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VBB on Competition Law

| HIGHLIGHTS

ABUSE OF DOMINANT POSITION:

| Preliminary reference from Portuguese court regarding discriminatory pricing under Article 102(c) TFEU

| Stockholm Administrative Court of Appeal validates PostNord's quantity discount system as not discriminatory

CARTELS AND HORIZONTAL AGREEMENTS:

| Advocate General Wahl recommends upholding appeal against General Court's judgment in Heat Stabilisers cartel case

| Court of Justice dismisses appeal in Animal Feed Phosphates cartel case

VERTICAL AGREEMENTS:

| Amazon offers voluntary commitments in European Commission e-books investigation

| German Federal Cartel Office closes proceedings against Apple and Amazon concerning exclusive supply arrangement for audiobooks

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS: General Court orders EU to pay damages for excessively long court proceedings for first time

TOPICS COVERED IN THIS ISSUE

MERGER CONTROL 4
ABUSE OF DOMINANT POSITION 5
CARTELS AND HORIZONTAL AGREEMENTS 7
VERTICAL AGREEMENTS 11
STATE AID 14
LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS 15
PRIVATE ENFORCEMENT 17

JURISDICTIONS COVERED IN THIS ISSUE

EUROPEAN UNION 4, 5, 7, 11, 14, 15
FINLAND 6
GERMANY 12, 17
HUNGARY 10
LATVIA 16
PORTUGAL 13
ROMANIA 5
SLOVAKIA 16
SWEDEN 6
UNITED KINGDOM 4, 12

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VBB on Competition Law | Volume 2017, Nº 1

Table of contents

| MERGER CONTROL 4

EUROPEAN UNION LEVEL....4

Fastweb challenges Commission merger clearance for Italian telecom JV....4

Commission decision to open in-depth investigation into Croatian cement deal challenged by merging parties....4

MEMBER STATE LEVEL....4

CMA consults on proposed change to reduce the number of mergers investigated in smaller markets....4

| ABUSE OF DOMINANT POSITION 5

EUROPEAN UNION LEVEL.... 5

Preliminary reference from Portuguese court regarding discriminatory pricing under Article 102(c) TFEU.... 5

MEMBER STATE LEVEL.... 5

Romanian Competition Authority fines chamber of financial auditors.... 5

Stockholm Administrative Court of Appeal validates PostNord's quantity discount system as not discriminatory.... 6

OTHER DEVELOPMENTS.... 6

| CARTELS AND HORIZONTAL AGREEMENTS 7

EUROPEAN UNION LEVEL....7

Summary of Significant Case Developments....7

Analysis of Important Substantive and Procedural Developments.... 8

Heat Stabilisers cartel case – derivative liability of parent company may not exceed that of its subsidiary.... 8

Methacrylates cartel case – derivative liability of parent company may not exceed that of its subsidiary.... 9

Animal Feed Phosphates - likely range of fines under settlement procedure creates no legitimate expectations for undertaking outside settlement.... 9

MEMBER STATE LEVEL....10

| VERTICAL AGREEMENTS 11

EUROPEAN UNION LEVEL....11

Amazon offers voluntary commitments in European Commission e-books investigation....11

MEMBER STATE LEVEL....12

Furniture manufacturers fined for vertical price fixing....12

German Federal Cartel Office closes proceedings against Apple and Amazon concerning exclusive supply arrangement for audiobooks....12

BMW amends policy on price comparison websites avoiding Competition and Markets Authority investigation....12

OTHER DEVELOPMENTS....13

Portuguese court upholds reduced fines imposed on Galp Energia Group for granting absolute territorial protection in the Portuguese bottled gas market....13

| STATE AID 14

OTHER DEVELOPMENTS....14

| LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS 15

EUROPEAN UNION LEVEL....15

General Court orders EU to pay damages for excessively long court proceedings for first time....15

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Table of contents

MEMBER STATE LEVEL.....16

Latvian competition authority fines medical equipment wholesaler for obstructing inspection.....16

Slovak competition authority upholds fine for the obstruction of dawn raids.....16

| PRIVATE ENFORCEMENT 17

MEMBER STATE LEVEL.....17

Higher Regional Court Karlsruhe rules that damages claim against member of the grey cement cartel is time-barred.....17

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MERGER CONTROL

– EUROPEAN UNION LEVEL –

Fastweb challenges Commission merger clearance for Italian telecom JV

On 14 January 2017, Fastweb lodged an appeal with the General Court of the European Union against the European Commission's decision to conditionally clear the Italian joint venture between Hutchison 3G Italy and VimpelCom's Wind in September 2016 (see VBB on Competition Law, Volume 2016, No. 9). Fastweb, a subsidiary of the Swisscom group, is an Italian fixed-line broadband provider and the second largest mobile virtual network operator in Italy. During the Commission's review of the H3G/Wind joint venture, Fastweb unsuccessfully bid to acquire telecom assets that the merging parties sought to divest in order to obtain the Commission's approval for the joint venture. The assets were ultimately acquired by French telecom operator, Illiad, and were sufficient to allow Illiad enter the Italian market as a fourth mobile network operator. The Commission's 575-page conditional clearance decision indicates that Fastweb argued that the H3G/Wind joint venture could give rise to a lessening of competition on the Italian mobile markets.

