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JURISDICTIONS COVERED IN THIS ISSUE

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MERGER CONTROL

– EUROPEAN UNION LEVEL –

Microsoft obtains conditional European Commission approval for acquisition of LinkedIn

On 6 December 2016, the European Commission conditionally approved Microsoft's acquisition of LinkedIn after a phase I review.

The Commission was concerned that the transaction, as initially notified, would allow Microsoft to use its strong market position in operating systems (Windows) for personal computers (PCs) and productivity software (including Outlook, Word, Excel and Power Point) to strengthen LinkedIn's position in professional social networks. This concern could arise if Microsoft pre-installed LinkedIn on all Windows PCs, and/or integrated LinkedIn into Microsoft Office and combined LinkedIn's and Microsoft's user databases. The Commission was concerned that this would make it harder for new players to start providing professional social network services and would tip the market towards LinkedIn in Member States where a competitor of LinkedIn currently operates (such as Austria, Germany or Poland).

To address the Commission's concerns, Microsoft offered a series of commitments for a period of five years: (i) to ensure that PC manufacturers and distributors would be free not to install LinkedIn on Windows and allow users to remove LinkedIn from Windows should PC manufacturers and distributors decide to preinstall it, (ii) to allow competing professional social network service providers to maintain current levels of interoperability with Microsoft's Office suite of products, and (iii) to grant competing professional social network service providers access to "Microsoft Graph" (a critical tool which enables software developers to build applications and services that can access data stored in the Microsoft cloud).

– MEMBER STATE LEVEL –

GERMANY

EDEKA/Kaiser's Tengelmann German merger review saga comes to an end

On 8 December 2016, the German Federal Cartel Office (FCO) cleared the divestment by supermarket chain EDEKA of 65 retail outlets in Germany to REWE. The FCO also reported that, in a related development, REWE has withdrawn its appeal against the ministerial authorisation of EDEKA's acquisition of its competitor Kaiser's Tengelmann. This brings the long-running saga of the EDEKA/Kaiser's Tengelmann merger review to an end.

In 2015, EDEKA's acquisition of Kaiser's Tengelmann had been prohibited by the FCO, which found that the transaction lessened consumer choice in a number of highly concentrated regional and municipal markets (see VBB on Competition Law, Volume 2015, No. 4). However, in March 2016, the German Minister of Economic Affairs issued a ministerial authorisation conditionally clearing the same EDEKA/Kaiser's Tengelmann transaction (see VBB on Competition Law, Volume 2016, No. 3). Following the ministerial authorisation, REWE (a competing supermarket chain) and other competitors of EDEKA and Kaiser's Tenglemann appealed against the ministerial authorisation before the Higher Regional Court of Düsseldorf. The Court found that the ministerial authorisation was unlawful and ordered its preliminary suspension, pending the outcome of a full hearing (see VBB on Competition Law, Volume 2016, No. 7). However, prior to a full hearing, REWE and the other competitors withdrew their appeal, largely because EDEKA agreed to transfer to REWE approximately 65 supermarkets that it acquired from Kaiser's Tengelmann. This divestment was approved by the FCO on 8 December 2016. EDEKA is now free to implement its acquisition of Kaiser's Tengelmann.

– OTHER DEVELOPMENTS –

EUROPEAN UNION: On 20 December 2016, the European Commission sent a Statement of Objections to Facebook alleging it provided incorrect information to the Commission during its 2014 merger review of Facebook's acquisition of Whatsapp. The concerns raised by the Commission focus on Facebook's submission to the Commission during the 2014 merger review that it would not be able to technically link users' Facebook accounts with their Whatsapp accounts. However, in August 2016, Whatsapp modified its terms of service to enable the possibility of linking Whatsapp user phone numbers with Facebook user identities. Because of this, the Commission expressed concerns that Facebook submitted incorrect information during the Facebook/Whatsapp merger review, in breach of its obligations under the EU Merger Regulation. The Commission has indicated that the current investigation is limited to the assessment of breaches of procedural rules and will not have an impact on the Commission's 2014 Facebook/Whatsapp clearance decision.

CARTELS AND HORIZONTAL AGREEMENTS

– EUROPEAN UNION LEVEL -

In this section, we give a factual overview of significant case developments at EU level, and then provide a more detailed analysis of some important substantive or procedural developments addressed in these cases.

Summary of Significant Case Developments

European Commission imposes fines totalling €485 million in euro interest rate derivatives cartel case

On 7 December 2016, the European Commission fined Crédit Agricole, HSBC and JPMorgan Chase a total of €485 million for their participation in the euro interest rate derivatives cartel. The Commission found that these banks had colluded on euro interest rate derivative pricing elements and had exchanged commercially sensitive information over varying periods of time between September 2005 and May 2008.

This decision follows the Commission's 2013 settlement decision against four other banks, namely Barclays, Deutsche Bank, RBS and Société Générale, in relation to their involvement in the same cartel (see VBB on Competition Law, Volume 2013, No.11). As Crédit Agricole, HSBC and JPMorgan Chase chose not to settle with the Commission, the decision was issued under the Commission's standard (non-settlement) cartel procedure.

European Commission fines rechargeable battery producers €166 million in cartel settlement decision

On 12 December 2016, the European Commission fined rechargeable battery producers Panasonic, Sanyo and Sony a total of €166 million for coordinating prices and exchanging sensitive business information in relation to the supply of rechargeable lithium-ion batteries between February 2004 and November 2007. These batteries are used in portable electronic and electrical devices, such as laptops and mobile phones.

