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JURISDICTIONS COVERED IN THIS ISSUE

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| MERGER CONTROL

– EUROPEAN UNION LEVEL –

EU Commission prohibits London Stock Exchange / Deutsche Börse merger

On 29 March 2017, the Commission prohibited the proposed merger between the London Stock Exchange (LSE) and Deutsche Börse, almost one year after the parties first announced the deal, and on the day that the United Kingdom served notice of its intention to leave the European Union.

The transaction would have combined the stock exchanges of Germany, Italy and the United Kingdom, as well as several of the largest European clearing houses. Announcing the merger prohibition, EU Competition Commissioner, Margrethe Vestager, stated that the deal would have significantly reduced competition by creating a de facto monopoly in the clearing of fixed income instruments (i.e., bonds and repurchase agreements known as repos). In addition, the merger would have foreclosed competitors of the merged entity's Clearstream business operating downstream of fixed income clearing in the markets for settlement, custody and collateral management, where Clearstream's competitors would depend on transaction feeds from the merged entity's fixed income clearing houses.

During the merger, LSE submitted a proposal consisting of the sale of its Paris-based clearing house, LCH Clearnet SA, to Euronext for €510 million. The Commission took the view that this divestment would have resolved horizontal concerns it had earlier identified in respect of the trading and clearing of certain single stock equity derivatives, but that it would not effectively remedy the competition concerns stemming from the creation of a de facto monopoly in fixed income clearing. This was because LCH Clearnet SA would have been dependent on trading feeds from LSE's MTS business, an Italian fixed-income electronic trading platform for bond and repo markets, with the result that the Commission could not determine if LCH Clearnet SA would be a viable competitor in fixed income clearing. Although the merging parties proposed supplementing the remedy with what the Commission described as a complex set of behavioural measures, the Commission insisted that LSE fully divest its stake in MTS, which it described as a "comparatively small asset" in the context of the size of the merging parties. This additional divestment requirement was publicly refused by LSE. Accordingly, the Commission concluded that the transaction must be prohibited.

LSE/Deutsche Börse is the 26th Commission prohibition and the first issued since May 2016, when it prohibited *Three/O2* (see VBB on Competition Law, Volume 2016, No. 5). Prior to that, the Commission's most recent prohibitions occurred in *UPS/TNT Express* and *Ryanair/Aer Lingus III* in 2013. Previously, the Commission also blocked a proposed merger between Deutsche Börse and NYSE Euronext in 2012.

General Court annuls Commission prohibition in UPS/TNT

On 7 March 2017, the General Court ("GC") annulled the European Commission's decision to prohibit UPS' acquisition of TNT Express under the EU Merger Regulation.

By way of background, UPS notified the acquisition of TNT Express to the Commission in June 2012. Following an in-depth Phase II investigation, the Commission prohibited the transaction on 30 January 2013 (see VBB on Competition Law, Volume 2013, No. 1). UPS subsequently appealed that decision to the GC.

In its decision, the GC found that the Commission had failed to properly communicate the final version of its econometric analysis to UPS before adopting its prohibition decision. The GC concluded that failure by the Commission to give UPS the opportunity to comment on the final econometric analysis amounted to a breach of its rights of defence.

The decision is noteworthy for a number of reasons. First, the decision marks the first time the EU Courts have annulled a merger decision of the Commission since 2002, when three separate important annulment decisions were issued in *Airtours/First Choice*, *Schneider/Legrand* and *Tetra Laval/Sidel*. Second, the GC reinforces the general principle of EU law (as enshrined in the Charter of Fundamental Rights of the EU) that merging parties have the right to a fair hearing in merger proceedings before the Commission.

The practical consequences of the ruling for the merging parties will, however, be limited because TNT was acquired by FedEx in 2016.

– MEMBER STATE LEVEL –

FRANCE

French Competition Authority fines Altice and SFR € 40 million for breaching commitments on fibre optic rollout

On 9 March 2017, the French Competition Authority ("FCA") fined Altice and SFR Group € 40 million for violating commitments entered into with the FCA at the conclusion of its review of the Altice/SFR merger in October 2014.

By way of background, the commitments required Altice/SFR to honour an existing contract (the so-called "Faber" contract) with co-investors, including Orange and Bouygues Telecom, by which Altice/SFR would continue to rollout fibre optic networks in high-density areas in France. The commitments prevented Altice/SFR from suspending or delaying completion of fibre optic connections and required Altice/SFR to meet an agreed timetable for the connections. The FCA was concerned that Altice/SFR would harm competition if it delayed installation of the fibre networks.

In its recent decision, the FCA found that Altice/SFR failed to honour its commitments by connecting fewer fibre connections than required. The FCA estimated that over half of the planned connections (58%) were not carried out. The FCA held that the failure of Altice/SFR to implement the conditions imposed by the FCA during its 2014 merger review adversely affected the development of high-speed internet and weakened the position of Altice/SFR's competitors in France. Accordingly, the FCA imposed a € 40 million fine on Altice/SFR and issued a number of injunctions to require it to perform the remaining connections within twelve months or face further penalties.

