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GCR GLOBAL COMPETITION REVIEW

Global Competition Review 2017 Law Firm of the Year – Europe

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vbb@vbb.com
www.vbb.com

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Chaussée de La Hulpe 166
Terhulpsesteenweg
B-1170 Brussels – Belgium

Phone: +32 (0)2 647 73 50
Fax: +32 (0)2 640 64 99

vbb@vbb.com
www.vbb.com

Table of contents

Chaussée de La Hulpe 166
Terhulpsesteenweg
B-1170 Brussels – Belgium

Phone: +32 (0)2 647 73 50
Fax: +32 (0)2 640 64 99

vbb@vbb.com
www.vbb.com

MERGER CONTROL

– EUROPEAN UNION LEVEL –

Commission conditionally clears Qualcomm's acquisition of NXP

On 18 January 2018, the European Commission (the "Commission") conditionally approved the acquisition of NXP by Qualcomm. Both companies are important producers of chipsets used for smartphones and other applications.

During an in-depth merger review, the Commission identified three competition concerns in relation to the licensing of certain innovative technologies for chipsets used for smartphones. Qualcomm and NXP entered into detailed licensing and interoperability obligations to address these concerns.

First, the Commission found that Qualcomm/NXP would be able to raise the licensing royalties for NXP's MIFARE technology and make it more difficult for competitors to access MIFARE technology. MIFARE is a contactless security technology platform used for ticketing and fare collection by several transport authorities in Europe. To address this concern, Qualcomm committed to offer licences to NXP's MIFARE technology for an eight-year period on terms that are at least as advantageous as those currently available.

Second, the Commission found that Qualcomm/NXP would be able to degrade the interoperability of Qualcomm's baseband chipsets and NXP's near-field communication ("NFC") and secure element ("SE") chips for smartphones with rivals' products. The Commission considered that the loss of interoperability would mean that smartphone manufacturers would prefer Qualcomm/NXP's products over those of competing suppliers. To alleviate this concern, Qualcomm committed for an eight-year period to provide the same level of interoperability between its own baseband chipset and the NFC and SE products it acquires from NXP with the corresponding products of other companies.

Finally, the Commission concluded that Qualcomm/NXP would hold significant intellectual property portfolios related to NFC technology. This would increase its bargaining power and allow it to charge significantly higher royalties for its NFC patents. To address this concern, Qualcomm offered not to acquire certain of NXP's standard essential patents ("SEPs") and non-SEPs for NFC. Further, although Qualcomm would only acquire certain of the non-SEPs for NFC owned by NXP, Qualcomm committed (i) not to enforce its patent rights against other companies, except for defensive purposes, and (ii) to grant worldwide royalty-free licences to these patents.

In view of the above commitments given by Qualcomm and NXP, the Commission conditionally approved the concentration.

Advocate General Wahl issues opinion on gun-jumping

On 18 January 2018, Advocate General ("AG") Wahl issued an important opinion to the Court of Justice of the European Union (the "ECJ") concerning the scope of the 'standstill obligation' in Article 7(1) of the EU Merger Regulation, which prevents companies from implementing a notifiable concentration prior to clearance by the Commission. AG Wahl considered that an action which only precedes and is severable from the measure actually leading to the acquisition of decisive influence on a target does not breach the standstill obligation.

By way of background, on 18 November 2013, KPMG Denmark entered into a merger agreement with its competitor, E&Y. Prior to clearance of that merger by the Danish Competition and Consumer Authority ("DCCA"), KPMG Denmark terminated its cooperation agreement with KPMG International. Although the DCCA ultimately cleared the transaction on 28 May 2014, it later held that KPMG Denmark had infringed the Danish equivalent of the standstill obligation contained in the EU Merger Regulation. The DCCA considered that the act of termination by KPMG Denmark of its cooperation agreement breached the standstill obligation because that measure was (i) merger-specific, (ii) irreversible, and (iii) potentially created effects in the market. On appeal, the Danish Commercial Court sought a preliminary reference from the ECJ on the interpretation of the standstill obligation.

In his opinion to the ECJ, AG Wahl reached a different view to the DCCA (and the European Commission which intervened in its support). He strongly criticised the relevance of the three reasons put forward by the DCCA as a basis for a breach of the standstill obligation. AG Wahl articulated a negative definition of the standstill obligation whereby measures, such as preparatory acts, which do not confer control and are severable from the definitive legal act which transfers control over an undertaking, simply fall outside the scope of the standstill obligation. According to AG Wahl, such acts are more properly assessed under Article 101 or 102 TFEU. AG Wahl held that the termination of the cooperation agreement by KPMG Denmark did not contribute to a shift in control between KPMG Denmark and EY, and thus would not breach the standstill obligation.

The analysis offered by AG Wahl in this non-binding opinion to the ECJ is instructive. Should the ECJ follow it, the negative definition of the standstill obligation put forward by AG Wahl will help to answer difficult questions of when to draw the line between pre-implementation measures which breach the standstill obligation and other legitimate merger preparatory measures.

