VAN BAEL & BELLIS

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# VBB on Competition Law

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# | MERGER CONTROL

## – EUROPEAN UNION LEVEL –

**Commission approves General Electric / Baker Hughes deal**

On 31 May 2017, the European Commission unconditionally approved the acquisition of Baker Hughes by General Electric under the EU Merger Regulation. Both companies provide oilfield services to exploration and production companies in the European Economic Area (EEA) and worldwide.

The transaction gave rise to a number of horizontal overlaps, including on the markets for onshore electrical submersible pumps used to pump fluids from oil wells to the surface, offshore electrical submersible pumps, and chemicals used in the refining and petrochemicals industry. The Commission dismissed concerns in electrical submersible pumps, citing GE's limited presence in Europe, and in chemicals, finding that the parties' products are relatively complementary and that the merged entity would continue to face a number of competitors.

The transaction also resulted in vertical relationships on a number of markets, including the supply of sensors used in drilling and wireline applications, where General Electric supplies not just Baker Hughes but its main competitors. The Commission considered that there are alternative suppliers of sensors as well as the potential for new sensor suppliers to enter the market.

The transaction is noteworthy as Baker Hughes previously agreed to be acquired by Halliburton in November 2014. However, the Halliburton/Baker Hughes deal was the subject of an extended in-depth Phase II investigation, and ultimately, the two parties agreed to terminate their merger agreement in May 2016 (see VBB on Competition Law, Volume 2016, No. 5, page 4).

## – MEMBER STATE LEVEL –

GERMANY

**German FCO publishes Guidance on Remedies in Merger Control**

On 30 May 2017, the German Federal Cartel Office (FCO) published guidance in respect of merger remedies. The 87-page document describes in detail the criteria under which the FCO assesses merger commitments. The document aims to enable companies to self-assess proposed commitments as accurately as possible and to more easily remedy the relevant competitive harm. The guidance describes the FCO's remedies practice and contains examples of previously admissible remedies. It further elaborates on the differences and similarities between the practice of the Commission and the FCO.

In practice, both the Commission and the FCO prefer structural remedies, such as divestitures. Indeed, as the guidance highlights, German law explicitly prohibits commitments that require the FCO to continuously monitor the behaviour of the parties. The only behavioural commitments that are allowed under German law are those which have an effective and sustainable structural effect on market conditions and which permanently remedy the competitive harm. The guidance also explains that the FCO generally requires an up-front buyer remedy. In other words, the transfer of ownership rights in the divested assets must occur before the merger is closed.

Please click here to access the FCO's English translation of the guidance document.

LITHUANIA

**Lithuanian Competition Council imposes fine of almost € 1 million for failure to notify**

On 13 June 2017, the Competition Council of Lithuania fined Kauno Grūdai, a Lithuanian food products company, € 947,700 for failure to notify its acquisition of a 51 per cent interest, and thereby of sole control, in Vievio Paukštynas, a Lithuanian poultry company.

According to the Competition Council, Kauno Grūdai entered into a number of concealed transactions in April 2011 in order to acquire a 51 % interest in the target company, Vievio Paukštynas. Following a Lithuanian court decision in October 2014, the Competition Council opened its investigation and determined that the concealed transactions enabled Kauno Grūdai to appoint the majority of the target's board members and to impose strategic decisions on the economic activity of the target. Further, Kauno Grūdai retained control of the target during its subsequent bankruptcy proceeding. The Competition Council held that the concealed transactions were undertaken in order to avoid the application of the Lithuanian merger control rules.

UNITED KINGDOM

**U.K. CMA adjusts rules to reduce number of small mergers subject to review**

On 16 June 2017, the UK's Competition and Markets Authority (CMA) raised the value threshold for markets which are generally considered as sufficiently important to warrant referring the merger for an in-depth, Phase II investigation from above £10 million to above £15 million. The CMA also changed the threshold for markets generally considered not sufficiently important to warrant referring the merger for an in-depth, Phase II investigation from below £3 million to below £5 million. Previously, the CMA consulted on this issue (see VBB on Competition Law, Volume 2017, No. 1, page 4).

