

April 2017

VBB on Competition Law

| HIGHLIGHTS

MERGER CONTROL

- | Commission conditionally clears merger between Dow and DuPont
- | Commission prohibits takeover of Cemex Croatia by HeidelbergCement and Schwenk Zement

ABUSE OF DOMINANT POSITION:

- | Advocate General Wahl offers important guidance on the criteria to identify excessive prices in abuse of dominance case

CARTELS AND HORIZONTAL AGREEMENTS:

- | French Endive cartel - Advocate General Wahl clarifies relationship between EU Common Agricultural Policy and competition law

VERTICAL AGREEMENTS:

- | German Court rules against ASICS Germany's restriction on the use of price comparison engines by dealers

INTELLECTUAL PROPERTY/LICENSING:

- | European Commission publishes roadmap on Standard Essential Patents

PRIVATE ENFORCEMENT:

- | Dutch court dismisses ABB's passing-on defence in private enforcement litigation

TOPICS COVERED IN THIS ISSUE

MERGER CONTROL	4
ABUSE OF DOMINANT POSITION	7
CARTELS AND HORIZONTAL AGREEMENTS	10
VERTICAL AGREEMENTS	13
INTELLECTUAL PROPERTY/LICENSING	16
PRIVATE ENFORCEMENT	17

JURISDICTIONS COVERED IN THIS ISSUE

EUROPEAN UNION.....	4, 6, 7, 10, 13, 16	ITALY	8
AUSTRIA.....	13	THE NETHERLANDS	17
DENMARK	14	NORWAY	5
FRANCE.....	11	SPAIN	12
GERMANY	14	SWITZERLAND	14

Van Bael & Bellis on Competition Law should not be construed as legal advice on any specific facts or circumstances. The content is intended for general informational purposes only. Readers should consult attorneys at the firm concerning any specific legal questions or the relevance of the subjects discussed herein to particular factual circumstances.

Table of contents

 MERGER CONTROL	4		
EUROPEAN UNION LEVEL.....	4		
Commission conditionally clears merger between Dow and DuPont.....	4		
Commission prohibits takeover of Cemex Croatia by HeidelbergCement and Schwenk Zement.....	4		
Commission conditionally approves ChemChina's acquisition of Syngenta.....	5		
MEMBER STATE LEVEL.....	5		
Norwegian Competition Authority blocks Eimskip's acquisition of Nor Lines.....	5		
OTHER DEVELOPMENTS.....	6		
 ABUSE OF DOMINANT POSITION	7		
EUROPEAN UNION LEVEL.....	7		
Advocate General Wahl offers guidance on the criteria to identify excessive prices in abuse of dominance case concerning Latvian collecting society AKKA/LAA.....	7		
Commission carries out inspections in the mobile telecommunications sector in Sweden.....	8		
MEMBER STATE LEVEL.....	8		
Italian Competition Authority accepts commitments from Italian collecting society in abuse of dominance investigation.....	8		
 CARTELS AND HORIZONTAL AGREEMENTS	10		
EUROPEAN UNION LEVEL.....	10		
Summary of Significant Case Developments.....	10		
Analysis of Important Substantive and Procedural Developments.....	10		
			<i>French Endive cartel - Clarification on relationship between EU Common Agricultural Policy and competition law.....</i>
			10
			MEMBER STATE LEVEL.....
			11
			French Competition Authority drops charges against car rental companies for exchanging detailed and individualised sales information.....
			11
			Spanish Competition Authority fines national basketball association for charging discriminatory fees.....
			12
			 VERTICAL AGREEMENTS
			13
			EUROPEAN UNION LEVEL.....
			13
			European Competition Network publishes industry report monitoring competition in the online hotel booking industry – divergences persist.....
			13
			MEMBER STATE AND SWITZERLAND LEVEL.....
			13
			Austrian Cartel Court fines power tool manufacturer for resale price maintenance and restrictions on parallel trade.....
			13
			Danish Competition and Consumer Authority fines Olympus Danmark A/S in settlement for resale price maintenance.....
			14
			Higher Regional Court rules against ASICS Germany's restriction on the use of price comparison engines by dealers.....
			14
			Switzerland moves towards an object based approach in assessing parallel import bans.....
			14
			 INTELLECTUAL PROPERTY/LICENSING
			16
			EUROPEAN UNION LEVEL.....
			16
			European Commission publishes roadmap on Standard Essential Patents.....
			16

Van Bael & Bellis on Competition Law should not be construed as legal advice on any specific facts or circumstances. The content is intended for general informational purposes only. Readers should consult attorneys at the firm concerning any specific legal questions or the relevance of the subjects discussed herein to particular factual circumstances.

Table of contents

 PRIVATE ENFORCEMENT	17
MEMBER STATE LEVEL.....	17
Dutch court dismisses ABB's passing-on defence in private enforcement litigation.....	17

Van Bael & Bellis on Competition Law should not be construed as legal advice on any specific facts or circumstances. The content is intended for general informational purposes only. Readers should consult attorneys at the firm concerning any specific legal questions or the relevance of the subjects discussed herein to particular factual circumstances.

| MERGER CONTROL

– EUROPEAN UNION LEVEL –

Commission conditionally clears merger between Dow and DuPont

On 27 March 2017, the European Commission conditionally approved the merger between US-based companies Dow Chemical and DuPont. Both parties are active in the production of plastics, chemicals, and agro-chemicals.

