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Global Competition Review 2017 Law Firm of the Year – Europe

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MERGER CONTROL

– EUROPEAN UNION LEVEL –

General Court rules that opening of Phase II cannot be appealed

On 27 November 2017, the General Court ("GC") dismissed appeals brought by HeidelbergCement and Schwenk Zement against the European Commission's decision of 10 October 2016 to open an in-depth (Phase II) merger investigation into their acquisition – via a joint venture – of Cemex Croatia.

In their appeals, HeidelbergCement and Schwenk Zement argued that the Commission lacked competence to review the Cemex Croatia deal as it incorrectly identified them as the "undertakings concerned", rather than their joint venture, which was the company making the acquisition. The GC dismissed their action as inadmissible, because the decision to open an in-depth investigation only constitutes an intermediate measure which is not capable of forming the subject matter of an action.

In particular, the GC ruled that under Article 263 of the Treaty on the Functioning of the European Union ("TFEU"), a party's right to appeal a Commission decision exists only in respect of a final binding decision that is capable of affecting that party's interests. According to the GC, under the EU Merger Regulation a decision of the Commission to open an in-depth investigation under Article 6(1)(c) is not the culmination of its merger review but rather a "preparatory step" in the procedure which does not prejudge the final outcome. As a result, the GC confirmed that such a Commission decision is not a challengeable act under Article 263 TFEU and dismissed the appeals of HeidelbergCement and Schwenk Zement. While the GC did not address whether the Commission had correctly characterised HeidelbergCement and Schwenk Zement as the undertakings concerned, it is apparent from the order that the Commission considered that the parent companies were "the real drivers behind the operation" as they were "involved significantly in the initiation, organisation and financing of the transaction of the operation". The joint venture was "a mere vehicle for an acquisition by the parent companies".

Separately, the Commission later prohibited the Cemex Croatia deal (see VBB on Competition Law, Volume 2017, No. 4) and this prohibition decision is itself subject to a separate appeal before the GC.

Lufthansa abandons Niki acquisition following criticism from Commission, but secures conditional approval for LGW acquisition

On 13 December 2017, Lufthansa announced it would no longer seek to acquire certain assets of Niki, a rival airline owned by the insolvent Air Berlin, following intense merger control scrutiny by the European Commission.

Although Lufthansa offered commitments to the Commission, on 6 December 2017 Competition Commissioner Vestager stated publicly that the Niki deal was "troublesome" and led to "a lot of uncertainty" for air passengers and staff. In particular, the Commissioner noted that Lufthansa and Air Berlin overlap on a significant number of routes, with the proposed transaction giving rise to clear risks to effective competition for Austrian, German and Swiss consumers.

Interestingly, Lufthansa had already been granted a derogation by the Commission to allow it implement the Niki acquisition prior to receiving formal clearance (see VBB on Competition Law, Volume 2017, No. 11). Foreseeing that it might need to prohibit Lufthansa's acquisition of Niki, the Commission imposed in its derogation certain conditions to prevent Lufthansa from hampering the possible onward sale of Niki to another buyer by, for example, ensuring that the leases which Lufthansa entered into prior to receiving formal clearance could easily be transferred to another buyer.

Separately, on 21 December 2017, the Commission conditionally cleared Lufthansa's acquisition of LGW, a second Air Berlin subsidiary that it had agreed to acquire.

During its investigation of the LGW acquisition, the Commission initially identified competition concerns as a result of the increase in Lufthansa's slot portfolio at Düsseldorf airport. According to the Commission, control by a single airline over a large portfolio of slots at a congested airport can result in higher barriers to entry which can lead to higher air fares or less choice for passengers. On 13 December 2017, Lufthansa proposed a set of commitments to the Commission to limit the transfer of slots to Lufthansa from Air Berlin at Düsseldorf airport for the summer season to the number of slots used by two aircraft.

Following market testing of the slot commitment, the Commission conditionally cleared at Phase I the acquisition of LGW by Lufthansa. As a result, Lufthansa's slot portfolio at Düsseldorf airport will only increase by 1% and half of all the slots at Düsseldorf airport will be held by Lufthansa's competitors.

ABUSE OF DOMINANT POSITION

– EUROPEAN UNION LEVEL –

AG Wahl issues ruling on requirements to establish price discrimination by a dominant undertaking, endorsing the necessity of carrying out a concrete assessment of all the circumstances

On 20 December 2017, Advocate General ("AG") Nils Wahl issued an opinion holding that investigations of price discrimination under EU competition law should assess all the circumstances of the practice, including its impact and context.

AG Wahl delivered his opinion in response to a request for a preliminary ruling from the Portuguese Tribunal for Competition, Regulation and Supervision in a dispute between MEO (a branch of Portugal Telecom) and the Portuguese Competition Authority ("PCA"). MEO had filed a complaint with the PCA alleging that it paid higher rates for use of audiovisual content licensed by GDA, a collecting society that manages the performing rights of its members in Portugal. MEO argued that GDA's pricing practices amounted to unlawful discrimination in breach of Article 102(c) TFEU.