The existence of the cartel was first revealed to the Commission by Samsung SDI, which was therefore exempted from fines in accordance with the Commission's Leniency Notice. All the companies concerned agreed to settle, thereby admitting their involvement in the cartel and their liability in this respect. In return, the Commission applied a reduction of 10% to the fines. Further fine reductions were given to Sony (50%), Panasonic (20%) and Sanyo (20%) for their cooperation under the Leniency Notice.

Court of Justice provides guidance to Spanish court regarding compatibility of national law restricting tariff review with EU competition law

On 8 December 2016, the European Court of Justice ("ECJ") handed down a judgment on requests for preliminary ruling from the Spanish courts regarding the compatibility with EU competition law of provisions of Spanish national law which make the fees of *procuradores* (specialised legal representatives) subject to a tariff, the review of which is limited by the courts (Cases C 532/15 and C 538/15, *Eurosaneamientos and Others*).

Specifically, the ECJ considered that EU competition law does not preclude a Member State from enacting legal provisions that sets the scale of tariffs for the legal services provided by procuradores, which may only be increased or decreased by 12%, in respect of which a national court merely checks its strict application without being in a position, save exceptional circumstances, to derogate from the price limits set by that tariff.

Advocate General Wahl recommends upholding appeals against General Court's judgments in Italian concrete reinforcing bar cartel case

On 8 December 2016, Advocate General ("AG") Wahl issued his opinion on six appeals lodged against the General Court's ("GC") judgments in connection with the Commission re-adoption of the Italian concrete reinforcing bar cartel decision. The Commission issued a new decision in 2009 after the GC annulled an earlier 2002 decision on the grounds that it had been adopted on the wrong legal basis (see VBB on Competition Law, Volume 2009, No. 10). The GC subsequently upheld the re-adopted decision in 2014 (see VBB on Competition Law, Volume 2014, No. 12).

In his opinion, AG Wahl took the view that the 2014 GC judgments and the 2009 Commission decision should be annulled because the parties' rights of defence were breached, insofar as they were not provided with the opportunity to present their arguments at an oral hearing following the re-adoption of the Commission's decision. AG Wahl also considered that the parties' rights were breached because the Commission did not expressly refer to aggravating circumstances in its Statement of Objections. However, the AG recommended that the ECJ dismiss the parties' claims in relation to public distancing and repeated infringement (Case C-85/15 to C-89/15, *Feralpi and Others*).

General Court annuls Commission's decision in envelopes cartel case for failure to sufficiently state reasons

On 13 December 2016, the General Court ("GC") annulled the Commission's decision in the envelopes cartel case in so far as it concerns Tompla, an envelope producer. In its judgment, the GC ruled that, due to an inadequate statement of reasons given by the Commission, Tompla was not in a position to adequately understand or dispute the fining methodology followed by the Commission in its settlement decision in light of the principle of equal treatment, and that the GC was not fully able to exercise its powers of judicial review with regards to the Commission's compliance with that principle (Case T-95/15, *Printeos, Tompla and Others*).

European Commission will not renew Insurance Block Exemption Regulation

On 13 December 2016, the European Commission announced that the Insurance Block Exemption Regulation ("IBER"), which is due to expire on 31 March 2017, will not renewed. The IBER provides for an exemption from Article 101(1) TFEU for agreements between insurers relating to joint compilations, tables and studies, as well as co-(re)insurance pools, subject to market share thresholds and other specified conditions.

In March 2016, the Commission published a preliminary report in which it indicated that the insurance industry no longer appeared to require an exceptional instrument such as a block exemption to assess the compatibility of common contractual arrangements with EU competition law (see VBB on Competition Law, Volume 2016, No. 3). The Commission has now confirmed that, in its view, the IBER is no longer warranted because the Horizontal Guidelines already provide guidance on how to assess the conformity of joint compilations, tables and studies with the EU competition rules. At the same time, the Commission underscored that these forms of co-operation agreements are not automatically unlawful under Article 101 TFEU. Rather, insurers will need to assess their co-operation agreements on a case-by-case basis to determine whether they are in line with EU competition rules.

General Court dismisses appeals in smart card chips cartel case

On 15 December 2016, the General Court ("GC") upheld the Commission's decision in the smart card chips cartel case, confirming that Infineon and Philips had, with others, coordinated their market behaviour in the EEA through bilateral contacts that took place in the period between September 2003 and September 2005 (see VBB on Competition Law, Volume 2014, No. 9).

The GC confirmed the Commission's findings that Infineon, Philips and others had restricted competition by object by exchanging information on the pricing of smart card chips and that their rights of defence had not been breached, in particular in connection with their right to have an oral hearing and the authenticity of certain leniency documents relied on by the Commission (Cases T-758/14, *Infineon Technologies* and T-762/14, *Philips*).

Analysis of Important Substantive and Procedural Developments

Italian concrete reinforcing bar cartel case – concept of public distancing

In EU competition law, public distancing by an undertaking from otherwise collusive meetings or other contacts with other undertakings is necessary for it to prove that its participation was without any anti-competitive intention. For that purpose, the undertaking involved must demonstrate that it had indicated to its competitors that it was participating in such meetings or contacts in a spirit that was different from theirs.

In their appeals to the Court of Justice of the European Union ("ECJ") in the Italian concrete reinforcing bar cartel case, the cartelists argued that the GC had wrongly applied the concept of 'public distancing' by confirming the cartelists' participation in some parts of the infringements despite the fact that they had ultimately published prices different from those agreed with their competitors.