The Commission was concerned that the merger, as notified, would reduce competition in the markets for crop protection products, and also stifle innovation to improve existing crop protection products and develop new active ingredients for crop protection. In addition, the Commission was concerned that the deal would reduce competition for certain petrochemical products.

Crop protection products are used in agriculture to control pests that can harm crops. They can be categorised into herbicides (targeting weeds), insecticides (targeting insects) and fungicides (targeting diseases). The Commission found that the merged entity would hold very high combined market shares on a number of national markets for various herbicides, insecticides and fungicides, leaving few remaining competitors. The Commission also found that innovation is a key element of competition between players in the crop protection industry where, according to the Commission, only five companies are globally active in the entire research and development (R&D) process (*i.e.*, BASF, Bayer, Syngenta, Dow and DuPont). The Commission found that the transaction would reduce this competition in innovation by removing the parties' incentives to continue pursuing costly R&D efforts in the crop protection sector.

In order to address the Commission's concerns, the parties agreed to divest a significant part of DuPont's crop protection business and almost the entirety of DuPont's global crop protection R&D organisation. DuPont also agreed to divest all tangible and intangible assets underpinning the divested businesses. The parties also agreed to divest two of Dow's manufacturing facilities for acid co-polymers in Spain and the US, in order to preserve effective competition on the markets for petrochemical products.

The decision is mainly noteworthy for the Commission's approach to the reduction of competition in innovation. Simply put, the Commission was not just concerned that the transaction would reduce innovation in product areas where the parties compete head-to-head, but the Commission had a broader concern that – by eliminating competition between two of the five global innovators – the transaction would reduce competition in innovation in the crop protection sector as a whole. This broader concern is more difficult to address through remedies, as remedies have to go beyond divestments of competing R&D poles to fully address this concern. This would explain why DuPont had to divest its entire global crop protection R&D organisation to obtain clearance.

It remains to be seen how the Commission will apply this theory of harm in the planned merger between crop protection companies Bayer and Monsanto, which is currently in pre-notification consultations with the Commission. On the one hand, the Dow/DuPont precedent makes it clear that the Commission is willing to push for significant remedies to address broad concerns about a reduction in innovation, which does not bode well for Bayer/Monsanto. On the other hand, Bayer and Monsanto might take heart in the fact that Monsanto was not listed in the Commission's Dow/DuPont press release as one of the five companies globally active in the entire R&D process for crop protection products.

The Commission also recently cleared another transaction in the crop protection sector – ChemChina/Syngenta (see below). However, this deal did not raise the same interesting concerns around a reduction in competition in innovation, as ChemChina is not considered to be an innovator in crop protection products.

Commission prohibits takeover of Cemex Croatia by HeidelbergCement and Schwenk Zement

On 5 April 2017, the European Commission prohibited HeidelbergCement and Schwenk Zement's acquisition of Cemex Croatia through their joint venture Duna Dráva Cement.

The transaction was supposed to combine the two largest cement importers in Croatia with Croatia's largest cement

VBB on Competition Law | Volume 2017, N° 4

producer. Announcing the prohibition, EU Competition Commissioner Vestager stated that the deal would have led to higher cement prices in Croatia.

During the review, the parties proposed a remedy that involved granting competitors access to a cement terminal in southern Croatia. However, according to the Commission, the parties did not offer to divest a stand-alone business. Rather, by merely providing access to a cement terminal without also offering access to an established cement source, existing customers, brands, or sales staff, the Commission found that the parties would not enable a competitor to establish a viable competing cement business in southern Croatia.

This is the second time the Commission has prohibited a transaction in 2017, which follows shortly after the prohibition decision in *LSE/Deutsche Börse* (see VBB on Competition Law, Volume 2017, No. 3). This decision is noteworthy because it demonstrates the Commission's strong preference for structural commitments (e.g., the sale of a stand-alone business unit) which do not require monitoring measures. Also, during the merger review, the parties filed an action before the General Court in December 2016 challenging the Commission's decision to launch an in-depth investigation into the transaction. The parties argued that the Commission lacked jurisdictional competence to review the deal as it incorrectly identified HeidelbergCement and SchwenkZement as the "undertakings concerned", rather than Duna-Dráva Cement, an entity which the parties regard as a full-function joint venture (see VBB on Competition Law, Volume 2017, No. 1). This action is still pending.

Commission conditionally approves ChemChina's acquisition of Syngenta

On 5 April 2017, the European Commission announced it had approved ChemChina's acquisition of Syngenta, subject to commitments. Syngenta is a leading agro-chemical supplier. ChemChina is a Chinese state-owned company active in the agro-chemical sector in Europe through its subsidiary Adama.

The Commission was concerned that the transaction would reduce competition in the markets for certain crop protection products and plant growth regulators for cereals because Adama is an important generic competitor of Syn-

genta in many of these markets. Within the crop protection sector, the Commission considered that the takeover would reduce competition in various markets for fungicides, herbicides, insecticides and seed treatment products.