– OTHER DEVELOPMENTS –

EUROPEAN UNION: On 29 December 2017, United Parcel Service lodged an action for damages before the EU General Court (the "GC") against the European Commission in respect of its prohibition decision in *UPS/TNT*, which was later annulled by the GC on 7 March 2017 on the grounds that the Commission's failure to properly communicate an economic analysis during its merger review had breached UPS' rights of defence (see VBB on Competition Law, Volume 2017, No. 3).

EUROPEAN UNION: On 5 January 2018, Marine Harvest lodged an appeal against the judgment of the EU General Court of 26 October 2017 which dismissed an appeal by Marine Harvest against a € 20 million fine imposed on it by the Commission for implementing its acquisition of sole control over Morpol without first obtaining approval under the EU Merger Regulation (see VBB on Competition Law, Volume 2017, No. 10).

POLAND: On 8 January 2018, the Polish Competition Authority announced that a major merger in the Polish fitness industry (Benefit System/Calypso System) was abandoned as a result of competition concerns raised during its merger control review. In particular, the Polish Competition Authority found that the transaction would result in a potentially significant restriction of competition on the market for sports and recreation packages offered to employers and result in Benefit Systems owning the largest number of chain fitness clubs in Poland.

ROMANIA: On 15 January 2018, the Romanian Competition Authority fined two companies active in the construction industry approximately € 655,000 for gun-jumping (thus, breach of the obligation not to implement a transaction prior to merger clearance).

ABUSE OF DOMINANT POSITION

– EUROPEAN UNION LEVEL –

Commission fines Qualcomm for abuse of dominant position

On 24 January 2018, the European Commission (the "Commission") announced that it had imposed fines totalling € 997.439 million on chipset producer Qualcomm for abusing a dominant position contrary to Article 102 TFEU. While the public version of the decision has not yet been published, the Commission's press release provides several insights on the case.

The Commission found Qualcomm to be dominant in the market for long-term evolution ("LTE") baseband chipsets, which enable smartphones and tablets to connect to cellular networks and are used both for voice and data transmission. This was based on the company having very high market shares, reportedly amounting to more than 90% for the majority of the period investigated (*i.e.*, between 2011 and 2016). In addition, the Commission noted that the market was characterised by high barriers to entry, including the extent of the R&D expenditure to launch an LTE chipset as well as various barriers related to Qualcomm's IPRs.

The Commission found that Qualcomm abused this dominant position by allegedly making significant payments to a key customer on condition of exclusivity. In addition, the Commission claims to have found that consumers and competition suffered harm on the basis of an assessment that took into account, *inter alia*, the "*significant amounts*" paid in exchange for exclusivity, the "*significant share*" of the market covered by the practices (with Apple accounting for on average one-third of demand, and also being able to influence other customer's procurement choices), and a price-cost test submitted by Qualcomm.

This is the first Commission decision on loyalty rebates since the recent judgment of the Court of Justice of the European Union (the "ECJ") in *Intel* (see VBB on Competition Law, Volume 2017, No. 9). Reportedly, M. Vestager, Commissioner for Competition, stated at a recent conference that the *Intel* judgment would not fundamentally change how its services analyse such rebates. However, the Commission's press release in *Qualcomm* suggests that the Commission did in fact make fundamental changes as compared to the *Intel* case.

More specifically, in the *Intel* case, the Commission claimed that loyalty rebates (*i.e.*, rebates conditional on a customer obtaining all or most of its requirements from the dominant undertaking) constituted an infringement of Article 102 TFEU under what was in essence a *per se* test of illegality. Although the Commission also examined various factors to test whether Intel's rebates actually had the capability of foreclosing competitors, even attempting to apply an as-efficient competitor test, the Commission nonetheless made it clear that its findings in this respect were not part of its formal legal assessment of an infringement (see paragraph 71 of the judgment of the General Court in Case T-286/09).

However, the Commission's interpretation of the case-law was rejected by the ECJ. Instead, the ECJ ruled that when a dominant undertaking accused of implementing loyalty rebates argues that its conduct was not capable of restricting competition and producing the foreclosure effects alleged by the Commission, and submits supporting evidence, the Commission is required to carry out a more detailed assessment of a number of factors, including the share of the market covered by the rebates, the conditions for granting the rebates, the duration of the rebates, and the amount of their rebates (see paragraphs 138-139 of the judgment of the ECJ in Case C-413/14).

It appears from the Commission's press release in *Qualcomm* that its legal assessment reflected the judgment of the ECJ, and thereby amounted to a fundamental change in approach. Thus, contrary to the *per se* test applied to Intel, the Commission now appears to acknowledge that its legal assessment of Qualcomm's rebates reflected a more thorough assessment of various market factors, including the "*significant amounts paid*" by Qualcomm, the "*significant share*" of the market covered by the market, as well as the price-cost test submitted by Qualcomm.

Whether the Commission properly took such factors into account remains to be seen, given that the decision is not published. Notably, however, Qualcomm immediately announced its intention to appeal the Commission's decision.

