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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

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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
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| MERGER CONTROL

– MEMBER STATE LEVEL –

AUSTRIA

Austrian Cartel Court levies fines for delayed compliance with merger divestiture commitment

In a decision issued on 8 July 2015 and made public on 28 October 2015, the Austrian Cartel Court (the "Cartel Court") imposed a fine of € 40,000 on the Austrian state-owned transport company Graz Köflacher Bahn- und Busbetrieb ("Graz Köflacher") for failing to comply with its merger commitments on time.

In April 2011, Graz Köflacher notified the Austrian Competition Authority ("BWB") of its purchase of the remaining 50% of LTE Logistik- und Transport GmbH ("LTE") that Graz Köflacher did not already own. The BWB requested review of the transaction by the Cartel Court, after which Graz Köflacher committed in June 2011 to resell the additional 50% shareholding within 18 months, i.e., by December 2012, subject to a 12-month extension until December 2013 if it was unable to find a suitable buyer. In response, the BWB withdrew its request for review, and the Cartel Court terminated proceedings.

However, Graz Köflacher ultimately sought the BWB's merger control approval of the proposed sale to implement the divestment only in July 2015, more than a year after the extended deadline had expired. In response, the BWB requested that the Cartel Court fine Graz Köflacher for illegally implementing its buyout of LTE by failing to comply with the attached conditions by the required deadline.

The Cartel Court considered that it should have been obvious to Graz Köflacher that merely attempting to sell the required shares was insufficient to comply with the commitment, as only the actual sale of the shares would remedy the competition concerns of the BWB and lead to the withdrawal of the BWB's request for review. Moreover, if the indicated deadlines had been unrealistic as such, then it would have been reckless of Graz Köflacher to offer them. The Cartel Court therefore confirmed the fine requested by the BWB.

DENMARK

Danish slaughterhouses abandon merger due to opposition from Danish authorities

On 2 November 2015, competing Danish slaughterhouses Danish Crown and Tican announced that they were abandoning their planned merger, as they had concluded that the Danish authorities would not be willing to approve the transaction.

The parties notified their proposed merger to the European Commission on 3 June 2015, but Denmark requested that review of the transaction be referred to the Danish Competition and Consumer Authority ("DCCA"). On 17 July, the European Commission found that a separate geographic market existed in Denmark for certain relevant products, and it therefore referred the portion of the merger control review concerning these Danish markets to the DCCA. On the same day, the Commission approved the transaction with regard to the markets outside Denmark.

Based on a national-level geographic market, the transaction would have combined the two main slaughterhouses active in Denmark and led to market shares of around 90% for the buying of live pigs for slaughter. The DCCA reportedly rejected a number of significant commitments offered by the merging parties, and the parties concluded that the DCCA would not be willing to approve the transaction within the required legal deadline. The parties therefore formally abandoned the transaction on 2 November.

The case illustrates the relationship between the EU Merger Regulation's partial referral mechanism and substantive merger control review. In order for the Commission to grant a Member State's request to refer part or all of a case to national review, the Commission must conclude that the transaction would affect "a market within that Member State, which presents all the characteristics of a distinct market". In this case, the parties had relied on the argument that the scope of the relevant geographic markets for key products was broader than Denmark alone. Consequently, the Commission's decision to refer a part of the case to the DCCA effectively rejected the parties' main argument and

facilitated a review by the DCCA of national-level markets, dooming the merger.

SPAIN

Spanish Competition Authority again imposes fines for failure to comply with merger commitments

On 18 November 2015, the Spanish Competition Authority ("CNMC") imposed a € 2.8 million fine on television broadcaster Atresmedia (formerly Antena 3) for failure to comply with certain behavioural commitments connected to its 2012 acquisition of La Sexta.

On 13 July 2012, the CNMC conditionally approved the acquisition of Spanish television channel La Sexta by Antena 3 (now Atresmedia). During its investigation into the transaction, the CNMC had expressed concerns regarding the markets for television publicity, the acquisition of audiovisual content and the marketing of that content. As a result, the parties agreed not to foreclose the publicity market and to ensure that the audiovisual content acquired by Atresmedia was periodically made available on the market.

