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| MERGER CONTROL

– EUROPEAN UNION LEVEL –

European Commission conditionally clears joint venture between Vodafone and Liberty Global

On 3 August 2016, the European Commission conditionally cleared the creation of a joint venture between mobile telecom operator Vodafone and cable company Liberty Global in the Netherlands. The joint venture will offer unified communications services and will compete with KPN, the only other fixed and mobile network service provider in the Netherlands.

The Commission was concerned that the transaction would restrict competition in the market for fixed and mobile multi-play telecommunication services. In order to address these concerns, Vodafone offered to divest its consumer fixed network business in the Netherlands. The Commission cleared the transaction subject to these conditions in phase I.

The joint venture is an interesting example of the on-going cross-market consolidation in the European telecom sector. For example, Liberty Global was involved in a similar deal earlier in 2016 in Belgium concerning its merger with Base wireless (see VBB on Competition Law, Volume 2016, No. 2). Telecoms providers are increasingly offering customers the possibility of purchasing 'quad-play' services which combine fixed, mobile, broadband and TV offerings in a single package and thus bundle services that were traditionally offered on a standalone basis. Regulators across Europe are watching such developments closely, particularly given the fragmented competencies between merger review, spectrum allocation, radio and broadcast licencing and national rules governing media plurality.

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CARTELS AND HORIZONTAL AGREEMENTS

– EUROPEAN UNION LEVEL –

In the following sections, we first provide a factual overview of the significant case developments at EU level, and thereafter provide detailed analysis of important substantive or procedural developments addressed in these cases.

Summary of Significant Case Developments

Court of Justice provides guidance to Latvian Supreme Court on when a company can be held liable for an independent service provider's anticompetitive behaviour

On 21 July 2016, the Court of Justice ("ECJ") handed down its judgment in the *VM Remonts case* (Case C-542/14, *VM Remonts and Others*). The case concerned a bid-rigging cartel, in which three food suppliers had been fined by the Latvian Competition Council for colluding on prices offered in tenders for the supply of food to kindergartens. The three companies had made use of the same legal advisers, which had coordinated the prices in the respective offers. All three companies were found guilty of engaging in an illegal concerted practice.

On appeal, the Regional Court annulled the decision against one of the companies, on the ground that this company had not authorised, or been aware of, the conduct of the legal advisers. The Latvian Competition Council then brought an appeal against this judgment before the Latvian Supreme Court, which in turn referred questions to the ECJ. Specifically, the Supreme Court asked the ECJ whether a company must have been aware of, or consented to, the conduct of an external service provider, in order to be found guilty of anti-competitive conduct engaged in by the latter. In its judgment, the ECJ listed cases in which a company can be held liable for the conduct of an external service provider. This is addressed further below under 'Analysis of Important Substantive and Procedural Developments'.

Advocate General recommends rejecting appeal by Timab Industries against General Court's judgment in Animal Feed Phosphates cartel case

On 28 July 2016, Advocate General Henrik Saugmandsgaard issued his opinion in the appeal brought by Timab Industries ("Timab") before the Court of Justice ("ECJ") against the General Court's ("GC") judgment in the *Animal Feed Phosphates cartel* case (Case C-411/15 P, *Timab Industries*). The Advocate General recommends that the ECJ reject the appeal which challenges the legality of the underlying Commission decision (this decision was upheld by the General Court; see VBB on Competition Law, Volume 2015, No. 5). The Advocate General considers that the Commission did not infringe the principles on the protection of legitimate expectations and equal treatment in setting the amount of the fine imposed on Timab higher than the fine the Commission had proposed during the settlement procedure. The Advocate General shares the position of the General Court that the Commission applied the same methodology for the calculation of the range of fines in the settlement procedure as the methodology for the calculation of the fine imposed in the standard procedure.

Court of Justice dismisses appeal in Pre-stressing Steel cartel case

On 7 July 2016, the Court of Justice dismissed in its entirety the appeal lodged by Dutch steelmaker, HIT Groep (Case C-514/15 P, *HIT Groep v Commission*). The company had challenged the General Court judgment which upheld the Commission decision on price-fixing and marketing-sharing in the *Pre-stressing Steel cartel* case (see VBB on Competition Law, Volume 2015, No. 7). In that case, HIT Groep had been fined € 6.93 million for its participation in the cartel.

