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MERGER CONTROL: Commission publishes White Paper on minority shareholding acquisitions and case referrals ■ Commission fines Marine Harvest € 20 million for late notification

ABUSE OF DOMINANT POSITION: ECJ dismisses appeal lodged by Telefónica in margin squeeze case ■ German Federal Cartel Office cracks down on "wedding rebates"

CARTELS AND HORIZONTAL AGREEMENTS: General Court reduces fines for three groups in candle wax cartel case ■ German Federal Cartel Office imposes fines on sausage cartel

VERTICAL AGREEMENTS: German court rules against Casio Europe's prohibition of online sales via Internet platforms

INTELLECTUAL PROPERTY: Commission fines Servier and 5 other generic producers a total of € 427 million over "pay-for-delay" deals and abuse of a dominant position

STATE AID: Commission adopts revised guidelines on state aid for undertakings in difficulty

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS: Commission publishes Communication on past and future of EU antitrust enforcement

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MERGER CONTROL

EUROPEAN UNION LEVEL

Commission publishes White Paper on minority shareholding acquisitions and case referrals

On 9 July 2014, the European Commission adopted a White Paper and opened a public consultation to consider possible new procedures that would allow the Commission to review acquisitions of non-controlling minority shareholdings under the EU merger control rules. The White Paper also outlines proposed changes to the rules on the referral of merger cases between the Commission and the EU Member States. Lastly, the White Paper suggests various other simplifications to the EU merger control procedure. The proposals contained in the White Paper, if adopted, would constitute the most significant changes to EU merger control since the regime was overhauled in 2004.

Acquisitions of non-controlling minority shareholdings

At present, the Commission does not have the power under the EU merger control rules to review or take action against acquisitions of minority shareholdings that do not give the acquirer joint or sole control over the target company. However, the Commission considers that, in certain cases, such acquisitions of non-controlling minority stakes could seriously harm competition. For example, a company that acquires a minority stake in its competitor might compete less vigorously if this stake would entitle it to a share of the competitor's profits. A minority shareholder could also have sufficient influence to affect the commercial strategies a competitor pursues. Although the Commission could investigate acquisitions of non-controlling minority stakes under Articles 101 and 102 TFEU, at least in certain cases, it considers that these existing legal provisions are insufficient and that an expansion of the Merger Regulation is therefore needed.

In June 2013, the Commission therefore launched a consultation to examine possible changes to the merger control law that would allow it to review acquisitions of non-controlling minority shareholdings that could raise competition concerns (see VBB on Competition Law, Volume 2013, No. 6). At that time, the Commission put forward three possible options: (i) a mandatory "prior notification system" of all acquisitions of non-controlling minority shareholdings meeting the EU thresholds; (ii) a "transparency system", whereby acquirers of non-controlling shareholdings would have to file a short information notice based on which the Commission could decide whether to investigate the acquisition; and (iii) a "self-assessment system", whereby no filing would be necessary but the Commission would be free to open an investigation at its own initiative.

In the White Paper, the Commission has now proposed to pursue a modified, "targeted" form of the "transparency system", which would require parties to submit an information notice, but only in the case of an acquisition giving rise to a "competitively significant link". According to this proposal, transactions would be considered to create a "competitively significant link" where: (1) the target of the acquisition is a competitor or is active in a market upstream or downstream from that of the acquirer; and (2) the acquired shareholding either reaches 20% or is between 5% and 20% but is accompanied by "additional factors", such as a de facto blocking minority, a seat on the board of directors, or access to commercially sensitive information.

The Commission proposes that the required information notice would contain certain details regarding the parties and the transaction, the shares and rights that would result from the minority stake being acquired, and "some limited market share information". The Commission is considering imposing a standstill obligation of around 15 working days from the submission of the information notice, during which the parties could not close their transaction. The Commission would also have a defined period within which it would be free to investigate the transaction, which the Commission currently proposes to be four to six months long. As part of its investigation, the Commission proposes that it would have the power to issue interim measures if the transaction has already been implemented, such as the hold separate order it can currently impose in its normal merger review.

Case referrals

In the White Paper, the Commission proposes to modify the procedures for three different types of merger control referrals.

The first proposed change concerns the provision that allows merging parties whose transaction does not meet the turnover thresholds for an EU notification but is capable of being reviewed in three or more Member States to request a referral of the case from these Member States to the Commission. At present, parties wishing to take advantage of a “one-stop shop” by notifying their transaction to the Commission instead of in several Member States must undertake the preliminary step of filing a reasoned submission (known as “Form RS”) and undergoing a 15-working-day waiting period during which the Member States where notification would otherwise be a possibility may object.

Experience shows that Member States rarely object to such referral requests and that the completion of Form RS and the ensuing waiting period is therefore a mostly unnecessary burden to the parties. As such, the Commission is proposing to abolish Form RS and allow merging parties to notify their transaction immediately to the Commission whenever it is capable of being reviewed in three or more Member States. Once the Commission receives the notification, it would immediately forward it to the Member States, which would still have 15 working days within which to object to the Commission’s jurisdiction. However, this period would run concurrently with the Commission’s review of the transaction. If no objections are raised within the 15-working-day period, the Commission would maintain full jurisdiction. However, if any Member State competent to review the transaction objects, the Commission would renounce all jurisdiction and the parties would be obligated to file with each Member State whose rules require notification.

The Commission has also proposed modifying the process by which one or more Member States may request that the Commission takes over the review of a transaction that does not meet the EU thresholds. At present, the rules allow other Member States to ‘join’ the request. If any Member State chooses not to join the request, it remains free to review the transaction itself if it would have jurisdiction under national law to do so. As a result, it is sometimes the case that the same deal is reviewed in part by the Commission and in part by one or more Member State authorities.

The Commission now proposes that if the Commission agrees to the request and no Member State competent to review the transaction objects, the Commission would assume exclusive jurisdiction to review the entire transaction, whereas if the Commission refuses or if any competent Member State objects, the Commission would renounce all jurisdiction. The result of this is that there would no longer be the possibility of the same transaction being reviewed at both the EU and Member State levels, except where a Member State authority had already approved a transaction notified to it before the Commission agreed to take jurisdiction further to a referral request by another Member State.

Finally, the Commission proposes amending the provisions by which the parties themselves may request that the Commission renounce jurisdiction and allow a Member State to review a transaction. At present, parties are reluctant to request referrals from the EU level to a Member State because, in order to do so, the parties must argue that the transaction “may significantly affect competition in a market within [that] Member State”. The Commission proposes to eliminate this “element of self-incrimination” by permitting parties to state only that the transaction is likely to have its main impact in a distinct market in a Member State.