Commission decision to open in-depth investigation into Croatian cement deal challenged by merging parties

On 22 December 2016, German cement manufacturers, HeidelbergCement and Schwenk Zement, lodged appeals before the General Court to challenge the Commission's decision to open an in-depth investigation into their joint acquisition of Cemex's Croatian subsidiary. The Croatian acquisition was notified to the Commission on 5 September 2016; an in-depth investigation was later opened on 10 October 2016 due to concerns that the acquisition will reduce competition on the Croatian market for grey cement. Cemex's Croatian subsidiary is currently the largest producer of grey cement in the area, owning three of the five cement plants in Croatia. Duna-Dráva Cement, a Hungarian joint venture also owned by the merging parties, is also a large importer of cement in the local Croatian market. Since the parties have filed the legal challenge in December, the Commission extended the in-depth review by five working days on 18 January 2017.

– MEMBER STATE LEVEL –

UNITED KINGKOM

CMA consults on proposed change to reduce the number of mergers investigated in smaller markets

On 23 January 2017, the UK's Competition and Markets Authority ("CMA") opened a consultation to seek views on whether it should raise the minimum thresholds for assessing if certain small markets are sufficiently important to justify an in-depth (or phase 2) merger investigation. Under UK rules, the CMA enjoys discretion over whether it opens a phase 2 investigation. In 2010, it published guidance outlining its approach. Now, the CMA proposes to amend the guidance and increase the market size threshold over which the CMA considers that the market concerned will generally be of sufficient importance to justify a reference from UK£ 10 million to UK£ 15 million and also increase the market size threshold below which the CMA will generally not consider a reference justified from UK£ 3 million to UK£ 5 million. The CMA anticipates that the proposed changes would reduce the number of mergers that are subject to investigations. The consultation is open until 13 February 2017.

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| ABUSE OF DOMINANT POSITION

– EUROPEAN UNION LEVEL –

Preliminary reference from Portuguese court regarding discriminatory pricing under Article 102(c) TFEU

On 16 January 2017, details of a request by a Portuguese court for a preliminary ruling from the Court of Justice of the European Union ("ECJ") were published in the Official Journal on questions relating to abusive discriminatory pricing under Article 102(c) TFEU. The request was issued in proceedings between MEO - Serviços de Comunicações e Multimédia S.A. ("MEO"), the consumer brand of Portugal Telecom, and the Portuguese Competition Authority ("PCA"). The PCA had previously rejected MEO's complaint that a royalty collecting society was charging retailers discriminatory wholesale tariffs for the rights required to offer TV services to customers. MEO challenged this rejection before the national court, which forwarded a number of questions to the ECJ.

In essence, by its first question, the Portuguese court seeks to ascertain whether the requirement under Article 102(c) that a trading party is placed at a "competitive disadvantage" means that there must be an assessment of the gravity, relevance or importance of the effects of the discriminatory pricing on that trading party's competitive position or its ability to compete, and in particular whether there can be an abuse when the trading party is capable of absorbing the discriminatory prices.

By its second question, the Portuguese court seeks to ascertain whether, in case there is proof or evidence that the discriminatory prices are of "significantly reduced importance" for the costs incurred, income obtained, and profitability achieved by the affected trading party, a finding that there is no abuse would be consistent with the Court's jurisprudence under Article 102 TFEU (which, it should be noted, often discounts the importance of the actual effects of a given conduct).

The Portuguese court also asks various specific questions on the meaning of the requirement under Article 102(c) TFEU that a trading party be placed at a "competitive disadvantage". Thus, the court asks whether this language imposes a requirement that the advantage arising from the discrimination corresponds to: (i) a minimum percentage of the affected undertaking's cost structure; (ii) a minimum difference between the average costs incurred by the "competitor undertakings" on the (upstream) wholesale market; and (iii) certain specific amounts identified by the Portuguese court in an unpublished table, taking account of the market and services in question. If the answer to any of these questions is in the affirmative, the Portuguese court further enquires about how to define the minimum threshold that must be met to establish the abuse, and whether it must be met each year.

Although the questions appear to be worded to address the specificities of the case before the Portuguese court, they provide the ECJ with the opportunity to shed additional light on the test to be met when establishing that discriminatory prices constitute an abuse. It is submitted that the contours of this test are not sufficiently clear, which is why it is regrettable that the European Commission has apparently abandoned the promise made in December 2005 (when announcing the publication of its discussion paper on abusive exclusionary practices) to also carry out further work regarding discriminatory and exploitative conduct to enhance its guidance on Article 102 TFEU.

– MEMBER STATE LEVEL –

ROMANIA

Romanian Competition Authority fines chamber of financial auditors

On 10 January 2017, the Romanian Competition Council ("RCC") fined the Romanian Chamber of Financial Auditors ("CAFR") approximately € 182 000 for abusing its dominant position by restricting competition on the Romanian market for auditing services. The CAFR is the national professional organisation which coordinates and authorises the performance of financial auditing services in Romania, comprising over 3,000 members. Following its investigation, the RCC discovered that the CAFR had imposed a certain level of average hourly rates and a minimum number of hours in relation to its members' auditing services, accompanied

by penalties for failure to comply. The CAFR had imposed these measures under the pretext of checking whether its members acted in line with its mandatory quality standards. However, the RCC took the view that the introduction of a set level of fees had a negative impact on the recipients of auditing services, who ended up having to pay higher fees. In addition to imposing the fine, the RCC requested the CAFR to forward to the RCC a new version of its rules, amended to comply with competition rules.

SWEDEN

Stockholm Administrative Court of Appeal validates PostNord's quantity discount system as not discriminatory

On 28 December 2016, the Stockholm Administrative Court of Appeal ("SAC") rejected an appeal brought by the Swedish Post and Telecom Authority ("PTS") against a decision of a lower court which held that a quantity discount system to be implemented by PostNord Group AB ("PostNord"), Sweden's universal postal provider, was lawful and not discriminatory. The SAC's judgment confirms the lower court's ruling which annulled a decision of the PTS that would have prevented PostNord from changing its discount system to one calculated on a per sender basis, whereas previously discounts had been granted for volumes aggregated by consolidators.