Analysis of Important Substantive and Procedural Developments

VM Remonts case: Court of Justice clarifies when an undertaking can be held liable for the anticompetitive behaviour of an independent service provider

In *VM Remonts*, the Court of Justice first reiterated the established case-law on the liability of an undertaking for the conduct of an independent service provider: an undertaking may be held liable if the service provider acts under the direction or control of the undertaking concerned, and is therefore considered part of the same economic unit of that undertaking. This is, for example, the case when the service provider has little or no autonomy or flexibility in the way he carries out his activities. The direction or control may also be inferred from specific legal or economic links with the undertaking concerned, similar to the relationship between a parent and its subsidiaries. In those situations, the service provider is not considered to be genuinely independent.

The ECJ also clarified the cases in which a company can be held liable for the conduct of a genuinely independent service provider. First, the anticompetitive behaviour of a genuinely independent service provider may be attributed to an undertaking making use of that service provider's services if the undertaking was aware of the anticompetitive objectives pursued by the service provider and the undertaking's competitors and intended to contribute by its own conduct to those objectives. This is, for example, the case when an undertaking intends to disclose commercially sensitive information to its competitors via a service provider with the aim of colluding on tender prices. This is also the case if the company expressly or tacitly consents to the anticompetitive behaviour of the service provider.

Second, the anticompetitive conduct of a genuinely independent service provider may be attributed to the undertaking making use of the services of that service provider if the undertaking could have "reasonably foreseen" the anticompetitive acts of the service provider and of the undertaking's competitors, and was prepared to accept the risks associated with those acts. In other words, it is not required that the undertaking intended to use the service provider to collude with its competitors, or that the undertaking was even aware of those practices. According to the ECJ, reasonable foreseeability of such anti-competitive behaviour is sufficient.

Interestingly, the ECJ did not follow Advocate General Wathelet's opinion. The Advocate General had suggested the introduction of a new form of rebuttable presumption for liability for competition law infringements committed by service providers (see VBB on Competition Law, Volume 2015, No. 12). With its condition of "reasonable foreseeability", the ECJ did not go so far as introducing a form of presumption of liability. A lot will, however, depend on how courts and competition authorities will interpret "reasonable foreseeability" and a broad interpretation will likely result in a low threshold for liability.

Animal Feed Phosphates cartel case: Advocate General's View on Hybrid Cartel Settlement

Hybrid settlements arise when one or more parties withdraw from a settlement procedure and the Commission decides to continue the case against these parties under the standard procedure. Because of the dual track, hybrid settlements raise questions on impartiality, objectivity, independence, equal treatment and legitimate expectations in the standard procedure.

The issues of equal treatment and legitimate expectations were, amongst others, examined by the General Court ("GC") in the *Timab* judgment (see VBB on Competition Law, Volume 2015, No. 5). Timab had argued that it had been punished by the Commission, in violation of Timab's rights of defence, for having discontinued the settlement procedure as the fine imposed on Timab had been substantially higher than the fine range considered by the Commission during the settlement procedure. The GC rejected Timab's application for annulment. The GC ruled that the Commission had correctly applied the 2006 Fining Guidelines and that the large discrepancy in the fine was the result of a change in the duration of the infringement applicable to Timab. This was the first time the GC had to rule on a hybrid cartel case and on the interplay between the standard procedure and the settlement procedure.

Timab appealed the GC's judgment before the ECJ. In its opinion of 28 July 2016, the Advocate General agreed fully with the GC's judgment and recommended rejection of Timab's appeal.

Pre-stressing steel cartel case: Commission refers to business year with normal economic activity

Under Article 23(2) of the Regulation on the Implementation of the Rules on Competition, a fine imposed for competition law infringements should not exceed 10 percent of the undertaking's total turnover in the business year preceding the decision in which the Commission imposes the fine.

In the *Pre-stressing Steel* case, the Commission issued its decision against HIT Groep in 2010. However, the Commission did not use 2009 as the reference year for applying the 10 percent threshold because HIT Groep had restructured its operational activities in 2004, following which its turnover was limited. The Commission therefore determined the fine imposed on HIT Groep on the basis of its last normal business year in 2003.

On appeal before the Court of Justice ("ECJ"), HIT Groep argued that, by referring to 2003 instead of 2009, the fine had been calculated on the basis of an incorrect business year and thereby had contravened Article 23(2) of Regulation 1/2003. The company also argued that the case-law, which provides for a derogation from this rule in exceptional cases, could not be applied retroactively.