In his opinion on their appeals, Advocate General ("AG") Wahl recalled that the absence of public distancing may constitute evidence that an undertaking participated in an infringement in breach of Article 101(1) TFEU. He further indicated that, when reviewing the evidence submitted with respect to an alleged public distancing by an undertaking, the concept of 'public distancing' cannot be so narrow and rigid that it becomes virtually impossible for an undertaking to make out.

According to AG Wahl, the analysis of what constitutes an adequate act of public distancing requires a factual assessment on a case-by-case basis, through an overall examination of all the relevant evidence and indicia, and therefore is not an error of law subject to review on appeal before the ECJ. In any event, AG Wahl concluded that, on the facts, the conduct of the cartelists (i.e., their communication of prices that differed from those agreed with the other cartelists) did not constitute 'public distancing' in a situation where the Commission had adequately proven the cartelists' participation in the infringement on the basis of a number of other indicia (including their attendance at one or more anticompetitive meetings). Moreover, AG Wahl stated there was no error of law because there was no distortion of evidence, no breach of any general principle of law or rule of procedure and no contradiction in the GC's reasoning.

Accordingly, AG Wahl recommended the ECJ to dismiss the appellants' claim in connection with the concept of public distancing.

Italian concrete reinforcing bar cartel case - rights of defence and proper conduct of administrative procedure

Under Article 12 of Regulation 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 101 and 102 TFEU, the Commission must give the parties to whom it has addressed a Statement of Objections ("SO") the opportunity to present their arguments at an oral hearing, if they have so requested. The holding of an oral hearing is a significant procedural step within the scheme laid down by the EU legislator for the enforcement of EU competition rules.

In his Opinion in connection with the Italian concrete reinforcing bar cartel case, Advocate General ("AG") Wahl considered that the procedure followed by the European Commission in its re-adoption of the contested decision did not comply with the provisions set out in Regulations 1/2003 (implementing the rules in Articles 101 and 102 TFEU) and 773/2004, and thus breached the appellants' rights of defence.

In 2002, the Commission fined several companies for participating in a cartel on the Italian market for concrete reinforcing bars, in breach of the Treaty establishing the European Coal and Steel Community (the "ECSC Treaty"). In 2007, the General Court ("GC") annulled the Commission's decision, stating that it was adopted on a legal basis which was no longer in force, i.e., the ECSC Treaty (see VBB on Competition Law, Volume 2007, No. 11). The Commission subsequently informed the companies that it intended to re-adopt the decision using a different legal basis (i.e., Regulation 1/2003), but did so without issuing a new SO and, as a result, deprived the parties from the opportunity to present their views during an oral hearing. A number of companies appealed against the Commission's new decision before the GC, which partly dismissed their claims in 2014 (see VBB on Competition Law, Volume 2014, No. 12).

On appeal before the ECJ, the companies alleged that the GC had breached their rights of defence by failing to recognise the Commission's error in refusing to issue a new SO and to grant them the opportunity to develop their arguments at an oral hearing. AG Wahl agreed with the appellant companies, stating that by not issuing a new SO, the Commission had denied the companies the right to request an oral hearing in which representatives of Member States' competition authorities would also participate.

The AG also emphasised the constitutional significance of the choice of correct legal basis for an act of the EU institutions. AG Wahl disagreed with the Commission's arguments that it did not need to follow the procedure under Regulation No 1/2003 and Regulation No 773/2004 since it had taken similar steps in the adoption of its 2002 decision under the ECSC Treaty. The AG noted that the Commission's 2002 decision was based on different legal provisions, which may have belonged to similar, but nonetheless completely distinct sets of legal rules.

Accordingly, the AG has recommended that the GC judgments be set aside and the Commission's decision be annulled.

Italian concrete reinforcing bar cartel case - rights of defence and calculation of fine where there are aggravating circumstances

Under the 1998 Fining Guidelines, the basic amount of the fine is increased where there are aggravating circumstances, such as repeated infringements of the same type by the same undertaking.

In his Opinion in the Italian concrete reinforcing bar cartel case, Advocate General ("AG") Wahl has stated that the General Court ("GC") erred in law when it did not find that the Commission had wrongly increased the amount of the fines imposed on Ferriere Nord on grounds of recidivism.

In the judgment under appeal, the GC found that the Commission had not made a direct reference in its Statement of Objections ("SO") to its intention to take into account the existence of a repeated infringement, as an aggravating factor, for the purposes of setting the fine imposed on Ferriere Nord under the 1998 Fining Guidelines. The Commission had only made a general statement that it would take into account all mitigating and aggravating circumstances when setting the fines, in light of the conduct of each undertaking.

AG Wahl stated that the Commission is not necessarily required to refer explicitly in the SO to all the aggravating circumstances it may apply to an undertaking under investigation. The reference to aggravated circumstances by the Commission may be considered sufficient if, in the light of the particular case and the information provided in the SO, the undertaking was nonetheless able to anticipate the likely application of a given aggravating circumstance and the underlying reasons.

In this specific case, the AG concluded that, as a minimum, the Commission should have indicated the reasons for which it took the view that a previous infringement constituted an infringement of the same type for the purposes of the 1998 Fining Guidelines. The absence of any indication on this point prevented Ferriere Nord from properly exercising its rights of defence, and as a result, the AG considered that the increase in fines was wrong.