Currently, the CMA is not obliged to carry out an in-depth, Phase II investigation where the relevant market concerned is not sufficiently important, even if it the CMA suspects that the merger could result in a significant lessening of competition. It was anticipated that as a result of the UK's decision on 23 June 2016 to leave the European Union, the CMA might seek to more narrowly focus its resources on more significant merger transactions and expand this *de minimis* exemption. According to the CMA, the exception to the duty to refer a merger to an in-depth investigation is designed to avoid investigations where the costs involved would be disproportionate to the size of the market concerned. The new thresholds are expected to reduce the number of mergers that are subject to such investigations.

# | ABUSE OF DOMINANT POSITION

**– EUROPEAN UNION LEVEL –**

**Record € 2.42 billion fine imposed on Google for abusing its dominant position by favouring its own comparison shopping services**

On 27 June 2017, the European Commission announced that it has issued a decision imposing a record € 2.42 billion fine on Google for abusing its dominant position as an internet search engine by giving an illegal advantage to its own comparison shopping services in violation of Article 102 TFEU. The decision also requires Google to end its anticompetitive conduct within 90 days.

According to the press release of the Commission, Google is dominant in each national market for general internet search in all 31 European Economic Area (EEA) countries, exceeding a 90% market share in most. The Commission found that Google has abused this market dominance by leveraging its position in general internet search into the separate market for comparison shopping services in 13 EEA countries by giving preferential treatment to its own service "Google Shopping" (formally Froogle) over those of its competitors. In particular, it gave prominent placement to its own comparison services by displaying them at the top in its search result pages or in a reserved space on the right-hand side. It also demoted rival comparison shopping services through the criteria it introduced in its search algorithms. Google's own services were not subject to those algorithms.

As a result of this preferential treatment, Google's comparison shopping service was allegedly much more visible to consumers in Google's search results and consequently received more traffic compared to rivals, while traffic to rivals' shopping services dropped substantially. This in turn made it more attractive for retailers to want to list their products on Google's comparison shopping service. The Commission found that the conduct therefore "stifled competition on the merits with the effect that consumers were deprived of genuine choice and innovation".

The decision imposed a record fine of € 2.42 billion on Google, which represents the duration and gravity of the infringement and was calculated on the basis of Google's revenue for its comparison shopping service in the 13 countries concerned. The decision also requires Google to explain to the Commission within 60 days how it will end its illegal practices. Google must implement those changes within 90 days of the decision or it could be liable for penalties of up to 5% of the average daily worldwide turnover of its parent company, Alphabet.

The Commission's decision represents a major milestone in the case which has been ongoing for seven years. A formal investigation was launched in 2010, following complaints from a number of competitors (see also, VBB on Competition Law, Volume 2012, No. 5). In 2013, Google proposed a settlement to resolve the competition concerns raised but this was opposed by rivals (VBB on Competition Law, Volume 2013, No. 4). Following two further failed attempts at settlement, and a change in the Commissioner for Competition, a formal statement of objections was sent to Google in April 2015 (VBB on Competition Law, Volume 2015, No. 4).

Google has said that it is carefully reviewing the recent decision with a view to potentially bringing an appeal.

EU Competition Commissioner, Margrethe Vestager, has described the investigation's finding that Google is dominant in general internet search services as an "essential" finding which could provide the starting point for investigations into Google's other services, such as Google Maps and Google Images.

Google is currently subject to two other investigations by the Commission into alleged abuses of a dominant position relating to its Android operating system and its online search advertisement tool AdSense.

## – MEMBER STATE LEVEL –

GERMANY

**German Federal Cartel Office terminates proceedings against district heating supplier after commitment to reimburse consumers**

The Federal Cartel Office ("FCO") decided on 13 February 2017 to terminate its proceedings against Innogy SE in view of its commitment to reimburse EUR 12.3 million to customers.

