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Highlights

MERGER CONTROL

General Court rejects challenge to conditional clearance of Vodafone / Liberty Global joint venture

Page 4

UK prohibits major supermarket merger between Sainsbury's and Asda

Page 6

ABUSE OF DOMINANT POSITION

European Commission fines AB InBev € 200 million for restricting cross-border sales

Page 7

CARTELS AND HORIZONTAL AGREEMENTS

European Commission imposes fines totalling over € 1 billion in foreign exchange spot trading cartel cases

Page 8

VERTICAL AGREEMENTS

Swedish Appeals Court overturns ruling that Booking.com's narrow price parity clauses infringe Article 101 TFEU

Page 11

STATE AID

Court of Justice provides guidance on assessment of violations of free movement of capital in relation to State aid scheme

Page 12

General Court annuls European Commission's decisions concerning Polish turnover tax on the retail sector

Page 12

GCR GLOBAL COMPETITION REVIEW

Global Competition Review 2017 Law Firm of the Year – Europe

GCR Awards 2017

Jurisdictions covered in this issue

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Table of contents

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MERGER CONTROL

– EUROPEAN UNION LEVEL –

General Court rejects challenge to conditional clearance of Vodafone / Liberty Global joint venture

On 23 May 2019, the General Court of the European Union ("GC") rejected a legal challenge brought against the European Commission's ("Commission") conditional clearance of the *Liberty Global / Vodafone* joint venture in the Netherlands by rival KPN (see VBB on Competition Law, Volume 2016, No. 8).

KPN had raised two main claims. First, KPN claimed that the Commission had incorrectly defined the relevant market. Second, KPN claimed that the Commission had failed to properly assess the vertical effects of the merger. The GC rejected each of these arguments.

On market definition, the GC held that the Commission had been correct to define the market as the wholesale provision of premium pay-TV sports channels. The GC disagreed with KPN's claim that the Commission ought to have found that each sports channel constitutes a separate market as they show different content. Although one sports channel (Fox Sports) charged a higher price for its service and offered different content to another sports channel operated by Liberty Global (Ziggo Sport Totaal), the GC held that it was decisive that retail TV service providers (i.e., the demand side of the wholesale market) regarded the channels as substitutable such that the Commission had correctly defined the market.

On vertical effects, the GC held that the Commission had correctly applied the 2008 Guidelines on Non-Horizontal Mergers. In particular, the Commission had only analysed the possibility of input foreclosure by reference to markets with a 'mobile' component where Vodafone was already active, i.e., the market for the retail supply of fixed-mobile 'multiple play' bundles. On this market, the Commission correctly found that even if the merged entity had the ability and incentive to engage in an input foreclosure strategy for Ziggo Sport Totaal, other channels were available and the consumption of live TV over mobile devices was of limited importance so it was unlikely that foreclosure would occur.

– MEMBER STATE LEVEL –

GERMANY

German FCO prohibits acquisition in the printing press sector

On 7 May 2019, the German Federal Cartel Office ("FCO") prohibited the proposed acquisition of MBO by rival Heidelberger.

Both parties are leading manufacturers of highly specialised industrial sheet-folding machines, which are used in the printing process to fold printed paper or book-binding paper. During its investigation, the FCO found that there is specific demand for industrial sheet folding machines from customers such as printing houses and book binders.

According to the FCO, the combined share of the parties in the market for industrial sheet folding machines would have far exceeded 50%. Moreover, MBO and Heidelberger are the two closest competitors and only two other firms would have remained active on the market in Europe. Further, the FCO found that no market entry had occurred in the last twenty years due to substantial barriers to market entry, such as high costs, high levels of customer loyalty, and special requirements for prompt service and spare-part supply. Interestingly, the FCO noted that American and Asian manufacturers of sheet-folding machines only export an insignificant volume of machines to Europe and were mainly unknown by customers who responded to the market investigation.

German FCO clears major bookstore merger despite high market shares

On 9 May 2019, the German FCO unconditionally cleared the merger between Thalia and Mayersche Buchhandlung, which operate a combined 288 bookstores in Germany.

