Telecom providing pay-TV services) and the Portuguese Competition Authority ("PCA"). MEO had filed a complaint with the PCA alleging that it paid higher rates for use of audiovisual content licensed by GDA, a collecting society that manages the performing rights of its members in Portugal. MEO argued that GDA's pricing practices amounted to unlawful discrimination in breach of Article 102(c) TFEU.

The PCA rejected MEO's complaint on the grounds that the imposition of discriminatory prices by a dominant company does not, in and of itself, breach Article 102 TFEU. It further held that the price difference was so small as to be absorbed in the normal course of business. MEO appealed against this decision, urging the Portuguese Tribunal to refer a series of questions to the ECJ for guidance.

In essence, the referring Tribunal asked for clarification on the meaning of the phrase "competitive disadvantage" contained in Article 102(c) TFEU, and in particular whether this concept requires an examination of the effects of the dominant company's behaviour and the seriousness of the discriminatory trading conditions on the competitive position of the disadvantaged client.

The ECJ's judgment follows the opinion of Advocate General Nils Wahl ("AG Wahl") on 20 December 2017, which held that investigations of price discrimination under EU competition law should assess all the circumstances of the practice, including its impact and context (see VBB on Competition Law, Volume 2017, No. 12).

The ECJ first emphasised that in order to demonstrate a "competitive disadvantage", it is not only necessary for the dominant undertaking's behaviour to be discriminatory, but also that it *tends to distort the competitive relationship between trading partners*.

The ECJ concluded that a finding of a "competitive disadvantage" does not require proof of actual quantifiable deterioration in the competitive situation; instead, any determination must be based on an analysis of all the relevant circumstances of the case, including: (i) the parties' negotiating power as regards the tariffs; (ii) the conditions and arrangements for charging these tariffs; (iii) the duration and the amount of the tariffs; and (iv) the possible existence of a strategy aiming to exclude from the downstream market one of its trading partners which is at least as efficient as its competitors.

Turning to the specifics of the case and referring to AG Wahl's Opinion, the ECJ made a number of additional interesting observations:

- The ECJ noted that – although GDA is the only undertaking managing collective rights of authors or performers in Portugal – it was clear from the file that MEO and NOS (its competitor) had a certain degree of negotiating power vis-à-vis GDA. Although the ECJ (unlike the Advocate General) did not use this observation to specifically question whether GDA held a dominant position, it did consider the negotiating power of customers a relevant factor to determine whether the tariffs were anticompetitive.

- The ECJ observed that the tariffs in question represented a relatively small percentage of the total costs of MEO, so that the differentiation in tariffs may well have had a limited effect on MEO's profits. The ECJ noted that in such instances, it could well be found that the differentiated tariff is not capable of having any effect on the operator's competitive position.

- The ECJ also found that, in a case concerning the application of differentiated tariffs on the downstream market, a non-integrated dominant undertaking has in principle no interest in adopting a strategy of excluding one of its trade partners from the downstream market, thereby suggesting the absence of an infringement.

The ECJ's judgment clarifies that a more flexible legal standard applies for the evaluation of downstream price discrimination claims. It also arguably "clarifies" its previous case-law in *British Airways*, which suggested that charging different prices will almost invariably be unlawful under Article 102 TFEU(c).

– MEMBER STATE LEVEL –

ITALY

Italian Competition Authority fines Moby/CIN for abuse of dominant position

On 23 March 2018, the Italian Competition Authority ("ICA") issued a decision fining two ferry companies € 29 million for abusing their dominant position.

The companies involved in the infringement were CIN, a public undertaking entrusted with public service obligations for some of the relevant ferry routes, and Moby, which operates in a free market. At the time of the proceedings, Moby held 100% of CIN's share capital.

According to the ICA, Moby and CIN held a dominant position on three ferry routes to and from Sardinia, with each route being defined as a separate relevant market. Furthermore, this dominant position arose from CIN's competitive advantage as holder of the public service obligation.