In 2013, the FCO initiated proceedings against the legal predecessor of Innogy SE, RWE Energiedienstleistungen GmbH ("RWE") for excessive pricing. The FCO's initial suspicions arose during a sector inquiry concerning district heating. Further investigations showed that RWE's revenue per kWh during the three-year period from 2010 to 2012 was considerably higher than the revenue in other district heating areas used for comparison. Based on a preliminary assessment, the FCO found that, during the period of investigation, RWE's prices differed from the prices which would likely have been charged under conditions of effective competition.

In line with previous case-law, the FCO defined the relevant market as the supply of district heating to end customers within a local network. District heating was found to constitute a monopoly market because (i) costs for customers of changing to another type of heating system are very high and (ii) supply by a second supplier is usually not possible, unlike in the case of line-based energy supply.

Federal Court of Justice rules on general terms and conditions in insurance contracts

On 24 January 2017, the Federal Court of Justice ("BGH") ruled that standard terms that are unreasonable (and therefore invalid under the legal rules applicable to standard terms) and that make it difficult to terminate a long-term contractual relationship with a dominant company generally constitute an abuse of dominance.

The Federal and State Government Employees Retirement Fund ("the Fund") offers employers in the public sector supplementary group insurance contracts for their employees. The standard terms of the contract between the Fund and employers stipulated an obligation on a terminating party to pay an amount equivalent to the ongoing financial obligations of the Fund towards the terminating party's employees after termination of the contract ("departure payment"). A medical association brought an action against this provision and filed for reimbursement of the departure payment.

With regard to the departure payment, the BGH ruled that the Fund is an undertaking within the meaning of, and subject to, German competition law. The relevant market was determined to be the market for supplementary pensions for public servants in Germany which is distinct from the market for supplementary pensions in the private sector. The Fund was found to have had a market share of 40% in 2002 and to be dominant. The Court held that, when examining whether the use of terms and conditions related to the termination of a *long-term* contractual relationship constitutes an abuse, there are generally no grounds to assume that a strong provider can be restrained by hypothetical supply-side substitution by competitors, unlike, for example, in a scenario where customers make repeat orders to satisfy a continuous need.

The BGH ruled that not every use of a clause that is invalid under the rules applicable to standard terms constitutes an abuse of dominance or market power. There is, however, an abuse if the use of the invalid clause is a consequence of the superior market power of the user. This was found to be so in the present case, where the use of standard terms made it unreasonably difficult for the employer to terminate or withdraw from the contractual relationship.

SPAIN

**The Spanish Competition Authority imposes a € 1.74 million fine on Nokia in respect of margin squeeze practices**

On 8 June 2017, the Spanish Competition Authority ("CNMC") imposed a € 1.74 million fine on Nokia Solutions and Networks Spain ("Nokia") for abusing its dominant position by engaging in margin squeeze during a tender process organised by the national railway operator Administrador de Infraestructuras Ferroviarias ("ADIF"). The infringement was found to be in violation of Article 2 of the Spanish Competition Act and Article 102 TFEU.

In July 2014, ADIF organised a tender process for the renewal and maintenance of GSM-R facilities on Spain's high-speed rail tracks. GSM-R facilities consist of equipment installed on trains and tracks to provide a digital communication system between train and railway control centres.

Prior to the tender, all maintenance of installed GSM-R facilities was directly carried out by the manufacturer. In this context, Nokia had manufactured and been responsible for the maintenance of the vast majority of GSM-R facilities installed in Spain, holding a market share of 85%. Conversely, Kapsch was found to have manufactured and maintained the remaining 15%.

The terms of the tender required bidders to present a commitment letter from manufacturers of the installed GSM-R facilities, guaranteeing that they would assist with additional technical support in their maintenance. As an alternative to presenting the letter, the bidder could replace the installed GSM-R facilities with its own equipment, but assuming its own costs.

Nokia and Kapsch were the only two companies to compete in ADIF's tender process. Neither of them provided each other with the commitment letter that would enable its rival to bid for the tender. Instead, they sent each other a proposal with the prices that they would charge as subcontractor for the supply of technical support. Nokia charged a very high price for its sub-contracting services, and as a consequence, in October 2014, Kapsh withdrew from the tender process because it was unable to compete with Nokia's low priced tender for maintenance services. After the contract was awarded to Nokia in December 2014, Kapsch brought a complaint to the CNMC.