Despite the parties' "relatively high joint market shares" in the bricks-and-mortar retail market for books, the FCO found after an intense pre-notification and Phase I examination that the merger would not raise competition concerns for end consumers or publishers. In particular, German law provides for retail price maintenance in the commercial book market which requires that most books must be sold at the same price. As a result, competition on the German book market generally focuses on quality of supply, service, choice of products and store design (instead of prices). In addition, the FCO found that consumers could still benefit from growing online sales as well as choosing to buy from a number of small and medium-sized book shops.

ICELAND

Iceland freezes store deal

On 16 May 2019, the Icelandic Competition Authority ("ICA") prohibited the acquisition by Samkaup, a supermarket chain, of two grocery stores owned by Basko verslanir in the Icelandic towns of Akureyri and Reykjanesbær.

Originally, Samkaup had intended to acquire fourteen stores from Basko verslanir. In light of competition concerns from the ICA, Samkaup had carved out the two stores in Akureyri and Reykjanesbær from the original transaction, which the ICA later unconditionally approved in 2018.

Subsequently, Samkaup notified the ICA of its intention to acquire the two remaining stores. By its latest decision, the ICA has found that this acquisition would seriously distort competition in these two areas, as entry barriers are high and the number of competitors would decrease from three-to-two in Akureyri, and from four-to-three in Reykjanesbær. The transaction was therefore prohibited.

While merger prohibitions in Iceland are fairly rare, the ICA also recently blocked a retail pharmacy merger between Lyf og Heilsa hf. and Opna ehf. (see VBB on Competition Law, Volume 2018, No. 10).

SPAIN

Spain conditionally clears merger-to-monopoly of regional private hospital deal

On 24 April 2019, the Spanish Competition Authority ("CNMC") conditionally approved the acquisition by Grupo Quirón of Clínica Santa Cristina, its only competitor in the region of Albacete for the provision of private healthcare services.

The CNMC carried out an in-depth Phase II investigation and cleared the deal subject to a number of onerous commitments which require Grupo Quirón to: (i) maintain and improve the quality of the private medical services; (ii) avoid future price increases; and (iii) guarantee that other health service competitors may access the hospitals of Grupo Quirón. The CNMC will monitor Grupo Quirón's compliance with the commitments for a period of five years.

SWEDEN

Swedish cheese deal sees hard block

On 30 April 2019, the Swedish Competition Authority ("SCA") blocked the acquisition of Svensk Mjölk by three Swedish dairy companies.

In Sweden, *Präst, Herrgård* and *Grevé* are well-known and popular hard cheeses made from Swedish milk. These three brands are owned by Svensk Mjölk, which in turn licenses out the right to produce and sell the cheeses. Prior to the proposed deal, Svensk Mjölk was jointly controlled by its five members: three major Swedish licensees active in the dairy industry (Arla Foods, Norrmejerier and Falköpings mejeri), a fourth French-owned dairy company that also held a license (Skånemejerier) and a fifth dairy association that did not produce any cheese under the licensed brands (Gäsene). Under the terms of the proposed deal, the three Swedish licensees would transfer the ownership of Svensk Mjölk into their joint control. This would enable them to set the licence terms for the three cheese brands, including in relation to pricing, terms of sale and product design.

However, the SCA found that the decrease in the number of owners of the brands from Sweden's five largest dairy companies to three would lessen competition. The proposed arrangement would allow the three Swedish licensees an incentive to offer other competing licensees' unfavourable terms of access and increased fees for use of the Swedish cheese licence. Even though the three Swedish licensees already exercised majority control in Svensk Mjölk, the SCA noted that existing minority protections prohibited discrimination between the members. As a result, the SCA considered that the deal would cause significant price increases in the licensed cheese brands. Although the merging parties argued that the deal was necessary to preserve the trademark protection and quality of the three cheese brands, the SCA considered that there were less restrictive methods to ensure that the cheese varieties maintained their quality and continued to be produced using Swedish milk.