The ECJ upheld the General Court's judgment in its entirety. It held that, for the purpose of calculating the fine, the Commission is entitled to refer to the last business year that corresponds to a full year of normal activity as this reflects the actual economic situation of the undertaking concerned. By choosing a year which reflects normal economic activity, the deterrent effect of the fine is assured.

The ECJ added that the principle of legal certainty had not been infringed by applying case-law retroactively. The Court reasoned that Article 23(2) of Regulation 1/2003 does not impose a binding requirement on the Commission to use the immediately preceding business year.

- MEMBER STATE LEVEL -

GERMANY

German FCO fines TV studio operators for anti-competitive exchange of information

The German Federal Cartel Office ("FCO") imposed fines totalling approximately € 3.1 million on TV studio operators Studio Berlin Adlershof, its affiliate Studio Berlin Broadcast and Bavaria Studios & Production Services (all located in Germany) for exchanging pricing information and other competitively sensitive information between 2011 and 2014. The investigation of the FCO was initiated by a leniency application lodged by a fourth company, MMC Studios Köln. The FCO reduced the fines imposed on the other three TV studios as they agreed to settle and extensively cooperated with the FCO throughout the proceedings.

SLOVAKIA

Slovak competition authority imposes fines for rigging bids for healthcare equipment

On 15 August 2016, the Slovak competition authority ("SCO") imposed fines totaling € 2.5 million on Chemkostav, PKB Invest and Pro-Tender for coordinating their behaviour in bids for the construction and supply of equipment for a healthcare facility in the city of Kosice. Chemkostav and PKB Invest had submitted concerted bids, whilst Pro-Tender, a provider of public procurement services, had actively contributed to the coordination of these bids. All companies have also been subjected to a ban on participation in public procurement for a period of three years.

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| VERTICAL AGREEMENTS

– MEMBER STATE LEVEL –

AUSTRIA

Austrian Cartel Court fines retailer Spar for retail price maintenance

On 30 June 2016, the Vienna Cartel Court (the "Court") imposed a fine of € 10.21 million on the supermarket chain Spar for retail price maintenance. Between July 2002 and December 2013, Spar and its suppliers fixed standard and promotional prices for a range of different food and drink products, including brewed products, non-alcoholic beverages, flour and bread baking mixes.

Last year, the Court already fined Spar for similar agreements relating to dairy products (see VBB on Competition Law, Volume 2015, No. 11). In calculating the fine, the Court took into account Spar's cooperation in terminating the anti-competitive practices and its agreement to settle the case.

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| INTELLECTUAL PROPERTY/ LICENSING

– EUROPEAN UNION LEVEL –

European Commission accepts commitments on geo-blocking practices relating to audio-visual content

On 26 July 2016, the Commission made legally binding the commitments offered by Paramount Pictures ("Paramount") as it considered that they adequately addressed its concerns regarding specific contractual clauses restricting passive sales.

In July 2015, the Commission had expressed concerns that Paramount and Sky UK had breached the competition rules by entering into licensing agreements containing (i) clauses that required Sky UK to block access to Paramount's films through its online pay-TV services (geo-blocking), or through its satellite pay-TV services to consumers outside its licensed territory (UK and Ireland); and (ii) clauses that required Paramount to prohibit or limit broadcasters residing or located within the EEA but outside the UK and Ireland from making their retail pay-TV services available in response to unsolicited requests from consumers located in the UK and Ireland (see VBB on Competition Law, Volume 2015, No. 7).

In the Commission's view, these clauses amounted to territorial restrictions on passive sales in breach of Article 101 TFEU.

The issue of geo-blocking is at the forefront of the Commission's Digital Single Market Strategy, as is shown by the proposal for a Regulation on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment presented by the Commission on 25 May 2016. Through this proposal, the Commission is hoping to put an end to what it considers as unjustified geo-blocking.

Because the main feature of audiovisual services is the provision of access and use of copyright protected works, these services have been excluded from the scope of the proposed Regulation. The situation of audiovisual services is particular as rights to audiovisual works are licensed on a territory-by-territory basis with the consequence that access to such works is often blocked on unlicensed territories. Given the territoriality of copyright, geo-blocking is an essential means of protecting against IP infringement.

The issue of geo-blocking of digital content protected by copyright may be addressed by the Commission in its reform of EU copyright rules since the Commission seeks to allow subscribers to digital content services to access their services in any EU country. The revision of the Satellite and Cable Directive could also provide some possible solutions.