To address the Commission's concerns, ChemChina offered to divest: (i) a significant part of Adama's existing crop protection business; (ii) some of Syngenta's crop protection products; (iii) 29 of Adama's generic crop protection products under development; (iv) a significant part of Adama's plant growth regulator business for cereals; and (v) all relevant intangible assets underpinning the divested crop protection business and plant growth regulator products.

– MEMBER STATE LEVEL –

NORWAY

Norwegian Competition Authority blocks Eimskip's acquisition of Nor Lines

On 3 April 2017, the Norwegian Competition Authority ("NCA") prohibited the proposed acquisition of Norwegian-based Nor Lines by Icelandic-based Eimskip on the basis that the € 15 million deal would reduce competition in the market for transportation of frozen fish with reefer vessels from Northern Norway to Northern Europe.

Eimskip and Nor Lines are close competitors and collectively hold a substantial market share for shipping frozen fish from Northern Norway to Northern Europe. The parties' customers are fish producers who procure shipping services for exporting frozen fish from Norway. The NCA found that there were only a few competitors on the market for transportation of frozen fish from Northern Norway to Northern Europe so that the acquisition would enable Eimskip to increase prices or reduce quality of service to customers.

Although Norway is not in the European Union, it is part of the European Economic Area and governed by the same basic competition rules as those applying in the EU.

– OTHER DEVELOPMENTS –

EUROPEAN UNION: On 7 April 2017, the European Commission unconditionally approved the proposed acquisition of Sky by Twenty-First Century Fox under the EU Merger Regulation. The Commission concluded that the deal would not raise competition concerns in Europe. However, the transaction remains subject to a European Intervention Notice ("EIN") issued by the UK Secretary of State, Culture, Media and Sport on 16 March 2017. Under the EU Merger Regulation, any EU Member State, such as the UK, may take measures to review (and, if necessary, prohibit) proposed transactions which might harm legitimate public interests on non-competition grounds. In this case, the legitimate public interest to be examined by the UK authorities concerns whether the Sky/Twenty-First Century Fox transaction is consistent with the UK's public interest in preserving media plurality. As a result of the EIN, the UK's communications regulator, Ofcom, and the Competition and Markets Authority (CMA) will conduct a media plurality review and report on whether the transaction is compatible with the public interest by 20 June 2017.

| ABUSE OF DOMINANT POSITION

– EUROPEAN UNION LEVEL –

Advocate General Wahl offers guidance on the criteria to identify excessive prices in abuse of dominance case concerning Latvian collecting society AKKA/LAA

On 6 April 2016, Advocate General ("AG") Wahl gave an opinion advising the European Court of Justice ("ECJ") on the criteria to determine whether a Latvian royalty collecting society had abused its dominant position by charging excessive prices in breach of Article 102(a) TFEU. The matter came before the ECJ by way of a request for a preliminary ruling from the Latvian Supreme Court.

The national court issued the request in the context of a dispute between the Latvian Competition Authority ("LCA") and the collecting society, AKKA/LAA, which possesses the exclusive right to issue licenses for the public performance of musical works in commercial premises and service centres in Latvia. In April 2015, the LCA fined AKKA/LAA for charging retailers and venue owners excessively high rates - between 50-100% higher than the EU average - for those licenses.

In his opinion, AG Wahl set out the twofold "*United Brands*" test used to establish the existence of unfair pricing. The first step requires a determination of whether there is an excess between the price charged by the dominant undertaking and the price which the undertaking would have charged had there been effective competition in the market (the "benchmark price").

The AG said that there are many different methodologies to determine the benchmark price, but each of these had its own inherent limitations. To minimise the risk of error, he recommended that multiple methodologies be used in combination wherever possible. However, in cases where only one method was suitable, he emphasised the need to take into consideration additional indicators, such as the negotiating position of customers, which could corroborate the initial results.

In the present case, the LCA had opted to make a comparison with the prices charged by societies in neighbour-

ing countries and other EU Member States to determine whether the Latvian fees were excessive. The AG described this approach as appropriate subject to the national court's verification that: (i) there were no other suitable methods available which the authority could have also employed; and (ii) it was implemented correctly, meaning that the comparison was carried out according to objective, appropriate criteria and took due account of relevant economic differences between countries (the use of a purchasing power parity index based on GDP may be one tool that would be appropriate to apply in this context).

To qualify as excessive, AG Wahl said that prices need to be "*significantly and persistently*" above the benchmark price, and that authorities should only intervene where the price difference is "*of such a magnitude that almost no doubt remains as to [the price's] abusive nature.*"

As regards the second step of the *United Brands* test, the AG said that the onus is on the undertaking to show the fair nature of the prices, once they are determined to be excessive. The AG said that in order to do so, undertakings may, in particular, refer to higher production or marketing costs or the fact that the products or services they supply are economically more valuable.

Moreover, in the AG's view, before an undertaking's conduct can be qualified as an abuse, it must be established that the undertaking's ability and willingness to exercise market power even when abusive presents the only rationale economic explanation for charging excessive prices.