In rejecting the appeal brought by PTS, the SAC relied on the decision of the Court of Justice of the European Union ("ECJ") in the *bpost* case (see VBB on Competition Law Volume 2015, No. 2) which previously held that a quantity discount system that calculated discounts on a per sender basis was not discriminatory. Specifically, in that case, the ECJ held that such a discount system did not discriminate against consolidators in favour of senders because the two groups could not be said to be in comparable situations, taking into account the objective pursed by the system. The ECJ identified that objective as being the incentive for customers to send larger volumes of mail, thereby facilitating economies of scale. It noted the objective was only served by targeting senders, as only they had the capacity to generate larger amounts of mail. In contrast, consolidators merely served as intermediaries between the sender and the operator, but did not originate mail themselves.

PTS sought to reject the applicability of this case on the grounds that there was more than one postal service provider in Sweden competing on the market. According to PTS, this meant that PostNord would have a different incentive than merely incentivizing customers to send larger volumes of mail as such — PostNord would also have an incentive to ensure that both consolidators and senders would be incentivized to choose it over its competitors. This would have allowed consolidators and senders to be considered as being in a comparative situation for the purposes of the discrimination test. The SAC rejected this argument. It confirmed the lower court's finding that, even though the Swedish postal market had been opened up to competition, consolidators and senders were not in a comparable situation to PostNord customers. Moreover, the SAC emphasized that the bpost case had unequivocally established that the objective of a quantity discount system was to stimulate demand.

– OTHER DEVELOPMENTS –

FINLAND: On 29 December 2016, the Finnish Supreme Administrative Court confirmed a decision of the Market Court of Finland imposing a fine of € 70 million on Finnish company Valio for abusing its dominant position on the Finnish fresh milk wholesale and production market by engaging in predatory pricing. The fine is the highest ever imposed on an individual company in Finland for breach of competition law. A summary of the Market Court's decision was provided in VBB on Competition Law, Volume 2014, No. 9.

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| 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 important substantive or procedural developments addressed in these cases.

Summary of Significant Case Developments

Advocate General Wahl recommends upholding appeal against General Court's judgment in Heat Stabilisers cartel case

On 21 December 2016, Advocate General ("AG") Wahl recommended upholding an appeal lodged by Akzo Nobel against a judgment of the General Court ("GC") in relation to the Commission's *Heat Stabilisers* decision.

In his opinion, AG Wahl considered that the GC was wrong not to annul the fine imposed on Akzo Nobel as a parent company for the involvement of two of its subsidiaries, Akzo GmbH and Akzo BV, in the *Heat Stabilisers* cartel. Specifically, the AG found that the GC was wrong to confirm the Commission's finding that, while the Commission could no longer impose a fine on Akzo Nobel's two subsidiaries for their participation in the heat stabilisers cartel because the limitation period of five years had expired, the Commission was not prevented from finding Akzo Nobel liable for the infringement as their parent company (see VBB on Competition Law, Volume 2015, No. 7). As a result, the AG recommended that the Court of Justice annul the fine imposed on Akzo Nobel on account of its derivative liability for its subsidiaries' conduct (see Section 1.2) (Case C-516/15, *Akzo Nobel and Others*).

Court of Justice dismisses appeal in Animal Feed Phosphates cartel case

On 12 January 2017, the Court of Justice of the European Union ("ECJ") dismissed an appeal lodged by Timab against a judgment of the General Court ("GC") upholding the fine of nearly € 60 million imposed on Timab for its participation in the animal feed phosphates cartel. The case arose from the Commission's first "hybrid" cartel settlement decision, in which it imposed fines on several producers of animal feed phosphates under the cartel settlement procedure, while imposing a fine on Timab under the standard Article 101 infringement procedure, after Timab had withdrawn from settlement discussions.

In its judgment, the ECJ ruled that the GC had correctly and systematically examined the analysis carried out by the Commission during the standard infringement procedure, as well as the factors used by the Commission to calculate the fine imposed on Timab. In particular, the ECJ considered that the Commission was not bound by the range of the fine it had indicated to Timab during the settlement procedure, and could therefore adjust its amount on the basis of objective factors under the standard infringement procedure (see Section 1.2) (Case C-411/15, *Timab Industries*).

Court of Justice upholds General Court's judgment in TV and Computer Monitor Tubes cartel case

On 18 January 2017, the Court of Justice of the European Union ("ECJ") dismissed an appeal lodged by Toshiba against a judgment of the General Court ("GC") in connection with the *TV and Computer Monitor Tubes* cartel decision. In its appeal, Toshiba argued that the General Court had erred in holding that it was jointly liable, with Panasonic, for the conduct of its joint venture company.

In its judgment, the ECJ ruled that the GC had been correct to find that, where it follows from statutory provisions or contractual stipulations that the commercial policy of a joint subsidiary is determined jointly by two parent companies (in this case, Toshiba and Panasonic), it may reasonably be concluded that that policy was indeed determined jointly. This implies that, in the absence of evidence to the contrary, the parent companies must be regarded as having exercised decisive influence over their joint venture and can therefore be held liable for its conduct (Case C-623/15, *Toshiba*).