The AG consequently recommended that, should the Court of Justice not annul the decision in its entirety on account of violations of the appellants' rights of defence (see above), it set aside the relevant part of the GC's judgment and order the Commission to recalculate Ferriere Nord's fines without taking the aggravating circumstance of recidivism into account.

Envelopes cartel case – settlement procedure and principle of equal treatment

Under the Commission's cartel settlement procedure, an undertaking admitting liability to a cartel infringement and waiving certain procedural rights is rewarded with a 10% reduction in the fine.

In the envelopes cartel case, the Commission fined five producers €19.4 million under the settlement procedure for coordinating prices, allocating customers and exchanging commercially sensitive information on the European market for certain types of paper envelopes.

In setting the fines, the Commission noted that, under the general methodology of the 1998 Fining Guidelines, all the potential fines that could be imposed on the undertakings involved could reach the maximum of 10% of their total turnover since the sales of most of these undertakings were generated on a single market. The Commission therefore proposed, in view of the very specific circumstances of the case, to depart from the general methodology of the Fining Guidelines and substantially reduce the basic amount of the fines. As a result of the Commission's adjustments, the fines imposed ranged between 4.5% of the total turnover of one settling undertaking to 9.7% in the case of Tompla. The Commission did not explain in its decision why it applied different individual reduction rates to the undertakings concerned.

Tompla challenged the Commission's decision before the General Court ("GC") because it considered that the

Commission had failed to explain why it had departed from the general methodology of the Fining Guidelines. In its recent judgment, the GC agreed with Tompla that the latter was not in a position to effectively dispute the merits of the Commission's approach in light of the principle of equal treatment. In addition, the GC considered it was not fully able to exercise its power of judicial review with regard to the Commission's compliance with that principle.

The GC did not accept the Commission's argument that Tompla received sufficient information during the settlement procedure on the fining methodology used. In addition, the GC ruled that the Commission's failure to state reasons could not be remedied in the course of the judicial proceeding. The GC also rejected the Commission's claim that it was under a less onerous duty to state reasons in a settlement case, because the parties were more familiar with the case against them as they were engaged in bilateral discussions with the Commission.

This judgment is noteworthy because it is the first time the GC has annulled a cartel settlement decision on appeal. While appeals on the substance of a settlement decision are unlikely considering that the settling parties admit to their involvement in a cartel, the Tompla case shows that settling parties can still appeal against a settlement decision, and be successful, on procedural grounds, such as in relation to the principle of equal treatment in setting the fines.

Smart card chips cartel case – rights of defence and leniency statements

Article 27(2) of Regulation No 1/2003 provides that the parties' rights of defence are to be fully respected in proceedings by the European Commission pursuant to Articles 101 and 102 TFEU. Article 12 of Regulation 773/2004 states that the Commission must give the parties to whom it has addressed a Statement of Objections ("SO") the opportunity to be heard.

On 3 September 2014, the Commission imposed fines totalling approximately €138 million on four companies for coordinating their conduct on the smart card chips market in the EEA from 2003 to 2005. The Commission sent each company an SO in April 2013, which was followed by a letter of facts in October 2013, to which Infineon and Philips replied during a hearing in November 2013. In July 2014, a second letter of facts was issued, in which the Commission informed the companies of the existence of two documents submitted by Samsung supporting the authenticity of evidence it had provided earlier in the proceedings. In September 2014, the Commission adopted the contested decision. Infineon and Philips brought actions before the General Court of the European Union ("GC") seeking the annulment of the Commission's decision.

With respect to the appeal lodged by Infineon, Infineon claimed that the Commission breached its rights of defence by failing to issue a second SO and to organise a hearing, instead of sending the parties a second letter of facts, particularly as Infineon considered that the Commission had materially altered its case after issuing the second letter of facts. The Commission rejected Infineon's argument, stating that Infineon had had the opportunity to comment and had provided its comments on the second letter of facts on time and had not asked for an extension. In its judgment, the GC confirmed that, in any case, the Commission's second letter of facts did not accuse Infineon of a new infringement and did not give rise to objections different from those in its original SO, so a new SO would not have been necessary. Moreover, the GC considered that the period of five days to respond to the second letter of facts, while extremely short, could not be considered in itself to be an infringement of Infineon's rights of defence because Infineon had in fact responded within the period set and had not asked for any extension, although it was entitled to do so.

Infineon also claimed that the Commission conducted a "fast track" procedure in its case, which constituted a breach of the principle of sound administration and of its rights of defence. The GC dismissed this claim and noted that the Commission is not required to carry out further investigations at a party's request or to hear witnesses put forward by the party concerned where it considers that its investigation of the case has been sufficient.

With respect to the appeal lodged by Philips, Philips claimed that the Commission had not treated it fairly and impartially during the administrative procedure, in breach of Article 41 of the Charter of Fundamental Rights, the principle of sound administration and its general duty of care. In this respect, both Infineon and Philips disputed the authenticity of certain documents provided by Samsung as part of its cooperation with the Commission under the Leniency Notice.

The GC noted that, although some caution has to be exercised in relation to the evidence provided by undertakings applying for leniency, the Leniency Notice does not necessarily create an incentive for the leniency applicant to submit distorted evidence, nor does it make such evidence less probative than information otherwise provided by an undertaking.