In May 2015, the CNMC opened formal proceedings into Atresmedia for failure to comply with some of these commitments. The CNMC found that Atresmedia had bundled publicity space on the channels of the group from October 2012 to February 2014 in violation of its commitments not to foreclose the publicity market, and that it had disregarded the commitments concerning audiovisual content acquisition and marketing from September 2012 to November 2014. The CNMC therefore imposed a € 2.8 million fine.

This is the second such fine imposed by the CNMC in two months. In September 2015, the CNMC fined television broadcaster Mediaset € 3 million for failing to comply with merger commitments, a case which also concerned, in part, the bundling of advertising space on its channels (see VBB on Competition Law, Volume 2015, No. 9).

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ABUSE OF DOMINANT POSITION

– MEMBER STATE LEVEL –

GERMANY

Higher Regional Court of Düsseldorf overrules decision on EDEKA's "wedding rebates"

On 18 November 2015, the Higher Regional Court of Düsseldorf (the "Court") annulled a decision issued by the German Federal Cartel Office ("FCO") on 3 July 2014, which held that the supermarket chain EDEKA had abused its market position by prompting four suppliers of sparkling wine to grant it discounts – so-called "wedding rebates" – and contractual benefits following EDEKA's takeover of the supermarket chain Plus in 2009 (see VBB on Competition Law Volume 2014, No. 7).

In 2014, the FCO found that, whilst not being dominant, EDEKA's market position on the procurement market in the food retail sector was strong enough for its suppliers to be economically dependent on EDEKA. On appeal, the Court concluded that the "wedding rebates" were the result of negotiations between almost equally powerful parties. According to the Court, as a full-range provider, EDEKA is dependent on the goods of the suppliers. Due to the prominence of their brands, these goods are considered to be "must-stock" products and the concrete market power of EDEKA is therefore opposed by the countervailing power of the suppliers.

The Court found that the commercial negotiation process, which included claims and counterclaims, indicated that the parties were of approximately equal power. All suppliers of sparkling wine were able to negotiate weighty counter-demands and substantially reduce the initial demands of EDEKA.

In addition, the Court found that some of the accusations against EDEKA were based on inaccurate facts. For example, the Court found that, contrary to the assumption of the FCO, EDEKA did not unilaterally impose improved payment targets on the suppliers, but rather made new payment targets dependent on the approval of the suppliers of sparkling wine, and entered into negotiations after the suppliers expressed objections.

The decision of the Court is not final and may be appealed to the German Federal Court of Justice.

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| VERTICAL AGREEMENTS

– MEMBER STATE LEVEL –

AUSTRIA

Austrian Supreme Court of Justice increases fine on retailer Spar

On 8 October 2015, the Austrian Supreme Court of Justice (the "Supreme Court") increased the fine against Spar, a food retailer, from € 3 million to € 30 million after upholding an earlier finding of illegal pricing agreements relating to dairy products.

On 26 November 2014, the Higher Regional Court of Vienna (the "Cartel Court") had found that Spar entered into a series of anti-competitive pricing agreements with several suppliers in the dairy products sector between 2002 and 2012, and imposed a fine of € 3 million (proceedings concerning other product groups are still pending). These agreements were found to have both vertical and horizontal aspects. In brief, Spar agreed with the supplier the resale price that Spar would charge and the supplier in turn agreed to communicate this price to Spar's competitors and to induce them to apply it. As such, this amounted to a hub-and-spoke arrangement intended to prevent competition between Spar and its competitors.

On appeal, the Supreme Court upheld the finding of an infringement, but found serious fault with the calculation of the fine. It stated that, under Austrian law, the basic amount of the fine is set by reference to the infringing undertaking's total turnover during the final year of the infringement (in contrast, under the EU's fining guidelines, the basic amount of the fine is set by reference to the turnover affected by the infringement). The Supreme Court held that the EU's fining methodology does not sufficiently account for the undertaking's entire economic capacity and accordingly does not satisfy the requirements of Austrian law. Furthermore, referring to a judgment of the German Federal Supreme Court of 26 February 2013 (see VBB on Competition Law, Volume 2013, No. 4), the Supreme Court held that the maximum level of a fine, which is 10% of the undertaking's overall turnover in the previous financial year, is not merely a cap but also serves as basis for setting the range of the fine to be taken into account by the Cartel Court.