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Court of Justice confirms General Court's judgment in Methacrylates cartel case

On 19 January 2017, the Court of Justice of the European Union ("ECJ") dismissed an appeal brought by the Commission against a judgment of the General Court in the context of the *Methacrylates* cartel decision. In its judgment, the ECJ ruled that the Commission was not entitled to send to parent companies (in this case, Total and Elf Aquitaine) letters that demanded payment of interest accrued on a cartel fine, for which they were held jointly and severally liable, where the fine imposed had been entirely paid by their subsidiary and where their liability was purely derivative of the conduct of that subsidiary (in this case, Arkema) (see Section 1.2) (Case C-351/15, *Commission v Total and Elf Aquitaine*).

Analysis of Important Substantive and Procedural Developments

Heat Stabilisers cartel case – derivative liability of parent company may not exceed that of its subsidiary

Under settled EU case law, a parent company may be held liable for the anticompetitive behaviour of its subsidiary even if the former has not directly participated in the infringement, provided the parent company is in a position to exercise decisive influence over its subsidiary and, in fact, has exercised such influence. The underlying logic of attributing liability to the parent company is based on the fact that, under EU competition law, the concept of single undertaking is not limited to a legal person, but covers an entity engaged in an economic activity. Where the liability of the parent company is engaged on the basis of the conduct of its subsidiary, some ambiguity still exists as to whether its liability is based on its personal involvement or on derivative involvement. The practical significance of this distinction can be illustrated by the question of whether a parent company should be absolved of liability if it is found that the Commission is time-barred from imposing a penalty in respect of its subsidiary.

In *Akzo Nobel*, the GC found that, while the Commission could no longer impose fines on two subsidiaries of Akzo Nobel for their participation in the heat stabilisers cartel because the limitation period of five years had expired, this did not prevent the Commission from finding Akzo Nobel liable for the infringement as their parent company (see VBB on Competition Law, Volume 2015, No. 7). Akzo Nobel and the two subsidiaries concerned (Akzo GmbH and Akzo BV) appealed against this finding before the ECJ. They argued that the annulment of the fines imposed on the two subsidiaries as a result of the expiration of the limitation period should have led to the annulment of the fine on Akzo Nobel since that fine was imposed on it solely because of its subsidiaries' direct participation in the infringements. Akzo Nobel's liability was argued to be purely derivative, secondary and dependent on that of its subsidiaries.

In his recent opinion, AG Wahl has agreed with the appellants' arguments and recommended that the ECJ uphold their appeal. The AG explained that differing terminology used and inferences drawn in the case law had given rise to competing views on the nature of parental liability (*i.e.*, whether it is personal or derivative in nature) in cases where the parent company has not directly participated in the infringement at issue. In the AG's view, parental liability must be said to be derivative in nature whenever the Commission adopts a decision imposing a fine on a parent company in which the Commission does not establish the parent company's actual and direct involvement in the infringement concerned. AG Wahl said that the logical consequence for the Commission is that any errors vitiating its finding in relation to a subsidiary's liability for the infringement should be extended to the benefit of the parent company. The AG contrasted this to a situation where the Commission finds that the parent company has also been directly involved in the infringement, in which case its liability would no longer be of a merely derivative nature.

In the case at hand, Akzo Nobel's liability was derived from that of its subsidiaries, as the Commission had not established that Akzo Nobel had been directly involved in the cartel during the infringement period at issue. AG Wahl therefore concluded that the GC's judgment should be set aside in so far as the GC did not align the respective fines imposed on Akzo Nobel and on its subsidiaries relating to that period as a result of the expiration of the limitation period.

The opinion of the AG is in line with the ECJ's recent judgment of 17 September 2015 in Case 597/13 *Total v Commission* (see VBB on Competition Law, Volume 2015, No. 9). In this case, the ECJ held that the liability of a parent company

could not exceed that of its subsidiary where the former's liability is derived solely from the latter.

Methacrylates cartel case – derivative liability of parent company may not exceed that of its subsidiary

As noted above, under settled EU case law, a parent company may be held liable for the anticompetitive behaviour of its subsidiary, even if the former has not directly participated in the infringement, provided the parent company is in a position to exercise decisive influence over its subsidiary and has, in fact exercised such influence. However, where the liability of the parent company is purely derived from that of its subsidiary, the liability of the parent company may not exceed that of its subsidiary.

The factual and procedural situation underlying the case is relatively complex and unusual. In 2006, the Commission imposed a fine of over € 219 million on Arkema for its involvement in the methacrylates cartel. Of that amount, its parent companies Elf Aquitaine and Total were held jointly and severally liable for € 181 million and € 140 million respectively (see VBB on Competition Law, Volume 2006, No. 5). After the decision issued, Arkema paid the amount of the fine in full. On appeal, the GC reduced the fine imposed on Arkema to € 113 million (see VBB on Competition Law, Volume 2011, No. 6) but dismissed appeals lodged by Total and Elf Aquitaine and upheld their joint and several liability for a fine imposed in relation to the anti-competitive activities of their subsidiary company, Arkema (see VBB on Competition Law, Volume 2011, No. 7). The Commission informed Total and Elf Aquitaine that, should they appeal before the ECJ, it would request the payment of the amount for which they were jointly and severally liable with Arkema (*i.e.*, a total of € 137 million), together with default interest. Before their appeal to the ECJ, Total and Elf Aquitaine paid the Commission the sum demanded. Following the dismissal by the ECJ of their appeal, the Commission issued a letter in which it demanded payment from Total and Aquitaine of outstanding interest because it took the view that Arkema had not paid the original fine back in 2006 on their behalf. Total and Elf Aquitaine then challenged this letter from the Commission.