This is the third fine imposed by the FCA on Altice/SFR since its 2014 merger. A fine of € 15 million for non-compliance with merger commitments was imposed in April 2016 (see VBB on Competition Law, Volume 2016, No.4) and a fine of € 80 million for gun-jumping was imposed in November 2016 (see VBB on Competition Law, Volume 2016, No. 11).

UNITED KINGDOM

UK Tribunal upholds CMA's decision to prohibit ICE/Trayport merger

On 6 March 2017, the UK Competition Appeal Tribunal ("CAT") upheld, in part, the decision of the UK's Competition and Markets Authority ("CMA") to prohibit the ICE/Trayport merger (see VBB on Competition Law, 2016, Volume 10).

In its decision, the CMA prohibited the ICE/Trayport merger on the grounds that the merger would give rise to a substantial lessening of competition in the market for the trading and clearing of European utilities because ICE's competitors depend on Trayport's platform to effectively compete. As the UK has a voluntary merger filing regime that does not prevent the parties from closing their transaction until UK merger clearance has been obtained (in contrast with the suspensive EU merger control regime), ICE and Trayport had already been able to implement their merger before the CMA started its investigation. Therefore, the CMA ordered ICE to undo the transaction by completely divesting Trayport through a sales process. Additionally, the CMA ordered ICE to undo a second agreement, entered into by the merging parties after the CMA had opened a full investigation, to enable ICE to distribute a range of ICE trading products on Trayport's platform. In November 2016, ICE appealed both of the CMA's decisions.

The CAT dismissed ICE's appeal against the CMA's decision to prohibit the merger and order the divestment of Trayport. However, the CAT found that the CMA did not provide sufficient justification to order the termination of the second agreement. Therefore, the CAT annulled this requirement and remitted this aspect of the case to the CMA.

This is the first case in which the UK's CMA prohibited a vertical merger since it was established following the amalgamation of the OFT and CC in April 2014.

| ABUSE OF DOMINANT POSITION

– EUROPEAN UNION LEVEL –

European Commission launches market test on Gazprom's commitments relating to the Central and Eastern European gas markets

On 13 March 2017, the European Commission launched a market test on commitments submitted by Gazprom aimed at addressing concerns over its alleged abuse of dominance on Central and Eastern European gas supply markets.

In April 2015, the European Commission announced that it had sent a Statement of Objections to Gazprom alleging that it was abusing its dominant position as the dominant gas supplier in eight Member States (Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland and Slovakia). Gazprom holds shares "well above 50% and in some cases up to 100%" on these markets (see VBB on Competition Law, Volume 2015, No. 4).

Specifically, the Commission expressed concerns that Gazprom may be abusing this dominant position by: (i) pursuing an overall strategy to partition Central and Eastern European gas markets; (ii) charging unfair prices in five Member States; and (iii) making the supply of gas conditional on obtaining unrelated commitments from wholesalers concerning gas transport infrastructure.

In the Commission's view, Gazprom's commitments address each of these three concerns. First, to address its alleged strategy to partition markets, Gazprom has proposed to remove all contractual provisions that either prevent or make it less attractive for customers to resell purchased gas across borders. It also commits not to reintroduce such clauses in the future.

In addition, Gazprom has proposed to offer customers based in Hungary, Poland and Slovakia the possibility of diverting the delivery of all or part of their contracted gas to entry points into Bulgaria and the Baltic States in exchange for a fixed and transparent service fee. This would allow customers to access new markets, despite the lack of interconnecting infrastructure between states.

Gazprom also commits to make changes to its contracts on the monitoring and metering of gas in Bulgaria, so that the Bulgarian market operator can exercise control over the cross-border flow of gas. This is intended to place the market operator in a better position to facilitate interconnection agreements between Bulgaria and its neighbours, especially Greece.

Second, to address the Commission's claims that Gazprom is charging unfair prices in five Member States (Bulgaria, Estonia, Latvia, Lithuania and Poland), Gazprom agrees to make changes to its contractual price revision clauses. These changes would give customers in these states a contractual right to request a change to their gas prices when they diverge from competitive price benchmarks. Such benchmarks would be determined on the basis of competitive continental European prices. Parties would also be able to refer to these prices when reviewing the contractual price. Gazprom also commits to increase the frequency and speed of price revisions and to introduce the same price review provisions in future contracts.

Third, Gazprom has in part responded to claims that it leveraged its dominant position by making the supply of gas to wholesalers dependent on: (a) the participation of Bulgarian wholesalers in the South Stream pipeline project, a large scale infrastructure project of Gazprom; and (b) maintaining Gazprom's control over investment decisions relating to the Yamal pipeline, an important transit pipeline in Poland.

In response to the first concern, Gazprom commits not to seek damages from its Bulgarian partners following the termination of the South Stream pipeline project. In contrast, as regards the Yamal Pipeline, the Commission has announced that the antitrust procedure cannot change the situation due to the effect of a governmental agreement between Poland and Russia.

To avoid such situations arising in future, the Commission has proposed to make intergovernmental agreements in the field of energy subject to the prior scrutiny of the Commission. It would therefore have the opportunity to flag potential concerns before international agreements are concluded. The proposal was recently approved by the Parliament and is currently awaiting a Council vote.