UNITED KINGDOM

UK prohibits major supermarket merger between Sainsbury's and Asda

On 25 April 2019, the UK's Competition and Market's Authority ("CMA") prohibited a merger between two supermarkets, Sainsbury's and Asda, on the grounds that the deal would have increased prices in stores, online and at many petrol stations across the UK.

In its detailed 542-page decision, the CMA found that that while Tesco is currently the largest grocery retailer in the UK with 27% of grocery sales in-store and online, the merger of Sainsbury's (15%) and Asda (14%) would have created a new largest UK retailer. A variety of smaller players, such as Morrisons (10%), Aldi (7%), Co-op (6%), Lidl (5%), Waitrose (5%), M&S (4%), Iceland (2%) and Ocado (1%) would remain post-transaction. However, the CMA found that competition between the 'Big 4' grocery retailers (i.e., Tesco, Sainsbury's, Asda and Morrisons) was important for customers, and that the presence of Lidl and Aldi (known as 'discounters') did not allay its serious competition concerns about the merger, as these imposed a materially weaker constraint on the parties' supermarkets.

The final decision indicates the scale of the competition issues faced by the merging parties. At a local level, the CMA's gross upward pricing pressure index ("GUPPI") model indicated a substantial lessening of competition in 537 supermarkets areas. Further, the CMA found that motorists would pay more for fuel at over 127 locations where Sainsbury's and Asda petrol stations are located close together. Moreover, even though the CMA found that the deal would generate almost UK£ 500 million in efficiencies, and the merging parties proposed to divest 125-150 stores and publicly claimed they would invest UK£1 billion annually in lower prices, the CMA found that the remedies proposed by the merging parties did not represent a comprehensive or effective solution to the identified areas where competition would be substantially lessened.

The case is noteworthy for the intensity of the CMA's review, during which it collected survey input from 60,000 shoppers and motorists, hundreds of thousands of internal documents of the merging parties, and thousands of submissions.

In addition, the case provides a rare example of merging parties successfully challenging the imposition of onerous procedural deadlines before the Competition Appeal Tribunal ("CAT"). On 14 December 2018, the CAT found that the date by which the CMA had demanded a response to various working papers and the date of the main hearing had been unreasonable and ordered them to be set back.

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ABUSE OF DOMINANT POSITION

– EUROPEAN UNION LEVEL –

European Commission fines AB InBev € 200 million for restricting cross-border sales

On 13 May 2019, the European Commission (the "Commission") announced that it had issued a decision imposing a fine of just over € 200 million on AB InBev for breaching Article 102 Treaty on the Functioning of the European Union ("TFEU"). According to the Commission, AB InBev abused its dominant position on the Belgian beer market by hindering imports of its Jupiler beer from the Netherlands.

According to its press release, the Commission found that AB InBev enjoyed a dominant position on the Belgian beer market. The Commission concluded that this followed from consistently high market shares, AB InBev's ability to increase prices independently from other beer manufacturers, the existence of barriers to "significant" entry and expansion, and the limited countervailing buyer power of retailers.

As regards the nature of the abuse, the Commission's press release notes that AB InBev abused its dominant position by pursuing a deliberate strategy to restrict the possibility for supermarkets and wholesalers to buy Jupiler beer at lower prices in the Netherlands for importing into Belgium. To do so, AB InBev allegedly engaged in the following practices:

- Changing the packaging of some of its Jupiler beer products supplied to retailers and wholesalers in the Netherlands to make these products harder to sell in Belgium, for instance by removing the French version of mandatory information from the label, as well as changing the design and size of beer cans;
- Limiting the volumes of Jupiler beer supplied to a wholesaler in the Netherlands so as to restrict imports of these products into Belgium;
- Making customer promotions for beer offered to a retailer in the Netherlands conditional upon the retailer not offering the same promotions to its customers in Belgium;
- AB InBev also refused to sell certain of its key products to one retailer unless it agreed to limit its imports of less expensive Jupiler beer from the Netherlands to Belgium.

The misconduct allegedly lasted from 9 February 2009 until 31 October 2016.