– MEMBER STATE LEVEL –

FRANCE

French Competition Authority fines Janssen-Cilag and Johnson & Johnson for preventing and restricting the development of generic medicines

On 20 December 2017, the French Competition Authority ("FCA") imposed a fine of € 25 million on Janssen-Cilag laboratory and its parent company Johnson & Johnson for preventing and then restricting the development of a generic version of its analgesic Durogesic (the "Decision").

Ratiopharm, now Teva Santé, is the producer of a generic version of Durogesic. In October 2007, the European Commission granted Ratiopharm a marketing authorisation for a generic version of Durogesic and instructed EU Member States to do the same with a 30-day delay. However, the AFSSAPS (the then-French agency for medical safety of health products) only gave that authorisation after a 14-month delay, in December 2008.

Ratiopharm brought a complaint to the FCA arguing that this delay in authorisation was the result of an abuse of dominance by Janssen-Cilag, which allegedly provided misleading information to the AFSSAPS. In addition, Ratiopharm further complained against action taken by Janssen-Cilag after this authorisation was given to engage in a major campaign falsely disparaging the generics.

The FCA accepted these arguments. In its press-release, the FCA announced that Janssen-Cilag abused its dominant position by first calling into question the legally binding decision of the European Commission and misleading the AFSSAPS through its suggestions that the Commission decision was not binding. Second, the FCA announced that Janssen-Cilag also abused its dominant position by implementing a major communications campaign with healthcare professionals denigrating the competing products and distorting the content of the warning issued by the AFSSAPS.

ITALY

Italian Competition Authority fines Telecom Italia and Vodafone for margin squeeze

On 13 December 2017, the Italian Competition Authority ("ICA") fined Telecom Italia S.p.A. ("TIM") and Vodafone Italia S.p.A. ("Vodafone") € 3.7 million and € 5.8 million respectively for abusing their dominant position on the market for wholesale bulk SMS services.

The ICA considered that each mobile network operator (such as TIM and Vodafone) is the sole undertaking capable of delivering SMSs on its own home network. Thus, independent retailers on the market for retail bulk SMS delivery have no choice but to buy such termination services from the above-mentioned dominant network operators. For that reason, each mobile network operator may be regarded as dominant with respect to the termination of SMSs on its network.

The ICA concluded that TIM and Vodafone abused a dominant position by engaging in margin squeeze practices. More specifically, the ICA found that the termination fees charged by TIM and Vodafone to independent retailers were higher than the fees charged to their internal divisions, and that their own competing retail SMS bulk delivery was offered at a price which was not financially viable for their competitors. In reaching these findings, the ICA applied an as-efficient competitor test, and concluded that an as-efficient competitor would not be able to offer the same conditions as TIM and Vodafone in the SMS bulk market without facing significant losses.

Italian Competition Authority fines Poste Italiane for exclusionary practices

On 15 January 2018, the Italian Competition Authority ("ICA") issued a decision fining Poste Italiane S.p.A ("Poste Italiane") over € 20 million for breaching Article 102 TFEU on the markets for intermediate and final delivery service of ordinary items.

According to the ICA, Poste Italiane holds a dominant position in the (upstream and downstream) delivery service market for ordinary items. In fact, Poste Italiane is the only operator able to provide postal services throughout the entire national territory, *i.e.* also in regions of low population density where its competing operators are not active. Consequently, Poste Italiane also provides input services which are indispensable to competing operators in order to complete their delivery services.

The ICA's decision found that Poste Italiane infringed Article 102 TFEU by implementing a strategy aimed at excluding competitors. First, the ICA found that Poste Italiane engaged in margin squeezing practices. In this respect, the ICA concluded that Poste Italiane offered economic conditions to its final customers that could not be replicated by as-efficient competitors. For instance, the ICA noted that Poste Italiane offered to competitors input delivery services which were more costly than the services it provided to its final customers. Second, the ICA found that Poste Italiane had offered unlawful conditional rebates to its final customers. These rebates took advantage of Poste Italiane's presence in regions where its competitors did not operate, leveraging that presence to offer discounts and attract customers in more competitive regions

SWEDEN

Swedish Competition Authority's complaint against Nasdaq rejected

On 15 January 2018, the Swedish Patent and Market Court (the "Court") rejected a complaint by the Swedish Competition Authority ("KKV"), which had accused Nasdaq Stockholm Aktiebolag and several affiliated companies ("Nasdaq") of abusing their dominant position by pressuring Verizon, Nasdaq's IT service provider, to terminate negotiations with Burgundy, a newly created Nordic trading platform and a rival of Nasdaq. The negotiations were aimed at enabling Burgundy to place its trading servers in the building that housed Nasdaq's primary trading servers and at allowing Burgundy to offer Nasdaq's co-located trading customers the opportunity to directly connect to Burgundy's trading servers.

The Court first sided with the KKV and found that Nasdaq had a dominant position in the market for the trading of Swedish, Danish, and Finnish shares over regulated exchanges and self-regulated, multilateral trading facilities or MTFs.