The CNMC found that Nokia had taken advantage of its dominant position by fixing a very high wholesale price in the upstream market for the supply of technical support and spare parts to assist in the maintenance of Nokia's GSM-R facilities. At the same time, it charged competitive retail prices in the down-stream market for the maintenance of GSM-R facilities. The CNMC used the "as efficient competitor test" to establish that Nokia's strategy rendered it uneconomic for other competitors, including Kapsch, to enter the tender process.

## – OTHER DEVELOPMENTS –

ITALY: On 14 June 2017, the Regional Administrative Tribunal of Lazio rejected an appeal brought by the pharmaceutical company Aspen Pharma against a decision of the Italian National Competition Authority imposing a € 5.2 million sanction for charging excessive prices for certain lifesaving cancer drugs (see VBB on Competition Law, Volume 2016, No. 11). The Court has not yet published its motivations behind the ruling.

# CARTELS AND HORIZONTAL AGREEMENTS

**– EUROPEAN UNION LEVEL –**

**European Commission imposes fines on car lighting system producers in cartel settlement case**

On 21 June 2017, the European Commission announced that, under its cartel settlement procedure, it had imposed fines totalling € 27 million on three manufacturers of lighting systems for passenger and commercial vehicles. The products concerned by the arrangements were car lighting systems, which include headlamps, daytime running lights, rear lights and high mounted stop lamps, fog lights and auxiliary lights. The cartel related solely to the original equipment spare parts market for car models whose mass production had ended.

The companies involved - Valeo, Automotive Lighting and Hella - acknowledged that, for more than three years, they had discussed quotes for tenders and negotiation strategies, as well as exchanged sensitive business information on the status of their negotiations with customers regarding price increases. In addition, the parties had agreed on the timing of price increases and coordinated the period during which spare parts would be contractually available after the end of mass production of certain car models.

The infringement was brought to the Commission's attention by Valeo, which received full immunity from fines and there thereby avoided a penalty of € 30.5 million. The Commission granted fine reductions of 35% to Automotive Lighting and 20% to Hella for their cooperation with the investigation under the Leniency Notice. These companies also benefited from a 10% fine reduction under the Settlement Notice for acknowledging their participation in the infringement and their liability for it. Ultimately, Automotive Lighting was fined around € 16.4 million and Hella around € 10.4 million.

**European Commission re-adopts decision against manufacturer in envelope cartel case**

On 16 June 2017, the European Commission re-imposed a fine of € 4.7 million on envelope manufacturer Printeos (formerly known as Tompla) for its involvement in a price-fixing and market-allocation cartel relating to the sale of envelopes between 2003 and 2008.

In December 2014, the Commission adopted a decision against Printeos and several other undertakings under its cartel settlement procedure in relation to their participation in the cartel. On appeal, the General Court ("GC") annulled the Commission's settlement decision in so far as it concerned Printeos due to a lack of sufficient reasoning concerning the grant of discretionary fine reductions to the addressees of the decision (see VBB on Competition Law, Volume 2016, No. 12). In its decision, the Commission had adjusted the fines so they would not exceed the maximum of 10% of the undertakings' total turnover. As a result of these adjustments, the fines ranged between 4.5% of the total turnover of one settling undertaking to 9.7% in the case of Printeos. The Commission did not explain in its decision why it had applied different individual reduction rates to the undertakings concerned. As Printeos was not in a position to understand or dispute the fining methodology followed by the Commission in its settlement decision and the GC was not fully able to exercise its powers of judicial review with regards to the Commission's compliance with that principle, the GC annulled the decision in so far as it concerned Printeos.

Following the GC's judgment, the Commission has re-adopted a more fully reasoned decision against Printeos to address the error identified by the GC in its judgment and re-imposed a fine on Printeos, the amount of which is identical to that imposed in the original decision.