The exclusionary abusive practices concerned sea freight transport services and were aimed at discouraging logistics companies from entering into agreements with Moby and CIN's competitors. Accordingly, Moby and CIN's behaviour targeted so-called "disloyal" logistics companies, i.e., those who were also working with Moby and CIN's competitors.

In particular, Moby and CIN's behaviour included: (i) boycotts of "disloyal" logistics companies, including the early termination of contracts, denied boarding, or use of less advantageous commercial contract terms; and (ii) discriminatory practices in the form of preferable conditions given to "loyal" logistics companies (e.g., rebates).

The ICA found that the anticompetitive practices had the effect of reserving approximately 70-80% of the total freight traffic volumes to and from Sardinia for Moby and CIN. For these reasons, the ICA concluded that the practices created barriers to entry and restricted competition on each relevant market.

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 developments addressed.

Summary of Significant Case Developments

Advocate General Wathelet recommends setting aside GC judgment in smart card cartel case

On 12 April 2018, Advocate General ("AG") Wathelet delivered an opinion in which he recommended that the Court of Justice of the European Union ("ECJ") set aside the General Court's ("GC") judgment which had dismissed the claims brought by Infineon in connection with its involvement in the smart card cartel case (see VBB on Competition Law, Volume 2016, No. 12).

In his opinion, AG Wathelet focused on two points of law. First, he opined that the case should be referred back to the GC because it had not carried out, in the exercise of its unlimited jurisdiction, an extensive review of the contacts challenged by Infineon. Such a review was necessary to determine whether the amount of the fine imposed by the Commission reflected the gravity of Infineon's involvement in the cartel. Second, AG Wathelet took the view that the GC had failed to comply with the requisite burden of proof when examining a piece of evidence, which was used by the Commission in its decision, and which was contested by Infineon. AG Wathelet, however, considered Infineon's plea as ineffective because the ECJ does not have jurisdiction to review the facts. Both points of law will be discussed below.

Analysis of Important Substantive and Procedural Developments

Smart card cartel case - effective judicial review and unlimited jurisdiction

Under EU case law, the fact that an undertaking did not take part in all aspects of an anti-competitive scheme or that it played only a minor role in the aspects in which it did participate is not material to the establishment of the existence of an infringement on its part. Those factors, however, must be taken into consideration when the gravity of the infringement is assessed when it comes to determining the fine.

On appeal, Infineon argued that the GC had committed an error of law insofar as it merely examined five of the eleven bilateral contacts relied upon by the Commission to hold Infineon liable for participating in the single and continuous infringement, although Infineon had contested all eleven contacts.

AG Wathelet opined, in the first place, that the GC had not erred in law by examining only five of the eleven bilateral contacts in order to ascertain whether Infineon had, in fact, participated in the single and continuous infringement. AG Wathelet noted that the infringement had lasted three years and that the coordinated price policies were agreed between the cartelists, including Infineon, on a yearly basis. Hence, since the examination by the GC of only five contacts was enough to prove Infineon's participation in the single and continuous infringement, there was no need for the GC to examine all eleven contacts.

Notwithstanding this finding, AG Wathelet considered that, in the exercise of its unlimited jurisdiction, the GC should have carried out an exhaustive review of all the contacts challenged by Infineon in order to determine whether the amount of the fine reflected the gravity of Infineon's involvement in the cartel. Because the GC did not do so, AG Wathelet recommended that the ECJ set aside the GC's judgment and refer the case back to the GC so that it could examine all the contacts at issue for the purpose of determining the amount of the fine.

Smart card cartel case – the issue of the authenticity of the evidence

Under EU case law, if the court finds that there is any doubt as to the actual nature of a contested document and/or whether it was obtained by proper means, the document must be disregarded.