Other proposals

The Commission has also proposed certain miscellaneous procedural simplifications. These include exempting from the notification requirement the creation of full-function joint ventures located and operating entirely outside the EEA. The Commission is also considering whether to exempt certain generally non-problematic categories of cases, such as where the parties are neither competitors nor upstream and downstream from one another.

Analysis

Although there are some aspects that are likely to be of concern to the business community, the Commission's proposals are largely positive.

As concerns case referrals, the changes being proposed would greatly improve a currently byzantine system. In particular, the abolition of Form RS and the elimination of the possibility of partial review by different authorities will streamline the process to the benefit of merging parties.

The proposed elimination of notification requirements for certain categories of transactions that do not raise competition concerns is also clearly welcome.

As concerns the proposals to expand the scope of EU merger control law to cover acquisitions of non-controlling minority shareholdings, while the merit of such an expansion can certainly be debated, the Commission's proposals reflect a desire to minimise its burden on companies. Indeed, the Commission's preferred approach would not impose the burden of mandatory notification – or even mandatory submission of a short information notice – on all acquisitions of non-controlling minority shareholdings. However, the proposed requirement to submit an information notice that would include "some limited market share information" raises questions as to how onerous the burden will be when it does apply. Indeed, providing market share information necessarily means defining the relevant product and geographic market(s), which can be the most time-consuming part of a merger notification.

Of even greater concern is that the Commission's window within which to initiate an investigation into an acquisition of a non-controlling minority shareholding, while not yet fixed, has been proposed at four to six months. Such a period seems excessive and would greatly undermine the legal certainty needed for such transactions, particularly given the possibility of companies being ordered to hold assets separate long after the deal has been implemented. It seems misguided to subject an acquisition of a minority stake to a longer period of legal uncertainty than that encountered in the case of an acquisition of sole control, which can often be notified and approved in less than six months.

The consultation website is accessible at http://ec.europa.eu/competition/consultations/2014_merger_control/index_en.html.

ECJ upholds € 20 million fine on Electrabel for late notification

On 3 July 2014, the European Court of Justice ("ECJ") dismissed Electrabel's final appeal arising from a € 20 million fine for failing to timely notify its 2003 acquisition of control of Compagnie Nationale du Rhone ("CNR") (see VBB on Competition Law, Volume 2012, No. 12).

In December 2003, Electrabel acquired de facto sole control of CNR by purchasing close to 50% of CNR's shares, in conjunction with other factors that gave Electrabel a powerful role in CNR's operational management and a stable majority at shareholders' meetings.

In 2007, Electrabel began consultations with the Commission to determine whether it had obtained control, finally submitting a formal notification of the transaction in April 2008. In part based on the duration of the delay between the acquisition and filing, the Commission fined Electrabel € 20 million for gun-jumping, i.e., implementing a notifiable transaction prior to receiving EU approval.

Electrabel argued before the ECJ that the Commission erred by taking the duration of its infringement into account. Electrabel claimed that because duration was first expressly introduced in 2004 as a factor to consider in fining, the Commission was illegally giving the 2004 Merger Regulation retroactive application to a 2003 acquisition. To the extent that duration could be considered to affect the "gravity" of the infringement, this would be true only if the infringement had harmed competition for that duration, but the Commission had ultimately cleared the deal and found no competitive harm.

The ECJ held that these arguments were inadmissible, as they were not pleas raised before the General Court, nor did they elaborate on parts of the pleas that were raised. While Electrabel had indeed contested whether the

Commission was right to consider the duration of the infringement to be "considerable", it had not argued that the Commission was not entitled to consider duration as a factor at all.

Electrabel also argued that the Commission had wrongly characterised the acquisition as a continuous infringement, when in fact the infringement was instantaneous upon the acquisition in 2003 and therefore the five-year limitations period had expired before the Commission's 2009 decision. The Court rejected this argument, noting that the Commission had issued a Request for Information and a Statement of Objections within five years of the acquisition, making its investigation timely regardless of whether the infringement was instantaneous or continuous.

The Electrabel case illustrates the potential severity of fines for failing to obtain clearance for an acquisition before closing. However, although a similar € 20 million fine was also imposed this July (see this Newsletter, page 6), fines for gun-jumping remain relatively rare.

Commission fines Marine Harvest € 20 million for late notification

On 23 July 2014, the European Commission imposed a € 20 million fine on Marine Harvest for acquiring Morpol without first obtaining merger clearance. The decision is notably similar in key respects to the 2009 decision fining Electrabel for its delay in notifying its 2003 acquisition of Compagnie Nationale du Rhone (see this Newsletter, page 5).

In December 2012, Norwegian salmon farmer Marine Harvest purchased 48.5% of the shares of rival Norwegian salmon farmer Morpol. As in the Electrabel case, Marine Harvest's near-50% share gave it a stable majority at shareholder meetings due to the wide dispersion of the remaining shares and low attendance rates at the meetings. Consequently, it obtained de facto sole control. However, a formal merger filing to the Commission was not made until August 2013, and the deal was not approved until September 2013.

The Commission fined Marine Harvest € 20 million for implementing the acquisition without first obtaining merger clearance. It based the fine on several factors, including that Marine Harvest should have known of its obligation to file and that the transaction, as originally implemented, raised serious competition concerns that ultimately required significant remedies to be approved once Marine Harvest finally notified it. However, the Commission considered the severity of the infringement to be mitigated by the fact that Marine Harvest began pre-notification consultations with the Commission promptly after closing the deal and that it did not exercise the voting rights it had acquired until after clearance.

Importantly, Marine Harvest was fined even though its acquisition of Morpol occurred through a public bid. Such acquisitions are ordinarily exempt from the requirement to suspend closing until approval is received, provided that the acquirer notifies without delay upon closing and does not exercise its voting rights except to protect its investment – requirements Marine Harvest claims to have met. However, to qualify for the public bid exception, control must have been acquired "from various sellers", whereas Marine Harvest reportedly purchased its shares from a single shareholder.

It is also notable that, by imposing a fine on Marine Harvest of the same magnitude as the 2009 fine against Electrabel (€ 20 million in each case), the Commission appears to be maintaining a policy of imposing more severe sanctions against gun-jumpers than it had imposed in the past.

Commission conditionally clears Telefónica's acquisition of E-Plus

On 2 July 2014, the European Commission approved the acquisition of E-Plus by fellow German mobile telecommunications business Telefónica Deutschland, subject to significant conditions. This marks the second high-profile national telecommunications merger cleared since the Commission's controversial approval of Hutchison 3G's acquisition of Orange Austria in December 2012 (see VBB on Competition Law, Volume 2013, No. 1 and Volume 2014, No. 6), which has reportedly resulted in significant price increases in Austria.