The PCA rejected MEO's complaint on the grounds that the imposition of discriminatory prices by a dominant company does not, in and of itself, breach Article 102 TFEU. It further held that the price difference was so small as to be absorbed in the normal course of business. MEO appealed this decision, urging the Portuguese Tribunal to refer a series of questions to the Court of Justice of the European Union ("ECJ") for guidance. In essence, the referring Tribunal asked for clarification on the meaning of the phrase "competitive disadvantage" contained in Article 102(c) TFEU, and in particular whether this concept requires an examination of the effects of the dominant company's behaviour and the seriousness of the discriminatory trading conditions on the competitive position of the disadvantaged client.

At the outset, AG Wahl made two interesting preliminary comments. First, he noted that although GDA is the only undertaking in Portugal managing collective rights of authors or performers, that circumstance alone did not mean that it effectively holds a dominant position, as it does not seem to have market power enabling it to act independently from its commercial partners. Second, he questioned GDA's interest in imposing discriminatory prices, noting that GDA is not itself active on the downstream market. AG Wahl thus considered that GDA should normally be expected to have every interest in ensuring the existence of a very competitive downstream market with a plurality of market participants, as this would help it maintain its negotiating power as the seller of the services concerned.

Turning to the questions referred to the ECJ, AG Wahl recalled that a discriminatory pricing policy is not, in itself, anticompetitive. Indeed, such a policy may well stimulate competition, not least by permitting sales to a greater numbers of customers.

Instead, AG Wahl noted that the imposition of differentiated pricing by a dominant undertaking is an abuse "if and only if" it gives rise to a "competitive disadvantage" between competitors and, in doing so, distorts competition between the "favoured" company and those companies which enjoy allegedly less advantageous conditions. According to AG Wahl, an analysis of the competitive disadvantage should concretely examine all the circumstances of the case. Of particular interest are: (i) the nature and magnitude of the price difference; and (ii) the cost structures of the businesses concerned.

AG Wahl emphasised that a "competitive disadvantage" within the meaning of Article 102(c) TFEU must concern the relationship between actual competitors. A discriminatory pricing system will be contrary to competition rules if it concretely affects the capacity of one party to compete effectively with another (favoured) party. Because the PCA had found that the additional costs borne by MEO were not significant and could be absorbed in the ordinary course of business, AG Wahl questioned whether the price discrimination affected MEO's position on the market vis-à-vis its competitor. In this regard, AG Wahl stressed the difference between profitability and competitiveness: MEO's business may be less profitable because of its pricing disadvantage, but this does not necessarily imply that it is less able to compete against other, more favoured operators on the market.

Ultimately, as AG Wahl noted, the concrete assessment of the existence of any competitive disadvantage must be undertaken by the national court.

AG Wahl's opinion does not bind the ECJ, which is expected to hand down its judgment in the case in the coming months.

– MEMBER STATE LEVEL –

GERMANY

German Federal Cartel Office prohibits use of exclusivity clauses in event ticketing market

According to a press release dated 4 December 2017, the German Federal Cartel Office ("FCO") has prohibited ticketing services provider CTS Eventim from using exclusivity agreements with event organisers and ticket offices. Having examined existing exclusivity contracts, which contained clauses obliging event organisers and ticket offices to market tickets almost exclusively via CTS Eventim's online platform, the FCO concluded that they were anticompetitive and constituted an abuse of CTS Eventim's dominant position.

It appears from the FCO's press release that CTS Eventim operates the largest ticketing portal in Germany, selling between 60% and 70% of all online tickets for concerts throughout the country. The exclusivity agreements were found to lead to market foreclosure and favour further monopolisation.

Following the administrative procedure, the FCO ordered CTS Eventim to alter the contracts within four months, giving trading partners the possibility of selling at least 20% of their annual ticket volume via a platform of their choice when contracts are concluded for a period of two years or more. CTS Eventim have announced that they will challenge this decision in court, stating that the FCO's decision did not take account of the fierce competition caused by the entry of multiple foreign and domestic providers into the market.

German Federal Cartel Office accepts DFB's commitments concerning ticket applications for soccer tournaments

According to a press release from 1 December 2017, the German Federal Cartel Office ("FCO") closed proceedings for abuse of dominance against the German Football Association ("DFB"), initiated as a result of numerous complaints about the DFB's ticket application conditions, after the DFB committed to change them for the 2018 World Cup.

Previously, a ticket application was conditional upon the applicant becoming a member of the national team's fan club subject to an annual membership fee of € 40. Having consulted with the FCO, the DFB committed to introduce an alternative way to purchase tickets by allowing ticket applications from holders of a temporary tournament membership with a limited duration which costs € 10. It appears that concerns for security in the stadium, which are not further specified, played a major role in the FCO's decision allowing DFB to require the temporary tournament membership.

ITALY

Italian Competition Authority fines Unilever for abuse of dominant position

On 6 November 2017, the Italian Competition Authority ("ICA") fined Unilever Italia Mkt Operations S.r.l. ("Unilever") over € 60 million for abusing its dominant position on the market for "impulse ice cream".

According to the ICA, Unilever holds a dominant position on the market for so-called "impulse ice-creams", *i.e.* industrial single-wrapped ice creams, excluding catering and industrial scooping ice-cream channels which are intended for out-of-home consumption, sold at various sales points. Unilever's most well-known products are the "Algida"-branded ice creams.

The ICA's decision finds that Unilever abused its dominant position by implementing a strategy aimed at obtaining exclusivity from its customers. By inserting exclusivity clauses in sales contracts with retailers, Unilever sought to oblige its customers to obtain their entire single-wrapped ice-cream supply from Unilever. Unilever also offered a series of fidelity rebates and fees. According to the ICA, this strategy foreclosed other wholesale distributors from competing at sales points which in turn limited consumers' access to different branded ice-creams.