In its recent judgment, the ECJ first rejected the Commission's claim that the contested letters merely enforced the *Methacrylates* decision and that they therefore in themselves did not produce binding legal effects susceptible to appeal. In this regard, the ECJ ruled that the contested letters demanded from Total and Elf Aquitaine default interest in spite of the payment in full of the original amount of the fine, and that constituted a modification of the pecuniary obligation for which they were liable. As a result, Total and Elf Aquitaine could validly challenge these letters before an EU court.

The ECJ then recalled that under settled EU case law, where the liability of the parent company is purely derivative of that of its subsidiary, the liability of the parent company may not exceed that of its subsidiary. In the present case, the ECJ found that the joint and several liability of Total and Elf Aquitaine was purely derived from that of their subsidiary, Arkema. The ECJ also underlined the uncontested fact that Arkema had paid the original fine in full in 2006.

The ECJ accordingly ruled that the Commission was no longer entitled to claim payment from Total and Elf Aquitaine, including for any resulting default interest in respect of the fine imposed in the *Methacrylates* cartel decision.

Animal Feed Phosphates - likely range of fines under settlement procedure creates no legitimate expectations for undertaking outside settlement

Under the EU settlement procedure, a party admitting liability to a cartel infringement and waiving certain procedural rights is rewarded by a 10% reduction in the fine. Under this framework, the Commission informs the companies wishing to engage in settlement discussions of the essential elements it intends to take into account, including the facts alleged, the classification of those facts, the gravity and duration of the alleged cartel, the attribution of liability and an estimation of the range of likely fines. This is intended to enable the parties to provide their views on the potential objections against them and allow them to make an informed decision on whether or not to settle.

In the *Timab* case, the ECJ recalled that the principle of the protection of legitimate expectations is one of the fundamental principles of EU law. The ECJ also added that under settled case law, during the procedural stage preceding the adoption of the final decision, the Commission cannot give any precise guarantee as to any fine reduction or immunity from fines and that the participants in the cartel cannot therefore entertain any legitimate expectation in that

regard. However, the ECJ noted that one notable exception to this principle is the settlement procedure. The ECJ underscored that this alternative administrative procedure has special features, such as the right of settling parties to be informed of the likely range of the fines the Commission intends to impose on them.

As a result, if an undertaking decides to opt out of a settlement procedure and to revert to the standard infringement procedure, that undertaking will lose the benefits of the settlement procedure, including the indication of the range of the fines likely to be imposed on it. This is because, under the standard infringement procedure, the Commission is only bound by the Statement of Objections, which does not set a range of fines.

The ECJ also indicated that, when adopting its decision under the standard infringement procedure, the Commission must take into consideration any new information brought to its attention during the context of that procedure. Given that Timab had put forward new evidence as to the duration of its involvement in the infringement (*i.e.*, 1993-2004), the ECJ held that it could no longer rely on any legitimate expectations that the range of the likely fine mentioned during the settlement procedure, which was premised on a different duration (*i.e.*, 1978-2004), would be maintained.

The requalification of Timab's conduct and the recalculation of its duration turned out to have dramatic negative effects on the final amount of the fine. Under the settlement procedure, the Commission qualified Timab's conduct as single and continuous, which enabled the Commission to impose a fine for an infringement of 25 years (*i.e.*, 1979 to 2004). On the basis of Timab's statements made during the investigative phase, the Commission had been minded to grant Timab a fine reduction of 17% under the Leniency Notice and of 35% for its cooperation outside the scope of the Leniency Notice for having enabled the Commission to extend the duration of Timab's own participation in the cartel. However, under the standard infringement procedure, Timab argued that the conduct amounted to multiple distinct practices, which were time-barred for the purpose of imposing a fine with the exception of one infringement from 1993 to 2004. In the absence of Timab's declaration supporting a 25-year single and continuous infringement, the Commission had to review the file anew and to reduce the duration of Timab's conduct to 10 years. The Commission then adjusted the fine accordingly: while Timab benefited from a shorter infringement period, it lost most of the fine reduction for its cooperation mentioned by the Commission during the settlement discussions (which was reduced to 5%). This is because the Commission had been minded to grant these reductions in fines as a reward for Timab providing self-incriminating evidence relating to the earlier period (*i.e.*,1979 to 1993).

It follows from this judgment that non-settling parties should be mindful that they might find themselves in a worse situation after pulling out of a settlement procedure, given that the amount of the fine may be increased as a result of the non-application of the Settlement and Leniency Notices.

– MEMBER STATE LEVEL –

HUNGARY

On 10 January 2017, the Hungarian Competition Authority reported in a press release that it had fined four undertakings a total of € 245,000 for their involvement in a price-fixing and market-sharing cartel, as well as for having exchanged business information on the estate agent sector for periods ranging between 2003 and 2015.

The four undertakings, Duna House Holding Nyrt., Otthon Centrum Holding Kft, Duna House Franchise Szolgáltató Kft. and Otthon Centrum Franchising Tanácsadó Kft. all agreed to settle and to admit their liability in the infringement, resulting in a 30% fine reduction.

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| VERTICAL AGREEMENTS

– EUROPEAN UNION LEVEL –

Amazon offers voluntary commitments in European Commission e-books investigation

On 24 January 2017, the European Commission announced it was inviting comments on voluntary commitments offered by Amazon relating to parity clauses included in its contracts with publishers of e-books. In brief, Amazon has offered to end the use of parity clauses under these commitments, which will apply for a period of five years. The commitments will be overseen by a trustee.

By way of background, on 11 June 2015, the Commission announced that it had started an investigation into Amazon's distribution contracts with publishers of e-books (see VBB on Competition Law, Volume 2015, No. 6). The Commission was concerned with clauses which gave Amazon the right: (i) to be notified of more favourable or alternative terms offered by publishers to its competitors; and/or (ii) to be granted terms and conditions at least as favourable as those offered by publishers to its competitors (referred to by the Commission collectively as "parity clauses").