Telefónica and E-Plus (the German subsidiary of Dutch telecom operator KPN) are the third- and fourth-largest of the four mobile network operators ("MNOs") on the German market. The Commission had serious concerns that the acquisition would impact competition in two markets: (i) the retail market in Germany for mobile telecommunications services; and (ii) the wholesale market in Germany for hosting service providers and mobile virtual network operators ("MVNOs"), i.e., operators that lack their own network.

In both markets, the deal would have left three similarly-sized competitors in markets characterised by high barriers to entry and a lack of countervailing buyer power. The Commission considered that Telefónica and E-Plus were close competitors at the retail level and that both were important competitive forces, meaning their merger would eliminate particularly aggressive competition in the market. In addition, the Commission felt that their combination would reduce the incentives for other MNOs to compete aggressively as well as the ability for other players to exert competitive pressure on remaining MNOs. Telefónica therefore agreed to extensive commitments designed to ensure the short-term entry or expansion of MVNOs offering competing retail services and the potential ultimately for the entry of a fourth MNO.

First, Telefónica agreed to sell up to 30% of the merged entity's network capacity to up to three MVNOs and to offer them a dedicated "pipe" in Telefónica's network. This capacity would be in exchange for a fixed fee rather than on a pay-as-you-go basis, giving the MVNOs the incentive to compete aggressively to fill their fixed capacity with new subscribers.

Second, it agreed to divest radio wave spectrum to an MNO entrant or to the MVNOs taking over its network capacity. In conjunction with spectrum auctions planned by the German government, this should help a fourth MNO to emerge.

Finally, it agreed to behavioural commitments to extend wholesale agreements with its partners for 2G and 3G services and to offer 4G services to all interested players in the future. In the Commission's view, this should improve partners' planning security and bargaining positions with respect to other MNOs as well.

Subject to these commitments, the Commission approved the acquisition on 2 July.

Together with the similar investigation and approval of Hutchison 3G's acquisition of Telefónica Ireland, the Commission's decision in Telefónica/E-Plus provides a blueprint for similar four-to-three telecommunications mergers. In particular, it appears to suggest that in comparable cases the Commission may deny Member States' requests to give jurisdiction to national regulators and ultimately may be willing to approve deals despite the barriers to entry and lack of buyer power that are characteristic of the telecoms market, provided appropriate remedies are offered. In both cases, the parties were willing to sponsor MVNOs and potential entrant MNOs as competitors by selling network capacity and ensuring competitors or potential competitors had planning security and the incentives to expand.

OTHER DEVELOPMENTS

EUROPEAN UNION: On 15 July 2014, the European Commission conditionally cleared the acquisition of Finnish steel producer Rautaruukki by Swedish rival SSAB, combining the clear market leaders in the Nordic countries in the production and distribution of flat carbon steel, stainless steel, and steel sheets. SSAB committed to divest production and distribution businesses and to ensure that another flat carbon steel producer would own a stake in these assets. The divestitures thus not only reduce the overlap between the parties but also ensure a competitor will have a route to the Nordic market.

ABUSE OF DOMINANT POSITION

EUROPEAN UNION LEVEL

ECJ dismisses appeal lodged by Telefónica in margin squeeze case

On 10 July 2014, the Court of Justice of the European Union (the "ECJ") issued its judgment on an appeal by Telefónica and Telefónica de España (collectively "Telefónica") against the judgment of the General Court affirming the finding that the companies had abused their dominant position on the Spanish broadband market by engaging in a margin squeeze. The ECJ largely upheld the General Court's judgment.

In the underlying decision of 4 July 2007, the Commission concluded that the companies had abused their dominant position on the Spanish broadband market from September 2001 to December 2006 by engaging in a margin squeeze with regard to the spread of its prices for retail broadband access on the Spanish market and the prices on the regional and national wholesale markets (see VBB on Competition Law, Volume 2007, No. 8).

The Commission imposed a fine of € 151.875 million, considering the infringement to be "very serious". In contrast, the Commission had previously imposed a fine of € 12.6 million against Deutsche Telekom for a similar practice, which reflected in part its finding that a margin squeeze had not been the subject of a formal Commission decision at the time of that case. As pointed out in a previous edition of this newsletter (see VBB on Competition Law, Volume 2012, No. 4), however, the classification of Telefónica's conduct as "very serious" in and of itself covered a period of more than 18 months before the adoption of a formal Commission decision finding a margin squeeze. In fact, the fine imposed on Telefónica was so large that it was the second largest for an abuse of dominance, behind Microsoft.

The Commission's decision was also notable insofar as the Commission emphasised that its position was in line with the then-current Discussion Paper on Article 82 EC (later adopted as the Guidance on the Commission's Enforcement Priorities in Applying Article 82), as the decision referred to the "as-efficient competitor test". In subsequent court proceedings involving the Intel decision, however, the Commission expressly distanced itself from the need to apply the methodology set out in these statements in assessing abuse of dominance cases, a point on which the General Court agreed (see VBB on Competition Law, Volume 2014, No. 6).

On appeal by Telefónica, the General Court upheld the decision in its entirety on 29 March 2012 (see VBB on Competition Law, Volume 2012, No. 4).

The ECJ essentially upheld the General Court's judgment in its entirety. In this respect, the ECJ disagreed with the Opinion of the Advocate General that concluded that the General Court did not carry out the necessary in-depth examination of the calculation of the fine (see VBB on Competition Law, Volume 2013, No. 9). According to the Advocate General, the 12 short points in the General Court's judgment were particularly insufficient in light of the exceptional amount of the fine imposed, both when considered on its own and in relation to previous cases such as Deutsche Telekom. Although the ECJ found fault with several omissions in the reasoning of the Commission and General Court as regards the imposition of the fine (the only elements of its judgment that were critical of the Commission or General Court), it nevertheless concluded that such reasoning was sufficient for purposes of EU competition law.

The judgment of the ECJ is also interesting insofar as it indicates that, in order to establish that any practice is abusive, it must be shown that it has potential anti-competitive effects "*which may exclude competitors who are at least as efficient as the dominant undertaking*". This indicates that, in all abuse of dominance cases, the as-efficient competitor test should be applied, which contradicts the reasoning of the General Court in its recent Intel judgment.

MEMBER STATE LEVEL

FRANCE

French Competition Authority imposes a € 5.7 million fine on Cegedim for discriminatory refusal to sell its medical database

On 8 July 2014, the French Competition Authority ("FCA") imposed a fine of € 5.7 million on Cegedim for having abused its dominant position on the medical database information market in France by refusing to sell its database to pharmaceutical companies using competing customer management software.