Interested stakeholders will now have until 4 May 2017 to submit their views on the proposed commitments. In light of the comments received, the Commission will then take a final position on whether the commitments should be formally adopted and made legally binding.

Commission publishes summary of decision terminating E.ON's commitments concerning the German gas supply market

On 22 March 2017, the Official Journal published a summary of a Commission decision terminating commitments previously adopted to address concerns that E.ON was abusing its dominant position on the German gas market by refusing to give competitors access to its gas transmission network. In 2010 the Commission alleged that E.ON's practice of booking, on a long term basis, almost the entire capacity of the pipelines at key entry points in its gas network amounted to a refusal to give access to an essential facility. In response, E.ON committed to: (i) reduce its share of bookings below a certain threshold; and (ii) once having achieved this, stay below this threshold for a further 10 years (*i.e.* until 1 April 2021). (See VBB on Competition law, Volume 2010, No. 1 and No. 5).

In June 2016, E.ON requested to have the commitments terminated on grounds that there had been a material change in the facts on which the 2010 commitment decision was based. The Commission agreed to the request in July 2016. In doing so, it noted that there had been important changes to the definition of the relevant product and geographic market. More importantly, E.ON had divested itself of ownership and control of the gas transport infrastructure and its market shares had dropped considerably. This suggested that E.ON no longer held a dominant position. It was also significant that E.ON did not operate close to the booking threshold and over time went far below it.

– MEMBER STATE LEVEL –

FRANCE

French Competition Authority fines ENGIE € 100 million for abusing its dominant position on the French retail gas supply market

On 22 March 2017, the French Competition Authority ("FCA") fined ENGIE (formerly known as GDF-Suez) € 100 million for abusing its dominant position on the retail gas supply market by using the customer database and business infrastructure it inherited from its former monopoly status in order to promote its market-based gas and electricity contracts.

ENGIE is the former monopoly holder on the French gas supply market where it continues to hold a dominant position. Even following market diversification, ENGIE carries on a public utility function of selling contracts at a state regulated price to certain eligible customers. In parallel, it offers market-based gas and electricity contracts in competition with new market entrants. ENGIE has only a limited share of the separate, though related, electricity supply market.

In its decision, the FCA found that ENGIE abused its dominant position on the retail gas supply market for residential and small non-residential customers by employing the resources it held as a result of its former state monopoly to bolster its separate competitive activity of selling gas and electricity supply contracts at market price. Specifically, ENGIE used historical information from a database, which listed customers eligible for state regulated prices, to sell its competitive contracts to private individuals and small business customers. This database gathered together almost the totality of French natural gas customers. In addition, ENGIE used the business structure developed to carry out its public utility function in order to contact consumers and offer them market-based contracts for gas and electricity. Both the database and the business structure were impossible for competitors to reproduce at a reasonable cost or within a reasonable time, according to the FCA. Additionally, the FCA found that ENGIE used a misleading sales tactic by telling consumers that the security of its gas supply was superior to that of its competitors.

ENGIE did not contest the findings of the FCA and requested the matter be dealt with under the settlement procedure. In its decision the FCA noted that the opening of the natural gas market to competition created a situation in which ENGIE may not have been immediately aware of its obligations under competition law given its former monopoly status. According to the FCA, the resulting uncertainty could be regarded as mitigating the gravity of some of the findings. The settlement procedure led to a fine amounting to € 100 million. It also confirmed the interim measures taken by the FCA on 9 September 2014 which imposed on ENGIE an obligation to give its competitors access to part of its customer database.

GERMANY

German Federal Court of Justice rules on rental fees for broad band cables conduits

In a judgment of 24 January 2017, the German Federal Court of Justice ("the Court") ruled on whether Telekom Deutschland had abused its dominant position on the market for access to cable conduits by way of excessive pricing.

The claimant in this case, a major operator of a broadband cable network, acquired a subsidiary of Telekom Deutschland, the defendant. This included the assets of the subsidiary consisting mainly of broadband cable networks. The cable conduits, which enclose the broadband cables, remained the property of the defendant. The defendant agreed to rent out the cable conduits to the claimant according to a rental agreement that the parties negotiated in connection with the transaction. The claimant then argued that the rental fee for the cable conduits was too high and constituted an abuse of the defendant's dominant position in the market for access to cable conduits for broad band cables. The claimant sought the repayment of part of the rental fees paid in the past as well as a declaration that the claimant was not obliged to pay more than a certain amount for the rental of the conduits.

The Higher Regional Court of Frankfurt, at previous instance, found that the defendant's pricing practices did not amount to an abuse of dominance, since the rental agreement was part of the claimant's acquisition of Telekom Deutschland's subsidiary. According to the Higher Regional Court of Frankfurt, the acquisition could not be split into a sales and a rental part. Instead, the rental fee was to seen as part of the consideration that the claimant had to provide for the entire transaction (see VBB on Competition Law, Volume 2015, No. 2).