On 9 December 2016, the Commission adopted a preliminary assessment within the meaning of Article 9(1) of Regulation (EC) No. 1/2003 ("Assessment"). According to the Assessment, Amazon may be dominant in the relevant markets for the retail distribution of English and German language e-books to consumers in the EEA, and Amazon's parity clauses used in the context both of agency and reseller agreements may constitute an abuse of its dominant position in breach of Article 102 TFEU and Article 54 of the EEA Agreement. The Commission takes issue in the Assessment with a wide range of specific parity clauses, which (according to its press release) require publishers to offer Amazon similar terms and conditions as those offered to Amazon's competitors, or to inform Amazon of such terms. These clauses comprise:

› Price-Related Parity Clauses (such as: Agency Price Parity; Discount Pool Provisions; Promotion Parity; Wholesale Price Parity; and Agency Commission Parity)

› Non-Price-Related Parity Clauses (such as: Business Model Parity; Selection and Features Parity)

› Notification Provisions (under which publishers must notify Amazon of alternative or more favourable terms offered to other retailers).

The Commission considers that these Parity Clauses and Notification Provisions have a number of anti-competitive effects including: dis-incentivising publishers from innovating; making it difficult for other e-book retailers to compete with Amazon in creating innovative products and services; deterring entry and expansion by e-book retailers; and risking higher prices and less choice for consumers.

Amazon has offered to address the Commission's concerns by offering:

› Not to enforce any of these Parity Clauses or Notification Provisions, and to inform publishers that it will not enforce them.

› To permit publishers to end e-book contracts with Amazon containing Discount Pool Provisions (*i.e.*, a clause linking discount possibilities for Amazon to the retail price of a given e-book on a competing platform). Publishers will be allowed to terminate the contracts upon 120 days' advance written notice.

› Not to include, in any new e-book agreement with publishers, any of the clauses mentioned above, including Discount Pool Provisions.

The Commission has invited comments on the proposed commitments by 26 February 2017.

The case illustrates the increasing competition law risks relating to the use of parity clauses when they benefit firms with market power. Thus far, these clauses have garnered scrutiny from the Commission in the earlier (Apple) E-books case, as well as from the national authorities in, in particular, the HRS and Booking.com cases (see e.g., VBB on Competition Law, Volume 2014, No. 3, VBB on Competition Law Volume 2015, No.7 and VBB on Competition Law, Volume 2016, No. 11).

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– MEMBER STATE LEVEL –

GERMANY

Furniture manufacturers fined for vertical price fixing

Between August and December 2016, the German Federal Cartel Office ("FCO") imposed fines totalling € 4.43 million on five manufacturers of furniture and four managers who were involved in vertical price fixing in relation to the sale of various types of furniture. The fined companies are hülsta-werke Hüls GmbH & Co. KG, Rolf Benz AG & Co. KG, Heinz Kettler GmbH, aeris GmbH and Zebra Nord GmbH.

The FCO's investigation revealed that the fined companies used framework agreements to fix the minimum prices charged, and the discounts provided, by their retailers to end consumers, using the manufacturers' recommended retail prices as a reference point. The companies further agreed with retailers on the specific products that could, or could not, be subject to promotions. The vertical price fixing covered both offline and online sales.

A stringent monitoring system to observe the pricing behaviour of the retailers was put in place by the manufacturers. This involved retailers' informing the manufacturers about other retailers who deviated from the agreements and requesting the manufacturers to ensure compliance with the minimum prices. In cases where retailers did not comply with the agreed upon minimum prices and discounts, the manufacturers threatened to refuse, or actually refused, to supply those retailers.

The manufacturers were granted a 10% reduction in their fines because they agreed to settle the cases. Exercising its discretion, the FCO decided not to impose fines on the retailers that participated in the monitoring system.

German Federal Cartel Office closes proceedings against Apple and Amazon concerning exclusive supply arrangement for audiobooks

On 19 January 2017, the German Federal Cartel Office ("FCO") announced that it had closed its investigation into Apple and Audible.com, a subsidiary of Amazon and a leading producer and supplier of audiobooks in Germany, in relation to a long-term mutually exclusive agreement for the distribution of audiobooks via Apple's iTunes Stores. This exclusivity agreement prevented Audible from supplying digital music platforms other than iTunes and required Apple to purchase audiobooks exclusively from Audible. The agreement to abandon the respective obligations takes effect from January 2017.

By way of background, an investigation was opened by the FCO on 16 November 2015 following a complaint by the German Publishers and Booksellers Association ("Association") concerning the exclusive audiobook agreement between the two companies (see VBB on Competition Law Volume 2015, No. 11). Subsequently, the Association also submitted a similar complaint to the Commission, which examined the exclusivity agreement working closely with the FCO.

On 5 January 2017, Audible and Apple reached an agreement to remove all exclusivity obligations concerning the supply and distribution of audiobooks. Accordingly, Audible is free to provide audiobooks to any media platform and Apple will be permitted to purchase the products from other publishers. In its press release welcoming the agreement and apparently signalling the end of its own investigation, the Commission noted that the removal of such exclusivity obligations will assist in fostering increased competition and ensure consumers have "broader access to downloadable audiobooks".

The case is an example of reciprocal exclusive supply and purchase obligations being considered to have the effect of limiting access to the market by competitors of both the supplier and purchaser in concentrated markets.