In this context of legal uncertainty as to the interplay between IP and competition with regards to geo-blocking, Paramount undertook to offer the following commitments to address the Commission's concerns:

› When licensing its film output for pay TV to a broadcaster in the EEA, Paramount will not apply contractual obligations that prevent or limit a pay TV broadcaster from responding to unsolicited requests from consumers within the EEA but outside of the pay TV broadcaster's licensed territory (No "Broadcaster Obligation").

› When licensing its film output for pay TV to a broadcaster in the EEA, Paramount will not apply contractual obligations that require Paramount to prohibit or limit pay TV broadcasters located outside the licensed territory from responding to unsolicited requests from consumers within the licensed territory (No "Paramount Obligation").

› Paramount will not seek to bring an action for the violation of a Broadcaster Obligation in an existing agreement that licenses its film output for pay TV.

› Paramount Pictures will not act upon or enforce a Paramount Obligation in an existing licensing agreement.

Paramount's commitments cover the standard pay-TV services as well as subscription video-on-demand services, and apply to online and satellite broadcast services.

The Commission's investigation into the other five film studios (Disney, NBCUniversal, Sony, Twentieth Century Fox and Warner Bros) continues as these companies still dispute the Commission's allegations.

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| STATE AID

– EUROPEAN UNION LEVEL –

US Treasury criticises the Commission's State aid investigations on transfer pricing

On 24 August 2016, the US Treasury took the unprecedented step of publishing a 25 page paper ("White Paper") criticising the Commission's State aid investigations into transfer pricing rules concerning Amazon, Apple, Fiat and Starbucks. As reported previously, (see VBB on Competition Law, Volume 2016, No. 6 and VBB on Competition Law, Volume 2016, No. 7), the Commission has already found that certain tax arrangements, entered into by Fiat in Luxembourg and Starbucks in the Netherlands, were in breach of the EU State aid rules and has ordered recover of the declared unlawful State aid. However, final decisions in the Amazon and Apple investigations have yet to be issued.

The White Paper identifies three primary concerns with the Commission's above-mentioned four State aid investigations. These are (i) the Commission's approach is novel and, as such, it was unforeseeable that the tax arrangements would be deemed unlawful at the time the companies entered into them, (ii) by ordering recovery of unlawful State aid in these cases, the Commission is seeking to impose retroactive measures in breach of general EU principles, and (iii) the Commission's approach is inconsistent with the OECD Transfer Pricing Guidelines and, as such, undermines the international tax system and standards. Indeed, the White Paper reviews a number of previous Commission decisions where the notions of 'selectivity' and 'advantage' were at issue. According to the White Paper, no previous Commission decision resulted in a finding that a measure could be treated as selective solely because it resulted in disparate treatment between multinational groups and standalone companies.

In summary, the White Paper is noteworthy as a public rebuttal by the US Treasury of the legal arguments put forward by the Commission in its investigations. However, as the Commission has already reached a final decision in two of the four investigations, it seems unlikely that it will significantly alter its view. On the other hand, the arguments raised by the US Treasury are likely to be relevant to the upcoming legal challenges brought by Luxembourg and the Netherlands in the EU General Court against the *Fiat* and *Starbucks* decisions.

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| PRIVATE ENFORCEMENT

– MEMBER STATE LEVEL –

GERMANY

Regional Court Potsdam rules on validity of standard term stipulating fix percentage of cartel damages

In a judgment of 14 April 2016, the Regional Court Potsdam (the "Court") ruled on the validity of a standard term in a procurement contract stipulating a fix percentage (15%) of damages in case of future follow-on action in relation to a competition law infringement.

The claimant, a public local transport company, awarded to the defendant's legal predecessor, a producer of rail tracks, a contract for the supply and instalment of rail tracks and track switches. The procurement contract included a clause which stipulates that if it is proven that the supplier has entered into an anti-competitive agreement in relation to the award of the contract, the supplier would have to pay 15% of the value of the contract to the customer, unless a different amount of damages can be proven. In 2013, the defendant's legal predecessor was fined by the German Federal Cartel Office ("FCO") for its involvement in the rail cartel. The claimant therefore claimed damages on the basis of the cartel damages clause.

The Court however found that the cartel damages clause is invalid and that the claimant has failed to substantiate the injury it had suffered and therefore rejected the claim for damages.