On appeal, Infineon argued that the GC had erred in law insofar as it had failed to set aside a piece of evidence whose probatory value was – according to Infineon – compromised. More specifically, Infineon argued that an email submitted by Samsung in the context of its leniency application, which had been relied upon by the Commission in its decision, was not authentic. This was despite the fact that, at the stage of the Commission's investigation, Infineon had provided the Commission with several expert reports which concluded that the authenticity of the document could not be confirmed.

In his opinion, AG Wathelet noted that the GC had placed the burden of proof on Infineon to demonstrate that the contested piece of evidence was not authentic. The GC had found that the expert reports provided by Infineon only concluded that it could not be confirmed that the document at stake was authentic and, as a result, the GC ruled that the Commission had correctly admitted the evidence.

In this regard, AG Wathelet reasoned that: (i) the only relevant criterion when assessing the probative value of evidence is its credibility; (ii) in order to assess whether a piece of evidence is credible, it must be authentic; and that (iii) if the court finds that there is any doubt as to the nature of a contested document, the document must be disregarded.

In the present case, AG Wathelet found that the Commission should have established the authenticity of the evidence by, at least, requesting an independent expert report in order to ascertain whether the piece of evidence was or was not authentic. As the Commission had not done so, the GC committed an error of law in its assessment of Infineon's claim, since the authenticity of that piece of evidence was clearly doubtful.

Notwithstanding this finding, AG Wathelet recalled that the ECJ does not have jurisdiction to review findings of fact or the value of the evidence accepted by the GC in support of the facts. Therefore, AG Wathelet recommended that the ECJ disregard Infineon's claim as ineffective.

VERTICAL AGREEMENTS

– MEMBER STATE LEVEL –

FRANCE

Paris Court of Appeal imposes penalty of € 500,000 on online platform which displayed Coty's products without being part of selective distribution network

On 28 February 2018, the Paris Court of Appeal (the "Court") released its judgment in an appeal related to a dispute between Coty France ("Coty"), a producer of branded luxury cosmetics including, in particular, perfumes, and Showroomprive.com, an online platform specialised in the sales of branded fashion products (the "Platform"). The Court ruled in favour of Coty and imposed a penalty of € 500,000 on the Platform.

The background to the ruling is a case brought by Coty in 2013 against the Platform for selling Coty products online without being part of Coty's selective distribution network. In response, the Platform claimed that the selective distribution network was anticompetitive and therefore illegal. By judgment of 17 November 2015, the Commercial Court of Marseille found the selective distribution network to be lawful and imposed a penalty on the Platform of € 25,000 for the moral prejudice caused by the Platform's behaviour in harming Coty's brand image.

The Platform appealed against the judgment, arguing that Coty's selective distribution agreement contained a number of anticompetitive clauses, including: (i) a prohibition of resale on third-party platforms; and (ii) the mandatory requirement for authorised distributors to have a physical point-of-sale, in effect excluding online-only retailers from the network.

In examining the contentious clauses, the Court affirmed, in line with the ECJ's ruling in *Coty* (see VBB on Competition Law, Volume 2017, No. 12) and established case law, that a selective distribution system for luxury goods aimed primarily at preserving their luxury image does not infringe Article 101(1) TFEU, provided that: (i) resellers are chosen on the basis of objective criteria of a qualitative nature that are laid down uniformly for all potential resellers and applied in a non-discriminatory fashion and (ii) the criteria laid down do not go beyond what is necessary. The Court also held that a specific clause in a selective distribution agreement is lawful under Article 101(1) TFEU where it fulfils these conditions. As it was not disputed that the first set of conditions was fulfilled, the Court focused on examining whether the clauses in question went beyond what was necessary to preserve the luxury image of Coty's products.

Third-party platform ban. Citing the ECJ's ruling in *Coty*, the Court held that the third-party platform ban, which is to be distinguished from an absolute ban on internet sales, is lawful under Article 101(1) TFEU. In so holding, the Court noted that, in the context of luxury goods, it is appropriate to include such a ban to avoid the image of the luxury goods being undermined by an online environment over which the manufacturer has no control given the absence of a contractual relationship with the third-party platform.