The Supreme Court stated that a fine of € 3 million accounted for merely 0.0346% of the overall group turnover of Spar, which was € 8.67 billion in 2013 (and of which € 400 million was related to dairy products). In addition, taking into account the objective of deterrence, a fine of € 3 million would only be appropriate if the potential benefits of the infringement did not exceed € 3 million. As the Supreme Court considered this to be completely unrealistic, it increased the fine to € 30 million, which accounted for 0.346% of the group's total turnover in 2013.

Austrian Cartel Court fines supermarket chain and parent company for vertical pricing agreements

On 2 July 2015, the Austrian Cartel Court (the "Court") imposed a fine of € 562,500 on Zielpunkt GmbH ("Zielpunkt"), an Austrian chain of supermarkets, and its parent company Pfeiffer HandelsgmbH ("Pfeiffer"), for entering into anti-competitive vertical pricing agreements with food suppliers between March 2007 and July 2011. Zielpunkt and its suppliers agreed on retail prices for dairy products, meat and sausage products, beer, non-alcoholic beverages and milled products, which were sometimes implemented. The Court found that the infringement also had a horizontal element as Zielpunkt received price information concerning its competitors. The Court found Pfeiffer to be jointly and severally liable for the infringement of its wholly owned subsidiary Zielpunkt.

Austrian Cartel Court fines United Navigation for vertical pricing agreements

On 8 July 2015, on application by the Austrian Cartel Authority, the Austrian Cartel Court (the "Court") imposed a fine of € 100,000 on United Navigation GmbH ("United Navigation"), a provider of portable navigation solutions.

The Court found that United Navigation and several retailers agreed on retail prices to be charged in online shops and in brick-and-mortar retail outlets between January 2010 and

May 2014. Furthermore, the Court found that the conduct had additional horizontal effects because United Navigation coordinated prices between the retailers. United Navigation also prohibited the retailers from selling its products in Germany.

The fine imposed by the Court took into account a 30% reduction for United Navigation's cooperation and a further 20% reduction as the case was concluded by way of a settlement.

Austrian Cartel Court fines Samsung for vertical pricing agreements

On 9 September 2015, the Austrian Cartel Court ("the Court") imposed a fine of € 1,050,000 on Samsung Electronics Austria GmbH ("Samsung") for engaging in a series of "vertical coordination measures" with Austrian resellers between April 2009 and May 2014. Samsung requested resellers to increase online sales prices for electronic products such as TVs, notebooks, vacuum cleaners, monitors, refrigerators, washing machines and tablets. In setting the fine, the Court accepted as a mitigating factor Samsung's cooperation with the Austrian Competition Authority in the clarification of the facts. The Court also took into account the fact that Samsung had put in place internal compliance measures and had taken other steps to prevent future infringements prior to the initiation of the investigation of the Austrian Competition Authority.

FRANCE

French Competition Authority closes investigation into Adidas

On 18 November 2015, the French Competition Authority ("FCA") announced that it had closed a formal investigation into Adidas's online distribution system after Adidas removed certain contractual provisions prohibiting its distributors from selling its products through online market platforms. Under the revised contracts, authorised resellers will be free to sell Adidas products through online platforms, such as eBay and Amazon, whom the FCA likened to shopping malls in the off-line world, provided that such platforms meet the qualitative criteria specified by Adidas. The FCA added that it will remain vigilant to ensure that authorised resellers are in practice provided effective access to online market platforms.

The investigation was conducted in collaboration with the German Federal Cartel Office, which also obtained a similar change in Adidas's distribution policy in 2014 (see VBB on Competition Law, Volume 2014, No. 7). The approach of the French and German competition authorities is controversial as it is apparently not consistent with the European Commission's Vertical Guidelines. The issue is, therefore, expected to be at the forefront of the European Commission's on-going e-commerce sector inquiry (see VBB on Competition Law, Volume 2015, No. 5).