The press release further notes that AB InBev joins the growing number of companies in non-cartel cases to cooperate with the Commission in exchange for a reduction in its fine. In this instance, the Commission granted a 15% reduction, noting that the cooperation took the form of expressly acknowledging the facts, the infringement of EU competition law, and proposing a remedy. The Commission also noted that the cooperation took place only after the Statement of Objections ("SO") was issued.

The remedy is aimed at ensuring that the packaging of all existing and new products in Belgium, France and the Netherlands will include mandatory food information in both Dutch and French for the next five years.

Although the remedy covers France, the press release does not mention whether the decision also covers imports of Leffe beer from the Netherlands into Belgium, or imports of Jupiler and Leffe beer into Belgium from France, despite the fact that these broader concerns formed part of the Commission's SO.

CARTELS AND HORIZONTAL AGREEMENTS

– EUROPEAN UNION LEVEL –

European Commission imposes fines totalling over € 1 billion in foreign exchange spot trading cartel cases

On 16 May 2019, the European Commission adopted two decisions under its cartel settlement procedure, in which it imposed fines totalling € 1.07 billion on five banks for their involvement in two separate cartels on the spot foreign exchange markets for eleven currencies. The banks involved in the infringements were Barclays, RBS, Citigroup, JPMorgan and the Bank of Tokyo-Mitsubishi (now MUFG Bank).

In its decisions, the Commission found that the banks had colluded on the manipulation of eleven foreign exchange (or "Forex") rates, namely on the Euro, British Pound, Japanese Yen, Swiss Franc, US, Canadian, New Zealand and Australian Dollars, and Danish, Swedish and Norwegian crowns. In practice, when companies exchange large amounts of a certain currency against another, they generally go through a Forex trader. Currency transactions that are executed on the same day are referred to as 'Forex spot order transactions'.

According to the Commission, individual traders in charge of Forex spot trading for the banks concerned – which were direct competitors – exchanged commercially sensitive information through online chatrooms which related to:

- outstanding customers' orders (i.e., the amount that a client sought to exchange and the currency involved, as well as indications on which client was involved in the transaction);
- prices (i.e., bid-ask spreads) applicable to specific transactions;
- the currencies that needed to be sold or bought by the trader;
- other information concerning current or planned activities.

The Commission concluded that the information exchange enabled the traders to make informed market decisions on whether to sell or buy the currencies they had in their portfolio and the timing of such transaction. More specifically, the Commission found that the traders exchanged this information in different chatrooms in two separate cartels, namely:

- The so-called "Three-Way Banana Split" infringement, which involved information exchange in three different chat rooms among traders from UBS, Barclays, RBS, Citigroup and JPMorgan. This infringement started on 18 December 2007 and ended on 31 January 2013. Total fines of € 811 million were imposed in respect of this infringement, ranging from € 116 million (Barclays) to € 310 million (Citigroup). Fine reductions under the Leniency Notice ranged from 10% (JPMorgan) to 50% (Barclays).
- The so-called "Essex Express" infringement, which involved communications in two chatrooms among traders from UBS, Barclays, RBS and Bank of Tokyo-Mitsubishi (now MUFG Bank). The infringement started on 14 December 2009 and ended on 31 July 2012. Total fines of € 257 million were imposed in respect of this infringement, ranging from € 69 million (Bank of Tokyo-Mitsubishi) to € 34 million (Barclays). Fine reductions under the Leniency Notice were granted to RBS (25%) and Barclays (50%).

A 10% fine reduction was granted to all the banks involved in the infringements under the Settlement Notice. UBS received full immunity under the Leniency Notice in relation to both cartels for revealing their existence to the Commission.

General Court dismisses appeal in car battery recycling cartel case

On 23 May 2019, the General Court delivered a judgment in which it dismissed the appeal lodged by Recylex against the European Commission's ("Commission") decision in the car battery recycling cartel case (Case T-222/17, *Recylex and Others v. Commission*).

In February 2017, the Commission imposed fines totalling € 68 million on three companies - Eco-bat, Recylex and Campine - for taking part in a cartel to fix the purchase prices of scrap lead-acid automotive batteries in Belgium, France, Germany and the Netherlands (VBB on Competition Law, Volume 2017, No. 2). Recylex was fined € 26.7 million.