**European Commission adopts amending decision in Spanish raw tobacco cartel case**

On 20 June 2017, the European Commission issued a decision amending its 2004 decision in the Spanish raw tobacco cartel case by reducing the amount of the fine imposed on Alliance One International for the involvement of its subsidiary in the infringement by € 243,000.

In its original 2004 Decision, the Commission imposed fines on five companies totalling € 20 million for colluding on the prices paid to and the quantities bought from tobacco growers in Spain. In particular, the Commission held World Wide Tobacco España (WWTE) and its then parent companies, Standard Commercial Corporation, Standard Commercial Tobacco Co. Inc. and Trans-continental Leaf Tobacco Corporation Ltd., jointly and severally liable for a fine of € 1.8 million. On appeal, the General Court partially annulled the decision as regards WWTE and reduced its fine by € 243,000 (see VBB on Competition Law, Volume 2011, No. 3). However, WWTE's then parent companies did not obtain a similar fine reduction before the GC or the Court of Justice of the European Union (ECJ) (see VBB on Competition Law, Volume 2010, No. 10 and Volume 2012, No. 7) because they had not raised the same plea. Since the time of the GC's judgment, Alliance One International has become the legal successor to WWTE's parent companies.

In its amended decision, the Commission has decided to grant Alliance One International the same fine reduction of € 243,000 as WWTE. The Commission appears to have made this decision in light of recent case law developments, in particular the EU Courts' recent rulings under which the liability of a parent company, whose liability is entirely derived from the conduct of its subsidiary, cannot exceed that of its subsidiary (see, for example, Case T-597/13 *Total v Commission*; VBB on Competition Law, Volume 2015, No. 9).

## – MEMBER STATE LEVEL –

CYPRUS

### Cypriot Competition Authority imposes fines of € 31 million relating to interchange fee system

On 22 May 2017, the Cypriot Commission for the Protection of Competition ("CPC") imposed a € 31 million fine on JCC Payment Systems ("JCC"), a payment processing company, and eight commercial banks for price fixing, unfair pricing practices and restricting competition in the Cypriot card payments processing market.

The CPC found that JCC and its shareholders (Bank of Cyprus, Hellenic Bank, National Bank of Greece and Alpha Bank Cyprus) had breached competition rules by setting up a uniform system for domestic interchange fees, which restricted competition on both the Cypriot card-issuance and card payment acceptance market. In addition, JCC was found to have entered into anti-competitive agreements with non-shareholder banks to fix the domestic interchange fees for processing card payments.

Furthermore, the CPC found that JCC had abused its dominant positon and JCC's shareholders had abused their collective dominant position by engaging in unfair pricing practices relating to the interchange fees. The Bank of Cyprus was also fined € 18 million for unjustifiably refusing JCC's competitor, FBME Card Services, permission to process American Express within the territory of Cyprus.

In addition to the fines, JCC was ordered to make a number of changes to the operation of the interchange fee system to ensure that it complies with competition law. These changes include removing restrictive terms from all service agreements and taking measures to ensure the board members of JCC were made up of independent members.

FRANCE

### French dairy cartelists secure fine reduction on appeal

On 23 May 2017, the Paris Court of Appeal reduced fines previously imposed by the French Competition Authority on ten dairy producers from € 192.7 million to € 128.35 million due to breaches to their rights of defence.

This judgment stems a decision adopted by the FCA in 2015 which imposed fines totalling € 192.7 million on ten producers active in the dairy product sector for their involvement in a price-fixing, volume allocation and bid-rigging cartel from December 2006 to February 2012 (see VBB on Competition Law, Volume 2015, No. 3)

On appeal, the dairy producers alleged that the FCA had violated their rights of defence. In particular, they argued that during the administrative hearing in November 2014, the FCA had used econometric models to assess the damage the cartel had caused to the economy that differed from those that had appeared in an earlier report notified to the parties, thereby leaving the dairy producers no time to prepare an effective defence. Under French law, damage to the economy caused by anticompetitive conduct is taken into consideration in determining the amount of the fine.