The Court also found that Nasdaq had put pressure on Verizon to terminate its negotiations with Burgundy by threatening to move its primary trading servers to another site, in part because it was concerned about the potential harmful effects Burgundy's relocation could have on Nasdaq's own trading business. The Court considered, however, that Nasdaq had the contractual right to control the technical set-up of its customers that were co-located with its primary trading server and therefore had the right to prevent co-located customers from creating direct connections to another trading server in the same building. The Court concluded that Nasdaq's conduct that was designed to enforce its contractual rights could be considered a normal, legitimate competitive response and did not constitute an abuse of a dominant position.

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

Commission adopts decision against International Skating Union

On 8 December 2017, the European Commission (the "Commission") adopted a decision finding that the International Skating Union's (ISU) rules imposing sanctions on athletes participating in speed skating competitions that are not authorised by the ISU breach Article 101 TFEU. The ISU is the exclusive body recognised by the International Olympic Committee (IOC) to administer the sports of figure skating and speed skating on ice.

In its press release announcing its decision, the Commission notes that, under the ISU eligibility rules, the ISU can impose sanctions up to a lifetime ban from all international speed skating events on speed skaters participating in competitions that are not approved by the ISU. The Commission states that such sanctions can be imposed on skaters in the absence of any legitimate risk to sport-related objectives, such as those related to the protection of integrity, health and safety of athletes. The Commission also takes the view that the ISU rules prevent independent organisers from organising speed skating competitions because they are unable to attract athletes, which allegedly limits the development of alternative and innovative speed skating competitions. Finally, according to the Commission, the ISU eligibility rules enable the ISU to pursue its own commercial interests to the detriment of athletes and organisers of competing events.

As a result, the Commission requires the ISU to end its alleged illegal conduct within 90 days of the adoption of the decision, either by abolishing or modifying its eligibility rules so that they are based on legitimate objectives as well as being inherent and proportionate to achieve these objectives.

The Commission did not consider it necessary or appropriate to impose a fine in this case. However, if the ISU fails to comply with the Commission's decision, the ISU would be liable for non-compliance payments of up to 5% of its average daily worldwide turnover.

Court of Justice considers that efforts by licensor and licensee to hinder competition between respective products by issuing misleading information is restriction of competition by object

On 23 January 2018, the Court of Justice of the European Union ("ECJ") handed down a judgment on a request for preliminary ruling from the Italian Supreme Court regarding the ongoing appeal of the 2014 decision by the Italian Competition Authority ("ICA") against Hoffman-La Roche ("Roche") and Novartis.

The ICA had decided that the parties, a licensor and a licensee, had illegally coordinated their conduct to hinder the off-label use of Roche's lower-priced product Avastin (a cancer medicine used off-label for eye disease) instead of Novartis's higher-priced product Lucentis (a medicine approved for eye disease) (Case C-179/16, *F. Hoffmann-La Roche and Others*). Following the opinion of Advocate General Saugmandsgaard Øe (see VBB on Competition Law, Volume 2017, No. 9), the ECJ takes the view that coordination by a licensor and licensee to issue misleading information about the relative safety of their products, and to thereby reduce competition between their products, constitutes a restriction of competition by object. The question of whether the specific conduct of Roche and Novartis was misleading is not addressed, as this is a factual matter to be decided by the Italian courts (see analysis below).

The ECJ also ruled that the fact that one of the products is used off-label, possibly in violation of the applicable regulatory framework, does not mean that the product falls outside of the relevant market for the purposes of the competition law assessment, and does not justify actions by the parties themselves to hinder the off-label use of the medicine through misleading statements.

Analysis of Important Substantive and Procedural Developments

Coordinated dissemination of misleading medicinal information may constitute a restriction of competition "by object" (Hoffmann-La Roche/Novartis)

Under EU case law, agreements with an anti-competitive object are those which, by their very nature, can be regarded as being harmful to the proper functioning of normal competition. Thus, where the anticompetitive object of the agreement is established, it is not necessary to examine its actual effects on competition. In order to determine whether an agreement reveals in itself a sufficient degree of harm to competition for it to be considered a restriction of competition by object, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms part.

The underlying case was referred to the ECJ by the Italian Supreme Court which requested guidance on the appeal lodged by Roche and Novartis of a fine imposed by the ICA for an infringement of Article 101 TFEU. The ICA had found that Roche and Novartis had colluded in the dissemination of misleading information to prevent the off-label use of the lower-priced product *Avastin* (commercialised by Roche) in order to favour the commercialisation of the higher-priced product *Lucentis* (commercialised by Novartis). Both products were licensed by the same company, Genentech.

In its judgment, following Advocate General Saugmandsgaard Øe's opinion, the ECJ took the view that the communication, in the context of scientific uncertainty, of misleading information on adverse effects resulting from the off-label use of one product (*i.e.*, Avastin) with a view to reducing the competitive pressure on the other product (*i.e.*, Lucentis) constitutes a restriction of competition "by object".

To reach this conclusion, the ECJ examined the conduct concerned in its legal and economic context. The ECJ found that the fact that two companies, which marketed competing products, disseminated misleading information relating to a product marketed by one of them (*i.e.*, Avastin) may constitute evidence that the information was not disseminated for legitimate pharmacovigilance purposes. The ECJ noted that, given the characteristics of the medicinal product market, the dissemination of misleading information was likely to deter doctors from prescribing the medicinal product in question. The ECJ thus concluded that an arrangement pursuing the objectives described above must be regarded as sufficiently harmful to competition to render an examination of its effects superfluous.