On appeal, the General Court rejected all of the pleas raised by Recylex. In essence, the General Court considered that:

- the Commission did not make an error in its application of the Leniency Notice when it refused to grant partial immunity to Recylex for the period from 23 September 2009 to 4 April 2011. According to the General Court, the Commission could have established that the companies were involved in the infringement during that period before it had received the information provided by Recylex;

- the Commission did not make an error in its application of the Leniency Notice when it refused to grant partial immunity to Recylex in relation to the part of the infringement relating to France. According to the General Court, the Commission was already aware of the fact that the cartel covered France before Recylex submitted its application;

- the Commission had set out to the requisite legal standard the reason why it decided to increase by 10% the fine imposed on Recylex under point 37 of the Fining Guidelines;

- the Commission did not err in the application of the Leniency Notice as regards the cooperation of Eco-Bat. According to the General Court, it could not be inferred from the wording of the 2006 Leniency Notice that, where two undertakings provide evidence that represents significant added value, the undertaking which provided evidence second is to take the place of the first undertaking if it transpires that the latter's cooperation did not meet the requirements of the Leniency Notice;

- finally, according to the General Court, in the exercise of its unlimited jurisdiction, there was nothing in the complaints, arguments and matters of law and of fact put forward by Recylex from which it might be concluded that the fine imposed on it is not commensurate with the gravity and duration of the infringement or with the degree of cooperation which it provided in the context of the leniency programme.

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VERTICAL AGREEMENTS

– MEMBER STATE LEVEL –

AUSTRIA

Austrian Cartel Court fines Anker Snack & Coffee € 210,000 for resale price maintenance

On 11 April 2019, the Austrian Cartel Court fined coffee-and-snack chain Anker Snack & Coffee € 210,000 for engaging in resale price maintenance. According to a press release of the Austrian Competition Authority from 13 May 2019, the company was found to have set minimum and fixed prices for the sale of bakery products, snacks and drinks by its franchisees, by means of its central control of the cash register system used by the franchisees. The infringement lasted from January 2006 to August 2017.

FRANCE

French Competition Authority dismisses a complaint against Hyundai for anticompetitive agreements in relation to its repair network

On 9 May 2019, the French Competition Authority ("FCA") dismissed the claims brought by the owners of certain garages (Garage Richard Drevet, Garage Guillotin and Littoral Automobile) against Hyundai alleging a breach of Article 101(1) Treaty on the Functioning of the European Union and the French law equivalent.

The garages alleged that Hyundai refused or, as the case may be, terminated their appointment as authorised Hyundai repairers in a discriminatory manner. They also alleged that Hyundai implemented a blanket exclusion policy against repairers who were not also appointed to sell Hyundai vehicles.

The FCA defined the relevant market as the market for repair and overhaul of Hyundai vehicles. The FCA considered the automotive repair and overhaul markets as brand specific, taking into account the Commission's supplemental guidelines on vertical agreements in the motor vehicle sector and previous national precedents.

With regard to the alleged discrimination, the FCA found that the selection criteria applied by Hyundai for the appointment of authorised repairers are exclusively qualitative (relating to, inter alia, the professional qualifications of the repairer, its employees and its facilities). The FCA found that the complainants had not produced any evidence demonstrating that Hyundai applies additional quantitative selection criteria. To the contrary, the evidence indicated that Hyundai does not implement either any geographical limitations on the numbers of authorised repairers it appoints nor any policy of excluding repairers who are not also appointed to sell Hyundai vehicles.

HUNGARY

Hungarian Competition Authority fines Husqvarna HUF 111 million for RPM

On 20 May 2019, the Hungarian Competition Authority (Gazdasági Versenyhivatal – "GVH") fined Husqvarna Magyarország ("Husqvarna") HUF 111 million (approximately € 330,000) for fixing retail prices charged by its authorised distributors. The GVH found that Husqvarna indirectly set minimum retail prices for gardening tools sold under the Husqvarna, Gardena and McCulloch brands by (i) providing its distributors with recommended retail prices for these products and (ii) agreeing with the distributors on the maximum amount by which they could discount these 'recommended' prices when selling online and, concerning only the McCulloch brand, when selling in-store. The infringement lasted from September 2013 to September 2016.