The Court found that the cartel damages clause as a standard term violates Sections 307 and 309 Nr. 5 (a) of the German Civil Code ("BGB"). According to these provisions, a standard term is invalid if it unreasonably disadvantages a party to the contract and namely if it constitutes an agreement on a lump-sum claim for damages where the agreed amount exceeds the expected injury under normal circumstances.

The Court found that it cannot be assumed that the injury caused by a competition law infringement related to the award of the contract will under normal circumstances always be (close to) 15% of the contract value, irrespective of the type, content and scope of the works undertaken. The Court rejected the claimant's argument that pursuant to a number of official studies, the average amount of cartel damages lies at approximately 15% of the contract value. According to the Court, such an average amount of cartel damages for all possible types and fields of cartel violations cannot be relied on in the framework of Sections 307 and 309 Nr. 5 (a) BGB. The claimant referred to a similar damages clause in another case, where a fix percentage of 5% of damages had been found to be valid. The Court however ruled that this decision does not affect the present case since, according to the rules on standard terms, a clause cannot be reduced to what is just not yet illegal. The Court also rejected the claimant's argument that since the clause is modelled after a governmental procurement manual and is regularly used by local transport companies, it has become custom. According to the Court, even if the cartel damages clause had become custom, this would not justify its validity.

According to the Court, the claimant could have easily substantiated the amount of its injury by comparing the price levels of the services in question prior and during the cartel agreement. Since the claimant failed to provide the Court with any tangible indication as to the concrete amount of the injury suffered, the Court did not have a sufficient basis to assess the injury and therefore did not award damages.

Administrative Court Düsseldorf rules on right to access cartel damages proceeding file before labour court

In a judgment of 7 July 2016, the Administrative Court Düsseldorf (the "Court") annulled the prior decision of the President of the Higher Labour Court Düsseldorf (the "President") who had denied a potential cartel victim access to the file of a cartel damages proceeding before the Higher Labour Court. Before the Higher Labour Court, a company, which had been fined by the German Federal Cartel Office for participating in a rail cartel, claimed damages against one of its former managers for his active role in the cartel (see VBB on Competition Law, Volume 2015, No. 3). Following the annulment of the first decision by the Court, the matter was referred back to the President to render a new decision.

The claimant is a local transportation company that bought construction material from members of the cartel. In January 2015, the claimant requested the President to be granted access to the file of the appeal proceedings between a cartel offender and its former manager before the labour court. The claimant submitted that it had suffered an injury due to the cartel and intends to claim damages in civil proceedings for which the content of the requested file could be of relevance. The claimant also wanted to have access to the file in order to decide whether to intervene in the labour court proceedings.

The President initially rejected the request for access to file because the parties to the dispute did not consent and because she found that, based on a weighing of interests, either the claimant had no information interest or the confidentiality interests of third parties or the parties to the labour court proceedings prevailed with respect to the majority of the documents in the file (which contain information on business relationships with customers or the internal relationship between the parties). The President rejected access to the whole file because she found that a clear separation between the parts of the file that exclusively deal with anti-competitive agreements and/or the relationship with the claimant on the one hand and confidential information on the other hand was not possible.

In its recent judgment, the Court held on appeal that the President had erred in exercising her discretion in deciding whether to grant access to the file. According to the Court, the President wrongly gave priority to the confidentiality interest of the parties to the proceedings. The President should have considered that the claimant's access to file was necessary to verify potential claims for damages against the parties of the labour court proceedings as there are no other sources of information available to the claimant. Namely, the claimant could not be referred to the content of the cartel decision of the Federal Cartel Office or to the hearings and judgments of the previous instances of the labour court proceedings, as these sources do not provide the concrete and detailed information necessary to determine liability for damages.

However, the Court explained that this does not mean access to the whole file has to be granted. Rather, there is information that should be protected, such as information that the parties are contractually obliged to keep confidential vis-à-vis third parties, if such information is not linked to the anti-competitive agreements. The same applies to documents that deal with business relations with third parties and do not relate to the cartel infringements. The Court however held that, if the delineation between the parts of the file that deal with anti-competitive agreements and the parts that contain confidential information is not clear, access should be granted to the claimant, because the Court considered that the information is not contemporary, the cartel offender's business unit in question has ceased its business operations and the claimant has never been a competitor of the cartel offender.

An appeal against the judgment of the Court is pending before the Higher Administrative Court of North Rhine Westphalia.

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