Interestingly, the AG also suggested that excessive pricing should only be considered unlawful in regulated markets, such as the one concerned in the present case in which he considered there was a legal monopoly. In his view, where there is a sector regulator, investigations for excessive pricing should therefore focus on cases where the sector's regulator has erroneously failed to intervene.

The opinion represents an important contribution to the limited judicial guidance on excessive pricing, and, if followed, would significantly restrict the scope of the abuse. The ruling of the Court will be eagerly awaited.

VBB on Competition Law | Volume 2017, N° 4

Commission carries out inspections in the mobile telecommunications sector in Sweden

The Commission issued a press release confirming that on 25 April 2017 it carried out unannounced inspections at the premises of companies active in the mobile telecommunications sector in Sweden. A number of companies including Telia, Tele2 and Telenor have confirmed that they are the subject of a Commission investigation.

According to the Commission, it has concerns that Swedish mobile network operators may have engaged in anti-competitive conduct preventing entry into the consumer segment of the Swedish mobile telecommunications market, in breach of Articles 101 and 102 TFEU.

Telenor (and others) has reported that the investigation regards possible abuse of a collective dominant position and/or possible anti-competitive practices between mobile network operators in Sweden. This is interesting because cases of collective dominance are relatively infrequent.

– MEMBER STATE LEVEL –

ITALY

Italian Competition Authority accepts commitments from Italian collecting society in abuse of dominance investigation

On 22 March 2017, the Italian Competition Authority (“ICA”) accepted commitments from the copyright-collecting society NUOVOIMAIE (“NI”) aimed at addressing ICA’s concerns that NI had abused its dominant position on the Italian market for management and intermediation services in the audio-visual and musical sector, in violation of Article 102 TFEU and Article 3 of Law 10 October 1990, n. 287.

NI is a collecting society whose function is to collect the royalties accrued through the use of works of art (music, films, audio-visual material) and to redistribute the earnings to right holders (artists, interpreters and performers). NI is the successor of IMAIE, which had been the only collecting society in Italy, until it went bankrupt in 2009. In its capacity as successor, NI inherited IMAIE’s general database which contained right holders’ works and contact details. NI also assumed IMAIE’s obligation to pay right holders their

royalties, until market liberalisation occurred in 2012.

In April 2016, the ICA initiated an investigation after it received a complaint from two other market operators alleging that NI was abusing its dominant position in three ways. In particular, it was claimed that:

1. NI exploited its obligation to pay royalties on behalf of IMAIE, by using it as an opportunity to approach right holders and ask them to join the society. It also reportedly told some right holders that payment of outstanding royalties owed by IMAIE was conditional on becoming a member of NI;
2. NI refused to give competitors access to the general database, which was considered essential in order to identify and contact right holders; and
3. NI used its position as IMAIE’s successor to sign agreements with foreign collecting societies in 2012, and also with important national broadcasters. The contracts were long-term and automatically renewed, thus excluding the new market entrants from the possibility of representing foreign artists and making it more difficult for them to represent their Italian members abroad.

Following the investigation, NI presented a number of commitments which the ICA deemed sufficient to re-establish a level playing field on the Italian market.

Specifically, NI committed to no longer request exclusive sponsorship and partnership agreements from right holders. It also agreed to give competitors free access to content uploaded to the general database before mid-March 2014 and full access in exchange for a license fee.

To address NI’s long-term agreements with foreign collecting societies, NI agreed to recognise a party’s right to terminate existing contracts on 30 days’ notice. In addition, NI’s future contacts will be limited in duration to one year and will not contain automatic renewal clauses.

Concerning its relations with TV broadcasters, NI agreed to the creation of a special commission and round table devoted to answering questions regarding the sums owed to right holders who are not affiliated with any collecting society. NI also committed to offer Italy’s public national

VBB on Competition Law | Volume 2017, N° 4

broadcaster a licensing contract to access the database on fair, reasonable and non-discriminatory ("FRAND") conditions.

Interestingly, the ICA recently opened another abuse of dominance investigation concerning the activities of the copyright-collecting society, SIAE, for alleged conduct similar to NI's.

| CARTELS AND HORIZONTAL AGREEMENTS

– EUROPEAN UNION LEVEL –

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

Summary of Significant Case Development

French Endive cartel - Advocate General Wahl considers that agricultural producers' organisations may be held liable under EU competition law

On 6 April 2017, Advocate General ("AG") Wahl issued an opinion on a preliminary reference from the French Supreme Court arising from the Endive cartel investigated by the French Competition Authority. In his opinion, the AG considers that agricultural producers' organisations and their associations may be held liable under EU competition law in specific circumstances.

The underlying case relates to a 2012 decision adopted by the French Competition Authority, in which it fined a number of endive producers' organisations and associations a total of € 4 million for their involvement in a price-fixing, output restriction and market-sharing cartel. The organisations and associations concerned appealed against the authority's decision, arguing that they had a responsibility, under EU law, to stabilise endive producer prices and to adjust production to demand. The French Court of Appeal upheld their argument, which was subsequently appealed before the French Supreme Court. The French Supreme Court stayed proceedings and requested guidance from the Court of Justice of the European Union ("ECJ") on, *inter alia*, the issue of how the objectives of the EU's Common Agricultural Policy (CAP) can be reconciled with the objectives of EU competition policy (see Section 1.2).