SPAIN

Spanish Competition Authority fines horse breeders association for abusing its dominant position

On 21 November 2017, the Spanish Competition Authority ("CNMC") issued a decision fining the National Association of Breeders of Purebred Spanish Horses ("ANCCE") € 187,677 for abusing its dominant position by hindering access to new competitors or placing the ANCCE in a better competitive position.

The ANCCE is an association of breeders of purebred Spanish horses, which represents and defends the interests of breeders and the economic and social sector in which they operate. Since 2007, the ANCCE has been entrusted with managing the studbook for purebred horses. According to the CNMC, ANCCE holds a dominant position on the markets of contest regulations and lineage management for purebred Spanish horses.

The CNMC conducted its investigation following a complaint by MELPI, a company specialised in IT and commercial activities promoting purebred Spanish horses, which reported that the ANCCE was precluding organizers of certain competitions from using MELPI´s services.

The CNMC's decision finds that the ANCCE abused its dominant position in the abovementioned markets by imposing new obligations on the organizers of competitions, such as a duty to publish in real time the results of the competitions on the ANCCE's website and to record and photograph the shows in order to then send copies to the ANCCE. The CNMC considered that those requirements were not necessary for the ANCCE's commercial activities. The CNMC further ruled that these requirements were "arbitrary, discriminatory or not objective" and granted the ANCCE a competitive advantage in the related markets for contest regulation and, in particular, in the market for lineage management for purebred Spanish horses. Hence, the CNMC concluded that ANCCE's conduct had strengthened its dominant position and effectively hindered the ability of other companies to compete in the relevant markets.

Interestingly, the calculation of the basic amount of the fine only comprised the revenues of the ANCCE in 2016 but did not include the turnover of the ANCCE's members.

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 developments addressed.

Summary of Significant Case Developments

Court of Justice dismisses appeal lodged by Telefónica concerning non-compete agreement

On 13 December 2017, the Court of Justice of the European Union ("ECJ") dismissed the appeal lodged by telecommunication operator Telefónica against the General Court's ("GC") judgment largely upholding a 2013 Commission decision, which imposed a fine on Telefónica for agreeing not to compete with Portugal Telecom on the Iberian telecommunications market, in breach of Article 101 TFEU (see VBB on Competition Law, Volume 2016, No. 7).

In its judgment, the ECJ dismissed Telefónica's claim that, by reason of not hearing certain witnesses, Telefónica's rights of defence had been breached. The ECJ also rejected allegations that the GC had distorted certain facts when it upheld the Commission's finding that the non-compete clause restricted competition by object (see analysis below). Finally, in relation to the calculation of the fine, the ECJ dismissed Telefónica's argument that the GC had erred in its assessment of the gravity of the infringement and of mitigating circumstances (Case C-487/16, *Telefónica SA v European Commission*).

Analysis of Important Substantive and Procedural Developments

Telefónica – Court of Justice confirms General Court's strict approach to ancillary restraints

Non-compete clauses are commonly used in the context of the acquisition of a business to protect a purchaser's investment. They guarantee the transfer to the purchaser of the full value of the assets, for instance, by preventing the seller from opening a new business servicing the customers access to whom was transferred to the purchaser. Under certain conditions, non-compete clauses fall outside the scope of Article 101 TFEU if they are (i) directly related; (ii) necessary; and (iii) proportionate to the implementation of the acquisition. If these conditions are met, the non-compete clause is in principle cleared as part of the merger process as a permissible "ancillary restraint".

In its *Telefónica* judgment of 28 June 2016, the General Court ("GC") adopted a strict approach to ancillary restraints and dismissed the claims of Portugal Telecom and Telefónica that the Commission had erroneously considered that the non-complete clause in the share-purchase agreement by which Telefónica had acquired from Portugal Telecom the exclusive control of Vivo, one of the main mobile telecom operators in Brazil, amounted to a market-sharing agreement with the object of restricting competition (see VBB on Competition Law, Volume 2016, No. 7). Under the non-compete clause, Portugal Telecom and Telefónica undertook to refrain "*to the extent permitted by law*" from competing with each other on the "*Iberian market*" (*i.e.*, on each other's respective home markets, Portugal and Spain) for a period of 15 months.

In its appeal before the Court of Justice of the European Union ("ECJ"), Telefónica again challenged the characterisation of the non-compete clause as a restriction by object. According to Telefónica, the GC had erred in its assessment of: (i) the context of the negotiations on the non-compete clause; (ii) the content and objectives of this clause; and (iii) Telefónica's efforts to minimise the scope of application of this clause. More precisely, Telefónica asserted that the GC had distorted the content of one of its internal e-mails, in which it had considered the option of proposing an increase in the duration of the non-compete clause. It further argued that the GC had failed to sufficiently take into account the fact that Portugal Telecom had insisted on the essential character of the non-compete clause.

The ECJ rejected these arguments. It held that the GC had properly examined the evidence put forward by Telefónica to substantiate its claim that the Portuguese government had imposed the non-compete clause. However, this examination did not concern Telefónica's interpretation of the hypothetical intention of the Portuguese government, but rather the fact that it could not be inferred from the e-mail in question that the Portuguese government had, in fact, imposed the clause on Telefónica. The ECJ found that Telefónica failed to sufficiently substantiate its other claims.