Physical point-of-sale requirement. As regards the physical point-of-sale requirement, the Platform argued that the requirement was not necessary. The Court, however, disagreed and found the clause lawful under Article 101(1) TFEU and appropriate to preserve the luxury image of the products in question without going beyond what was necessary to achieve that goal.

First, although the Platform was specialised in the resale of branded products, the Court nonetheless concluded that the Platform could not preserve the luxury aura of Coty's products taking into account that the range of products it offered for sale was too general, and that its business model was based on selling branded products at a discount. The Court therefore, in effect, took the view that it was legitimate to exclude this particular online-only platform from the network.

Second, and of more general application, the Court underlined that the requirement to have a physical outlet was necessary for the preservation of the aura of luxury of the products. In this respect, it pointed to the ability given to customers as a result of this requirement to test perfumes and benefit from personalised advice, pointing out that authorised retailers often had their own websites on which customers who chose not to make use of these services could buy the products. It went on to note that online and in-store sales are complementary rather than substitut-

able, and allowing online-only resellers into the system may discourage investments in the physical outlets necessary to preserve the luxury image of Coty's products. The Court was not persuaded by the argument raised by the Platform that some of Coty's French retailers were active online in the UK and Belgium without having any physical outlets in these countries.

The Paris Court of Appeal upheld the judgment under appeal, but increased the penalty from € 25,000 to € 500,000 by extending its scope to cover not only moral prejudice suffered (i.e., the damage to Coty's brand image) but also the unfair commercial practices and free-riding ("*parasitisme*") engaged in by the Platform.

The principal point of interest of the ruling is its analysis of the physical point-of-sale requirement, and the generally applicable grounds on which the Court considered that it fell outside Article 101(1) (in particular, the need for consumers to be able to test products if they so wish, as well as free-riding concerns). The Court also considered that the particular platform at issue was not compatible with the luxury image of Coty's products (interestingly, in part because of its pricing policy) but it is not clear whether this was a necessary underpinning to its conclusion on the physical point-of-sale requirement. In any event, such a restriction would be exempted under the Vertical Agreements Block Exemption if the 30% market share threshold were to be respected, regardless of whether there would be an objective justification.

– OTHER DEVELOPMENTS –

SWITZERLAND: On 19 April 2018, the Swiss Competition Authority announced that, in a settlement, it had fined the German luxury suitcase manufacturer Rimowa € 111,000 for restricting the export of products to Switzerland in contracts with its distributors in Germany between January 2012 and November 2013.

STATE AID

– SUMMARY OF DEVELOPMENTS –

- On 28 February 2018, the Court of Justice of the European Union (the "ECJ") ruled on a request for a preliminary ruling from a Bulgarian court regarding the interpretation of the De Minimis Regulation in the area of state aid (Case C-518/16, *„ZPT" AD v Narodno sabranie na Republika Bulgaria and Others*). In particular, the national court sought to clarify what constitutes export aid within the meaning of the De Minimis Regulation. The Regulation provides that "*aid to export-related activities towards third countries or Member States, namely aid directly linked to the quantities exported, to the establishment and operation of a distribution network or to other current expenditure linked to the export activity*" is excluded from its scope. The ECJ confirmed that there must be a direct link between the aid and the export. Investment aid which is not determined by the quantity of the goods exported does not constitute export aid, even if the supported investments facilitate the development of goods intended for export.

- On 6 March 2018, the Court of Justice of the European Union (the "ECJ") issued a judgment on appeal clarifying the application of the market economy operator test in cases where a company has previously benefited from a state aid measure (Case C-579/16 P, *European Commission v FIH Holding A/S and FIH Erhvervsbank A/S*). To assess whether an economic transaction carried out by a public authority is in line with normal market conditions and therefore whether or not that transaction grants an advantage to its counterparts, the market economy operator test requires that a comparison be made between the behaviour of the public body and that of a similar private economic operator under normal market conditions. For the purpose of the market economy operator test, only the benefits and obligations linked to the role of the state as an economic operator – to the exclusion of those linked to its role as a public authority – are to be taken into account. Therefore, the ECJ ruled that, if a state has previously granted aid to a company, the risks to which the state is exposed and which are the result of the previous aid (e.g., obligations arising for the state from loans or guarantees) are linked to the state's actions as a public authority and are not among the factors that a private operator would, in normal market conditions, have taken into account in its economic calculations.