The leading role of Husqvarna in the infringement was taken into account as an aggravating factor in setting the amount of the fine, but nonetheless it received a 75% reduction as a result of its cooperation with the authority, its settlement submission in which it acknowledged the infringement and the improvements it implemented to its compliance programme. The GVH did not impose any fines on the distributors, but obliged them to adopt compliance measures.

SWEDEN

Swedish Appeals Court overturns ruling that Booking.com's narrow price parity clauses infringe Article 101 TFEU

On 9 May 2019, the Swedish Patent and Market Court of Appeal ("Court") overturned the ruling of the Swedish Patent and Market Court which had found that so-called narrow (vertical) price parity clauses in contracts between Booking.com and hotels in Sweden, which prevented the hotels from setting lower prices on their own websites than those advertised on Booking.com's platform, infringed Article 101 Treaty on the Functioning of the European Union ("TFEU") and its Swedish equivalent (see VBB on Competition Law, Volume 2018, No. 8).

The Court noted at the outset that digital booking platforms create significant benefits for both consumers and suppliers of services using the platform. The Court also noted that the Swedish Competition Authority, along with several other competition authorities in the EU, had found narrow price parity clauses to be compatible with Article 101 TFEU, and that a range of different views on the competitive effects of price parity clauses had been expressed in the legal and economic literature. In light of these observations, the Court concluded that it could not be presumed that narrow price parity clauses infringed Article 101 TFEU (in other words, that they had the object of restricting competition).

When examining whether Visita had met its burden of proving that the narrow price parity clauses had anticompetitive effects, the Court stated that a plaintiff could not merely rely on economic theories showing possible harmful effects, but instead would have to present factual evidence of harmful effects on the market. This requirement would be appropriate in particular because the allegedly anticompetitive clauses had been in place for a long time.

The Court found, first, that Visita had not offered sufficient evidentiary support for its allegation that the narrow price parity clauses prevented rival booking platforms from competing with Booking.com by lowering their commissions. Visita had argued that if a rival booking platform attempted to compete on lower commissions, hotels would prefer to lower the prices on their own websites as well. Yet the parity clauses would in that case also require prices on Booking.com to be lowered, although commission on Booking.com would not be reduced. This situation would undermine the incentives for hotels to price differentiate among booking platforms, thus limiting competition among booking platforms. The Court considered that survey data which Visita had presented in support of this argument were not sufficiently representative, and that the survey results were not sufficiently robust, as there was evidence that hotels did to some extent price differentiate among booking platforms and there were alternative explanations for why price differentiation did not occur to a greater extent. The Court also referred to a Booking.com study showing that hotels that did not adhere to narrow price parity clauses did not price differentiate between online platforms and their own websites to a greater extent.

Along the same lines, the Court held that Visita had failed to present sufficient evidentiary support for its argument that the narrow price parity clauses had harmful effects because they prevented hotels from offering reduced rates on their own websites, and that prices on their own websites would be lower in the absence of the contested clauses. In addition to rejecting the robustness of the survey results offered by Visita, the Court pointed out that Visita had not offered any studies comparing the situation in Sweden with market developments in EU Member States such as France or Germany, where legislation had prohibited all price parity clauses for several years. The Court also noted that although hotels would certainly prefer to price differentiate in favour of their own websites, they could already in the current situation reflect the costs of Booking.com commissions in their overall pricing strategy and set their prices freely. Visita had not presented any evidence that hotel prices overall would be lower in the absence of narrow price parity clauses, as greater pricing flexibility might encourage hotels to primarily raise prices on Booking.com. In this context, the Court also observed that there was intense competition among hotels, also as a result of a high degree of price transparency, and that in such cases vertical restraints that could be characterized as intra-brand restraints were less likely to have anticompetitive effects.