The FCA found that Cegedim had a market share of 78% through its medical database OneKey and that it therefore held a dominant position on the medical database information market in France. The OneKey medical database provides laboratories with information which is useful to medical sales representatives such as names, address details, and visiting conditions of doctors. In addition, Cegedim is a provider of customer management software which enables laboratories to use medical databases.

The decision of the FCA follows a complaint lodged by a competitor of Cegedim on the customer management software market, Euris. Euris claimed that Cegedim refused to sell its OneKey database to pharmaceutical companies that used Euris' customer management software.

In its decision, the FCA first found that Cegedim's OneKey database did not constitute an essential facility and that, as a result, Cegedim was not under an obligation to grant access of its database to a competitor. However, the FCA concluded that the refusal to sell such a database solely to actual or potential users of the competing Euris software was discriminatory and therefore amounted to an abuse of a dominant position in breach of Articles 102 TFEU and L.420-2 of the French Commercial Code. Finally, the FCA disregarded Cegedim's argument that the refusal to sell was justified by the fact that it had filed a lawsuit against Euris for alleged software counterfeiting.

GERMANY

German Federal Cartel Office cracks down on "wedding rebates"

In a press release issued on 3 July 2014, the German Federal Cartel Office ("FCO") announced that it had adopted a decision finding that the German supermarket corporation EDEKA Zentrale AG & Co. KG ("EDEKA") abused its market position on the food retailing procurement market by prompting its suppliers to grant it contractual benefits – so-called "wedding rebates" – following EDEKA's takeover of the supermarket chain Plus in 2009. However, no fine was imposed for this abuse.

According to the FCO's press release, EDEKA insisted on suppliers granting it the same preferential conditions and benefits that they had previously granted to Plus without, however, justifying why it should be granted such preferential treatment. EDEKA's claims were also made with retroactive effect and, reportedly, as many as 500 suppliers were subject to such pressure from EDEKA.

The FCO concluded 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. As a result, EDEKA's claims towards its suppliers were found by the FCO to amount to an abuse of its market position. The FCO's conclusion reflects the wording of Section 20 of the German Act against Restraints of Competition, according to which the prohibition of an abuse of a dominant position applies equally to non-dominant companies with superior market power in their relations with small and medium-sized suppliers or purchasers that are economically dependent on them.

CARTELS AND HORIZONTAL AGREEMENTS

EUROPEAN UNION LEVEL

Commission fines canned mushrooms producers in cartel settlement case

On 25 June 2014, the European Commission announced that it has imposed fines totalling € 32.3 million on two producers of canned mushrooms, Prochamp and Bonduelle, for their participation in a price-fixing and customer-sharing cartel in Europe for a period of more than one year. Lutèce, the third producer of canned mushrooms to have participated in the cartel, escaped fines as it benefited from immunity under the Commission's 2006 Leniency Notice for having revealed the existence of the cartel to the Commission.

According to the Commission's press release announcing the decision, the cartel members sought to stabilise their market shares and to stop the decline of prices. In order to do so, the cartelists exchanged confidential information on tenders, set minimum prices, agreed on volume targets and allocated customers.

The Commission granted Prochamp a 30% fine reduction for having cooperated in the investigation. The Commission also granted a further 10% fine reduction for all the companies involved since they acknowledged their participation in the cartel and agreed to settle the case with the Commission. The case is the fourteenth settlement reached by the Commission since the introduction of the settlement procedure for cartels in 2008.

General Court reduces fines for three groups in candle wax cartel case

On 11 July 2014, the General Court ("GC") handed down three judgments reducing the fines imposed by the Commission's decision of 1 October 2008 in the candle wax cartel case following appeals lodged by Sasol, Esso France and ExxonMobil, and RWE AG.

On 1 October 2008, the Commission imposed fines totalling over € 676 million on nine groups for having participated in a cartel on the EEA paraffin wax market and the German slack wax market from 1992 until 2005 (see VBB on Competition Law, Volume 2008, No. 10). Appeals were subsequently lodged before the GC.

GC reduces fine on Esso France and ExxonMobil by € 20.8 million

The GC upheld Esso France's (formerly Mobil Corp. prior to 2003) and Exxonmobil's (the 1999 merged entity of Exxon Corp. and Mobil Corp.) claims that the Commission had made an error of law in calculating the fine by failing to take account of the fact that Exxon Corp. did not participate in the infringement prior to the 1999 Exxon/Mobil merger in breach of Article 23(3) of Regulation 1/2003 and the principles of equal treatment and proportionality. When calculating the amount of the fine imposed on the applicant, the Commission had taken account of the value of the sales after the ExxonMobil merger (the average of years 2000 to 2002) for the period 1992-1999 despite the fact that Mobil Corp. alone participated in the cartel during that period. As a result, the Commission imposed the same amount of fine on Esso France as if Exxon had participated in the infringement for more than 7 years prior to the merger.

The GC, while acknowledging that the Commission had a certain amount of discretion in selecting the reference year(s) of the infringement, held that the reference year must constitute an "*appropriate proxy to reflect the economic importance of the infringement as well as the relative weight of each undertaking in the infringement*" for the entire duration of the infringement. In this case, since a merger had taken place during the course of a cartel in which only one of the parties had participated in the infringement before the merger (i.e., Mobil Corp.), the GC ruled that the value of sales of the merged entity was not an appropriate proxy. As a result, the GC reduced the fine imposed on Esso France by slightly more than € 20.8 million (from € 83,588,400 to € 62,712,895) by splitting Exxonmobil's period of involvement into a pre-merger and a post-merger period to reflect the fact that Exxon was not involved in the infringement between 1992 and 1999.

GC substantially reduces fine on Sasol group by € 170 million

In the Commission's decision against Sasol, the Commission imposed fines totalling over € 318 million on the Sasol group for the illegal conduct of Sasol Wax (formerly known as Schumann Sasol). Sasol Wax was a subsidiary of Sasol Wax International (formerly known as Schumann Sasol International), which was itself a joint venture held by Sasol Holding (66%) and by Vara (33%), although Vara was not held liable for any infringement. Sasol Holding itself was the subsidiary of Sasol Ltd. The Commission found the Sasol group had committed a single and continuous infringement during three successive periods between 1992 and 2005, namely the "Schumann period" (1992 to 1995), the "joint venture period" (1995 to 2002) and the "Sasol period" (2002 to 2005). During the last period, Sasol Ltd acquired the remaining 33% of the shares of joint venture Sasol Wax International and was found jointly and severally liable by the Commission (which it did not contest).

The GC rejected a number of pleas lodged by Sasol including those relating to the fine imposed (e.g., the finding of an aggravated circumstance that Sasol Wax played a leading role; the calculation of the basic amount of the fine regarding slack wax; and the failure to grant Sasol Wax's full immunity for certain parts of the fine). However, the GC upheld one of Sasol's pleas relating to attribution of liability. More particularly, the GC considered that the Commission had failed to show that Sasol Ltd (via its subsidiary Sasol Holding) determined unilaterally the resolutions of the board of joint venture Sasol Wax International during the "Schumann period" and the "joint venture period".