Analysis of Important Substantive and Procedural Development

French Endive cartel - Clarification on relationship between EU Common Agricultural Policy and competition law

The objectives of the EU's common agricultural policy ("CAP") are different from those of EU competition law. While the CAP aims to actively address certain perceived failures in agricultural markets, the EU competition rules are premised on the objective of market liberalisation. Under Article 42 TFEU, the objectives of the CAP take precedence over the objectives of EU competition law. Hence, although agricultural producers' organisations ("POs") and their associations ("APOs") constitute forums for concerted action which would usually be considered problematic from a competition law perspective, they nevertheless escape the application of Article 101 TFEU in situations where the EU's common rules for agricultural markets provide for explicit derogations. These derogations are framed narrowly. Therefore, the question arises whether further derogations may follow implicitly from the POs/APOs' responsibility to adjust production to demand, to reduce the costs of production and to stabilise producer prices.

In his opinion, Advocate General ("AG") Wahl defends the view that actions taken by POs and APOs may escape the application of EU competition law where these actions: (i) relate to tasks specifically assigned to them; and (ii) are strictly necessary for the fulfilment of these tasks. This implies that the measures concerned must be adopted within the framework of the same PO or APO. In that case, the measure is comparable to an "internal" measure of a company or group of companies presenting itself on the market as a single economic entity. Such internal measures fall outside the scope of EU competition law.

In contrast, practices occurring (i) between different POs or APOs, (ii) between a PO/APO and other types of market operators, or (iii) within entities not responsible for marketing for their members are fully subject to EU competition law. These practices are considered to take place between economic entities which are supposed to be independent.

VBB on Competition Law | Volume 2017, N° 4

In his opinion, AG Wahl examines the alleged cartel on the French endive market in the light of the above principles. First, as regards the concertation on prices, he finds that a policy of fixing a minimum price between producers cannot escape the prohibition of Article 101(1) TFEU, whether that policy is determined between different POs/APOs or within the same PO/APO. In the AG's view, the fixing of a non-variable minimum price *within* the framework of POs/APOs cannot be justified given that their task is to negotiate, *on behalf of their members*, a single price with endive distributors that is applicable to all production and variable depending on marketing periods and the quality of the product concerned. If the POs/APOs negotiate a single, variable price for the products of their members, there is no need for these members to fix a minimum, non-variable price between them. According to the AG, such price fixing could only be conceived if the individual producers still had some powers in relation to the negotiation of the selling price of the products concerned (which, however, is not the case).

Second, as regards the concertation on the quantities placed on the market, AG Wahl takes the view that such concertation can escape the application of EU competition rules only if it takes place within the same PO/APO and is genuinely intended to regulate production to stabilise the prices of the products concerned.

Finally, as regards the exchange of strategic information, AG Wahl considers that the EU competition rules generally do not apply within the same PO/APO given that the tasks assigned to POs/APOs necessarily involve internal exchanges of strategic information. In contrast, exchanges of strategic information between different POs/APOs cannot be linked to their assigned tasks and are, therefore, subject to EU competition law.

The Court of Justice of the European Union ("ECJ") is expected to deliver its judgment in the next few months. The judgment is eagerly anticipated given that the issues involved are of great practical interest to the agricultural sector. As evidence of the importance of the case, the Grand Chamber of the ECJ is set to deliver the judgment. It is also noteworthy that the European Commission has submitted amicus curiae briefs to the French Supreme Court in the proceedings on the merits, which is rather exceptional (according to AG Wahl, this has happened only seventeen times in twelve years).

– MEMBER STATE LEVEL –

FRANCE

French Competition Authority drops charges against car rental companies for exchanging detailed and individualised sales information

On 27 February 2017, the French Competition Authority ("FCA") decided to close a ten-year investigation into information exchanges between car rental companies without imposing any sanction.

The FCA investigated whether information exchanged through airport management authorities facilitated collusion between car rental companies operating at French airports. In particular, twelve French airport management authorities contractually required car rental companies (*i.e.*, Europcar, Avis-Budget, Hertz, Citer, Sixt and Ada) to provide them on a monthly basis with information relating to their turnover, and the number of contracts signed for the purposes of: (i) calculating the fee payable by the rental companies to the airport management authorities for the right to use publicly owned space; and (ii) reallocating available parking spaces. In return, under the contract signed with the airport management authorities or simply in practice, each company received from the authorities the information provided by each of the other car rental companies. In addition, some of the airport management authorities concerned also provided the car rental companies with data on market shares and the average value of contracts which they had calculated (in other cases, the car rental companies could calculate these figures themselves using the turnover and contract numbers communicated by the authorities).