GERMANY

German Federal Cartel Office fines Tempur for resale price maintenance

According to a press release published on 22 October 2015, the German Federal Cartel Office ("FCO") imposed a fine of € 15.5 million on Tempur Deutschland GmbH ("Tempur"), a manufacturer of bedding products, for engaging in resale price maintenance with retailers.

Between 2005 and 2011, retailers agreed with employees of Tempur to sell Tempur's products online and in brick-and-mortar stores at a sales price recommended by Tempur. According to the FCO, the majority of the retailers adhered to the recommended prices, fearing negative consequences in case of non-compliance. The infringement mainly concentrated on online trade because online prices were more transparent. In some instances, when retailers deviated from Tempur's recommended sales prices and did not react after being confronted by Tempur, retailers were punished by delays in supply, discontinuation of supply, or the withdrawal of rights to use Tempur's brand name for online advertising. As for brick-and-mortar stores, Tempur attempted to induce retailers to expressly exclude its products from certain advertising campaigns that substantially reduced prices.

The current investigation was triggered by complaints which led to the FCO carrying out dawn raids at several companies in August 2011. Two other manufacturers of bedding products, Recticel Schlafkomfort GmbH and Metzeler Schaum GmbH, were already fined for resale price maintenance in 2014 and 2015 respectively (VBB on Competition

Law Volume 2014, No. 8 and VBB on Competition Law Volume 2015, No. 2).

The FCO granted Tempur a reduction in the fine for cooperating with the FCO's investigation and entering into a settlement.

– OTHER DEVELOPMENTS –

AUSTRIA: On 9 September 2015, the Austrian Cartel Court (the "Court") imposed a fine of € 170,000 on Nikon GmbH ("Nikon"), Nikon's Vienna branch. The Court found that Nikon and its distributors had agreed on resale prices for digital SLR cameras for beginners and digital compact cameras between 2009 and 2013. In setting the fine, the Court accepted that Nikon had not disputed the facts of the case as a mitigating factor.

GERMANY: On 16 November 2015, the German Federal Cartel Office ("FCO") announced that it had initiated administrative proceedings against Apple and Audible.com, a subsidiary of Amazon and a leading producer and supplier of audiobooks in Germany, in relation to a long-term agreement for the distribution of audiobooks via Apple's iTunes Stores. According to the FCO, this issue had to be looked at closely in view of the strong market position of both companies concerned, which it characterised as competitors. It noted the need for audio book publishers to have sufficient alternative channels for the sale of digital audio books.

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STATE AID

– EUROPEAN UNION LEVEL –

ECJ rules on the application of state aid rules in national court proceedings and the principle of res judicata

On 12 November 2015, the Court of Justice of the European Union ("ECJ") handed down a judgment on a reference for a preliminary ruling from the Münster Regional Court in case C-505/14, *Klausner Holz Niedersachsen GmbH v Land Nordrhein Westfalen*. The case concerns the application of the EU state aid rules in national court proceedings following a definitive judgment of a national court.

In 2007, Klausner Group, of which the applicant is part, had concluded a contract for the supply of wood with the Forestry Administration of the Land of North Rhine – Westphalia (the "Land"). In 2009, the Land rescinded the contract and ceased to supply wood to Klausner Holz. The Münster Regional Court issued a declaratory judgment holding that the contracts at issue remained in force, which was confirmed on appeal. The judgment on appeal was definitive, or *res judicata*.

The applicant then brought a new action against the Land before the referring court, seeking payment of damages and the execution of the contract. The referring court took the view that the contracts at issue constituted state aid which was implemented in breach of the third sentence of Article 108(3) TFEU. However, it regarded itself as prevented from drawing the consequences of the breach because of the declaratory judgment, which is *res judicata*, by which it was held that the contracts at issue remained in force. The referring court therefore decided to stay the proceedings and refer a question to the ECJ.