The judgment is of great practical interest as the concerted practice of Roche and Novartis did not fall within any traditional type of infringement "by object". Notably, the ECJ once again declined to limit restrictions "by object" to certain forms of concerted practice and emphasised the need to assess the nature of the agreement, its content, and the economic and legal context of which it is part.

VERTICAL AGREEMENTS

– MEMBER STATE LEVEL –

AUSTRIA

Austrian Cartel Court imposes fine on electronics company Pioneer & Onkyo for retail price maintenance

According to a press release of the Austrian Competition Authority dated 3 January 2018, the Austrian Cartel Court imposed a fine of € 120,000 in November 2017 on electronics company Pioneer & Onkyo Europe GmbH for retail price maintenance. The unlawful agreements set retail prices of home audio and visual equipment products of the brands "Onkyo" and "TEAC", particularly receivers, amplifiers and turntables, between March 2011 and April 2017. The company did not dispute the facts of the case. The decision is final.

GERMANY

German Supreme Court finds prohibitions against the use of price comparison sites fall under Article 101 TFEU and are hardcore restraints

On 12 December 2017, the German Federal Supreme Court affirmed a decision by the Higher Regional Court of Düsseldorf (see VBB on Competition Law, Volume 2017, No. 4) which had found that a provision prohibiting online retailers from using price comparison sites violated Article 101 TFEU and could not benefit from the Vertical Restraints Block Exemption (the "VABER") as it was a hardcore restriction according to Article 4(c) of the VABER.

Asics' appeal to the Supreme Court challenged the decision of the Higher Regional Court not to grant Asics leave to appeal its decision (Nichtzulassungsbeschwerde). The Supreme Court, however, rejected Asics' appeal on the grounds that the Higher Regional Court decision did not raise any fundamental questions of law. In the Supreme Court's view, there was no need to clarify any open legal questions, including any questions under EU law that required a referral to the Court of Justice of the European Union (the "ECJ").

Asics had not appealed the finding of the Higher Regional Court that the prohibition against using price comparison sites fell under Article 101(1) TFEU. It argued, however, that the restriction should benefit from an exemption under the VABER. The Supreme Court rejected this argument and held that a total prohibition against using price comparison sites should be considered a prohibition against passive sales and therefore a blacklisted provision under Article 4(c) of the VABER. The Supreme Court's emphasis on the fact that Asics had imposed a total ban on the use of price comparison sites suggests that it might assess differently restrictions on the use of price comparison sites that are based on qualitative criteria.

The Supreme Court took note of the recent judgement of the ECJ in *Coty* (see VBB on Competition Law, Volume 2017, No. 12) in which the ECJ had found that a prohibition against using third party platforms, such as Amazon, as a sales channel could be objectively justified in the case of luxury products, and, even if the prohibition were considered a restriction of competition, it could benefit from the VABER because it did not amount to a restriction on passive sales to a particular customer group. The Supreme Court noted first that Coty concerned only luxury products and not "regular" branded products. Moreover, the Supreme Court found that the restrictions imposed by Asics were different from those considered by the ECJ in *Coty*, as Asics imposed a total ban on the use of price comparison sites and additional restraints, such as a prohibition against using the Asics trademark on third-party sites. In light of this, the Supreme Court concluded that the prohibition against the use of price comparison sites was a restriction on passive sales to customers. The Supreme Court did not address the finding of the ECJ in *Coty* that a prohibition against certain internet sales channels did not affect a particular customer group, which was a reason why such a prohibition did not amount to a passive sales restriction under Article 4 of the VABER.

This ruling, which is liable to be influential also outside of Germany, suggests a much stricter approach applies to prohibitions on the use of price comparison websites than to prohibitions on sales through third party platforms, even when the market share thresholds of the VABER are not exceeded. Furthermore, it does not appear that the additional restrictions (including restrictions on online advertising) imposed by Asics were necessarily essential to the finding in the case that a prohibition on the use of price comparison websites is a hardcore restriction. In the absence of, inter alia, any explanation as to why a prohibition on the use of price comparison websites should be considered to obviously prevent effective selling over the internet whereas a prohibition on the use of platforms does not, it can be questioned whether the ruling is consistent with *Coty*.

German Federal Cartel Office discontinues administrative proceedings concerning raw milk supply conditions of Germany's largest dairy

According to a press release dated 9 January 2018, the German Federal Cartel Office ("FCO") has terminated administrative proceedings concerning the raw milk supply conditions of Germany's largest dairy company, Deutsche Milchkontor ("DMK"). The proceedings were initiated as a sample case given the potential risk of market foreclosure of dairies entering the market or extending their activities resulting, inter alia, from the supply conditions agreed between milk farmers and DMK. The contract conditions in question included the widespread use of long-term exclusivity agreements, requiring farmers to offer their entire raw milk production to one dairy, which were only terminable on 24 months' notice.