In its decision, applying an effects test, the FCA assessed whether this exchange of information "*reduce[d] strategic uncertainty in the market.*" The FCA assessment relied on two factors, namely: (i) the market structure; and (ii) the nature (strategic or not) of the information exchanged. The FCA noted that the car rental market at airport hubs is oligopolistic and is usually limited to the six players under investigation. The FCA then examined the nature of the information exchanged, stating that "*it is necessary to determine whether the transmission of the individual turnover and the number of contracts concluded by each of the car rental companies during the previous month was such*

VBB on Competition Law | Volume 2017, N° 4

as to reduce the uncertainty in the market sufficiently so that each company was able to identify the pricing and commercial strategies of its competitors with sufficient precision to adapt its behaviour accordingly". In this respect, the FCA underlined that the information was exchanged on an aggregated basis to the extent that it did not distinguish between rentals to private individuals and professional customers, which are considered to form two different car rental markets. The FCA also highlighted that there was no evidence establishing that any of the companies under investigation had adapted their behaviour on the market. Accordingly, the FCA concluded that the information exchanged was not strategic and did not impede competition.

The Italian Competition Authority ("ICA") followed a similar reasoning in a decision dated 30 March 2017. In this case, car rental competitors also exchanged detailed information through a professional association. The ICA concluded that there was no evidence that the information exchanged reduced the uncertainty in the market or otherwise restricted competition.

SPAIN

Spanish Competition Authority fines national basketball association for charging discriminatory fees

The Spanish Competition Authority ("CNMC") imposed fines of € 400,000 on the national basketball association, Asociación de Clubes de Baloncesto ("ACB") for its involvement in a serious and continuous infringement of Article 1 of the Spanish Competition Act, the Spanish equivalent of Article 101 TFEU. The infringement concerned the conclusion of agreements imposing discriminatory, disproportionate and unjustified entry fees on basketball clubs that were promoted for the first time to the highest basketball league in Spain ("ACB League"). The CNMC found that the infringement had lasted almost 25 years.

The CNMC found that the ACB was charging a very high entry fee to basketball clubs which were entitled to a promotion to the ACB League and which had never before participated in it (the "ACB fee"). A basketball club could be promoted to the highest basketball league if, at the end of the prior season, it had accumulated a sufficient number of points. The ACB fee was, at the end of each season, distributed amongst all clubs which took part in the ACB League.

In its decision, the CNMC found that this fee (i) conferred an economic advantage to clubs participating in the ACB League, which enjoyed a more competitive economic situation during the coming season as compared to new entrants; (ii) was discriminatory, given that there were several clubs in the ACB League which never had to pay the fee for new entrants; (iii) was disproportionate, since the amount of the fee exceeded the average annual revenue generated by clubs competing in lower leagues; and (iv) was unjustified, since the ACB League already charged promoted clubs other fees to compensate for the costs incurred by the ACB as a consequence of such promotion.

The ACB has already announced its intention to appeal against the CNMC's resolution.

| VERTICAL AGREEMENTS

– EUROPEAN UNION LEVEL –

European Competition Network publishes industry report monitoring competition in the online hotel booking industry – divergences persist

On 6 April 2017, a European Competition Network ("ECN") Working Group consisting of the European Commission and 10 national competition authorities ("NCAs") published a report monitoring competition within the online hotel booking sector in light of earlier investigations.

This report is published amid divergence in the treatment by NCAs, and by legislators, of price parity clauses imposed by large online travel agents ("OTAs") (see VBB on Competition Law, Volume 2016, No. 11). By way of background, between 2014 and 2015 several NCAs scrutinised the use of so-called "wide" parity clauses by OTAs (see VBB on Competition Law, Volume 2015, No. 5 and VBB on Competition Law, Volume 2016, No. 1). In brief, such a wide clause requires a hotel contracting with an OTA to offer the OTA the lowest room prices and best room availability relative to all the other sales channels. In contrast, a "narrow" parity clause prohibits the hotel from displaying on its own website prices lower than the prices displayed on the OTA's portal, without restricting the hotel's right to offer rooms at a lower price on other booking portals. In April 2015, the NCAs in France, Italy and Sweden obtained commitments which limited the scope of wide parity clauses, due to concerns that they reduced competition on online hotel booking platforms. In December 2015, the German Federal Cartel Office ("FCO") took a more restrictive approach in prohibiting both narrow and wide parity clauses.

In December 2015, the ECN Working Group was established to monitor the effects of remedies offered in hotel booking platform cases. Given the inconsistent results in some earlier investigations, the NCAs furthermore agreed not to open further proceedings without coordination.

The report results from a yearlong information-gathering exercise. It concludes that measures adopted to address parity clauses, namely: (a) allowing OTAs to use narrow parity clauses; and (b) prohibiting OTAs from using wide

clauses "have generally improved conditions for competition and led to more choice for consumers". It therefore found no evidence that narrow parity clauses are anti-competitive. The report notes that the theory of harm for wide clauses is, first, that they lead to a softening of competition between incumbent OTAs and, second, that they foreclose entry or expansion by new or smaller OTAs. The ECN further decided to keep the online booking sector under review and to "re-assess the competition situation in due course".

In light of the report's findings, the UK's Competition and Markets Authority ("CMA") has stated that it will not prioritise further investigations into the hotel online booking sector, noting that "it is too early to reach any conclusions on whether so-called "narrow" parity clauses should separately be regarded as giving rise to competition concerns". On the other hand, the response of the FCO maintains its view that both narrow and wide parity clauses are restrictive, stating that "such parity clauses restrict competition between the different OTAs and between hotels".