In its recent judgment, the Federal Court of Justice ruled that the Higher Regional Court Frankfurt was correct in finding that there was a link between the sales price of the subsidiary and the rental fee for the cable conduits in the contractual agreements of the parties. It also agreed that this link justified the assumption that the claimant was bound by the conditions of the contracts that were negotiated under competitive conditions. However, the Court held that, contrary to what was found by the court at previous instance, the claimant was not permanently prevented from demanding to have the contractually agreed upon rental fees adapted on the basis that the rental fee was higher than the fee that the defendant would be able to charge as a result of effective competition. According to the Court, from the point in time when the claimant was contractually authorised to demand amendments to the contracts and had actually done so, it was no longer sufficient to point to the fact that the amount of the rental fee was initially contractually agreed upon in order to exclude a claim for damages due to an abuse of the defendant's dominant position.

The Court therefore referred the matter back to the Higher Regional Court of Frankfurt, which will have to assess whether the defendant holds a dominant position in the respective regional markets for the access to cable conduits for broad band cables and whether the defendant charged excessively high prices, taking as a reference point the point in time when the claimant first had the right to ask for a decrease of the rental fee.

German FCO concludes investigation into district heating markets

The German Federal Cartel Office ("FCO") has concluded proceedings initiated due to concerns of abusive pricing practices in the district heating markets by accepting commitments offered by the district heating suppliers.

In 2013, the FCO initiated proceedings against seven companies and industry associations in more than 20 different supply areas. Part of the proceedings were already concluded in 2015, when the FCO accepted commitments from Leipzig's municipal utility to decrease district heating prices by an amount of € 8 million per year over a period of five years.

With respect to the remaining proceedings, the FCO made the provisional finding that the district heating suppliers were dominant in the local markets for the supply of heat to consumers and had abused their dominant position by charging excessive prices for heat between 2010 and 2012. According to the FCO, it is particularly problematic that consumers in this market usually do not have the option to switch to an alternative supplier, while switching to a different type of heating is either impossible or a lengthy and expensive process. The FCO agreed to terminate proceedings on the basis of commitments offered by the investigated district heating suppliers. The commitments entail that affected customers will be either compensated or will benefit from future price decreases amounting to approximately € 55 million. The FCO's acceptance of the suppliers' commitments concludes the remaining pending proceedings.

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 one of these cases.

Summary of Significant Case Developments

European Commission imposes fines of € 155 million in Thermal Systems cartel settlement

On 8 March 2017, the European Commission announced that it had imposed fines under the cartel settlement procedure totalling € 155 million on six companies that supplied air conditioning and engine cooling components to car manufacturers. The companies involved, Behr, Calsonic, Denso, Panasonic, Sanden and Valeo, acknowledged they had taken part in one or more of four infringements in which they had agreed to fix prices, allocate markets and exchange commercially sensitive information for the supply of climate control components and engine cooling components to certain car manufacturers in the EEA between 2004 and 2009.

The products concerned are climate control components, which include heating ventilation air conditioning units, compressors and e-compressors for electric and hybrid cars. Engine cooling modules, such as radiators and fans, were also affected by the cartel.

The infringements were brought to the attention of the Commission by Denso and Panasonic, which received full immunity from fines for one or more infringements under the Leniency Notice. Denso informed the Commission of the existence of three cartels, thereby avoiding total fines of around € 267 million. Panasonic revealed the existence to the Commission of one cartel, and avoided a fine of € 200,000. The Commission also granted to all the undertakings fine reductions ranging from 15% to 50% for their cooperation under the Leniency Notice. A 10% fine reduction was also given under the Settlement Notice because the companies concerned acknowledged their participation in the infringements and their liability for them.

European Commission re-adopts decision fining air cargo carriers total of € 776 million for price fixing cartel

On 17 March 2017, the European Commission re-adopted a cartel decision against 11 air cargo carriers and imposed fines totalling over € 776 million for their involvement in a price-fixing cartel in the airfreight services market covering flights from, to and within the EEA between December 1999 and February 2006. The companies involved are Air Canada, Air France-KLM, British Airways, Cargolux, Cathay Pacific Airways, Japan Airlines, LAN Chile, Martinair, Scandinavian Airlines and Singapore Airlines. Lufthansa, and its subsidiary Swiss International Air Lines, received full immunity under the Leniency Notice.

The Commission's original 2010 decision was annulled by the General Court on procedural grounds in December 2015 (see VBB Competition Law, Volume 2016, No. 1). While the decision's recitals appeared to describe a single and continuous infringement of the EU competition rules in which all of the carriers had participated, the operative part of the decision identified four separate infringements. The Commission has now re-adopted the decision with the intention of remedying the procedural errors identified by General Court. The anticompetitive behaviour identified in the original decision remains unchanged, as well as the level of all the fines imposed for all the companies involved, except for Martinair. The fine of Martinair was reduced to reflect the fact that its turnover in 2016 was significantly lower than in 2009, when the original decision was adopted.

The Commission imposed fines ranging from around € 8 million to € 182 million on the carriers concerned, except for Lufthansa and its subsidiaries, which received immunity under the 2002 Leniency Notice.