The GC recalled that, in order to impute the anti-competitive conduct of one company to another under Article 101 TFEU, the Commission cannot rely solely on the ability to exercise decisive influence, but must ascertain whether that influence had actually been exercised. The GC also stated that the Commission and EU Courts may presume that the agreements and rules relating to the operation of an undertaking (e.g., articles of incorporation) have been implemented and complied with. In that regard, when the applicable provisions enable one parent company alone to determine the decisions of the governing bodies of the joint venture, in the absence of proof to the contrary, the Commission may find that the parent company exercised decisive influence over these decisions. However, the parties may adduce evidence to demonstrate that, despite the legal provisions, decisions were in fact taken by the shareholders. Applying the law to the facts, considering that the second parent company (i.e., Vara) was not found liable of any infringement, the GC criticised the Commission for concluding that Sasol exercised decisive and unilateral influence over the commercial conduct of Sasol Wax International on the basis of an abstract and prospective analysis (equivalent to an assessment of control for the purposes of the EU Merger Regulation) given that the examination concerning the actual exercise of decisive influence is retrospective and may therefore be based on concrete evidence. In that regard, the GC found that the Commission had not, *inter alia*, established that Sasol had exercised decisive influence over the management board of Sasol Wax International considering that the chairman of the board had special and close links with Vara, which could cause the commercial policy of Sasol Wax International to be aligned with that of Vara's.

Considering that Sasol Ltd and its subsidiary Sasol Holding did not exercise actual and decisive control over the joint venture, the GC found they were not liable for the illegal conduct of Sasol Wax during the "joint venture period" and the "Schumann period". As a result, because the amount of the fine imposed had to be capped at 10% of the turnover of Sasol Wax International and Sasol Wax (and not of the whole Sasol group) during the "Schumann period" and the "joint venture period", the GC substantially reduced the fine imposed on the Sasol group by over € 170 million, from € 318 million to € 149 million.

GC slightly reduces fines imposed on RWE AG by € 1.5 million

The Commission fined RWE AG over € 37 million for participating in a single and continuous infringement between: (i) 3 September 1992 and 1 January 2002 for exercising decisive influence and effective control over 99.4%-owned subsidiary Dea Mineraloel; and (ii) between 2 January 2002 and 30 June 2002 for exercising decisive influence and effective control over the joint venture Shell and RWE/Dea. Shell and RWE/Dea was a 50/50 joint venture owned by Shell and RWE and was created from the existing subsidiary Dea Mineraloel. The joint venture was set up with the intention that on 1 July 2004 Shell would acquire sole control. RWE AG appealed against the Commission's decision claiming that it had not exercised decisive influence over its subsidiary between 1992 and 2002 and over its joint venture during the first 6 months of 2002.

Concerning period (i), the GC rejected RWE AG's claim that it was not liable for the conduct of its 99.4%-owned subsidiary Dea Mineraloel on the grounds that it had not rebutted the presumption that it had exercised decisive influence. In that regard, the GC considered that the fact that a parent company is not involved in operational management is not decisive as regards the question of whether it should be considered to constitute a single economic unit with the operational units of the group. Nor did the GC find the fact that the paraffin wax business constituted only 0.1 to 0.2% of the parent company's turnover relevant.

However, concerning period (ii), the GC considered that the Commission had failed to establish that RWE AG exercised decisive influence over its joint venture. The GC criticised the Commission for relying on an abstract and prospective analysis of the joint venture agreement by not determining whether RWE AG actually exercised decisive influence in practice. According to the GC, the Commission had not established that the two parent companies had managed the joint venture in strict collaboration and that the adoption of board decisions reflected the will of both parents (e.g., by producing minutes of the meetings). In addition, while the members of the management board were equally appointed by the shareholders, the GC placed significant weight on the fact that the chairman of the joint venture's management board, who had a decisive vote, was a Shell nominee.

As a result, the GC slightly reduced the amount of the fine imposed on RWE AG by € 1.56 million, from € 37.44 to € 35.88 million.

MEMBER STATE LEVEL

GERMANY

German Federal Cartel Office imposes fines on sausage cartel

According to a press release issued on 15 July 2014, the German Federal Cartel Office ("FCO") has imposed fines totalling around € 338 million on 21 sausage manufacturers and 33 individuals on account of illegal price-fixing agreements.

According to the FCO, well-known sausage manufacturers had, for decades, regularly met to discuss prices and market developments. In addition to these regular meetings – referred to by the companies concerned as the "Atlantic circle" – the FCO found that individual, concrete agreements between various sausage manufacturers concerning the implementation of collective price increases for retailers had been implemented since 2003.

The FCO found that this collusion took place largely via phone, either in bilateral phone conversations or in telephone conferences. As the fixing of individual prices was not possible due to the heterogeneity of the products (different sausages and different package sizing), price ranges for product groups (e.g., raw sausages, cooked sausages and ham, among others) were coordinated instead. The FCO considered it proven that higher prices for retailers had been implemented on the basis of the cartel agreements.

The companies concerned were Bell Deutschland Holding GmbH, Böklunder Plumrose GmbH & Co. KG/Könecke Fleischwarenfabrik GmbH & Co. KG, Döllinghareico GmbH & Co. KG, Herta GmbH, Franz Wiltmann GmbH & Co. KG, H. Kemper GmbH & Co. KG, H. & E. Reinert Holding GmbH & Co. KG/Sickendiek Fleischwarenfabrik GmbH & Co. KG, Hans Kupfer & Sohn GmbH & Co. KG, Heidemark Mästerkreis GmbH & Co. KG, Heinrich Nölke GmbH & Co. KG, Höhenrainer Delikatessen GmbH, Lutz Fleischwaren GmbH, Marten Vertriebs GmbH & Co. KG, Meica Ammerländische Fleischwarenfabrik Fritz Meinen GmbH & Co. KG, Metten Fleischwaren GmbH & Co. KG, Ponnath DIE MEISTERMETZGER GmbH, Rudolf und Robert

Houdek GmbH, Rügenwalder Mühle Carl Müller GmbH & Co. KG, Westfälische Fleischwarenfabrik Stockmeyer GmbH, Wiesenhof Geflügelwurst GmbH & Co. KG and Willms Fleisch GmbH.

According to the FCO, the range of amounts for the individual fines was large. Whilst the bulk of the total fines (85%) were imposed on six companies that belong to larger corporate groups, the individual fines on the fifteen small and medium-sized cartelists were much lower and on average in the low one-digit million euros range.