– MEMBER STATE AND SWITZERLAND LEVEL –

AUSTRIA

Austrian Cartel Court fines power tool manufacturer for resale price maintenance and restrictions on parallel trade

In a recently published judgment of 7 December 2016, the Austrian Cartel Court (the "Court") imposed a fine of EUR 1.56 million on the power tool manufacturer Makita Werkzeug Gesellschaft m.b.H. ("Makita") for resale price maintenance and restrictions on parallel trade.

The Court found that Makita had taken various measures to control the resale prices of its dealers between 2002 and 2015. For example, Makita distributed lists to dealers with selling prices and lower limits for promotional prices, without indicating that the listed prices were non-binding. According to the Court, dealers also sought Makita's approval of prospective prices and enquired about promotional prices for certain products. The Court further found that Makita instructed dealers not to sell products to customers outside of Austria at prices lower than those on the price lists. In one instance, Makita required a certain

VBB on Competition Law | Volume 2017, N° 4

dealer that had sold a Makito product to a customer in Germany to confirm in a written letter that the dealer would sell goods only in Austria.

The fine against Makito was significantly reduced in view of Makita's cooperation with the Austrian Competition Authority and its efforts to immediately ensure competition law compliance.

DENMARK

Danish Competition and Consumer Authority fines Olympus Danmark A/S in settlement for resale price maintenance

According to a press release of the Danish Competition and Consumer Authority (the "Authority"), on 6 April 2017 the Authority fined Olympus Danmark A/S ("Olympus Danmark") DKK 3,600,000 (€ 484,000) for infringing section 6 of the Danish Competition Act by imposing a form of resale price maintenance. The anti-competitive practice consisted of a "cash-back system", under which Olympus Danmark would pay a cash amount to dealers on proof that certain camera models had been sold at minimum prices. The conduct took place between March 2011 and November 2013 and the size of the fine reflected Olympus Danmark's cooperation with the investigation.

GERMANY

Higher Regional Court rules against ASICS Germany's restriction on the use of price comparison engines by dealers

According to a press statement of the German Federal Cartel Office ("FCO"), on 5 April 2017 the Higher Regional Court of Düsseldorf (the "Court") upheld the prior finding by the FCO that ASICS Germany had violated competition law by prohibiting dealers in the framework of its selective distribution system from using price comparison engines (see VBB on Competition Law, Volume 2015, No. 9). The Court apparently ruled that a general prohibition of this type would amount to a restriction by object, as it would deprive dealers of advertising as well as sales possibilities. It apparently considered that such a prohibition could not be justified by a desire to protect either ASICS' brand image or the provision of pre-sale services in respect of its products since consumers do not necessarily want or

require pre-sales services, and can also obtain the information online. The Court apparently viewed this as a hard core restriction under EU competition law, and that it could not be exempted. According to the press release, the Court did not decide whether the prohibition on dealers (that had applied under ASICS Germany's earlier distribution system) from using Google AdWords, and from selling via online marketplaces, also constituted a violation of competition law.

SWITZERLAND

Switzerland moves towards an object based approach in assessing parallel import bans

On 21 April 2017, the Swiss Federal Supreme Court ("FSC") published its judgment affirming the fine of CHF 4.8 million imposed by the Swiss Competition Commission on Gaba International AG ("Gaba"), which is part of the Colgate-Palmolive-Group, for imposing an export ban on its Austrian licensee, Gebro Pharma GmbH ("Gebro").

According to the contract, Gebro was obliged to produce and sell the contractual products exclusively in Austria, and could not directly or indirectly export these products to other countries (including Switzerland).

In its ruling, the FSC held as follows:

- Concerning jurisdiction, although Switzerland was not directly referred to in the contract and the export ban had not been implemented, it was sufficient that the export ban would potentially have effects within Switzerland in order for jurisdiction to be established under Swiss law.
- Concerning object versus effect, a restriction of passive sales would generally be considered to constitute a significant restriction of competition without the need to demonstrate this through a quantitative analysis. According to the FSC, the same principle would apply to resale price maintenance and agreements amongst competitors to fix prices, to restrict production, purchasing or supply-quantities, or to allocate territories or customers.
- The import ban in question cannot be justified on grounds of economic efficiency.

VBB on Competition Law | Volume 2017, N° 4

Accordingly, the FSC appears to be moving towards an object-based approach. On this basis, export bans concluded in and applicable to sales outside of the EEA (of any individual EEA country as in this case) risk being considered as generally unlawful under Swiss competition law.

| INTELLECTUAL PROPERTY/ LICENSING

– EUROPEAN UNION LEVEL –

European Commission publishes roadmap on Standard Essential Patents

On 10 April 2017, the European Commission published its roadmap on "Standard Essential Patents for a European digitalised economy" (the "Roadmap") with the aim of supporting the development of the 5G mobile communications standard ("5G") and the Internet of Things ("IoT") universe.