- On 20 April 2018, a European Commission Notice amending the European Union Guidelines for State aid in the agricultural and forestry sectors and in rural areas was published in the Official Journal. The Guidelines set out the conditions and criteria under which aid for the agriculture and forestry sectors and in rural areas will be considered to be compatible with the internal market. The Notice amends various points of the Guidelines, including with respect to aid for the participation of active farmers in quality schemes for cotton or foodstuffs and regarding aid to the forestry sector.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– EUROPEAN UNION LEVEL –

General Court rules on Commission dawn raids and legal professional privilege

On 10 April 2018, the General Court of the European Union (the "GC") issued a judgment in the *Alcogroup* case. The GC dismissed as inadmissible an action to annul an inspection decision as well as a letter from the European Commission (the "Commission") concerning legally privileged documents and the implementation of a Commission inspection decision (Case T-274/15, *Alcogroup and Alcodis v Commission*).

The case concerned Alcogroup, a Belgian company active in the production, processing and marketing of ethanol, and its subsidiary Alcodis (collectively "Alcogroup"). The litigation originated in two separate inspections ordered in accordance with Article 20(4) of Regulation No. 1/2003. In particular, at the start of the second inspection, Alcogroup's lawyers requested that the Commission's inspectors exclude from their investigation defence documents which had been drafted following the first inspection on the grounds that they were covered by legal professional privilege ("LPP"). However, Alcogroup contended that during the second inspection Commission officials did, in fact, review such documents. By letter of 21 April 2015 to the Commission, the applicants submitted that the review of these documents constituted a violation of the right to a fair hearing and of the fundamental right to the inviolability of the home, as well as a violation to the principle of good administration. They therefore requested that the investigations in relation to Alcogroup should be suspended. In its reply of 8 May 2015, the Commission rejected this request.

Alcogroup sought the annulment before the GC of both the second inspection decision and the Commission's letter of 8 May 2015 on the grounds that:

- The defects in the implementation of the second inspection decision invalidated the decision;
- The second inspection decision should have provided for precautionary measures in order to prevent the Commission from becoming aware of documents prepared by Alcogroup concerning its defence following the first inspection;
- The letter of 8 May 2015 was an actionable measure on the grounds that the Commission failed to comply with the agreement drawn up at the beginning of the second inspection concerning legally privileged documents and that the letter constituted a refusal to grant the protection afforded by European law to confidential correspondence covered by LPP.

The Commission disputed the admissibility of the action as a whole.

As regards the annulment of the second inspection decision, the GC recalled that it is settled case-law that acts subsequent to the adoption of a decision cannot affect the validity of the decision. Rather, the legality of the act must be assessed in the light of the elements of law and fact existing at the time that the decision was adopted. The GC added that an undertaking cannot rely on the unlawfulness of the conduct of inspection proceedings in support of an annulment against the act on the basis of which the Commission carried out that inspection. In this regard, the GC distinguished the situation at hand from the *Deutsche Bahn* case where the information illegally collected during the first inspection had been the basis for subsequent inspection decisions, and the GC therefore annulled the later, but not the first inspection decision (Case C-583/13 P, *Deutsche Bahn and Others v Commission*). The GC stated that it could not be inferred from the *Deutsche Bahn* judgment that the unlawful conduct of an inspection in and of itself has the potential to call into question the validity of the decision authorising the same inspection.

In relation to the provision for precautionary measures, the GC dismissed the claim, as Alcogroup did not identify any concrete rule establishing a legal obligation for the Commission to include specific precautionary measures in the inspection decision relating to the protection of documents covered by LPP.