The investigation was triggered by an anonymous tip-off. Eleven companies cooperated with the FCO during its investigation, which was taken into account by the regulator in the calculation of the fines.

German Federal Cartel Office fines Alstom € 1.89 million for customer allocation agreement

According to a press release issued on 4 July 2014, the German Federal Cartel Office ("FCO") has imposed a fine in the amount of € 1.89 million on Alstom Power Energy Recovery GmbH (Alstom) for having engaged in anti-competitive customer allocation with its competitor Balcke-Dürr GmbH (Balcke-Dürr). The agreement concerned the market for the provision of services for heating surfaces of regenerative heat exchangers used in power plants. The investigation was triggered by a leniency application by Balcke-Dürr who was thus exempted from fines in accordance with the FCO's leniency programme.

Alstom and Balcke-Dürr are the leading providers of regenerative heat exchangers for use in power plants in Germany. The FCO concluded that Alstom and Balcke-Dürr had agreed that service contracts for heating surfaces of heat exchangers should always be won by the company that originally installed the heat exchanger. This was achieved through the submission of excessive bids to power plant operators by the other company after having asked the offer price of the "incumbent" manufacturer. The FCO found that the agreement had been, at the very least, implemented between December 2003 and March 2012.

Since public tendering procedures may also have been affected by the alleged cartel, the Public Prosecutor's Office in Mannheim is investigating the individuals involved in the agreement on suspicion of bid-rigging.

In the calculation of Alstom's fine the FCO took into account that Alstom had cooperated with the FCO during its investigation and that it had agreed to settle the case.

THE NETHERLANDS

Dutch court annuls part of € 66 million fines imposed in flour mill cartel case

On 17 July 2014, the Rotterdam District Court delivered four judgments in the flour mill cartel case. While the Court upheld most of the € 66 million in fines imposed by the Dutch Competition Authority ("ACM"), it annulled the decision in as far as it imposed fines on seven of the companies involved.

On 16 December 2010, the ACM imposed fines amounting to € 81.6 million on flour producers in the Netherlands, Belgium and Germany for their involvement in a market-sharing cartel between 2001 and 2007. Following an administrative appeal, the fines were reduced to € 66 million in March 2012.

On further appeal before the Rotterdam Court, eleven companies argued that their fines should be annulled. In its judgments of 17 July 2014, the Court upheld the findings of the ACM, holding that it had been sufficiently substantiated that the individual infringements were part of a single and continuous cartel. The Court further held that sufficient evidence was available to demonstrate the existence of the infringements and the participation of several of the companies concerned.

With respect to six companies, however, the Court held that the ACM had failed to put forward sufficient evidence to prove their participation in the specific infringements. To substantiate its findings concerning these companies, the ACM relied on statements made in the leniency applications. However, since the companies concerned denied the allegations, the Court held that the ACM should have presented adequate additional evidence. Furthermore, for one company, the Court held that the ACM erred in not granting it full immunity from fines. The Court also held that an internal e-mail by an ACM employee proposing an investigation could not be considered as the moment that the ACM first confirmed its suspicions of a cartel in the sector. According to the Court, the investigation started only officially after the ACM had received the leniency application.

OTHER DEVELOPMENTS

DENMARK: On 15 July 2014, the Danish Competition and Consumer Authority ("DCCA") announced that the Danish construction company NH Hansen & Son has accepted to pay a fine of DKK 2.2 million (around € 295,000) in a settlement agreement with the DCCA for its participation in a bid-rigging cartel in the construction sector in Denmark that lasted between 2006 and 2009. The DCCA also imposed a fine of DKK 25,000 (around € 3400) on an employee of the company for his personal involvement in the cartel. This is the first fine to be imposed on a participant of the construction cartel at issue. The DCCA is currently investigating the participation in the cartel of another 32 construction companies and their employees.

HUNGARY: By a decision dated 30 June 2014, the Hungarian Competition Authority (the "GVH") fined eight ready-mix concrete producers and the Hungarian Concrete Association a total of HUF 2.7bn (approximately € 9.3 million) for running a hard-core cartel between 2005 and 2007 for orders of more than 1000 m3 of concrete in the Budapest region. According to the GVH, the eight cartel members (Betonpartner Magyarország Kereskedelmi és Szolgáltató Kft., Cemex Hungária Építőanyagok Kft., DBK-Földgép Építési Kft., Duna-Dráva Cement Kft., Osteuropäische Zementbeteiligungs AG, Magyar Betonszövetség "v.a.", STRABAG Építő Zrt., Frissbeton Betongyártó és Forgalmazó Kft., and LASSELSBERGER HUNGÁRIA Termelő és Kereskedelmi Kft.) committed a single, continuous and complex infringement consisting of market-sharing and price-fixing. Evidence in the GVH's possession showed that the companies' senior management and middle-management met respectively once a year and several times a month in order to discuss price levels and the allocation of customers. The Hungarian Concrete Association provided administrative assistance to such conduct, in particular, by hosting the meetings of the middle management. The investigation of the GVH was aided by an informant of undisclosed identity, who was rewarded with HUF 27,902,000 (approximately € 93,000) for his/her services.

SWEDEN: On 14 July 2014, the Swedish Competition Authority ("SCA") submitted a summons application to the Stockholm District Court by which it demands the Court to impose fines totalling SEK 42 million (around € 4.6 million) on the three Swedish removal services companies Alfa Quality Moving AB ("Alfa"), NFB Transport Systems AB ("NFB") and ICM Kungsholms AB ("ICM") for having agreed not to compete with one another on the market for international household removal services. The alleged infringements took place in connection to Alfa's acquisition of NFB's and ICM's international removal services businesses in 2006 and 2011, respectively, and the inclusion of a non-competition clause in the transaction agreements by which NFB and ICM agreed not to compete with Alfa on the international removal services market for a period of 5 years after the completion of the transfer of the relevant business to Alfa. In its summons to the Court, the SCA held that the non-competition clauses in the two transaction agreements had a duration that went beyond what is necessary for the implementation of the two transactions – which the SCA estimated to be a period of two years – and that they were therefore not ancillary to the respective transactions. The SCA also found that the non-competition clauses infringed Article 101 TFEU and its Swedish equivalent as it had resulted in the restriction of competition on the relevant market. As a result, the SCA requested the Court to impose fines totalling SEK 42 million (around € 4.6 million) on the three companies.

VERTICAL AGREEMENTS

MEMBER STATE LEVEL

BELGIUM

Interim measures ordered in car distribution case

On 11 July 2014, the Competition College (*Mededingingscollege / Collège de la concurrence*) of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la concurrence*) ("BCA") imposed interim measures on BMW Belux in the context of an on-going investigation into possible infringements of competition law. This investigation concerns the distribution, repair and maintenance of BMW and Mini brand cars.