The judgment cannot be appealed, which means that Sweden will stay in line with those EU Member States where narrow price parity clauses have been found to be compatible with Article 101 TFEU.

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STATE AID

– EUROPEAN UNION LEVEL –

Court of Justice provides guidance on assessment of violations of free movement of capital in relation to State aid scheme

On 2 May 2019, the Court of Justice of the EU ("ECJ") delivered a judgment on a request for a preliminary ruling by the Dutch Court of Appeal of 's-Hertogenbosch. The request was made in proceedings between A-Fonds, an investment undertaking governed by German law, and the Dutch tax administration. A-Fonds sought a refund of the dividend tax relying on the rules on free movement of capital provided for in Article 63 TFEU. The Dutch authorities refused to grant this refund on the grounds that A-Fonds was not established in the Netherlands.

The referring court considered that the refusal constituted an infringement of Article 63 TFEU and that, in order to remedy that infringement, the request submitted by A-Fonds for a refund of dividend tax should have been granted. However, the referring court questioned whether such a decision would comply with State aid law. Taking the view that the measure providing for the refund of dividend tax constitutes an existing State aid scheme, it sought to ascertain whether the rules on State aid precluded it from granting the request for a refund submitted by A-Fonds on the basis of Article 63 TFEU, since the effect of that decision would be to widen the group of recipients entitled to benefit from the aid scheme in question.

The ECJ recalled that a national court is competent to assess whether the arrangements of a State aid scheme comply with Treaty provisions which have direct effect, other than those relating to State aid, only if those arrangements can be evaluated separately and thus, although forming part of the aid scheme in question, are not necessary for the attainment of its objective or for its functioning.

Since, in the present case, the residence condition is indissolubly linked to the object of the State aid scheme at issue, the ECJ concluded that the national court cannot assess whether this condition complies with the rules on free movement of capital. In particular, the ECJ held that Articles 107 and 108 TFEU must be interpreted as meaning that a national court cannot assess whether a residence condition complies with Article 63(1) TFEU, where the scheme for the refund of dividend tax concerned constitutes an aid scheme.

It is important to note that the ECJ did not assess the compatibility of the State aid scheme with Article 63 TFEU. It took the view that the referring court had already established that this aid scheme was incompatible with the rules on free movement of capital. However, in the absence of a decision by the ECJ on this aspect, the question whether this aid scheme complies with the requirements provided in Article 63 TFEU remains open. A clear decision would have helped to shed light on the intricate relationship between the rules on free movement and those of State aid, which is often a source of debate in the context of State aid proceedings before the European Commission.

General Court annuls European Commission's decisions concerning Polish turnover tax on the retail sector

On 16 May 2019, the General Court ("GC") annulled the European Commission's ("Commission") decision to open a formal investigation (Case T-836/16) and the final decision (Case T-624/17) regarding alleged State aid granted by the Polish retail sector tax on turnover.

First, the GC held that the Commission erred in identifying the reference tax system against which the measures had to be analysed. In fact, the Commission took into consideration the reference tax system applicable to all sectors, and not the one specific to retailers.

Second, the GC held that the Commission misinterpreted the objective of the Polish tax, in so far as it considered that the purpose of the tax system was to subject the entire turnover of all undertakings in the relevant sector to taxation. The GC held that, in view of the drafting his-

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tory and intention of the Polish legislator, the purpose of this tax system was to redistribute resources through progressive taxation. The Polish progressive system is thus coherent with this objective, as undertakings with higher turnover are expected to make more profit and have more resources to be redistributed than smaller undertakings.

The GC also noted that, although the progressive system benefits smaller undertakings, this does not mean that the selectivity requirement is met. Selectivity is absent if the different tax treatment, which is justified in order to redistribute resources, results from the mere application of the reference tax system and not from a derogation thereto. Thus, legislation which sets out a minimum turnover threshold for the purpose of applying a tax on turnover and applies progressive tax rates, does not per se confer any selective advantage.

On these grounds, the GC annulled the contested decisions.