– MEMBER STATE LEVEL –

PORTUGAL

Portuguese Competition Authority fines stationery producer in paper envelopes cartel case

On 6 December 2016, the Portuguese Competition Authority ("PCA") imposed a fine of approximately €160,000 on stationery company Firmo Papéis e Papelarias for its involvement in a cartel on the market for paper envelopes between 2007 and 2010.

The PCA found that five companies concerted on the Portuguese market for paper envelopes, allocated customers among themselves and fixed prices. The companies were found to have restricted and distorted competition in relation to tenders by coordinating their responses to customers' tender submissions and aligning their offer prices in order to artificially select a winner.

Two companies received full immunity from fines for revealing the existence of the cartel and providing the PCA with sufficient information which allowed it to prove the infringement. Another company was sanctioned, but not fined, because of its lack of turnover. Finally, one company was fined € 440,000 in May 2016.

ROMANIA

Romanian Competition Authority fines milk producers for bid rigging

On 14 December 2016, the Romanian Competition Council ("RCC") penalised five milk producers with fines amounting to approximately €1.9 million for rigging auctions as part of a school milk scheme implemented in several Romanian counties between 2010 and 2011.

Following its investigation, the RCC discovered that the five companies had concerted their behaviour in the context of auctions, by selecting and dividing bids among themselves. Each company would indicate to the others which lot they intended to bid for while the other bidders agreed not to bid for those lots, so that each participant only bid for lots they were certain to win. Two companies received a 20% reduction of their fine for having admitted to the infringement.

| VERTICAL AGREEMENTS

– MEMBER STATE LEVEL –

GERMANY

German FCO concludes proceedings concerning vertical price fixing in the food retail sector

The German Federal Cartel Office ("FCO") has announced the conclusion of a series of proceedings concerning vertical price fixing in the food retail sector. The proceedings followed nationwide dawn raids carried out in 2010 and led to the imposition of 38 fines totalling EUR 260.5 million on 27 companies. Most of the fines concerned infringements related to confectionery, coffee and beer products. The FCO considered the infringements to be particularly serious since, in addition to engaging in vertical price fixing with major retailers, in some cases manufacturers also colluded horizontally with each other.

As one of the results of these proceedings, the FCO imposed fines totalling EUR 112 million (by a number of decisions adopted during the period June 2015 - December 2016) on 11 food and drink retailers for vertical price agreements related to the sale of beer products of the brewery Anheuser Busch InBev Germany Holding GmbH ("AB InBev"). Under the last decision taken on 2 December 2016, fines were imposed on two companies of the EDEKA group. The FCO found that, between 2006 and 2009, competing food and drink retailers concluded agreements with AB InBev, according to which the retailers would comply with a minimum retail price level for AB InBev beer products to the extent that AB InBev would coordinate the price levels among all retailers.

The FCO has announced that it will publish a guidance note with the most important findings of the proceedings concerning price fixing in the food retail sector. The guidance note will describe the possibilities for, and limits to, coordination between retailers and manufacturers in this sector.

INTELLECTUAL PROPERTY/ LICENSING

– EUROPEAN UNION LEVEL –

Request for preliminary ruling on application of abuse provisions to licensing of television signals

On 17 November 2016, the European Court of Justice (the "ECJ") was asked by a Portuguese court whether the application by a copyright management society of tariffs for television signals that vary depending on which provider of electronic communications services is to pay constitutes a discriminatory practice within the meaning of Article 102 c) of the Treaty on the Functioning of the European Union. According to this provision, an undertaking in a dominant position is prohibited from applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.

European Commission publishes its seventh monitoring report on patent settlement agreements

On 13 December 2016, the European Commission published its seventh monitoring report on patent settlement agreements between originators and generic companies in the pharmaceutical sector covering the period January to December 2015. Patent settlement agreements are commercial agreements to settle patent-related disputes, such as those relating to patent infringement or patent validity. The Commission generally considers that the parties may have a legitimate interest in finding a mutually acceptable compromise to end a dispute because litigation is costly, time consuming and/or risky as regards its outcome. Still, the Commission considers that patent settlement agreements may in specific circumstances be problematic under EU competition law, specifically if they limit generic entry while involving a value transfer from the originator to the generic company.

According to the new report, 90% of the settlement agreements were unproblematic from an EU competition law perspective, while the rest is likely to attract the highest degree of antitrust scrutiny.

The Commission's report is accessible here.

STATE AID

– EUROPEAN UNION LEVEL –

ECJ confirms General Court judgment annulling EU Commission decision on state aid to France Télécom (Orange) – test of the prudent private investor

On 30 November 2016, the European Court of Justice ("ECJ") issued its second judgment in the case concerning public statements made by the French authorities in support of France Télécom ("FT" – now Orange) and the offering of a shareholder loan to FT.

In 2002, FT, a public limited company, was facing serious financial difficulties. Between July and October 2002, the French Minister for Economic Affairs made several statements aimed at assuring FT that it had the support of the French Authorities. In the meantime, FT initiated a restructuring process. Subsequently, in December 2002, the French state offered a shareholder loan in the form of a credit line to FT. The offer was, however, neither accepted nor acted upon.

By decision of 2 August 2004, the European Commission (the "Commission") concluded that the credit line, placed in the context of the public statements, constituted state aid incompatible with EU law. The French government, FT and other interested parties brought an action before the General Court seeking annulment of the Commission's decision.