In its judgment, the ECJ reiterates that the national court should interpret the provisions of national law in such a way that they can be applied in a manner which contributes to the implementation of EU law. Therefore, the ECJ states that the referring court should examine the possibility of ordering a measure such as the temporary suspension of the contracts at issue until the adoption of the Commission decision closing the procedure. Indeed, this would enable that court to satisfy its obligations under the third sentence of Article 108(3) TFEU without actually ruling on the validity of the contracts at issue. Furthermore, the referring court should ascertain whether the rule of national law enshrining the principle of *res judicata* extends only to the legal claims on which the court has ruled and therefore does not preclude a court from ruling, in a later dispute, on points of law on which there is no ruling in that definitive decision. Indeed, in the proceedings which led to the declaratory judgment in first instance and the definitive judgment on appeal, the question of state aid was not examined.

The ECJ then states that, if such a measure or interpretation should prove not to be possible, attention should be drawn to the importance of the principle of effectiveness. According to the principle of effectiveness, national procedural rules, such as the principle of *res judicata*, should not be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by EU law. The ECJ concludes that if, in a case such as the case at issue, the principle of *res judicata* were to take precedence over the application of the state aid rules, both the state authorities and recipients of state aid would be able to circumvent the prohibition laid down in the third sentence of Article 108(3) TFEU by obtaining, without relying on EU state aid law, a declaratory judgment whose effect would enable them, definitively, to continue to implement the aid in question over a number of years.

Therefore, the ECJ considers, in circumstances such as those at issue in the main proceedings (where a court in earlier proceedings did not consider the state aid aspect of the case), that EU law precludes a national court from giving effect (on the basis of the principle of *res judicata*) to a contract which constitutes state aid and was implemented in breach of the third sentence of Article 108(3) TFEU.

This case is interesting in that it clearly asserts the primacy of EU State aid rules and the effectiveness thereof, even over the principle of *res judicata* under national law.

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LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– EUROPEAN UNION LEVEL –

EU Commission begins public consultation on the need to enhance enforcement powers of NCAs

On 4 November 2015, the European Commission released a public consultation in the form of an online questionnaire designed to collect opinions on whether national competition authorities ("NCAs") should be given additional powers to enforce EU competition rules.

This public consultation follows the Commission Communication "Ten Years of Regulation 1/2003" (the "Communication"), published in July 2014, on the enforcement of EU competition law at both national and EU level during the past ten years. While the Communication highlighted the close and efficient cooperation between the Commission and the NCAs within the European Competition Network ("ECN"), it also noted a number of important areas where divergence still subsists, i.e., (i) the rules on the independence of NCAs and their resources; (ii) the range of enforcement, investigative and decision-making powers available to NCAs; (iii) the rules on the calculation of fines for the imposition of proportionate and effective fines; (iv) the introduction of a leniency programme in all member states; and (v) the interplay between corporate leniency programmes and criminal sanctions on individuals. In a speech delivered on 20 November 2015, Competition Commissioner Margarethe Vestager again pointed out these areas of divergence and highlighted issues such as authorities not having the power to properly collect evidence, to impose appropriate fines or to be completely impartial, which translate into concerns for both businesses and consumers.

The Commission now seeks to gather views from stakeholders on how the powers of NCAs should be enhanced in order to facilitate increased convergence of the national rules in the above areas.

An initial section of the online questionnaire deals with NCA resources and independence. The Commission underlines that there are notable differences between NCAs as far as financial and human resources are concerned, which have sometimes resulted in the NCA not conducting (or poorly conducting) certain enforcement activities. Another issue relating to the independence of NCAs is that they are not always safeguarded from the interference of national public and private bodies.

In a second section, the main issue pointed out by the Commission is that most NCAs do not have a comprehensive and effective set of investigation and decision-making powers. An illustration of this is the fact that some NCAs lack the power to reject complaints based on priority grounds, or to adopt commitment decisions and to inspect non-business premises. While most NCAs do have the power to inspect business premises, some NCAs still cannot gather digital evidence effectively. Additionally, fines may not always act as a very strong deterrent to undertakings, since fines are set at a very low level in some jurisdictions and NCAs may lack the power to impose periodic penalty payments to compel compliance.