Finally, as regards the annulment of the Commission's letter of 8 May 2015, the GC dismissed Alcogroup's request on the basis that the letter was only a preliminary act, suggesting that the investigation procedures would continue and a final act would be adopted, which would definitively determine the Commission's position. Therefore, such a letter was not a measure which can be the subject of an action for annulment. More precisely, the GC disagreed that the letter constituted a formal decision refusing to grant the protection afforded to documents protected by LPP. The GC found that, in the letter of 8 May 2015, the Commission did not rule on whether or not the documents were covered by LPP but, at most, confirmed to Alcogroup that the documents were not being read by the Commission. Moreover, there was no tacit decision on the part of the Commission rejecting the claim for protection of the documents under LPP.

In conclusion, the GC dismissed the action for annulment finding it to be inadmissible.

Commission proposes protection for whistleblowers

On 23 April 2018, the European Commission (the "Commission") published draft whistleblower protection legislation designed to shield persons who report breaches of EU law which they observe in their work-related activities ("Proposal for a Directive on the Protection of Persons Reporting on Breaches of Union Law" – COM(2018) 218 final of 23 April 2018). According to the Commission, such protection is needed because whistleblowers play a critical role in uncovering unlawful activities that damage the public interest.

The protection will be afforded for a wide range of EU law breaches in the areas of competition law, consumer protection, data protection and privacy, money-laundering and terrorist financing, product safety and public procurement and in sectors as diverse as public health (including pharmaceuticals and medical devices), food, animal health and transport.

Many organisations will be subject to the new rules as these will apply to all private companies with at least 50 employees or with an annual turnover or balance sheet exceeding € 10 million. These companies will be required to create internal channels and procedures to handle whistleblowers' reports. Importantly, the new rules will also apply to public entities such as States, regional administrations or local municipalities with a population of more than 10,000 inhabitants as well as other public law entities.

Member States will have to complement the internal reporting procedures with external reporting channels. In addition, reporting will have to result in follow-up and feedback and will impose a record-keeping obligation. There will also be elaborate rules to avoid all forms of retaliation as well as remedies if the anti-retaliation measures fail.

Additional information can be found on the Commission's website: http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=620400.

– MEMBER STATE LEVEL –

FRANCE

Paris Court of Appeal confirms that raided companies must be given possibility of contacting their outside counsel immediately

On 28 March 2018, the Paris Court of Appeal annulled the dawn raid carried out by the French Competition Authority ("FCA") at the premises of household appliance distributor Darty for breach of its rights of defence.

The FCA's investigation related to alleged anticompetitive practices in the household appliances sector, and, in particular, to vertical restraints that were allegedly imposed by household appliance suppliers including Darty on other distributors.

Having obtained a judicial authorisation, the FCA carried out a dawn raid at Darty's premises on 17 October 2013. At the beginning of the inspection, the FCA officials did not allow the company to immediately contact its outside legal counsel and only allowed such contact after seals had been affixed on the offices to be searched.

For the Court, by postponing the possibility for Darty to contact its outside counsel, the FCA had breached the company's right to benefit from the effective and immediate assistance of a lawyer. As a result, the Court annulled the dawn raid carried out by the FCA, ordered the FCA to return the seized documents and forbade it to make use of any such documents in its proceedings.

This decision of the Paris Court of Appeal is in line with the judgment of the French Supreme Court of 4 May 2017, which, in the framework of the same investigation, had ruled in favour of Samsung Electronics France in relation to a similar breach of its rights of defence (see VBB on Competition Law, Volume 2017, No. 5).

In the centre of Europe with a global reach

VAN BAEL & BELLIS

Chaussée de La Hulpe 166
Terhulpsesteenweg
B-1170 Brussels
Belgium

Phone: +32 (0)2 647 73 50
Fax: +32 (0)2 640 64 99

vbb@vbb.com
www.vbb.com