In a judgment of 21 May 2010, the General Court annulled the Commission's decision on the ground that the measures at issue did not involve a transfer of state resources, despite the financial advantage thereby conferred on FT (see VBB on Competition Law, Volume 2010, No. 5). However, this judgment was set aside by the ECJ on 19 March 2013 (see VBB on Competition Law, Volume 2013, No. 3). According to the ECJ, the shareholder loan, although unimplemented, entailed a transfer of state resources insofar as the state budget was potentially burdened. The ECJ referred the case back to the GC for judgment on the remaining issues.

By judgment of 2 July 2015, the General Court again annulled the Commission's decision, this time on the ground that the Commission had not correctly applied the test of the prudent private investor (see VBB on Competition Law, Volume 2015, No. 7). Under this test, the Commission has to determine whether a prudent private investor in the same position as the French state would have acted in the same way. The General Court concluded that the Commission applied the test neither to the correct measures, i.e., the offering of the shareholder loan rather than the previous public statements, nor to the correct timeframe, i.e., December 2002 rather than July 2002.

This second judgment of the General Court was again appealed. The Commission claimed that the General Court had (i) infringed the obligation to state reasons, (ii) infringed Article 107(1) TFEU, (iii) exceeded the limits of judicial review, and (iv) distorted the Commission's decision. In its judgment of 30 November 2016, the ECJ rejected each of the Commission's grounds of appeal and upheld the General Court's judgment of 2 July 2015.

In particular, the ECJ confirmed that the prudent private investor test should have been applied to the shareholder loan, which was only granted in December 2002. By assessing the prudent private investor criterion to the situation as it existed in July 2002, the Commission necessarily excluded from that assessment relevant factors that occurred between July 2002 and December 2002. On these grounds, the ECJ concluded that the Commission failed to take account of all relevant factors for the assessment of the state aid character of the measures.

In consequence of this second judgment of the ECJ in this case, the Commission's decision of 2 August 2004 is definitively annulled.

Commission publishes decision on Irish tax rulings favouring Apple

On 19 December 2016, the European Commission released the non-confidential version of its decision of 30 August 2016 in relation to the illegal State aid granted by Ireland to Apple. The aid consisted of two tax rulings issued by the Irish tax authority in 1991 and 2007 in favour of Apple allowing for the internal allocation of profits within its two

Irish subsidiaries (Apple Sales International and Apple Operations). The Commission previously announced in a press release its decision to order the recovery of up to € 13 billion from Apple (see VBB on Competition Law, Volume 2016, No. 9).

The Commission's detailed 130-page decision is noteworthy for its complex re-assessment of the basis upon which Ireland's tax authorities accepted Apple's internal allocation of profits within its two Irish subsidiaries. According to the Commission, the two tax rulings at stake allowed Apple's two Irish subsidiaries to determine their yearly corporation tax liability in Ireland by applying certain profit allocation methods endorsed by the Irish tax authorities. However, the Commission considered that the profit allocation methodology accepted by the Irish tax authorities departed from a reliable approximation of a market-based outcome in line with the arm's length principle. In addition, the Irish tax authorities incorrectly accepted Apple's profit allocation methodology based on an unsubstantiated assumption that Apple's intellectual property should be allocated outside of Ireland. In summary, the Commission found that both tax rulings constituted unlawful State aid.

Ireland lodged its appeal of the decision with the General Court on 9 November 2016.

ECJ annuls General Court judgment regarding Spanish tax scheme – selectivity

On 21 December 2016, the European Court of Justice ("ECJ") issued a judgment on appeal in the joined cases C-20/15 P, *Commission v World Duty Free Group* and C-21/15 P, *Commission v Banco Santander SA and Santusa Holding SL*. The ECJ struck down the General Court's judgments annulling a Commission decision relating to a Spanish tax scheme. In what can be considered a landmark judgment, the ECJ analysed the scope of the criterion of selectivity applicable to the assessment of state aid under Article 107(1) TFEU.

The Spanish law on corporation tax provided that undertakings which are resident in Spain for tax purposes and acquire a shareholding of at least 5% in a foreign company could deduct, through amortisation, the goodwill resulting from that shareholding from the basis of assessment for the corporation tax for which the undertaking is liable. By contrast, resident undertakings making the acquisition of such a shareholding in undertakings taxable in Spain could not obtain that advantage. By decisions of 28 October 2009 and 12 January 2011, the European Commission found that the scheme of deduction applicable to the acquisition of shareholdings in foreign companies constituted state aid, which was incompatible with the internal market.

Three undertakings established in Spain (World Duty Free Group, Banco Santander and Santusa Holding) brought actions before the General Court seeking the annulment of the Commission decision. By its judgments of 7 November 2014, the General Court ("GC") annulled the two Commission decisions. The GC ruled that the tax scheme at issue could not be considered as a state aid measure, since it did not meet the criterion of selectivity. According to the GC, the advantage conferred on the undertakings acquiring shareholdings in foreign companies was not selective, since the tax advantages were accessible, *a priori*, to any undertaking. The GC considered that a tax advantage is not selective if it is directed to a category of economic transactions rather than a particular category of undertakings. Since the Commission had failed to identify a category of undertakings that was exclusively favoured by the tax measure, the GC annulled the Commission's decision.

The ECJ did not agree with this reasoning. By its judgment of 21 December 2016, the ECJ set aside the GC's judgments. According to the ECJ, the GC added an additional requirement to the assessment of aid measures under Article 107(1) TFEU, in contradiction with the settled case law of the courts. In particular, the ECJ stated that the only relevant criterion in order to establish the selectivity of a national tax measure consists in determining whether that measure is such as to favour certain undertakings over other undertakings which, in the light of the objective pursued by the general tax system concerned, are in a comparable factual and legal situation and who accordingly suffer different treatment that can, in essence, be classified as discriminatory. Contrary to the ruling of the GC, the case law of the courts does not require the Commission to always identify a particular category of undertakings that exclusively benefit from the measure.