Court of Justice dismisses appeal in TV and Computer Monitor Tubes cartel case

On 9 March 2017, the Court of Justice of the European Union ("ECJ") dismissed in its entirety an appeal lodged by Samsung against the judgment of the General Court ("GC") in connection with the *TV and Computer Monitor Tubes* cartel case (Case C-615/15, Samsung).

The ECJ confirmed the Commission's finding that Samsung had taken part in both parts of the cartel, which related to colour picture tubes (CPT) and colour display tubes (CDT) for TV and computer monitors. With respect to the CPT cartel, the ECJ found that the GC was entitled to reject Samsung's argument to exclude certain sales of CPT products from the relevant value of sales on the grounds that all CPTs were the subject of collusive contacts which amounted to a single and continuous infringement. The ECJ also ruled that the GC did not err in law in applying the principle of equal treatment in relation to the end date of the infringement. In this regard, the ECJ held that an undertaking on which a fine has been imposed for its participation in a cartel cannot request the annulment or reduction of that fine on the ground that another participant in the same cartel was not penalised in respect of a part, or all, of its participation in that cartel. The ECJ also found that the GC did not err in confirming the end date of Samsung's participation in the infringement (see Section 1.2). With respect to the CDT cartel, the ECJ found that the GC correctly considered that, in order to determine the amount of sales within the EEA, it was necessary to take account of all deliveries made in the EEA, even if those sales were negotiated outside the EEA.

Analysis of Important Substantive and Procedural Developments

TV and Computer Monitor Tubes cartel – agreement requires more than one independent undertaking

As a matter of EU law, the finding of an agreement or concerted practice under Article 101 TFEU requires the involvement of at least two independent parties acting in concert. This requirement excludes purely unilateral action from the scope of Article 101 TFEU.

In its appeal before the Court of Justice of the European Union ("ECJ") in the *TV and Computer Monitor Tubes* case, Samsung argued that the General Court ("GC") had breached the principle of equal treatment as regards the end date of Samsung's participation in the colour picture tubes ("CPT") cartel. Samsung challenged the Commission's conclusion, which the GC had confirmed, that the end date of its participation in the CPT cartel was found to be after the dates selected for the other participants of the cartel as it entailed that, during a certain period, Samsung had participated in the CPT cartel alone.

By way of background, the Commission had set the end dates of the other participating undertakings as follows:

- 12 June 2006 for Matsushita Toshiba Picture Display Co. Ltd and its parent companies.

- 30 January 2006 for LPD, a joint venture established by LG Electronics and Philips Electronics. LPD was not an addressee of the Contested Decision, but its parent companies were. The Commission had set the end date for the involvement of LPD's parent companies on the day LPD was declared bankrupt and placed under the control of a court-appointed administrator. From that date, the Commission considered that the parent companies no longer exercised decisive influence over the joint venture.

- On 15 November 2006 for Samsung. Samsung had acknowledged it had engaged in anticompetitive contacts until that date.

According to Samsung, it could not be held liable for participating in the CPT cartel for the period between 13 June 2006 and 15 November 2006, since that would imply that it had participated in the cartel alone during that period.

In response to this argument, the ECJ found that Samsung had not established that all the other participants in the CPT cartel had withdrawn from the cartel prior to 15 November 2016 and that, as a result, Samsung's participation in the infringement had ended. On the contrary, Samsung had submitted that other undertakings, in particular LPD, had participated in the cartel until 15 November 2006. Therefore, the ECJ confirmed that, until 15 November 2016, there were at least two undertakings – namely Samsung and LPD – which participated in the CPT cartel. According to the ECJ, the fact that the Commission chose not to include LPD in the proceedings was considered irrelevant, since it did not mean that LPD did not continue to participate in the cartel until 15 November 2016.

– MEMBER STATE LEVEL –

SPAIN

Spanish Competition Authority fines 13 concrete companies for anticompetitive behaviour

On 3 March 2017, the Spanish Competition Authority imposed fines totalling € 6.12 million on thirteen companies and on one of their directors for their involvement in a price-fixing and bid-rigging cartel which lasted fifteen years on the concrete market in the Asturias region. The regulator found the infringing conduct occurred in the context of meetings organised in an industry association.

Spanish Competition Authority fines several rail companies for blocking rail sector liberalisation

On 6 March 2017, the Spanish Competition Authority imposed fines totalling € 75.6 million on several rail companies, including Renfe and Deutsche Bahn, for allegedly concluding agreements and engaging in concerted practices, in breach of Article 101 TFEU. According to the Authority, the arrangements covered 80% of the market for rail transport and the participating companies maintained the market position they had before the liberalisation of the sector. Additionally, the Renfe group was fined for abusing its dominant position by setting discriminatory conditions against other companies, in breach of Article 102 TFEU.