In March 2017, the FCO published an interim report on its investigation in which it outlined its findings and proposed alternative ways to structure supply relationships. In its press release of 9 January 2018, the FCO states that market conditions have significantly changed in 2017 and 2018 and that, since the interim report was published, more farmers have been switching to other dairies and new contract models are being developed industry-wide.

The FCO also notes that, following its 2017 interim report, DMK changed its supply conditions and reduced the notice period from 24 to 12 months, which the FCO considers to be a step towards stimulating competition although it leaves open whether this will prove sufficient.

ROMANIA

Romanian Competition Authority fines car battery producer and eleven distributors for resale price maintenance

On 9 January 2018, the Romanian Competition Council ("RCC") imposed fines amounting to approximately € 731,492 on one Romanian car battery producer and its eleven distributors for infringing Romanian competition law by entering into anticompetitive agreements concerning the resale pricing of car batteries on the Romanian market. According to the RCC, the agreements entered into by car battery producer Rombat and its distributors (Chimszed Impex, Dova Com, Fado Trade, Fast Consignaţie, Genamag, Nelson, Romprioxim Impex, Rubin, Super-Sim, Tenet, and Zetas Batrom Impex) between 2008 and 2013 contained clauses fixing resale prices. Rombat received the highest fine of approximately € 657,310, followed by Tenet, which received a fine of approximately € 15,894. The producer and all its distributors admitted to participating in the infringement and received a 30% reduction in their fines.

STATE AID

– EUROPEAN UNION LEVEL –

ECJ reminds Commission that selectivity assessment requires comparison

On 20 December 2017, the Court of Justice of the European Union ("ECJ") issued its judgment in case C-70/16 P, *Comunidad Autónoma de Galicia and Retagal v Commission*. The ECJ annulled, on appeal, a Commission decision of 19 June 2013 ordering the recovery of state aid granted by Spain to operators of the terrestrial television platform.

According to the ECJ, the Commission decision was vitiated by a defective statement of reasons, in particular concerning the examination of the condition relating to the selectivity of the aid measure. The ECJ ruled that the Commission did not provide sufficient reasons to allow full judicial review of the question whether the situation of the operators benefiting from the measure is comparable with that of the operators excluded from it. According to the ECJ, a measure which benefits only one economic sector (*in casu* the broadcasting sector) or some of the undertakings in that sector (*in casu* broadcasting undertakings using terrestrial technology) is not necessarily selective. It is selective only if, within the context of a particular legal regime, it has the effect of conferring an advantage on certain undertakings over others in a different sector or the same sector, which are, in the light of the objective pursued by that regime, in a comparable factual and legal situation. Since the Commission did not make that assessment, the ECJ annulled the Commission's decision.

The requirement of making a comparison for the purpose of assessing selectivity is not new. However, this judgment is a good reminder that, even if the selectivity of a measure seems self-evident, the Commission should still demonstrate this by making that comparison.

General Court confirms inapplicability of private investor test to tax waiver granted by France to EDF

On 16 January 2018, the General Court of the European Union (the "General Court") issued its judgment in case T-747/15, *EDF v Commission*. The General Court upheld the Commission's decision of 22 July 2015 ordering France to recover € 1.37 billion in the context of state aid granted to Électricité de France ("EDF"). In particular, in the context of the restructuring of EDF's balance sheet and of its capital increase (within the framework of the opening up of the internal market in electricity), France had waived a tax claim corresponding to the corporation tax due from EDF.

Before the General Court, EDF argued that the Commission's recovery decision should be annulled because the Commission was not entitled to find that the private investor test was not applicable to the case at hand. According to EDF, since the aid was granted by France in its capacity as shareholder (and not in its capacity as public authority) the private investor test should be applied.

The General Court found that the measure at issue was not, as EDF argued, a measure recapitalising EDF taken by France in its capacity as shareholder, but rather a waiver to collect the applicable tax at the time of the requalification of the debt into capital contribution. Moreover, neither France nor EDF submitted evidence to unequivocally establish that the measure falls to be ascribed to the State acting as shareholder. Therefore, the General Court upheld the Commission's decision finding the private investor test inapplicable.

– OTHER DEVELOPMENTS –

EUROPEAN UNION: On 16 January 2018, the European Commission published its [2017 State Aid Scoreboard](). The scoreboard provides detailed information on the Member States' aid expenditure in 2016. It is based on expenditure reports by Member States and covers all existing aid measures to industries, services, agriculture and fisheries. One of the conclusions of the analysis is that, in 2016, Member States spent € 105.9 billion (*i.e.* 0.71% of GDP) on state aid, representing a 5.6% increase compared to 2015. This increase could be attributed to higher state aid for environmental protection, research and development, broadband and infrastructure projects. Aid to social support, agriculture and forestry sectors decreased in 2016. The scoreboard also shows that around 97% of new aid measures fell under the General Block Exemption Regulation and could therefore be disbursed more quickly.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– MEMBER STATE LEVEL –

BELGIUM

Brussels Court of Appeal clarifies obligation to provide statement of reasons regarding documents seized during dawn raids

On 13 December 2017, the Brussels Court of Appeal (the "Court") held that documents seized by the Belgian Competition Authority ("BCA") during an inspection had been legally included in the scope of the investigation as the BCA had provided a satisfactory statement of reasons following a court-mandated verification procedure.