Therefore, the ECJ set aside the two judgments of the GC and referred the cases back to the GC for a ruling on the remaining grounds invoked by the applicants at first instance.

The judgment of the ECJ is particularly interesting as it reveals the ECJ's extensive interpretation of the criterion of selectivity. According to this interpretation, the selectivity criterion is fulfilled when certain behaviour (such as making an investment in a foreign company as in the present case), rather than certain undertakings, benefit from aid. Such extensive interpretation of the criterion of selectivity potentially covers a very broad range of tax schemes. Although the ECJ's interpretation of the criterion of selectivity in the present case appears to be less relevant for the state aid assessment of individual tax rulings, the Commission will likely draw strength from this judgment to pursue each of its investigations into alleged State aid of a fiscal nature.

ECJ confirms Commission decision relating to Irish air travel tax – recovery of unlawful aid

On 21 December 2016, the European Court of Justice ("ECJ") handed down a judgment confirming the decision of the European Commission relating to the recovery of the sum of € 8 per passenger from airlines benefiting from the "air travel tax" imposed by Ireland (Joined Cases C-164/15 P and C-165/15 P, *Commission v Aer Lingus Ltd, Ryanair Designated Activity Company and Ireland*).

The air travel tax is an excise duty which airline companies operating in Ireland must pay in respect of every passenger departing on an aircraft from an airport situated in Ireland. In July 2009, Ryanair requested the Commission to examine whether the air travel tax constituted unlawful state aid in favour of some of its competitors. The Commission concluded that the application of a lower rate of € 2 for short-haul flights, compared to a standard rate of € 10, constituted state aid incompatible with the internal market. Therefore, the Commission ordered the recovery of that aid from the beneficiaries in an amount which was set at € 8 per passenger, i.e., the difference between the lower rate of € 2 and the standard rate of € 10.

The judgment of the ECJ of 21 December 2016 stems from an appeal lodged by the Commission against two judgments of the General Court which partially annulled the Commission's decision on the ground that the Commission had failed to show that the advantage enjoyed by the airlines concerned was, in all cases, € 8 per passenger (see VBB on Competition Law, Volume 2015, No. 2).

The ECJ first recalled that the obligation on the Member States to abolish, through recovery, aid considered by the Commission to be incompatible with the single market has as its purpose to restore the situation as it was before the aid was granted. That objective is attained once the aid in question has been repaid by the beneficiaries. Second, the ECJ pointed out that the restoration of the situation as it was before the aid was granted does not imply reconstructing past events differently on the basis of hypothetical elements such as the choices which could have been made by the operators concerned.

Consequently, the ECJ held, in accordance with the observations made by the Advocate General, that recovery of unlawful aid entails the restitution of the advantage procured by the aid for the recipient, and not the restitution of any economic benefit the recipient may have enjoyed as a result of exploiting the advantage.

Therefore, the ECJ ruled that restitution of the advantage required, just as the Commission indicated in its decision, Ireland to recover a sum of € 8 per passenger for each of the flights concerned. Consequently, the ECJ set aside the part of the GC's judgment ruling otherwise and dismissed, in their entirety, the actions brought by Aer Lingus and Ryanair against the Commission's decision.

ECJ finds ARCO guarantee granted by Belgium incompatible with EU law

On 21 December 2016, the European Court of Justice ("ECJ") issued a ruling on the guarantee scheme granted by Belgium to three financial cooperatives of the ARCO group ("ARCO") (Case C-76/15, *Paul Vervloet and Others v Ministerraad*).

The judgment of the ECJ stems from a request for a preliminary ruling from the Belgian Constitutional Court, which had to rule on several questions with regard to the constitutionality of the ARCO guarantee. In November 2011, the Belgian authorities decided to grant to 800,000 ARCO members the same protection as that provided for savings deposits and life insurance, i.e., a protection of funds limited to € 100,000 per investor.

By decision of 3 July 2014, the European Commission classified the ARCO guarantee as unlawful state aid (since it was not notified in a timely manner) and incompatible with the internal market. The three financial cooperatives and Belgium brought an action before the General Court for annulment of the Commission's decision. Those proceedings were however stayed pending the ECJ's response to the questions referred by the Belgian Constitutional Court in the present proceedings.

The ECJ was asked to rule on the compatibility of the ARCO guarantee with EU law, in particular with Directive 94/19/EC of 30 May 1994 on deposit-guarantee schemes ("Directive 94/19/EC"), and on the validity of the Commission's decision of 3 July 2014.

The ECJ held that, while Directive 94/19/EC does not impose on Member States an obligation to adopt a guarantee scheme with regard to shares in recognised cooperatives operating in the financial sector, such as ARCO, Member States are not prevented from extending the application of the Directive. However, such extension must not undermine the practical effectiveness of the scheme that Directive 94/10/EC requires Member States to establish. This assessment must be made by the national courts, which must take into account, *inter alia*, the number of beneficiaries of the additional guarantee and the beneficiaries' contributions towards the financing of the guarantee. In addition, the ECJ stressed that national courts must assess whether the extension is compatible with the Treaty, in particular the provisions relating to state aid.