Further, Telefónica submitted that, in the absence of significant precedents establishing the harmful nature of the agreement at hand, its situation had been treated too strictly. The ECJ rejected this claim, noting that it is well-established case law that market-sharing agreements constitute particularly serious breaches of competition law. The fact that the non-compete clause would apply only "*to the extent permitted by law*", allegedly imposing a prior obligation to self-assess the lawfulness of the clause, did not affect its qualification as a restriction of competition by object.

The ECJ further clarified that, contrary to what Telefónica asserted, rather than holding that "*the non-compete clause was not essential to Portugal Telecom because it was not an ancillary restraint within the meaning of competition law*", the GC simply found that Telefónica had failed to demonstrate that the clause was indeed essential.

– MEMBER STATE LEVEL –

GERMANY

German Competition Authority imposes fines of € 13 million in harbour towage service cartel case

On 18 December 2017, the German Federal Cartel Office ("FCO") announced it had imposed fines totalling € 13 million on three harbour towage service providers and their executives for their participation in a market-sharing agreement between 2002 and 2013. The companies involved in the infringement are: Fairplay Schleppdampfschiffsreederei Richard Borchard; Bugsier-, Reederei- und Bergungsgesellschaft, Petersen & Alpers, Unterweser Reederei, Lütgens & Reimers; and Neue Schleppdampfschiffsreederei Louis Meyer. The FCO concluded the case under its cartel settlement procedure.

Unterweser Reederei and its subsidiary Lütgens & Reimers received full immunity from fines under the FCO's leniency programme. The FCO did not impose fines on one company because it had since exited the market. The fining decisions against two companies are final, while proceedings against another unnamed company are still on-going.

SPAIN

Spanish Competition Authority imposes fines totalling € 44.7 million in low and medium voltage cables cartel case

On 21 November 2017, the Spanish Competition Authority ("CNMC") imposed fines totalling € 44.7 million on eleven undertakings and one trade association for their involvement in a cartel relating to the supply of low and medium voltage cables, in breach of Article 101 TFEU and its equivalent under the Spanish Competition Act.

The CNMC concluded that the companies concerned had fixed prices and other commercial conditions as well as distributed projects amongst themselves in three different cartels, *i.e.*, between cable manufacturers, between cable manufacturers and distributors and between distributors.

The cartel between (seven) cable manufacturers lasted 13 years and took place within the framework of the Spanish Association of Cable Manufacturers. The CNMC found that the cable manufacturers had systematically agreed on: (i) applicable tariffs and discounts for the supply of cables; (ii) the dates on which new rates would enter into force; (iii) the dates on which those tariffs would be communicated to clients and the justification to be given; (iv) the applicable payment terms; and (v) the conditions of supply. The CNMC also found that they had distributed amongst themselves more than 330 contracts for cable supply.

The cartel between (four) cable manufactures and (one) distributor lasted seven years and concerned the market for distribution of voltage cable. The CNMC concluded that these companies were involved in bid rigging practices.

Finally, the CNMC imposed fines on two distributors for allocating amongst themselves over a period of four years more than 20 cable supply contracts.

SWEDEN

Swedish Court of Appeal dismisses claim that non-compete clauses of five years in connection with a business transfer are necessarily anti-competitive

On 29 November 2017, the Patent and Market Court of Appeal ("the Court") upheld the Stockholm District Court's dismissal of the Swedish Competition Authority's ("SCA") claim that two non-compete clauses concluded in connection with business transfers were unlawful due to their long duration. The non-compete clauses each ran for a period of five years.

The Court noted that Alfa Transport Systems had purchased the foreign business operations of two rivals in 2011 and 2016, and that non-compete clauses had been included in both purchase agreements. The SCA argued that the length of the clauses was disproportionate and that the non-compete provisions therefore constituted a restriction by object. The SCA also invoked the European Commission's Notice on Ancillary Restraints according to which non-compete clauses in connection with a business transfer are not ancillary to the relevant transaction if they run beyond two or three years.

The Court held that the Commission's Notice is not binding on national courts and considered it impossible to make a non-arbitrary determination in the abstract at what point in time a non-compete clause became unduly restrictive. The SCA would therefore have had to carry the additional burden of proving that the clauses had an anti-competitive effect, which it had chosen not to argue on appeal. By clarifying that non-compete clauses beyond two or three years will not automatically be deemed unlawful as a restriction by object, the Court set an important precedent for future business transfers.

VERTICAL AGREEMENTS

– EUROPEAN UNION LEVEL –

Court of Justice rules in favour of restrictions on the use of platforms in a selective distribution system for luxury products

On 6 December 2017, the Court of Justice of the European Union (the "ECJ" or the "Court") handed down its eagerly anticipated judgment in *Coty* (C-230/16). In general, the ECJ closely follows the opinion of Advocate General ("AG") Nils Wahl, published on 26 July 2016 (see VBB on Competition Law, Volume 2017, No. 8), in essentially holding that:

- the nature of luxury products justifies the use of selective distribution under Article 101(1) of the Treaty on the Functioning of the European Union ("TFEU") to preserve their luxury image, provided that the system itself meets the remaining established conditions of the case law;
- a prohibition on selling those goods on third party online platforms in a manner discernible to consumers is in principle compatible with Article 101(1) TFEU where it is intended to ensure the luxury image of those goods; and
- a prohibition on selling those goods on third party online platforms in this manner is, in any event, exempted by the Vertical Agreements Block Exemption ("VABER").