A standard essential patent ("SEP") is a patent that covers technology that is essential for complying with a technical standard. The Commission takes the view that the benefits of 5G and IoT to businesses, citizens and public authorities may be more difficult to reach due to uncertainties regarding the delineation, licensing and enforcement of SEPs. According to the Commission, access to the technology underlying SEPs remains compromised due to a range of factors including:

- *Opaque information about SEP exposure:* there are no effective and reliable tools for potential licensees to identify and verify the relevant patents for which they have to take licenses to implement the relevant standardised technology in a product;
- *Unclear valuation of the patented technologies:* there are difficulties to assess the value of the technology offered by the standard; and
- *Risk of uncertainty in enforcement:* the framework that potential licensors and licensees of SEPs have to observe was established by the Court of Justice of the European Union ("ECJ") in *Huawei v ZTE* (see VBB on Competition Law, Volume 2015, No. 7). Still, the Commission considers that this framework is incomplete. For example, the ECJ did not address portfolio licensing and related claims for damages; the impact of alternative dispute resolution mechanisms; and the level of technical specifications that would be required to substantiate the essentiality claim or the basis for fair, reasonable and non-discriminatory ("FRAND") counter-offers.

The Commission seeks to establish (i) best practice recommendations to increase transparency regarding SEP exposure; (ii) guidance on FRAND and core valuation principles; and (iii) complements to the existing case-law.

Stakeholders are invited to provide their views on the Commission's Roadmap by 8 May 2017.

| PRIVATE ENFORCEMENT

– MEMBER STATE LEVEL –

THE NETHERLANDS

Dutch court dismisses ABB's passing-on defence in private enforcement litigation

On 29 March 2017, the District Court of Gelderland (the "Court") dismissed a passing-on defence put forward by the Swiss technology company ABB in a cartel damages case initiated by the Dutch network grid operator TenneT. TenneT claimed that it had incurred damages as a result of higher prices paid for ABB's cartelised gas-insulated switchgears ("GIS"). The Court dismissed ABB's passing-on defence on the basis of the principle of effectiveness even though it assumed that pass-on had taken place.

This case had been referred to the Court for the quantification of the damages following judgments delivered by the District Court for the Eastern Netherlands, the Arnhem-Leeuwarden Court of Appeal (see VBB on Competition Law, Volume 2014, No. 9) and the Supreme Court (see VBB on Competition Law, Volume 2016, No. 7) which had confirmed that ABB was liable for loss that TenneT might have incurred but that ABB could invoke the passing-on defence..

ABB submitted to the Court two reports of economic consultancies to support its claim that TenneT had not paid an overcharge for ABB's GIS and that, even if it had, TenneT had passed on a substantial amount of the overcharge to its own customers. According to ABB, the magnitude of the overcharge was to be determined by comparing ABB's profit margins for GIS during its participation in the cartel and thereafter.

The Court instead held that the damage was, in principle, to be determined on the basis of the difference between the price of the GIS that TenneT had paid during ABB's participation in the cartel, and the price which TenneT would have been offered in a market without the cartel. The Court, therefore, dismissed ABB's comparison of its profit margins and found instead that the overcharge could be estimated on the basis of a comparison of a price offer made by ABB for GIS during its participation in the cartel and a price offer for identical GIS made by ABB after the cartel had ended.

On this basis, the Court found that the total overcharge paid by TenneT during the cartel amounted to € 23,1 million.

As to ABB's passing-on defence, the Court assumed that the overcharge had been passed on to the final consumer, even though GIS represented a fixed cost for TenneT, because prices were regulated and cost-based in the electricity market. However, the Court held that, if it were to accept ABB's passing-on defence, it would be very unlikely that the final consumer would claim damages in light of the cost of legal proceedings and the difficulty to calculate the overcharge. This would relieve the infringer of its liability, which is not the purpose of the Antitrust Damages Directive which instead intends to ensure that damages are awarded to the direct and indirect customers to whom the overcharge has been passed on. Furthermore, it held that, if damages were awarded to TenneT, this would benefit those final consumers, since TenneT is owned by the Dutch state and the awarded damages would result in lower transport and electricity costs or profit distribution. The Court also considered obiter that the cartel fine which ABB had avoided as a result of its successful leniency application would have been ten times higher than the amount of damages to be paid by ABB in the current proceeding.

In view of these circumstances, the Court held that ABB's passing-on defence could not be reasonably accepted and ordered ABB to pay damages and interest to TenneT.

The Court's pragmatic, purpose-driven interpretation of the law enables it to equate the award of damages by ABB to TenneT with compensation for all, thereby dispensing with the (possible) need to reduce the award against TenneT to take account of the (potential) overcharge incurred by the chain of TenneT's own customers. It remains to be seen whether, on any appeal, the principle of effectiveness favoured by the Court can be considered to outweigh the rule that "the loss which has been passed on no longer constitutes harm for which the party that passed it on needs to be compensated" (Antitrust Damages Directive, recital 39).

Chaussée de La Hulpe 166
Terhulpesteenweg
B-1170 Brussels
Belgium

Phone: +32 (0)2 647 73 50

Fax: +32 (0)2 640 64 99

vbb@vbb.com

www.vbb.com