According to the BCA, the interim measures were granted to a former dealer and are intended to maintain its chances of staying in the market as an independent repairer by protecting its access to technical information and spare parts. However, these interim measures only ensure the *status quo*; the BCA has yet to rule on the merits of the case.

GERMANY

German court rules against Casio Europe's prohibition of online sales via Internet platforms

By a recently published judgment of 5 June 2014, the Higher Regional Court of Schleswig-Holstein (the "Court") upheld on appeal a judgment of a lower instance court condemning restrictions on the use of Internet platforms imposed by Casio Europe ("Casio"). The Court confirmed that a ban on sales via Internet platforms such as eBay and Amazon Marketplace imposed by Casio on its authorised retailers violates Article 101 TFEU and the equivalent provision under German law, Section 1 of the Act against Restraints of Competition ("GWB").

Casio operates a multi-channel distribution system for its digital cameras, under which it sells its cameras to: (i) wholesalers; (ii) large retailers (such as Karstadt and Saturn); and (iii) consumers through its own online shop.

Casio requires that wholesalers sell Casio's cameras to retailers who fulfil certain obligations, including requirements related to the display, stocking and advertising of the products. The retailers are entitled to sell through catalogues, newspapers and their own online shops. However, they are prohibited from selling through Internet platforms such as eBay and Amazon Marketplace, as well as from selling to unauthorised third party resellers.

The Court held that Casio's prohibition to sell via Internet platforms such as eBay and Amazon Marketplace has both the object and effect of restricting competition in violation of Article 101(1) and Section 1 GWB. Furthermore, the Court found no objective reasons that would justify this restriction under Article 101 (3) or Section 2 GWB.

Violation of Article 101 (1) TFEU and Section 1 GWB

The Court found that the ban restricts competition by object because it: (i) decreases the price pressure on Casio and its authorised retailers as it prevents price competition from Internet platforms such as eBay and Amazon Marketplace; (ii) diverts the sales that would otherwise be made through the Internet platforms to Casio's own online shop; and (iii) allows Casio to increase its presence in the growing e-commerce sector.

According to the Court, the reason why the ban also restricts competition by effect is because it limits the access of both retailers and end-customers to e-commerce.

The Court rejected the possibility that quality-based factors would prevent the ban from infringing Article 101 TFEU/Section 1 GWB. In reaching this conclusion, the Court took the view that: (i) photographic cameras of the type produced by Casio are not so technically complex that expert customer service is required; (ii) Internet platforms such as eBay and Amazon Marketplace are in any event increasingly professional, no longer resemble flea markets and ensure a high level of customer satisfaction because the online transactions are safe; and (iii) the Internet-related standards which Casio requires its retailers to meet are very low and easily met by Internet platforms such as eBay and Amazon Marketplace.

Justification under Article 101 (3) TFEU / Section 2 GWB

The Court proceeded to consider whether the ban in question could be justified on an individual assessment under Article 101 (3) TFEU/Section 2 GWB or under the Vertical Agreement Block Exemption Regulation ("VABER").

First, the Court took the view that the ban could not be justified on an individual assessment under Article 101 (3) TFEU/Section 2 GWB as it does not further technical or economic progress.

Second, the Court concluded that the ban could not be block-exempted under the VABER because it constituted a hard-core customer restriction within the meaning of Article 4 (b) VABER. While acknowledging that the ban did not target any particular group of customers, the Court took the view that the scope of application of Article 4 (b) VABER was not limited to restrictions on sales to specific groups of customers. In this respect, the Court referred to the English language version of Article 4 (b) VABER, which specifies as problematic restrictions on the "customers" to which the buyer may resell the contract goods, whereas the German language version of Article 4 (b) VABER instead uses the term "Kundengruppe" (customer group) instead of "customers". The Court held that it was preferable to interpret Article 4 (b) VABER on the basis of the English language version, which was also supported by the French and Spanish language versions.

This case is a further example of the increasingly expansive, but at times inconsistent and therefore somewhat confusing, German case law concerning restrictions on the use of third party platforms. It is understood that appeals are pending in some of these cases and guidance from the European Court of Justice would be welcome to ensure that a coherent approach to this important issue is applied across the European Union by both national courts and competition authorities.

OTHER DEVELOPMENTS

FRANCE: According to a press release issued on 10 July, 2014, the French Competition Authority raided optical glass makers Zeiss and Essilor on 9 July 2014. The dawn raids are said to have been carried out in relation to alleged restrictions of online distribution.

GERMANY: According to a press release issued on 2 July 2014 by the German Competition Authority ("BKA"), Adidas has submitted a revised version of the online distribution policy applicable to its selective distribution system following concerns expressed by the BKA. According to the revised policy, authorised resellers will be free to sell Adidas' products through online shops located on third party Internet platforms, such as eBay and Amazon. In addition, the authorised resellers will be free to use the Adidas trade mark as a search word for search engine advertising, including on Google AdWords.

INTELLECTUAL PROPERTY / LICENSING

EUROPEAN UNION LEVEL

Commission fines Servier and 5 other generic producers a total of € 427 million over "pay-for-delay" deals and abuse of a dominant position

On 9 July 2014, the European Commission announced that it had fined French pharmaceutical company Servier over € 331 million for abusing its dominant position and for concluding a series of "pay-for-delay" agreements with five generic companies in order to exclude them from the perindopril market in breach of Articles 101 and 102 TFEU. The five generic producers, namely Krka, Lupin Limited, Matix Laboratories Limited, Niche Generics Limited / Unichem Laboratories Limited and Teva UK Limited were also fined a total of over € 96.7 million for their involvement.

Perindopril is a blood pressure control medicine that used to be Servier's bestselling medicine. The Commission considered that, even though Servier's basic patent in the perindopril molecule had expired in 2003, Servier sought to protect its medicine by using a number of secondary patents relating to various processes and form aimed at delaying or preventing the entry of generic producers onto the market. In particular, Servier reportedly recognised that the acquisition of a key 2004 secondary patent was aimed at "*strengthening the defence mechanism*" while it never put the technology to use.

The Commission reportedly also found evidence that between 2005 and 2007, Servier settled at least 5 court challenges to its patents brought by generic companies. The Commission considered that these transactions were not ordinary transactions where two parties decide to settle patent litigation out of court to save costs and time. Instead, while these generic companies were close to entering the market, they had abstained from doing so in exchange for several tens of millions of euros.