Background

The case concerns a dispute between Coty Germany GmbH ("Coty"), a producer of branded luxury cosmetics, and Parfümerie Akzente GmbH ("Parfümerie Akzente"), a member of its selective distribution system. The dispute arose when Parfümerie Akzente began selling Coty products online through Amazon, in breach of the terms of Coty's selective distribution agreement which prohibited authorised retailers, when making internet sales, from either using a different name or from engaging an unauthorised third-party in a manner discernible to the public in relation to those sales. In this context, the Higher Regional Court of Frankfurt referred the following questions to the ECJ concerning the use of selective distribution for luxury goods and the platform restriction:

1. whether selective distribution systems for luxury goods that primarily serve to ensure the luxury image of the goods comply with Article 101(1) TFEU;
2. whether an undertaking can impose a general prohibition on authorised retailers from engaging third party undertakings discernible to the public to handle online sales regardless of whether the manufacturer's legitimate quality standards are violated; and
3. whether such a prohibition constitutes a "restriction by object" under Articles 4(b) or (c) of the VABER.

First question: Selective distribution systems for luxury products

The key issue in the ECJ's analysis is whether the characteristics of a luxury product should be considered to meet the apparent requirement of the selective distribution case law that, in order for such a system to escape Article 101(1) TFEU, the characteristics of the product should necessitate the use of selective distribution in order to preserve its quality and ensure its proper use. Although the ECJ is not consistently explicit on the point, it appears that it considers "prestige" to be an essential element of luxury and that luxury and prestige products are therefore equivalent.

In deciding that this condition is met, the ECJ equates the luxurious image of a product with a product's quality, which is important because, as noted above, quality is a key element in justifying the use of selective distribution under the case law. Referring to the 'aura of luxury' that surrounds luxury goods, the ECJ notes that the quality of such goods is not simply the result of material characteristics, but also of the "allure and prestigious image" of the goods in question. The protection of that 'aura' may therefore justify the prohibition of sales through unauthorised resellers which is achieved through the use of selective distribution, and which ensures that the products are only displayed in sales outlets in a manner which contributes to their reputation in the eye of the consumer. The ECJ cites a trademark law case, *Copad* (C-59/08), in support of this position, thereby implicitly suggesting that selective distribution may be considered to comply with competition law where it is an appropriate way to protect an essential function of a prestigious trade mark.

The ECJ confirms that this assessment is not at odds with its earlier ruling in *Pierre Fabre Dermo-Cosmétique* (C-439/09), where it had stated that the aim of preserving a prestigious image is not a legitimate aim for restricting competition. The ECJ clarifies that this statement was made in the context of an assessment of the compatibility with Article 101(1) TFEU of a comprehensive prohibition imposed by Pierre Fabre of the internet sale of goods sold through its selective distribution system, whereas Coty does not impose such a comprehensive prohibition. It also notes that the products at issue in *Pierre Fabre* were not luxury products, but instead cosmetic and body hygiene products (although the fact that the products at issue in *Coty* are also described by the ECJ as "cosmetic products" brings into question how easily such a distinction can be drawn in practice). The ECJ therefore confines the significance of *Pierre Fabre* to its specific facts.

Having confirmed the appropriateness of the use of selective distribution for luxury goods in order primarily to preserve the luxury image of those goods, the ECJ goes on to confirm (as established since *Metro* (C-26/76)) that a selective distribution system for such goods does not infringe Article 101(1) TFEU provided that: (i) resellers are chosen on the basis of objective criteria of a qualitative nature, laid down uniformly for all potential resellers and not applied in a discriminatory fashion; and (ii) the criteria laid down are proportionate to the goal of protecting the luxury image of the goods.

Second question: Prohibition on authorised retailers from engaging, in a discernible manner, third-party platforms for online sales of luxury goods

The ECJ notes that this question concerns the lawfulness, under Article 101(1) TFEU, of a specific clause in a selective distribution system for luxury and prestige goods.

In responding to the first question above, the ECJ has already established that the nature of luxury and prestige goods justifies the use of selective distribution under Article 101(1) TFEU provided that the criteria applied in appointing authorised distributors meet the conditions of the established case law described above. As a result, in answering the second question, the ECJ focuses instead on whether the specific platform restriction itself meets those conditions. To recap, this will be the case if the restriction is considered to be (i) an objective criterion of a qualitative nature, (ii) laid down uniformly for all potential resellers, (iii) not applied in a discriminatory fashion, and (iv) proportionate to the objective being pursued and no more restrictive than is necessary.

While recognizing that it is for the referring court to determine whether these conditions are met, the ECJ nonetheless points out that the restriction has the objective of preserving the image of luxury and prestige of the goods at issue (which presumably fulfils the requirement for the obligation to be qualitative) and, furthermore, seems objective and uniform and is applied without discrimination to all authorised distributors.