A third section deals with the imposition of fines and, more particularly: (i) the nature of the fines imposed (civil, administrative or criminal); (ii) the persons who may be fined (the concept of "undertaking", the liability of parent companies, the liability of legal or economic successor); and (iii) the determination of the amount of the fines (legal ceiling, methodology and factors, aggravating and mitigating circumstances).

In a fourth section, the Commission deals with the leniency programmes adopted at national level and the impact that certain limitations in one jurisdiction may have in other EU jurisdictions. Despite the fact that the ECN's Model Leniency Programme has increased consistency between leniency programmes, there are still a number of remaining differences on issues such as who can benefit from leniency and under which conditions leniency may be obtained.

The deadline for taking part in the Commission's public consultation is 12 February 2016. Based on the answers received, the Commission will decide whether further action is needed in these areas. Commissioner Vestager emphasised that this is not about simply harmonising various

laws, but also about empowering NCAs to work cooperatively towards achieving a more competitive Europe.

– MEMBER STATE LEVEL –

BELGIUM

Belgian Competition Authority launches public consultation on new leniency guidelines

On 10 November 2015, the Belgian Competition Authority ("BCA") launched a public consultation on new draft leniency guidelines (the "Draft Guidelines") in order to revise the current 2007 leniency guidelines.

The reasons for the revision of the current guidelines are threefold. First, the introduction of sanctions and immunity from prosecution for natural persons in Book IV of the Belgian Code of Economic Law requires a revision of the 2007 guidelines, which currently only apply to undertakings. Second, the revision should reflect amendments made to the Model Leniency Program of the European Competition Network in November 2012. Finally, the revision aims at reflecting the experience gained by the BCA since 2007.

The main novelty of the Draft Guidelines consists in the introduction of a section on immunity from prosecution applicable to natural persons.

The Draft Guidelines make clear that natural persons can only be prosecuted and found guilty for their participation in a cartel if an undertaking or an association of undertakings is also found guilty on the basis of the same facts.

In addition, the Draft Guidelines provide that natural persons covered by the leniency application filed by an undertaking or an association of undertakings are always eligible for immunity from fines. Natural persons can obtain immunity from prosecution regardless of the rank of their immunity application.

Natural persons seeking immunity from prosecution can file their application either together with an undertaking (or association of undertakings) or on their own initiative. If the latter, a natural person can be granted immunity from prosecution regardless of whether the undertaking (or association of undertakings) has filed a leniency application.

However, natural persons seeking immunity on their own must be involved in the cartel at stake and must provide the BCA with the same kind of information that an undertaking (or association of undertakings) would have to submit in order to obtain partial or total immunity from fines.

It is worth noting that, under the Draft Guidelines, the fact that a natural person has applied for immunity from prosecution and provided the information necessary to be granted immunity does not prevent an undertaking or an association of undertakings from obtaining a total or partial reduction of fine.

Finally, the above rules apply regardless of whether the undertaking or association of undertakings which applied for leniency is (or has been) linked to the natural person seeking immunity.

The BCA invites all interested parties to send their comments on the Draft Guidelines to pres@bma-abc.be by 10 December 2015.

Draft Bill proposes the introduction of "abuse of significant dominant position" into Belgian competition law

On 13 November 2015, a draft bill introducing into Belgian competition law a new infringement called "abuse of significant dominant position" (the "Draft Bill") was submitted to the Chamber of Representatives of the Belgian Federal Parliament.

The Draft Bill follows the announcement made on 8 July 2015 by the Minister of Economic Affairs and Consumers, Kris Peeters, that he is examining whether, and in what form, a prohibition on the abuse of economic dependence, as is in place in France, could be introduced in Belgium.

The aim of the Draft Bill is to protect small companies which are in a relationship of economic dependence vis-à-vis bigger companies. These bigger undertakings may find themselves in a position of "relative" dominance (vis-à-vis certain undertakings only) but not in an "absolute" dominant position on the market, and thus fall outside the scope of Article IV.2 of the Code of Economic Law ("CEL"), which prohibits abuses of a dominant position (the Belgian provision corresponding to Article 102 TFEU). Also, Article IV.2 CEL only applies if the abuse distorts competition in the entire

market concerned, which is not necessarily the case where an undertaking commits an abuse of its dominant position vis-à-vis a specific undertaking only.