Spanish Competition Authority fines transport companies for price-fixing practices

On 15 March 2017, the Spanish Competition Authority sanctioned a cartel between 34 transport companies and one association (*Federación Empresarial Balear de Transporte*), which affected several segments of the passenger road transport market in the Balearic Islands region. The regulator fined the companies for their involvement in three different infringements in the sector which covered a twelve-year period. Specifically, all the undertakings were fined a total of € 3.16 million for their involvement in price-fixing and bid-rigging practices in relation to school transport; eight of the companies were fined a total of € 5.98 million for their participation in a cartel in relation to the occasional transport of passengers, and the association involved was fined € 20,000 for issuing recommended prices to its members.

| VERTICAL AGREEMENTS

– MEMBER STATE LEVEL –

BELGIUM

Belgian Competitino Authority fines yeast producer € 5.489 million for resale price maintenance and abusive behaviour

On 22 March 2017, the Belgian Competition Authority ("BCA") imposed a fine amounting to € 5,489,000 on leading yeast producer Algist Bruggeman NV ("AB"), and three parent companies, for several infringements of Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU") and their counterparts under Belgian Law, Articles IV.1 and IV.2 of the Code of Economic Law ("CEL").

This decision is the result of a settlement between the BCA and AB. In exchange for a 10% fine reduction and a shortened procedure, AB acknowledged that, from January 2008 to June 2013, it had engaged in, among other practices, resale price maintenance contrary to Article 101 TFEU and Article IV.1 CEL and that it had had abused its dominant position by engaging in various types of conduct liable to foreclose competitors contrary to Article 102 TFEU and Article IV.2 CEL.

Resale price maintenance. According to the decision, AB fixed the price that its distributors could charge for the resale of compressed fresh bakers' yeast to artisanal and semi artisanal bakeries. Distributors could not deviate from AB's prices and had to ask for AB's prior approval should they wish to grant their customers a discount in individual cases. AB, in turn, only consented to a discount if a customer was considering switching to competing products. Additionally, AB itself calculated the level of such a discount.

Customer allocation. AB further engaged in customer allocation at the distributor level, including through the granting or withholding of discounts to distributors aimed at achieving the desired allocation.

Purchase obligations. AB concluded long-term purchasing agreements with bakeries. These included non-compete clauses applicable to all kinds of yeasts. AB also tied bakeries through the financial terms it applied to the acquisition of yeast dosing installations that it linked to the sale of, specifically, stabilised liquid bakers' yeast.

Discounts and other abusive conduct. The BCA found that AB abused its dominant position on the market for the supply of fresh bakers' yeast by offering individualised exclusivity and loyalty-inducing retroactive discounts, aimed at foreclosing its competitors. AB also denigrated the products of its competitors by communicating to distributors and bakeries the results of incomplete internal analysis, which created uncertainty as to the quality of AB competitors' yeast and which did not have official support. AB also caused its distributors to object to their inclusion in the list of distributors published by AB's competitor Basic Bakery, even though their inclusion was factually correct.

GERMANY

Regional Court of Cologne rules that best price clauses are block exempted

In a judgment of 16 February 2017, the Regional Court of Cologne (the "Court") ruled that the best price clauses of an online hotel booking platform are exempted by the Vertical Agreements Block Exemption Regulation.

The claimant in this case, a hotel association, claimed that the best price clause of the defendant, an online hotel booking platform, violated competition law. By way of background, the German Federal Cartel Office ("FCO") had initiated proceedings in 2015 against the defendant on the basis that the obligations it imposed on hotels not to offer better prices or conditions on other online hotel booking platforms or on their own websites ("wide best price clauses") may violate competition law. These proceedings are currently pending.

After the proceedings were initiated by the FCO, the defendant changed its contractual conditions so as to permit hotels to offer lower rates on other online hotel booking platforms, but not on the hotels' own websites (*i.e.*, it adopted "narrow best price clauses"). Some hotels proceeded to offer lower rates and better conditions on other booking platforms. Subsequently, the defendant restricted the visibility of the profiles of those hotels, to ensure that the hotels were listed below other hotels and that photos or customer reviews were not displayed for those hotels. The defendant did this, it claimed, because the hotels' offers are less attractive if they do not offer the best prices, or conditions, on the defendant's hotel booking platform. The claimant brought an action before the Court arguing that, by presenting the hotels in such a disadvantageous manner on its online hotel booking platform, the defendant was attempting to enforce a wide best price clause. The claimant submitted that such best price clauses were illegal based upon the previous decisions of the FCO in 2013 and 2015, according to which the best price clauses of HRS and Booking.com violated competition law (see VBB on Competition Law, Volume 2014, No. 3 and VBB on Competition Law, Volume 2016, No. 1).

The Regional Court of Cologne considered that the defendant's best price clauses are a restriction of competition under Section 1 of the Act against Restraints of Competition ("GWB") and Article 101 of the Treaty on the Functioning of the European Union ("TFEU"). However, the Court found that the defendant's best price clauses are exempted by the Vertical Agreements Block Exemption Regulation, since the defendant has a market share of only 10 to 15 % (*i.e.*, under the 30% threshold applied by the Regulation). The Court held that best price clauses do not constitute hardcore restrictions in the sense of the Vertical Agreements Block Exemption Regulation. In particular, the Court found that a best price clause does not fall within the scope of Article 4 (a) of the Vertical Agreements Block Exemption Regulation, as it does not restrict the hotels' ability to determine their sales prices but rather, instead, ensures that the online hotel booking platform is treated equally to the hotels' own and /or other distribution channels.