As regards the state aid rules, the ECJ confirmed the validity of the Commission's decision of 3 July 2014. The ECJ considered that the Commission did not erroneously classify the ARCO guarantee as state aid, that the Commission's decision was sufficiently reasoned and that the Commission was entitled to conclude in its decision that the guarantee scheme was unlawfully put into effect by Belgium.

– OTHER DEVELOPMENTS –

EUROPEAN UNION: On 30 November 2016, the European Commission ("Commission") published its **final report** on the state aid sector inquiry into capacity mechanisms, i.e., national measures to ensure security of electricity supply (see VBB on Competition Law, Volume 2015, No. 5 and Volume 2016, No. 4). The Commission concluded that, in order to comply with EU rules, capacity mechanisms must be: (i) accompanied by appropriate market reforms; (ii) proven to be necessary; and (iii) fit for purpose and open to all capacity providers. As the Commission found that a number of existing capacity mechanisms have major shortcomings, the Commission will work with the Member States concerned to bring these schemes into line with the EU state aid rules.

EUROPEAN UNION: On 12 December 2016, the European Commission ("Commission") updated the **analytical grids** on the application of state aid rules to the public financing of infrastructure projects. The grids provide sector-specific guidance as to when a notification is required. The analytical grids were first published following the second General Court judgment in the Leipzig-Halle airport state aid case (see VBB on Competition Law, Volume 2011, No. 3), and were updated in September 2015 to reflect changes to the rules as a result of the state aid modernisation project (see VBB on Competition Law, Volume 2015, No. 10). In light of the amended Notice on the Notion of Aid (see VBB on Competition law, Volume 2016, No. 5), the Commission has now prepared a new grid on road, bridges, tunnels and inland waterways and updated the grids for ports, water, culture and rail, metro and local transport. The Commission services are currently updating the remaining existing analytical grids, i.e., the grids for broadband infrastructures, airports, RDI infrastructures, sport and multifunctional recreational infrastructures, energy and waste management infrastructures.

| LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– MEMBER STATE LEVEL –

HUNGARY

Substantial changes to the Hungarian Competition Act

On 6 December 2016, the Hungarian Parliament adopted substantial changes to the Hungarian Competition Act, which were published in Hungary's official journal on 15 December 2016 (the "Amendment"). With some exceptions, the new provisions will enter in force on 15 January 2017. The main changes include the following:

Merger control

Under the current regime, mergers must be notified to the Hungarian Competition Authority (the "GVH") if, in the preceding business year, the undertakings concerned achieved a combined turnover of more than HUF 15 billion (approximately € 50 million) and the turnovers of at least two of the groups concerned exceeded HUF 500 million (approximately € 1.6 million). The Amendment modifies this regime in the following ways:

First, the Amendment increases the above-mentioned HUF 500 million threshold to HUF 1 billion (approximately € 3.2 million), thus limiting the group of mergers that must be notified by virtue of meeting turnover thresholds.

Second, the Amendment creates a new regime for mergers that do not meet the HUF 15 billion and the new HUF 1 billion thresholds (see above) but still must be notified if

› it is not obvious that the concentration does not significantly lessen competition on the relevant market, particularly by creating or strengthening a dominant position; and

› the combined turnover of the groups concerned exceeded HUF 5 billion (approximately € 16 million).

The mergers falling under this new regime are not subject to any standstill obligation and the GVH may only investigate them for six months after the implementation of the concentration (whereas concentrations that must be notified for meeting the HUF 15 billion and HUF 1 billion thresholds may be investigated for five years).

While currently the thresholds for companies registered in Hungary is calculated on the basis of their worldwide turnovers, pursuant to the Amendment, such companies' thresholds will also be calculated on the basis of turnover achieved in Hungary only.

Importantly, in the future, pursuant to the Amendment, concentrations will first need to be notified to the GVH in a simplified form. Following that notification, the GVH will need to decide within 8 days whether to initiate an investigation, otherwise the concentration can be implemented. The administrative fee for such notifications will amount to HUF 1 million (approximately € 3,200).

While dawn raids are currently only available for the investigation of alleged abuses of a dominant position or restrictive agreements, pursuant to the Amendment, dawn raids will also be available in merger cases, for the investigation of gun jumping and the provision of incomplete or incorrect data.

Private enforcement

The Amendment transposes Directive 2014/104 on antitrust damages actions (the "Damages Directive"), resulting in a number of changes.

Previously, damages could not be collected from leniency applicants who received full immunity, unless the other cartel members were unable to pay. After the Amendment, leniency applicants will be liable for the damage caused to their own direct or indirect purchasers or suppliers.

The Amendment opens the way for the courts to order the disclosure of certain information based on a reasoned request subject to certain exceptions (e.g. privileged communication).

Pursuant to the Amendment, damages applicants will be able to benefit from a rebuttable presumption concerning the passing-on defence (i.e. the defendant will need to prove that the price increase has been passed on) and will continue to benefit from the ten-percent-presumption under Hungarian competition law (i.e. the defendant will need to prove that the price increase was less than 10%).

Leniency regime

Previously, leniency was available only for horizontal hardcore cartels. Following the Amendment, all agreements directly or indirectly aiming at the setting of prices, including vertical price-fixing, can be subject to leniency applications.

Settlement

Undertakings admitting the infringement in a settlement procedure were able to receive a 10% discount from fines. In order to make settlements more attractive, the Amendment increased the maximum level of the fine-reduction to the level of between 10% and 30%.

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