European Commission launches four public consultations in the context of its comprehensive policy evaluation in the area of State aid ("Fitness Check")

- Targeted consultation to stakeholders on the *De minimis* Regulation (from 24.05.2019 to 19.07.2019)

- Targeted consultation for the evaluation of the Guidelines on State aid for Environmental protection and Energy 2014-2020 (EEAG) (from 14.05.2019 to 10.07.2019)

- Targeted consultation on the ex-post evaluation of the Regional Aid Framework 2014-2020 (from 14.05.2019 to 10.07.2019)

- Targeted consultation on the ex-post evaluation of the 2014 Aviation Guidelines (from 24.05.2019 to 19.07.2019)

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LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– MEMBER STATE LEVEL –

BELGIUM

Publication of two laws reforming Belgian competition law

On 24 May 2019, two laws that complete and recast Belgian competition law were published in the Belgian Official Journal.

The first law introduces in Book IV of the Code of Economic Law ("CEL"), which contains the Belgian competition law rules, new provisions regarding abuses of a position involving economic dependence, significantly unbalanced contract terms and unfair practices in business-to-business relationships. This law (i) seeks to establish an additional competition law infringement, namely the abuse of a position of economic dependence towards other businesses; and (ii) introduces a prohibition of unbalanced contract terms and unfair, misleading and aggressive practices in a business-to-business relationship (see VBB on Competition Law, Volume 2019, No. 3).

The prohibition of unfair, misleading and aggressive practices will enter into force on 1 September 2019, the prohibition of abuse of economic dependence on 1 June 2020 and the prohibition of unbalanced contract terms on 1 December 2020.

The second law published on 24 May 2019 will recast Book IV of the CEL. This Law does not bring about major substantive, procedural or institutional changes to the current competition law regime in Belgium. However, it replaces in full Book IV of the CEL, adds new definitions to Book I, and amends Book XV which governs the enforcement of laws (see VBB on Competition Law, Volume 2019, No. 3).

This second Law will enter into force on 3 June 2019, except for the provisions sanctioning the abuse of economic dependence which, logically, will enter into force simultaneously with the law introducing the concept of abuse of economic dependence in Belgium, i.e., on 1 June 2020.

– OTHER DEVELOPMENT –

EUROPEAN UNION: Johannes Laitenberger, Director General of DG Competition since 2015, has been appointed judge to the EU General Court, together with 13 other judges (see press release of the Council of the EU available here). He will serve as one of Germany's judges at the General Court for the period from 1 September 2019 to 31 August 2025.

PRIVATE ENFORCEMENT

– MEMBER STATE LEVEL –

GERMANY

Higher Regional Court of Stuttgart upholds ruling in favour of follow-on damages claims against truck manufacturer

On 4 April 2019, the Higher Regional Court of Stuttgart essentially upheld a damages claim based on the infringement decision of the European Commission establishing that truck manufacturers MAN, Volvo/Renault, Daimler, Iveco, DAF and Scania participated in a cartel. The claimant, a construction company, purchased 11 vehicles from one of the cartelists between 1997 and 2010 and was seeking approximately € 300,000 in damages (plus interest).

The Higher Regional Court of Stuttgart analysed the case law of the Federal Court of Justice ("FCJ"), specifically its judgment of 11 December 2018 in the rail track cartel case dealing with the applicability of *prima facie* evidence and the (rebuttable) factual presumption that a cartel causes harm (see VBB on Competition Law, Volume 2019, No.1). Recently, a number of first instance decisions which dealt with various follow-on damages claims in the truck cartel left these questions explicitly undecided (see VBB on Competition Law, Volume 2019, No.3).

The Higher Regional Court of Stuttgart came to the conclusion that *prima facie* evidence is not applicable in the present case, but that the factual presumption is applicable and highlighted the requirements for rebutting the factual presumption, as opposed to *prima facie* evidence. In order to disprove *prima facie* evidence, the defendant would need to positively prove an atypical course of events. The factual presumption constitutes strong evidence which points to the harm caused by the cartel, and will apply unless the defendant puts forward valid factual or legal arguments to the contrary.

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