The Court's position diverges from the views expressed by the FCO in its HRS decision in 2013. In that decision, the FCO did not make a final decision on whether the best price clause at issue was a hardcore restriction, since, owing to the high market share of HRS, the clause could not be exempted by the Vertical Agreements Block Exemption Regulation. However, the FCO commented that the competitive effect of a best price clause is comparable to that of a hardcore pricing restriction pursuant to Article 4 (a) of the Vertical Agreements Block Exemption Regulation. According to the FCO's reasoning, Article 4 (a) would be interpreted broadly to protect the freedom of the buyer to compete for customers with independently set prices, and the FCO further noted that best price clauses have the same effect in practice as minimum prices.

The Court further found that the defendant's conduct did not constitute an abuse of dominance, pursuant to Section 19 GWB, or prohibited conduct on the basis of its relative or superior marker power, pursuant to Section 20 GWB. The defendant was found not to be dominant in the market for online hotel booking platforms. The Court furthermore held that an oligopoly cannot be presumed, since the defendant's competitors, Booking.com and HRS, have a market share between 75 and 85 % and already by themselves are legally presumed to form an oligopoly under German law. In addition, according to the Court, the defendant does not have relative or superior market power since, due to the low market share of the defendant, hotels have reasonable alternatives to the services of the defendant which are therefore not indispensable to the hotels.

It remains to be seen whether the FCO in its pending proceedings against the defendant will come to the same conclusion as the Regional Court of Cologne. The judgment of the Regional Court Cologne has already been appealed.

UNITED KINGDOM

Competition and Markets Authority's updated register of advisory and warning letters reveals focus on RPM and online sales restrictions

On 15 February 2017, the Competition and Markets Authority ("CMA") published an updated register of its competition law advisory and warning letters. These letters are beginning to form an increasing part of the CMA's enforcement toolbox, and the updated information illustrates the CMA's overall continued focus on cases involving resale price maintenance and online sales.

The CMA sends advisory and warning letters to companies when it suspects that anticompetitive conduct may be occurring, but where in light of its prioritisation principles opening a full formal investigation is not warranted. These letters invite the companies concerned to undertake a self-assessment of their practices to ensure compliance with the competition rules. A warning letter requests the company to inform the CMA as to how it will ensure compliance, whereas an advisory letter requires the company to simply inform the CMA it has received the letter.

In 2016, the CMA issued 63 warning letters covering 19 matters overall: 16 of these matters were related to resale price maintenance in the retail sector and at least 7 were related to online sales restrictions. The CMA issued 31 advisory letters covering 14 matters overall in 2016, half of which involved resale price maintenance and 6 related to online sales. Some of these letters complemented cases which the CMA further pursued. Of particular note during 2016, the CMA fined companies for online resale price maintenance in relation to commercial catering (see VBB on Competition Law, Volume 2016, No. 5) and bathroom fittings (see VBB on Competition Law, Volume 2016, No.4). Interestingly, in the context of these cases, the CMA chose to send warning letters to other entities active in the same sectors that it suspected of similar anticompetitive conduct.

| STATE AID

– EUROPEAN UNION LEVEL –

ECJ confirms irrelevance of the Altmark conditions for compatibility assessment under Article 106(2) TFEU

On 8 March 2017, the European Court of Justice ("ECJ") handed down its judgement on appeal in case C-660/15 P, *Viasat Broadcasting UK* ("Viasat") *Ltd v European Commission.* The case concerns aid granted to the Danish public broadcaster TV2/Danmark for the execution of public service obligations. In particular, the case raises the issue of the distinction between the assessment of the existence of state aid and the compatibility of such aid in relation to services of general economic interest.

In line with the General Court's view and Advocate General Wahl's opinion, the ECJ concluded that the conditions laid down in the *Altmark* judgment, *i.e.*, the landmark judgment on services of general economic interest, are relevant for determining whether an advantage has been granted and therefore, whether a measure constitutes state aid pursuant to Article 107(1) TFEU. By contrast, the *Altmark* conditions have no bearing on the assessment of the compatibility with the internal market under Article 106(2) TFEU. Consequently, the ECJ dismissed the appeal brought by Viasat against the General Court's judgement.

The judgment of the ECJ is interesting as it is the first time that the ECJ has considered the relationship between Article 106(2) and Article 107(1) TFEU as regards the application of the *Altmark* conditions. A summary of the background of the case was provided in VBB on Competition Law, Volume 2016, No. 11, p. 11.

– OTHER DEVELOPMENTS –

On 15 March 2017, the European Commission published the 2016 state aid scoreboard and on 24 March 2017, the EFTA Surveillance Authority published its state aid scoreboard. Both state aid scoreboards provide detailed information on the Member States' aid expenditure in 2015. One of the conclusions of the analysis is that the three EFTA states have increased their state aid expenditure, whereas the EU member states spent a slightly lower amount in 2015 compared to 2014.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– EUROPEAN UNION LEVEL –

European Commission issues proposal for a Directive to make national competition authorities more effective

On 22 March 2017, the European Commission adopted a proposal for a new Directive designed to enable Member States' national competition authorities ("NCAs") to more effectively enforce competition law rules within the EU. The proposed Directive provides for minimum guarantees and standards which, according to the Commission, will allow NCAs to "*reach their full potentia*l".