Most of the ECJ's analysis focuses on the proportionality requirement. In a first step, it concludes that the platform ban appears to be appropriate in light of the legitimate objective of preserving the products' luxury image for the following reasons:

1. Together with the obligation imposed by Coty on authorised distributors to sell through their own online shops using their own business name, the ban is viewed as a "coherent" means of guaranteeing that the goods are associated exclusively with authorised distributors, which is precisely one of the objectives of such a selective distribution system (which makes such a system an appropriate means by which to preserve the luxury and quality image of luxury goods);

2. The ban enables the supplier to ensure that its goods are sold online in a manner that meets its qualitative requirements because, where there is no contractual relationship between the supplier and third party platforms (*i.e.*, where the platforms are not themselves authorised distributors), the supplier cannot take action against a third-party platform which does not meet the quality conditions set by the supplier to preserve the product's character; and

3. As all kinds of goods are sold through platforms (*i.e.*, not just luxury goods), ensuring that luxury goods are sold only in the online shops of authorised distributors contributes to their luxury image.

As a second step in the analysis of proportionality, the ECJ finds that the platform ban appears not to go beyond what is necessary to realise the appropriate objective of protecting the luxury image of the products for three reasons:

- First, in contrast to the restriction at issue in *Pierre Fabre,* the ban does not amount to an absolute prohibition on online sales since authorised distributors can sell via their own websites and via unauthorised third-party platforms whose use is not discernible to the consumer;

- Second, the results of the E-commerce Sector Inquiry indicate that distributors' own online shops - rather than platforms - are in practice the main online distribution channel used by distributors (used by over 90% of distributors surveyed); and

- Third, because there is no contractual relationship between the supplier and unauthorised third-party platforms enabling the supplier directly to require such platforms to comply with the quality criteria imposed on authorised distributors, an alternative approach of permitting authorised distributors to use platforms subject to those quality criteria being met by the platform would not be as effective as the platform ban.

Third and fourth questions: Application of the VABER

The ECJ begins by affirming that it is only if and where a platform ban restricts competition within the meaning of Article 101(1) TFEU that the question arises whether the clause benefits from an exemption under the VABER.

In examining whether the clause at issue constitutes a hardcore restriction under the VABER that would prevent the application of the exemption, the ECJ focuses on whether or not the clause should be considered, within the meaning of Articles 4(b) and (c) of the VABER, to restrict either: (i) the customers to whom authorised distributors can sell the goods; and/or (ii) passive sales by authorised distributors to end users.

In that respect, the ECJ re-iterates that, although the clause at issue *restricts* a specific type of internet sale, it does not – in contrast to the restriction at issue in *Pierre Fabre* – *prohibit* use of the internet as a means of marketing the goods. It further notes that it does not appear possible to delimit a group of third-party platform customers within the group of online purchasers (to whom sales should be considered restricted for the purposes of Article 4(b) of the VABER). Finally, since it was apparent from the case file that Coty's authorised distributors can advertise via online third-party platforms and search engines, the ECJ further notes that customers can usually find the products offered online by authorised distributors (thereby enabling passive sales). In conclusion, the ECJ finds that the restriction of this specific kind of internet sale does not restrict either the distributors' customers or their passive sales to end users within the meaning of the VABER.

Comment on the ruling

In general, the part of the ruling concerning the application of the VABER to platform restrictions is of broadest application and of most practical significance, especially given the extent of the inconsistency in the interpretation of the rules that has occurred at the national level concerning this issue. Where the VABER does not apply for reasons of market share, the very clear endorsement of such restrictions under Article 101(1) TFEU is also valuable, at least in the case of luxury products. The principal value of the selective distribution analysis is that it confirms the case law before *Pierre Fabre*, namely that the use of selective distribution for luxury products is justified regardless of whether the VABER is applicable.

Initial reactions to the ruling have been varied, with the President of the Bundeskartellamt discounting its significance for non-luxury products and with the European Commission expressing its intention to consider its implications for online-related restrictions other than platform restrictions.

A fuller analysis of the consequences of the judgment can be found in "The ECJ's Coty Judgment: consequences for platform restrictions and selective distribution", available on the VBB website at http://www.vbb.com/media/Insights_Articles/VBB_Coty_judgment_reflections_15.12.17.pdf.

– MEMBER STATE LEVEL –

AUSTRIA

Austrian Cartel Court fines distributor of floor cleaning products for resale price maintenance and territorial restrictions

On 9 November 2017, the Austrian Cartel Court fined Robopolis, a distributor of floor cleaning robots, € 208,000 for engaging in resale price maintenance and imposing territorial restrictions on retailers between October 2008 and November 2014. Robopolis did not dispute the facts of the case.

GERMANY

German Federal Court of Justice rules that resale price maintenance by Almased Wellness constitutes an appreciable restriction of competition

On 17 October 2017, the German Federal Court of Justice ruled that discounts offered by weight loss product maker Almased Wellness ("Almased") to pharmacies on the condition that they maintained minimum resale prices breached competition law.

In 2014, Almased ran a promotion which included the offer of a 30% discount on a one-off direct order of a minimum of 12 and a maximum of 90 cans of a weight loss product. Pharmacies could avail themselves of this offer if they committed to visibly displaying at least three cans in the pharmacy and to charging a minimum retail price of € 15.95.