In its recent judgment, the Paris Court of Appeal upheld the appellants' argument and underlined that the FCA, in the course of an oral hearing, can modify an opinion expressed in an initial report only if (i) no element outside the initial report is alleged to the detriment of the undertakings under investigation; and (ii) the undertakings have been able to respond in a manner consistent with due process. The court found that the FCA had not complied with these conditions, faulting the FCA in particular for failing to comply with the second condition. The court first noted that the FCA had presented new facts concerning the assessment of the damage to the economy. The court then noted that the undertakings were provided only seven business days to comment on the FCA's changes, which was considered too short a timeframe in light of the complexity of the questions raised. In addition, the court took issue with the fact that the undertakings were not able to respond to all the new elements regarding the assessment of damage to the economy but, rather, were only allowed to respond in relation to the methodology used. Hence, the court ruled that the parties' rights of defence had been infringed and that the fines had to be recalculated accordingly (reduced from € 192.7 million to € 128.35 million).

GERMANY

**Higher Regional Court of Düsseldorf confirms prohibition decision concerning federal state's timber marketing practice**

On 15 March 2017, the Higher Regional Court Düsseldorf upheld a Federal Cartel Office prohibition decision (see VBB on Competition Law Volume 2015, No 8), which found that the federal state (*Land*) of Baden-Württemberg had infringed European competition law by engaging in a distribution cartel with private and public forest owners. The Federal Cartel Office had found that the cartel had led to a standardisation of sales prices for timber and an almost complete elimination of competition between timber suppliers.

In particular, the court confirmed that the state of Baden-Württemberg had acted as an undertaking within the meaning of the competition rules when engaging in the conduct in question, as it was carrying out an economic activity. The court underlined that a public entity cannot escape from the application of the competition law rules if it participates in an economic activity. Furthermore, the court ruled that no exemptions were applicable because, *inter alia*, it had not been shown that the joint marketing conduct had led to efficiency gains.

Finally, the court considered that the state of Baden-Württemberg was not entitled to rely on the provisions of the National Forest Act ("BWaldG"), which purports to exempt the relevant conduct from the scope of application of competition law because these provisions are incompatible with EU law. The court stated that the power to enact exemptions to the EU competition rules does not lie with the national legislator, but only with the Council of the European Union. The court found an irreconcilable conflict between the German BWaldG and EU law and, therefore, held that the relevant provisions of the BWaldG were inapplicable.

The state of Baden-Württemberg has lodged an appeal before the Federal Court of Justice.

IRELAND

**Irish Central Criminal Court imposes criminal fine and three month suspended sentence on company director for bid rigging**

On 31 May 2017, Ireland's Central Criminal Court ("CCC") imposed a three-month suspended prison sentence and a fine of € 7,500 on a company director for engaging in bid rigging in the tender process for large commercial flooring contracts between 2012 and April 2013. The director was also barred from acting as a company director for five years, while the company involved, Aston Carpets & Flooring ("ACF"), received a fine of € 10,000. On top of the competition convictions, the director was found guilty of impeding a criminal prosecution, after asking another cartel member, during a surprise inspection, to delete incriminating emails,

The case was brought before the CCC following an investigation by Ireland's Competition and Consumer Protection Commission ("CCPC") which found that ACF and one of its competitors had entered into an agreement with the aim of indirectly fixing the price for flooring contracts and sharing the market by over-bidding on alternating tenders. Aston Carpet's competitor successfully applied for immunity and was therefore spared from any penalties.

While all infringements of competition law in Ireland are treated as criminal offences, this is the fifth Irish prosecution to be brought on indictment (subject to a criminal trial by jury) and only the third that has been successful.

ITALY

**Italian Consiglio di Stato reduces fine imposed in connection with bid-rigging cartel in public contracts for asbestos removal**

On 21 June 2017, the Italian Administrative Supreme Court (*Consiglio di Stato*) partly confirmed a 2015 decision adopted by the Italian Competition Authority ("AGCM") against Italian company Coibesa in connection with a bid-rigging cartel in three public tenders for the removal of asbestos from naval facilities. The AGCM imposed fines totalling over € 3 million on twelve companies, including € 343,000 on Coibesa, in respect of the infringement. While the court confirmed the substance of the infringement, it nonetheless ordered the AGCM to reduce the fine imposed on Coibesa by 70%.