In June 2011, the BCA inspected the premises of NV Distripaints and NV Novelta (the "Claimants") in the context of an antitrust investigation regarding an alleged abuse of dominance and cartel behaviour. As the Claimants disputed the relevance of some documents seized by the BCA, the documents concerned were put in a sealed envelope for later consideration. Two years later, the BCA lifted the seal and decided that a number of documents were within the scope of the investigation. The Claimants decided to challenge this decision before the Court. The appeals were based on: (i) the alleged illegality of the inspection; (ii) the alleged abuse of rights that resulted from the unnecessarily long time period between the inspection and the lifting of the seals; and (iii) the failure to state sufficient reasons to justify the inclusion of certain documents within the scope of the investigation.

The Court partially rejected the arguments of the Claimants: it confirmed the legality of the inspection and noted that the Claimants did not claim that they had suffered any injury following the long period of uncertainty between the inspection and the seal process. However, the Court did allow the appeal with regard to the third claim. It stated in its interim judgment of 26 November 2014 that the Claimants could not appropriately defend themselves against the brief standard statement of reasons issued by the BCA in order to justify the "in-scope" character of the seized documents.

The Court ordered the BCA to include the Claimants in the verification procedure, the purpose of which would be to have a meaningful discussion regarding the "in-scope" character of the documents. First, the BCA was asked to provide a satisfactory statement of reasons for the disputed documents. In response, the Claimants must be given the opportunity to challenge this statement of reasons. In the absence of a satisfactory reasoning, the documents must be considered "out-of-scope" and be removed from the investigation file. If the parties fail to reach a consensus, the Court would decide on the inclusion or exclusion of the documents concerned.

Since the Parties did not reach an agreement following the required verification procedure, the Court was asked by the Claimants in February 2015 to review the process with regard to certain documents. Due to the reform of the Court structure and the creation of the new Market Court, the case was only put into motion on 31 May 2017.

The Claimants raised two claims before the Court: (i) a claim for damages resulting from the unreasonably long period of uncertainty regarding the outcome of proceedings; and (ii) the rejection from the scope of the investigation of the documents for which the BCA's reasoning was insufficient.

The Claimants' claim for damages was based, firstly, on the long duration of the investigation in the period before the interim judgment of 26 November 2014 and, secondly, on the long period of time after that interim judgment. As to the first period, the Court stated that it had exhausted its jurisdiction by having already decided on the matter in the aforementioned interim judgment. With regard to the second period, the Court ruled that the Claimants could not claim damages for any uncertainty as they themselves had neglected to act by not requesting the Court to deal with the case prior to the hearing of 31 May 2017.

In their second claim, the Claimants argued that their rights to a fair trial had been violated in view of the contradictions in the original mandate of the BCA, identifying them both as victim as well as offender in abuse of dominance and other antitrust allegations.

In its judgment of 13 December 2017, the Court recalled the principles set forth by the General Court of the European Union (the "GC") in cases T-340/04 *France Télécom v. Commission* and T-289/11 *Deutsche Bahn and Others v. Commission* when reviewing the statement of reasons of the European Commission (the "Commission") accompanying seized documents. The GC established in these judgments that its review of the Commission's statement of reasons is to "ensure that the principle of protection against arbitrary and disproportionate interventions and the rights of defence are respected [...], while bearing in mind the need for the Commission to retain a certain leeway, without which the provisions of Regulation No. 1/2003 would be rendered redundant [...]."

The Court applied these principles in its review of the BCA's statement of reasons. The Court noted that the reasoning provided by the BCA for each individual document did not appear to be, *prima facie*, unacceptable, unreasonable or illegal in the context of its limited review. It concluded that the principle of protection against arbitrary and disproportionate interventions and the rights of defence were respected and, therefore, the documents seized could be included in the investigation.

In short, the Court considered that the BCA had fulfilled its obligation to provide a satisfactory statement of reasons justifying the inclusion of certain documents within the scope of the investigation where (i) it had given an individual reasoning for each document; and (ii) this reasoning did not appear to be, *prima facie*, unacceptable, unreasonable or illegal, or in violation of the principle of protection against arbitrary and disproportionate interventions or the rights of defence.

PRIVATE ENFORCEMENT

– EUROPEAN UNION LEVEL –

Commission reports on implementation of collective redress recommendations at national level

On 26 January 2018, the European Commission (the "Commission") published a report on the implementation of collective redress mechanisms in EU Member States (the "Report"). The Report is the Commission's opportunity to comprehensively review the implementation of its 2013 Recommendation on common principles for injunctive and compensatory collective redress mechanisms for breaches of EU law (the "Recommendation").

As a non-binding instrument, the Recommendation set out basic principles for national collective redress mechanisms while taking into account the many different legal systems present throughout the EU. The Commission also sought to achieve a balance between the goal of ensuring effective access to justice and the need to prevent abusive collective actions.