In 2015, the Centre for Protection against Unfair Competition ("Wettbewerbszentrale") sought an injunction to prohibit the conduct, which the Regional Court of Hannover granted. On appeal, the Higher Regional Court of Celle overturned this ruling, holding that, although the manufacturer's practice constituted a restriction of competition by object under Article 101 TFEU and the equivalent provision of German competition law, it did not amount to an infringement because the effect of the restriction on competition by the specific offer at issue was not appreciable. In particular, the Higher Regional Court of Celle rejected the claimant's argument that, based on the *Expedia* judgment of the Court of Justice of the European Union (C-226/11), agreements with an anti-competitive object constitute an appreciable restriction on competition, stating that not every restriction by object constitutes an appreciable restriction and therefore an infringement of competition law (see VBB on Competition Law Volume 2016, No. 6).

The Federal Court of Justice has now overturned this ruling. Referring to the *Expedia* judgment, the Federal Court of Justice stated that certain forms of collusion between undertakings which constitute restrictions by object are harmful to competition and therefore, in general, constitute an appreciable restriction of competition independent of any concrete effect. In any case, the Federal Court of Justice concluded that the Higher Regional Court of Celle had no grounds for ruling that Almased's conduct lacked the ability to affect the market more than only marginally since the promotion concerned a potential sales volume of up to 1.8 million cans. The Federal Court of Justice decided not to refer the case back to the Court of Celle and instead issued a ruling itself that Almased had breached competition law.

ITALY

Italian Competition Authority publishes commitments following probe into restrictions on online sales of stoves

On 4 December 2017, the Italian Competition Authority ("ICA") published commitments offered by Zanette Group, MCZ and Cadel ("the companies") following the ICA's probe into the restrictions on the online sale of kitchen stoves applied by the companies. The companies have agreed, among other things: not to fix retailers' pricing policies; to refrain from recommending sales prices for two years; and to notify retailers of new policies on online sales, highlighting, among other things, the total autonomy of retailers to determine the products' retail price; freedom to promote products and deliver products abroad. Third parties have until 18 January 2018 to submit comments on the commitments offered.

INTELLECTUAL PROPERY/LICENSING

– EUROPEAN UNION LEVEL –

Court of Justice clarifies exhaustion of trademark principles and broadens test for economic links between trademark owners

On 20 December 2017, the Court of Justice of the European Union ("ECJ") handed down its judgment in Case C-291/16 *Schweppes v Red Paralela and Others*. The ECJ held that the owner of a trademark may not oppose the parallel importation of goods bearing an identical trademark but originating in another Member State in circumstances where the owner has assigned the parallel trademark to a third party but is responsible for maintaining the image and impression of a unified global trademark.

In his non-binding opinion, Advocate General ("AG") Mengozzi had earlier proposed to develop the case-law on the exhaustion of trademark rights in the case of a voluntary fragmentation of parallel rights by significantly broadening the interpretation of 'economic links' between the parallel rights owners (see VBB on Competition Law, Volume 2017, No. 9).

The ECJ now largely follows AG Mengozzi's views. It concludes (i) that the trademark owner's rights are exhausted if it promotes, independently or in coordination with a parallel trademark holder, the appearance of a single global trademark; and (ii) that economic links will exist between parallel rights holders if they coordinate their commercial policies in such a way as makes it possible for them to determine, directly or indirectly, the goods to which the trademark applies and to control the quality of those goods.

Facts

The Coca-Cola Company ("TCCC") owns the Schweppes® brand in the United Kingdom and in ten other EU Member States, while Orangina Schweppes Holding BV ("OSHBV") owns the brand in Spain and in 16 other EU Member States. Schweppes SA ("Schweppes") is the exclusive licensee of the Schweppes® brand in Spain. This fragmented situation arose in the late 1990s as a result of the Commission's objection to the transfer of the Schweppes trademarks in all Member States to TCCC alone.

Schweppes took issue with parallel imports of UK products into Spain (and therefore TCCC-originated) and commenced proceedings in Spain against Red Paralela, the main parallel importer, as well as OSHBV. In the main proceedings, Red Paralela counterclaimed that Schweppes had committed acts of unfair competition and acted in breach of Article 101 TFEU by making agreements with suppliers to restrict parallel imports of Schweppes®-branded products.

This counterclaim was withdrawn when the Spanish Competition Authority began an investigation into Schweppes's behaviour. That investigation concluded without a finding of infringement after Schweppes agreed to a number of amendments to the agreements. These were: first, that the restriction of parallel imports would concern only products originating in the UK and manufactured by TCCC; second, that the scope of any future agreements would be similarly restricted to UK products; and third, that, in relation to on-going judicial proceedings in which Schweppes was challenging certain distributors, Schweppes would similarly limit its arguments and urge the court to rule in a manner consistent with this commitment (see VBB on Competition Law, Volume 2017, No. 7). While this appeared to be consistent with the settled case law of the ECJ on the principle of exhaustion, the ECJ's judgment appears to extend the principle more broadly.

Judgment

The referring Spanish court sought guidance as to the scope of the principle of exhaustion provided for by Article 7(1) of Directive 2008/95/EC and Article 15(1) of Directive 2015/2436. These articles are identical and provide that a trademark does not give its proprietor the right to prohibit its use in relation to goods which have been put on the market in the Union under that trademark, whether by the proprietor itself or with its consent. The case law has established that the proprietor's consent includes situations in which the trademarks have a common origin (Case 192/73 *Van Zuylen*, but reversed in Case C-10/89 *HAG GF*), or are held by 'economically linked' entities (Case C-9/93 *IHT Internationale Heiztechnik*). Conversely, if a trademark is no longer under 'unitary control' (*e.g.*, as a result of an assignment limited to specific territories), the original proprietor of the mark loses the ability to regulate the quality of products manufactured in territories controlled by the new proprietor and therefore cannot be considered to have given its consent to their commercialisation (*Ibid.*)

In essence, the ECJ develops the principle of exhaustion to cover branded products whose trademarks do not have common ownership but are nonetheless considered to be 'economically linked' in substance if not in form.