The decision against Servier and the other pharmaceutical companies follows a 2009 investigation and a 2012 Statement of Objections (See VBB on Competition Law, Volume 2012, No. 7). This is the third decision in which the Commission has imposed fines on pharmaceutical producers on account of "pay-for-delay" agreements. The other two cases concerned Lundbeck and three generic companies in June 2013 (See VBB on Competition Law, Volume 2013, No. 6) and Johnson & Johnson and Novartis AG in December 2013 (VBB on Competition Law, Volume 2013, No. 12).

STATE AID

EUROPEAN UNION LEVEL

Commission adopts revised guidelines on state aid for undertakings in difficulty

On 9 July 2014, the European Commission adopted revised guidelines on state aid for rescuing and restructuring non-financial undertakings in difficulty (the "Guidelines").

The Guidelines set out the criteria under which EU Member States can grant public funding to companies in financial difficulty. The aim of the revised Guidelines is to ensure that public funding is channeled where it is needed most, and that investors of a company in difficulty carry a fair share of the costs of restructuring.

The key principles of the previous rescue and restructuring guidelines remain unchanged. "Rescue aid" can be granted temporarily for a period of six months. Beyond this period, aid must either be reimbursed or a restructuring plan must be notified to the European Commission for the aid to be approved as "restructuring aid". The latter may only be granted once over a period of ten years.

The revised Guidelines, however, introduce a number of important changes. First, the Guidelines include new filters to try to ensure that the aid is used where it is really needed and that it will bring benefits to society (such as reducing job losses). Aid-granting authorities will have to demonstrate that: (i) the aid is needed to prevent social hardship or address market failures; and (ii) the granting of aid will make a difference as compared to a situation without aid. Second, the Guidelines require that the owners of companies that receive aid contribute to the costs of the restructuring, meaning that owners will bear losses first and that the state (and taxpayers) will receive a fair share of any future gains. Third, the Guidelines introduce a new concept of temporary restructuring support – allowing loans and guarantees to be granted to SMEs for, at most, 18 months – on simplified terms to target liquidity issues that SMEs may face. Finally, the revised Guidelines introduce new, objective criteria used by financial analysts to assess the health of a company to define the term "difficulty".

The Guidelines entered into force on 1 August 2014 and replaced the previous guidelines adopted in 2004. The Guidelines only apply to non-financial undertakings. Separate rules are applicable to banks and other financial institutions.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

EUROPEAN UNION LEVEL

Commission publishes Communication on past and future of EU antitrust enforcement

On 9 July 2014, the European Commission published a Communication which reviews the operation of Regulation 1/2003 and lays out areas where progress will be needed in the future. The Commission is seeking, in particular, to identify areas for action to enhance the enforcement of EU antitrust rules by national competition authorities ("NCAs").

The Communication is also accompanied by two working documents which deal, in greater detail, with the antitrust enforcement of the Commission and NCAs over the past decade as well as institutional and procedural issues in enhancing the role of the NCAs.

Regulation 1/2003 had introduced a number of important changes to the enforcement of EU competition rules. In particular, the Commission's powers of investigation into suspected infringements of competition law were enhanced. In addition, a new framework for greater cooperation between the Commission and the NCAs was introduced.

As part of these reforms, both the Commission and the NCAs obtained the power to fully enforce EU antitrust rules, with the Commission losing its monopoly to apply the exemption contained in Article 101(3) TFEU and the NCAs becoming bound to apply EU rules to agreements or practices which have an effect on EU trade.

In 2009, the Commission published a report on the functioning of Regulation 1/2003 which concluded that the reforms had been largely successful in bringing about improvements in the enforcement of competition rules. The framework for cooperation between regulatory authorities was also found to be a success, leading to greater consistency and convergence.

No reforms were proposed at that time, although the report did recognise that procedural divergences existed at national level, which should be addressed. The recently published Communication builds on this report and outlines the enforcement of competition rules by both the Commission and the NCAs, noting that differences continue to exist between the Member States.

According to the Communication, Regulation 1/2003 has successfully transformed the enforcement of competition rules in the EU. Furthermore, the Communication emphasises the close cooperation which exists within the European Competition Network (ECN), which it credits with underpinning the coherent application of the rules across the EU.

However, the Communication accepts that reform is needed and sets out priority areas where further progress is necessary. The Commission will then assess which policy initiatives should be taken to best achieve these goals.

Although Regulation 1/2003 did not harmonise the procedures used by the NCAs in enforcing competition rules, after ten years of cooperation a substantial level of alignment has been noted, although significant differences still exist.

To remedy these continuing divergences, the Commission will seek to reinforce the institutional position of NCAs, while also ensuring greater convergence of national procedures and sanctions. The Communication notes that some Member State authorities are administrative in nature, while others are more judicial. Reforms have been recommended in some Member States to strengthen the institutional position and resources of NCAs.

The Commission has also observed an increasing trend of NCAs merging with other regulators, with only a minority of NCAs remaining exclusively responsible for competition enforcement (See, for instance, VBB on Competition law Volume 2014 No. 3, which deals with the creation of the Competition and Markets Authority in the UK). The Commission warns that the amalgamation of competences should not lead to a weakening of competition enforcement or a reduction in the means assigned to competition supervision.

The Commission also believes it is necessary to ensure that all NCAs have a complete set of powers at their disposal including core investigative powers; the right to set enforcement priorities; key decision-making powers; and the necessary enforcement and fining powers to compel compliance with investigative and decision-making bodies. The Commission also recommends the introduction of minimum guarantees to ensure that NCAs can execute their tasks in an impartial and independent manner.

In addition to the institutional considerations outlined above, the Communication also highlights the alignment of procedures as a means of enhancing competition enforcement. At present, NCAs apply EU competition rules on the basis of different procedures, although many are now, more or less, aligned with Commission practice.

The Communication notes, however, that practices remain dispersed in certain areas such as differences in scope of investigative powers, the ability to impose structural remedies and the power to set enforcement priorities. The Commission further notes that any confluence remains fragile and dependent on soft law instruments.

Regarding sanctions, the Communication notes that differences still exist with regard to the underlying principles of fine calculation, such as the base used for calculating the amount of the fine and the method for taking into account the gravity and duration of the infringement.

The Commission therefore considers it necessary to ensure that all NCAs have effective powers to impose deterrent fines on undertakings and on associations of undertakings. However, it is also recognised that it is necessary to find the right balance between increased harmonisation on the one hand, and the appropriate degree of flexibility for NCAs when imposing fines in individual cases on the other. In addition, the Commission recommends increased cooperation in the practical implementation of leniency programmes.

The Commission hopes that the achievements to date can be built upon with the abovementioned reforms to create a truly common competition enforcement area in the EU.

The full Communication "Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives" can be accessed here:
http://ec.europa.eu/competition/antitrust/legislation/antitrust_enforcement_10_years_en.pdf