The Report canvasses the extent to which those principles and recommendations have been incorporated into national law by Member States. It finds broad inconsistencies and significant differences in national practice across the EU. In its conclusion, it commits to continuous monitoring and a follow-up in the forthcoming "New Deal for Consumers", a proposal to reform EU consumer rights law.

The Recommendation applies to all breaches of rights conferred on a person by EU law, although redress is mandatory only in the field of consumer rights. Directive 2009/22/EC on injunctions for the protection of consumers' interests (the "Injunctions Directive") requires that an injunctions procedure for the protection of collective consumers' interests be available in all Member States.

In competition law, Directive 2014/104 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (the "Antitrust Damages Directive" – see VBB on Competition Law, Volume 2014, No. 11) provides that a finding of an infringement in a final decision of a national competition authority or by a review court is to be considered irrefutable evidence in follow-on actions for damages in that Member State. A finding by the competition authority of another Member State is to be considered as prima facie evidence of an infringement. The Antitrust Damages Directive applies to collective actions where they exist, but does not require Member States to introduce collective actions into their legal systems.

Against this context, the Report finds that collective redress mechanisms are not available consistently across the EU and safeguards against abuse vary from one Member State to another. Nine Member States do not provide any mechanism to claim collective compensation in case of harm. Of the 19 Member States in which compensatory collective redress is available, over half limit the redress to specific sectors, mainly consumer complaints. In other Member States, conditions are such that it is too risky, costly, difficult or time-consuming to avail of the formal right to collective action. The Recommendation has led to new legislation being adopted in only four Member States (Belgium, France, Lithuania and the UK).

Other areas where little progress was found include rules on third party financing of collective actions, harmonisation of procedures relating to the awarding of costs and broader grounds for follow-on actions. The variety of national practice also makes it difficult to coordinate cross-border collective actions.

Despite these mixed results, the Commission has said that it intends to continue its efforts in promoting the Recommendation. Further reviews and analysis will be undertaken, and the forthcoming New Deal for Consumers is likely to be of interest also.

– MEMBER STATE LEVEL –

GERMANY

Regional Court of Hanover grants cartel damages against MAN

On 18 December 2017, the Regional Court of Hanover (the "Court") ruled that the city of Göttingen is in principle entitled to cartel damages against truckmaker MAN, the amount of which is to be determined in a subsequent judgment. The claim concerns a follow-on action to an infringement decision of the European Commission dating from July 2016, establishing the participation of MAN, Volvo/Renault, Daimler, Iveco and DAF in a 14-year price-fixing cartel in the truck sector (see VBB on Competition Law Volume 2016, No. 7).

The city of Göttingen claimed damages for 13 vehicle purchases for its departments of firefighting and waste collection and sought damages of approximately € 335,000 plus interest. The Court rejected part of the claim for purchases which fell outside the period of MAN's involvement in the infringement.

The Court then examined the validity of a lump sum damages clause in the standard terms of the purchase agreements providing for compensation of 15% of the total sales volume. Similarly to a judgment of the Thuringian Higher Regional Court concerning the rail construction sector (see VBB on Competition Law Volume 2017, No. 6), the Court decided that such a standard clause is valid unless: (i) the other party to the contract is not expressly allowed to show that a loss has either not occurred or is substantially lower than the lump sum or (ii) the lump sum exceeds the loss expected under normal circumstances. In the present case, the clause expressly allows MAN to demonstrate that the actual loss is lower and the Court took account of the fact that economic studies showed that cartel damages amount to a median value of 18%.

MAN's passing-on defence, claiming that ultimately cartelised prices were borne by the taxpayers and not by the city of Göttingen, was dismissed by the Court for lack of a secondary market (the vehicles were not resold to the taxpayers). The Court also took a stand on the debated issue concerning the application of a provision which suspends the statute of limitations during cartel investigations of the EU Commission or a competition authority of a Member State, siding with previous judgments which held that the provision is applicable to claims which came into existence before the provision became effective (see VBB on Competition Law Volume 2017, No. 6 and 9; Volume 2015, No. 4).

More judgments on follow-on damages claims in the truck sector are to be expected. According to press releases, a number of other actions have already been filed: (1) a claim by financial right, a debt collection service provider, of assigned rights from over 3,200 companies before the Higher Regional Court Munich exceeding € 500 million, (2) a claim by ELVIS, the European Freight Association for International Transporters, of assigned rights from more than 300 companies before the Regional Court Stuttgart for € 176 million, (3) a claim by the German railroad company Deutsche Bahn, to which the German Army and 40 companies assigned their rights concerning the purchase of 35,000 trucks for a value of approximately € 2 billion before the Higher Regional Court Munich and (4) a class action by CDC (Cartel Damage Claims) representing over 400 companies and concerning a purchase volume of 50,000 trucks before a Court in Amsterdam.

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VAN BAEL & BELLIS

Chaussée de La Hulpe 166
Terhulpsesteenweg
B-1170 Brussels
Belgium

Phone: +32 (0)2 647 73 50
Fax: +32 (0)2 640 64 99

vbb@vbb.com
www.vbb.com