UNITED KINGDOM

BMW amends policy on price comparison websites avoiding Competition and Markets Authority investigation

On 24 January 2017, the Competition and Markets Authority ("CMA") announced it will not open an investigation into BMW following a decision by BMW to alter its policy to allow its dealers to work with car price comparison online platforms.

During 2016, Carwow, an online price comparison site allowing dealers to compete for potential car buyers, submitted a complaint to the CMA. Carwow alleged that BMW was

restricting its dealers from listing BMW and MINI cars on its platform and it requested the CMA to consider whether this infringed competition law.

The CMA conducted an initial assessment of the complaint and met with both Carwow and BMW. BMW subsequently announced that it would change its policy in order to permit its dealers to work with Carwow and other similar internet-based platforms. Following BMW's policy change, the CMA stated that "in light of its prioritisation principles", it would not open a formal investigation on the matter.

In its e-commerce sector inquiry report released on 15 September 2016, the European Commission outlined its findings aimed at identifying business practices in the sector that might restrict competition and limit consumer choice (see VBB on Competition Law, Volume 2016, No. 9). This report indicated that an outright prohibition on the use of online price comparison platforms is liable to be problematic. BMW's decision to alter its policy appears consistent with the Commission's viewpoint and additionally the CMA's overall focus on promoting online price transparency.

Further, both the German Federal Cartel Office ("FCO") and the German Courts have ruled against restrictions preventing the use of online platform comparison sites. This is reflected in the FCO's 2015 ASICS decision (see VBB on Competition Law, Volume 2015, No. 9) and the *Deuter* ruling from the Higher Regional Court of Frankfurt (see VBB on Competition Law, Volume 2016, No. 2).

– OTHER DEVELOPMENTS –

PORTUGAL

Portuguese court upholds reduced fines imposed on Galp Energia Group for granting absolute territorial protection in the Portuguese bottled gas market

On 19 January 2017, the Lisbon Court of Appeal upheld an earlier ruling of the Competition Court of Portugal, which had: (i) confirmed the prior finding by the Portuguese Competition Authority ("PCA") that Galp Energia Group ("Galp") had violated Article 101 TFEU and the Portuguese law-equivalent by granting absolute territorial exclusivity to distributors of Portuguese bottled gas; but (ii) reduced the fine from € 9.29 million to € 4.09 million (see VBB on Competition Law, Volume 2016, No. 1). The PCA had found that Galp had granted absolute territorial exclusivity for a period of at least 15 years to the majority of its distributors (see VBB on Competition Law Volume 2015, No. 2). In upholding the earlier ruling lowering the fine, the Lisbon Court of Appeal agreed that Galp's conduct had been "negligent", as opposed to "wilful".

| STATE AID

– OTHER DEVELOPMENTS –

EUROPEAN UNION: On 18 January 2017, the EFTA Surveillance Authority ("ESA") published its new **guidelines on the notion of state aid**. The ESA guidelines correspond to the guidance provided by the European Commission in its Notice on the notion of state aid (see VBB on Competition Law, Volume 2016, No. 5). The ESA guidelines include clarifications on: (i) the issue of economic activities versus non-economic activities; (ii) the interplay between public procurement and state aid; (iii) the application of the state aid rules to tax measures; and (iv) the application of the state aid rules to public funding of infrastructure.

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LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– EUROPEAN UNION LEVEL –

General Court orders EU to pay damages for excessively long court proceedings for first time

On 10 January 2017, the General Court ("GC") issued a judgment in which it ordered the European Union to pay Gascogne and Gascogne Sack Deutschland ("Gascogne") a total of about € 57,000 in damages for the excessive duration of previous proceedings before the GC in connection with the *Industrial Bags* cartel case.

In 2006, Gascogne lodged an appeal before the GC seeking the annulment of a decision adopted by the European Commission in relation to the *Industrial Bags* cartel case. The GC delivered its judgment in November 2011 (see VBB on Competition Law, Volume 2011, No. 11) and, on further appeal, the Court of Justice of the European Union ("ECJ") in November 2013 (see VBB on Competition Law, Volume 2013, No. 11). While both the GC and, ultimately, the ECJ dismissed the action brought by Gascogne in its entirety, the ECJ nevertheless took the view that the duration of the proceedings before the GC, namely five years and nine months, was excessive and in breach of Article 47 of the Charter of Fundamental Rights (right to be heard within a reasonable time). Such a breach, the ECJ suggested, was sufficiently serious to give rise to liability on the part of the EU for the damages arising from it. Following this judgment, Gascogne lodged the present action before the GC seeking € 3.9 million in damages against the EU.

In its judgment, the GC noted that the non-contractual liability of the EU may be incurred provided three cumulative conditions are met, namely: (i) the conduct of the institution must be unlawful; (ii) actual damage must have been suffered; and (iii) there must be a causal link between the unlawful conduct and the alleged damage.

With respect to the first condition (*i.e.*, unlawful conduct), the GC found that the right to adjudication within a reasonable time, as enshrined in the Charter of Fundamental Rights, was breached as a result of the excessive duration of the proceedings before the same GC. The proceedings lasted for more than five years and nine months, and that duration could not be justified by any specific circumstances of that case. Specifically, the GC considered that, in the case of proceedings concerning infringement of competition rules, the requirements of legal certainty and effective competition in the internal market are of considerable importance for the applicant, for its competitors and for third parties. As a matter of principle, the GC considers that a period of 15 months between the end of the written part of the procedure and the opening of the oral part of the procedure before the GC is an appropriate period. However, in case of the parallel treatment of related cases, that period could be extended by a period of around one month per additional related case. In the present case, the parallel treatment of 12 actions for annulment brought before the GC against the Commission's cartel decision could justify an increase of 11 months in the length of the proceeding. Therefore, a period of 26 months (that is, 15 months plus 11 months) between the end of the written phase of the procedure and the opening of the oral part of the procedure would have been appropriate. Considering that a period of 46 months actually passed between these two procedural phases, well in excess of the recommended 26 months, the GC found that the duration of the proceedings before the GC was unlawfully excessive by 20 months.