The proposal is part of the Commission's Work Programme 2017 and is based on the Commission's enforcement experience within the European Competition Network ("ECN") since 2004, when NCAs were first empowered to apply EU competition law alongside the Commission, pursuant to Regulation 1/2003. The Commission and NCAs have since been working closely together on enforcing EU competition law in the framework of the ECN, which currently aims at achieving the coherent application of EU competition rules by all NCAs. However, in the Commission's view, Regulation 1/2003 did not address the means and instruments by which NCAs apply the EU competition law rules and therefore many arguably do not have all the means and instruments they need to effectively enforce Articles 101 and 102 TFEU.

The new proposal ("ECN+") follows a public consultation launched by the Commission in November 2015 on potential EU legislative action to strengthen the enforcement and sanctioning tools of NCAs. It is seen as complementing Regulation 1/2003 by granting NCAs the necessary guarantees of independence, enforcement and fining powers, so as to remove national obstacles which may prevent them from effective enforcement. In particular, the proposal aims to ensure that NCAs have the appropriate enforcement tools to achieve genuine common competition enforcement when applying EU competition law rules. Some examples of the current setbacks faced by a number of NCAs, set out by the Commission in its proposal, include the following: s:

- some NCAs cannot apply EU competition rules independently, without taking instructions from public or private entities, or have insufficient financial and human resources to perform their work;
- some NCAs lack the investigative powers needed to gather evidence stored electronically (*i.e.* on mobile phones, laptops, tablets etc.);
- not all NCAs can impose effective fines, including on parent companies or legal successors, due to national law obstacles, or the level of fines varies greatly from one Member State to another;
- some NCAs face difficulties in enforcing the payment of fines against infringing companies that do not have a legal presence on their territory;
- divergences exist between leniency programmes across the EU, which may discourage companies from coming forward and reporting on cartels; and
- gaps exist in the NCAs' ability to provide mutual assistance, due to dissimilar fact-finding tools that undermine the EU system of competition enforcement which is designed to work as a cohesive whole.

The Commission's proposal covers all the above issues, and others, in order to strengthen the enforcement and sanctioning tools of NCAs. The proposed Directive has to pass through the European Parliament and Council before it is formally adopted. Member States will then have to transpose its provisions into their national law.

The text of the future Directive is accessible here.

European Commission introduces new anonymous whistleblower tool

On 16 March 2017, the European Commission introduced a new service enabling individuals to alert the Commission in relation to cartels or other EU competition law infringements, while maintaining their anonymity in the process.

The tool protects the identity of whistleblowers through a specifically designed encrypted messaging system which allows them to communicate directly with the Commission, without disclosing any personal information. The messaging system is run by an external service provider, which acts as an intermediary between the whistleblowers and the Commission, and forwards the content of the message without sending any attached metadata that would allow the Commission to identify the sender of the message.

The new tool allows for dialogue: whistleblowers will be able to provide information and ask for replies from the Commission and the Commission will be able to seek details and clarification on the information received. The Commission believes that such an anonymous tool increases the likelihood that the information received will be sufficiently precise and reliable to enable the Commission to follow up on the information by opening an investigation.

EU Competition Commissioner Margrethe Vestager stated that inside knowledge can be a powerful tool to help the Commission uncover cartels and other anticompetitive practices, and contribute to the speed and efficiency of the Commission's investigations.

Most cartels have so far been detected through the Commission's leniency programme, which allows undertakings to report their own involvement in a cartel in exchange for a reduction in their fine. The new whistleblower tool has the added value of also allowing individuals who are aware of the existence of an infringement to report it. According to the Commission, this new tool is expected to complement and reinforce the effectiveness of the Commission's leniency programme. Importantly, unlike the leniency programme, the new whistleblower tool applies to all anticompetitive practices and not only cartels.

The Commission's new anonymous whistleblower tool is accessible **here**.

– MEMBER STATE LEVEL –

POLAND

Polish Competition Authority publishes guidelines on confidentiality claims in competition proceedings

On 16 March 2017, the Polish Competition Authority ("UOKiK") published guidelines on confidentiality claims in competition proceedings. The document clarifies, among other things, what type of information can qualify as a business secret and specifies the requirements that must be met by a request for confidentiality submitted by a party to the proceedings. It also contains specific instructions for the preparation of confidential and non-confidential versions of the documents submitted to UOKiK, as well as an annotated template of a request for confidential treatment. The guidelines recall that a party must precisely indicate the information for which it requests confidentiality, as well as identify the parties with regard to which such confidentiality should be ensured. It must also justify, separately for each type or category of information, why the information should be treated as confidential and demonstrate that it has taken all the steps to protect this information from being disclosed to the public. The guidelines were developed on the basis of the existing provisions of Polish competition law and are in line with similar guidelines adopted by the European Commission.

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