In its judgment, the court considered that bid-rigging cartels restricted competition by object and, therefore, there was no need to prove the actual or potential restrictive effects of the conduct on competition. However, the court added that the effects of an infringement had to be accounted for when determining its gravity and hence the amount of the fine. As the AGCM had not accounted for the harm caused by Coibesa's conduct when calculating the fine, the court decided that the amount of the fine should be reduced by 70%. On that basis, the AGCM was ordered to recalculate the fine imposed on Coibesa in accordance with the court's instructions.

# VERTICAL AGREEMENTS

## – EUROPEAN UNION LEVEL –

**European Commission announces opening of investigations into distribution and/or licensing practices of Guess, Nike, Sanrio and Universal Studios**

On 6 June 2017, the European Commission ("Commission") opened a formal investigation into the distribution agreements and practices of clothing manufacturer and retailer Guess. The Commission will be investigating agreements (apparently at both retail and wholesale level) relating to the distribution of clothing, shoes and accessories that contain cross-border sales restrictions, cross-selling bans among members of a selective distribution system, internet sales limitations and resale price restrictions. The Commission is concerned that Guess's agreements may be in breach of Article 101 of the Treaty on the Functioning of the European Union ("TFEU").

Subsequently, on 14 June 2017, the Commission initiated formal proceedings in three separate investigations concerning the licensing and distribution practices of Nike, Sanrio and Universal Studios. The Commission is considering whether the three companies, in their role as licensors of rights for merchandising products for certain brands, may have breached the EU competition rules by restricting their licensees' ability to sell licensed merchandise cross-border and online. The investigation concerns the licensing and distribution of various merchandise products, such as clothes, shoes, phone accessories, bags or toys, on which an image or text is applied during the manufacturing process. The specific brands mentioned are: Fútbol Club Barcelona (Nike), Hello Kitty (Sanrio) and "Minions" and "Dispicable Me" (Universal Studios).

## – MEMBER STATE LEVEL –

FRANCE

**Paris Court of Appeal fines Expedia for use of hotel price parity clauses**

On 21 June 2017, the Paris Court of Appeal ruled that Expedia will have to pay a penalty of € 1 million for imposing price parity clauses on hotels in France in breach of the country's commercial code. The clauses restricted hotels from offering lower prices than those found on booking sites. Previously, in August 2015, France passed the 'Macron Law' which prohibited the use of all parity clauses (see VBB on Competition Law, Volume 2015, No. 11).

# INTELLECTUAL PROPERTY/ LICENSING

**– EUROPEAN UNION LEVEL –**

**English High Court issues "FRAND" injunction in dispute involving standard essential patents**

On 7 June 2017, Justice Birss of the English High Court of Justice issued a "FRAND" (Fair, Reasonable and Non-Discriminatory) injunction against Huawei, a Chinese telecommunications company, in its longstanding licensing dispute pitting it against Unwired Planet, a US based patent assertion entity. The dispute involves a portfolio of patents which are considered essential to the 2G, 3G and 4G wireless telecommunications standards developed under the auspices of the European Telecommunications Standards Institute ("ETSI").

The present judgment follows the judgment handed down on 7 April 2017 in which Justice Birss found that Unwired Planet had not abused its dominant position in the present case and could directly enforce FRAND royalty rates (see VBB on Competition Law, Volume 2017, No. 5). In that earlier judgment, Justice Birss also determined a FRAND rate and took the preliminary position that an injunction to prevent Huawei from infringing Unwired Planet's patents should be granted because: (1) Unwired Planet had established that Huawei infringed valid patents; (2) Huawei was not prepared to accept a license on terms which the judge considered as FRAND; and (3) Unwired Planet was not in breach of competition law. Still, Justice Birss did not decide whether an injunction should actually be granted until the judgment of 7 June 2017.