With respect to the second condition (*i.e.*, actual damage suffered), the GC recalled that the party seeking to establish the liability of the EU has the burden of adducing conclusive evidence as to the existence and the extent of the damage alleged. In this case, Gascogne alleged it had suffered loss because of the interest it had paid on the fine imposed by the 2005 Commission decision (*i.e.*, 3.56%) as well as on the cost incurred from the bank guarantee provided to secure the payment of the fine during the court proceedings. With respect to the alleged damage resulting from the interest paid on the fine, the GC found that Gascogne had not established that it had suffered actual loss during the period of 20 months exceeding the reasonable delay of the GC proceedings given that, during that same period, Gascogne benefited from having the amount of that fine at its disposal (which it could have for example invested). In contrast, with respect to the bank guarantee, the GC found that Gascogne had in fact suffered a loss which it should be compensated for.

With respect to the third condition (*i.e.*, causal link), the GC ruled that a causal link existed between the damage suffered by Gascogne due to the excessive length of the proceedings and the additional amount it had to incur owing to bank guarantee costs. As a result, the GC awarded Gascogne damages amounting to around € 47,000.

Finally, Gascogne alleged it also suffered non-material harm because it was placed in a situation of uncertainty which went beyond the degree of uncertainty usually caused by litigation. That state of prolonged uncertainty impacted Gascogne's planning and management decisions, which it estimated at over € 500,000. The GC accepted this claim, but substantially reduced the damage award on that count to € 5,000 for each company.

– MEMBER STATE LEVEL –

LATVIA

Latvian competition authority fines medical equipment wholesaler for obstructing inspection

On 10 January 2017, the Latvian Competition Authority ("LCA") imposed a fine of over € 13,000 on medical equipment wholesaler Interlux for obstructing a competition investigation of potential collusion in public procurement proceedings for the supply of medical equipment. The LCA stated that Interlux staff had deleted important data from their file servers during the inspection, thus preventing the LCA from obtaining complete information necessary for the objective clarification and evaluation of evidence of possible collusion. The LCA recalled that, due to the hidden nature of cartels, infringements are difficult to detect, so it considered that the destruction of evidence in such cases amounted to a very serious procedural irregularity.

SLOVAKIA

Slovak competition authority upholds fine for the obstruction of dawn raids

On 11 January 2017, the Council of the Slovak Antimonopoly Office ("Council") announced that it had upheld the decision of the Slovak Antimonopoly Office, Division of Cartels ("SAO"), to sanction PP & P Co. for breach of the Slovak Act on the Protection of Competition by failing to cooperate with the SAO during an inspection at its premises in April 2015. The SAO considered that PP & P Co.'s representative did not follow SAO's instructions not to disclose information on the existence of the ongoing inspection at a time when the SAO had not yet been provided with access to all the facilities it intended to examine. The SAO considered that such conduct prevented it from properly conducting the inspection and led to the damage of evidence sought by the SAO as part of its investigation. The SAO noted that the power to inspect was one of its most important investigative tools, which enabled it to uncover infringements of competition law under the Slovak Act on the Protection of Competition. The Council however lowered the fine imposed by the SAO from approximately € 1,000 to € 250, on the grounds that it was inappropriate in view of the infringement of the Slovak competition act.

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PRIVATE ENFORCEMENT

– MEMBER STATE LEVEL –

GERMANY

Higher Regional Court Karlsruhe rules that damages claim against member of the grey cement cartel is time-barred

In a judgment of 9 November 2016, the Higher Regional Court Karlsruhe ("Court") found that the claims for damages of a trader of building materials against a member of the grey cement cartel are time-barred.

The claimant in this case, a trader of building materials, requested the Court to find the defendant liable for the payment of damages based on the defendant's participation in the grey cement cartel between 1993 and 2002 for which the German Federal Competition Office fined the defendant and other manufacturers of cement in 2003.

According to the Court, Section 33 (5) of the German Act against Restrictions of Competition ("GWB"), which states that the limitation period for a claim for damages is suspended if cartel proceedings are initiated by the competition authority, does not apply to the claim concerned since Section 33 (5) GWB only became effective after the cartel violation occurred. This is because, according to the Court, Section 33 (5) GWB only concerns the suspension of a statute of limitation of a claim for damages on the basis of Section 33 (3) GWB, which sets out that whoever commits a competition law infringement is liable for the damages arising therefrom. The Court found that since Section 33 (3) GWB only came into force after the cartel infringement in question occurred and does not apply retroactively, Section 33 (5) GWB does not apply retroactively either.

With this finding, the Court explicitly goes against previous decisions of the Higher Regional Court Düsseldorf and the Regional Court Berlin. The latter found that Section 33 (5) GWB is applicable if the damages claims were not yet time-barred and the administrative cartel proceeding had not yet been concluded at the time of the entry into force of Section 33 (5) GWB.

The Court concluded that since the claimant could not rely on Section 33 (5) GWB, the claim for damages concerned was time-barred. The claimant could, however, still make a claim for restitution pursuant to Section 852 of the German Civil Code. Such a claim for restitution, however, covers only the cartel advantages gained by the defendant. The judgment has been appealed so that the matter will be heard by the Federal Court of Justice.

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