1.. Principle of exhaustion and 'essential function' test

The ECJ reiterates that the essential function of a trademark is to guarantee the identity of the origin of the trademarked product to the end user. The end user may thereby distinguish that product from goods which originate elsewhere. If, however, a trademark owner has assigned some parallel national trademarks to a third party but continues to promote the trademark as a single global trademark, there will be increased confusion on the part of the consumer as to the commercial origin of the products. This confusion is inconsistent with the essential function of the trademark. If the trademark can no longer fulfil its essential function for this reason, then the trademark owner is deemed to have itself compromised or distorted that essential function and its trademark rights are exhausted. The ECJ clarifies that merely evoking the common historical geographical origin of the parallel trademarks does not, however, deprive the trademark of its essential function.

2. Principle of exhaustion and 'economic links' test

Even if the trademark owner has not promoted the image of a single global trademark, the principle of exhaustion may still apply if there are 'economic links' between the trademark owner and the parallel trademark holder.

In *IHT Internationale Heiztechnik*, the ECJ held that the principle of exhaustion applies, '*where the owner of the trade mark in the importing State and the owner of the trade mark in the exporting State are the same or where, even if they are separate persons, they are economically linked. A number of situations are covered: products put into circulation by the same undertaking, by a licensee, by a parent company, by a subsidiary of the same group, or by an exclusive distributor.*' The ECJ confirms that the "*concept of 'economic links* [...] *refers to a substantive, rather than formal, criterion*". What matters is not the form of the parties' relationship but rather the effects of their relationship. In the case at hand, for instance, Schweppes and TCCC were legally distinct businesses and independent of each other.

For the ECJ, the decisive factor is the possibility of determining, directly or indirectly, the goods to which a trademark is affixed and of controlling the quality of the goods in question. This, it held, may arise in the case where, following the division of national parallel trademarks resulting from a territorially limited assignment, the owners of those trademarks coordinate their commercial policies or reach an agreement to exercise joint control over those goods. It is not necessary that such control is in fact exercised: the mere possibility is sufficient. This appears to be a development of the principle in *IHT Internationale Heiztechnik* in a direction which points to an increased erosion of trademark rights.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– EUROPEAN UNION LEVEL –

French Competition Authority fines Brenntag € 30 million for obstruction

On 21 December 2017, the French Competition Authority ("FCA") applied for the first time Article L.464-2 V of the French Code of Commerce allowing for the imposition of fines in cases of procedural obstruction. It, subsequently, fined Brenntag € 30 million for obstructing an on-going investigation.

Brenntag is a German chemicals distributor that has been the subject of various complaints filed by its competitors on the French market, such as Gaches, Solvadis and Chimiphar. These competitors argued that Brenntag was involved in various anticompetitive practices (*e.g.*, predatory pricing, horizontal agreements, and pressure on suppliers not to deal with Brenntag's competitors). Following these complaints, the FCA opened several proceedings, some of which have already led to the imposition of fines.

However, the FCA has not yet been able to conclude its investigation into unilateral and vertical practices (*i.e.*, predatory pricing and exclusive dealing) due to, according to the FCA, Brenntag's conduct. The FCA noted that Brenntag provided incomplete and insufficiently precise information in response to requests for information, often with a one- or two-year delay. Brenntag also refused to communicate decisive elements required by the FCA to assess the functioning of the market despite the additional extensions of time granted (*e.g.*, accounting extracts, invoices, explanation of methodology used to compute data, etc.).

In response, Brenntag counter-argued that the FCA's requests for information were disproportionate and unreasonable. It further stated that certain information was unavailable and that, in any case, the legal criterion for an obstruction required evidence of an intentional element. In its decision dated 21 December 2017, the FCA rejected these arguments. It emphasised that the requests for information only included detailed non self-incriminating questions, underlined the obligation on Brenntag to actively cooperate with the FCA, and affirmed that obstruction could be the result of negligence without the need to prove any intentional element.

In order to calculate the amount of the fine, the FCA relied on the maximum ceiling of 1% of the world annual turnover, as stated in Article L.464-2 V of the French Code of Commerce and under EU competition law (*i.e.*, Recitals 23 and 29 and Articles 18 and 23 of Regulation 1/2003). The FCA also pointed to the "particular gravity" of the obstructive behaviour that rendered impossible the adoption of any decision on the alleged practices, especially because the FCA was unable to determine whether Brenntag had a market share above 50%. Further, the FCA took into account the annual turnover of the Brenntag group (*i.e.,* Brenntag AG and its 99.4%-owned subsidiary Brenntag SA) to ensure a sufficient deterrent effect. Finally, noting that the annual worldwide turnover of the Brenntag group was € 10.3 billion, the FCA imposed a fine of € 30 million for which Brenntag AG and Brenntag SA were found jointly and severally liable.

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