Therefore, the Draft Bill aims at introducing a second paragraph in Article IV.2 CEL to prohibit "abuses of a significant dominant position". A "significant dominant position" would include (but would not be limited to) the situation where there is a "link of economic dependence between the buyer and the seller". This is described in the commentary attached to the Draft Bill as situations where a business relationship is so unbalanced that, in practice, it is impossible for one of the undertakings concerned to turn to another trading partner.

The Draft Bill contains a non-exhaustive list of practices which would be considered as abuses of a significant dominant position:

- to apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- to permanently impose on the producer or the supplier of a good a requirement to sell it at a price which does not cover the cost of production, thereby placing the producer or supplier at a competitive disadvantage;
- to permanently impose on a buyer a requirement to acquire goods at a price significantly higher than the market price, thereby placing the buyer at a competitive disadvantage;
- to directly or indirectly impose unfair trading conditions;
- to suddenly terminate an existing commercial relationship, or to threaten to do so.

If the Draft Bill is adopted, undertakings which commit an abuse of a significant dominant position will be subject to a gradual system of sanctions. First, the undertaking concerned will be given the possibility to change its behaviour or end it within a certain deadline. If the undertaking does not comply, the decision establishing the existence of an abuse of significant dominant position will be published in the Belgian Official Journal. Further, if the undertaking still refuses to implement behavioural changes, a fine will be imposed.

It is worth noting that the Draft Bill still has to go through the full parliamentary procedure, which includes discussions and possible amendments to the Draft Bill before it is subject to vote, first in committee and then during a plenary session of the Parliament. This process can be lengthy and it remains to be seen whether it will eventually lead to the adoption and entry into force of the Draft Bill.

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| PRIVATE ENFORCEMENT

– MEMBER STATE LEVEL –

THE NETHERLANDS

Dutch government publishes legislative proposal for implementing Directive on Antitrust Damages Actions

On 8 October 2015, the Dutch Ministers of Justice and Economic Affairs published a legislative proposal for the implementation of the EU Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (the "Directive") (see VBB on Competition Law Volume 2014, No. 11).

The proposal envisages the implementation of the Directive as part of the Dutch Civil Code ("DCC") and the Dutch Code of Civil Procedure ("DCCP"). The proposal essentially corresponds to the provisions of the Directive. In certain respects, however, transposition was not deemed necessary.

Concerning joint and several liability and full compensation, the joint and several liability for harm caused by joint behaviour of undertakings, the right to full compensation, including actual loss, loss of profit and interest, and the prohibition of overcompensation were considered to be already part of Dutch law. However, in line with the Directive, the proposal limits the liability of immunity applicants to harm caused to their own direct and indirect purchasers or providers.

As far as claims by direct and indirect purchasers are concerned, Dutch law was neither deemed to preclude claims by direct and indirect purchasers of a competition law infringer, nor to prevent claims in relation to injury suffered as a result of full or partial passing-on of the overcharge, since pursuant to Dutch tort law anyone who suffers injury as a result of an infringement of competition law is entitled to bring a claim for damages against the perpetrator of the injury. In this regard, the Ministers were of the view that Dutch law already foresees the means to avoid multiple liability or absence of liability due to actions for damages by claimants from different levels in the supply chain.

With respect to the disclosure of evidence, the current regime in the DCCP was considered to be in conformity with the Directive and to go even beyond the requirements of the Directive. As to the disclosure of evidence from the file of the competition authority, in line with the Directive, the proposal does not allow for the disclosure of leniency statements and settlement submissions and makes the disclosure of certain documents, such as replies to requests for information, conditional upon the closure of proceedings by the competition authority.

Notwithstanding the fact that the passing-on defence in relation to claims by indirect purchasers was recognised by the Arnhem-Leeuwarden Court of Appeal in September 2014 (see VBB on Competition Law Volume 2014, No. 10), the proposal includes a provision explicitly recognizing that defendants may invoke as a defence that the claimant passed on whole or part of the overcharge resulting from the infringement of competition law.

The proposal provides for mandatory implementation of the Directive by 26 December 2016 at the latest.

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