Huawei argued that an injunction should not be granted because (i) the case was under appeal, and the Court of Appeal may determine that different FRAND rates from those determined by Justice Birss are appropriate; and (ii) if an injunction was granted, it would last until 2028 (i.e., until the expiry of the patent), while the FRAND licensing agreement would expire in 2020, which would put Huawei in a weak negotiation position against Unwired Planet should the license be renegotiated. In this respect, Huawei submitted that Unwired Planet would benefit from the injunction if new terms could not be agreed upon. As an alternative to an injunction, Huawei offered the judge two undertakings, namely that it would (i) enter into the licensing agreement following the final outcome of the appeal; and (ii) comply with the terms of the licensing agreement as if it was in effect – including the payment of the royalties – until the appeal was final.

Justice Birss did not accept Huawei's proposed undertaking and, instead, ordered that an injunction should be granted. However, Justice Birss acknowledged that a "standard" injunction would negatively impact future negotiations between the parties with respect to the terms of the license. He therefore granted Unwired Planet what would seem to be a new type of "FRAND" injunction, which includes two specific features, namely (i) a clause stipulating that the injunction would cease to have effect when the defendant enters into a FRAND license; and (ii) the freedom for the parties to return to court to decide whether the injunction should remain in force at the expiry of the FRAND license (which, as noted above, will end before the relevant patents expire).

Justice Birss annexed to his judgment a copy of the final form of the licensing agreement to be entered into by Unwired Planet and Huawei.

# | LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

**– EUROPEAN UNION LEVEL –**

**General Court orders EU to pay damages for excessively long court proceedings in Flat Glass cartel case**

On 7 June 2017, the General Court ("GC") delivered a judgment in relation to an action claiming damages for excessive duration of judicial proceedings and for an infringement of the principle of equal treatment in connection with the *Car Glass* cartel case. The GC ruled that the duration of the judicial proceeding was excessive and ordered the European Union to pay Guardian, a flat glass producer, € 654,523 (plus interest) as compensation for the damage suffered. It dismissed the second part of the damages claim.

In November 2007, the Commission adopted a decision in which it imposed a fine on Guardian totalling over € 148 million for its involvement in a cartel in the flat glass market. In September 2012, the GC dismissed in its entirety Guardian's request for annulment of the Commission Decisions (see VBB on Competition Law, Volume 2012, No. 10). In November 2014, however, the Court of Justice of the European Union ("ECJ") ruled that the Commission had breached the principle of equal treatment and reduced the fine imposed on Guardian to € 103.6 million (See VBB on Competition Law, Volume 2014, No. 11). In addition, the ECJ observed that the long duration of the GC proceedings could not be justified. Following the ECJ judgment, Guardian lodged an action against the European Union seeking damages of more than € 43 million as compensation for the injury suffered as a result of (i) the GC's failure to adjudicate within a reasonable time and (ii) the Commission and the General Court's "*sufficiently serious infringement of the principle of equal treatment*". Guardian sought to recover bank guarantee costs, loss profits, non-pecuniary losses and compensatory interest.

*Damages linked to the failure to adjudicate within a reasonable time*

The GC ruled that the EU's conduct was unlawful because of the excessive length of the proceedings. It first noted that a period of 15 months between the end of the written phase and the beginning of the oral phase of the GC proceedings is considered acceptable in complex cartel cases such as the one at hand. In the present case, the GC found that 41 months had lapsed between the end of the written phase and the beginning of the oral phase, which exceeded the reasonable time period by over 26 months. Accordingly, Guardian's right to adjudication within a reasonable time period, as enshrined in the Charter of Fundamental Rights of the European Union, had been was breached.

The GC then examined the amount of damages allegedly suffered by Guardian. The GC took the view that Guardian was entitled to claim compensatory interest for the costs of a bank guarantee during the time period that exceeded the reasonable time period of 26 months. These costs were estimated at € 654,523.

This is the fifth time that the GC ruled on damages claims for the excessively long duration of appeals against Commission cartel decisions. The GC previously awarded damages to Gascogne (see VBB on Competition Law, Volume 2017, No. 1), Kendrion, ASPLA and Armando Alvarez (see VBB on Competition Law, Volume 2017, No. 2), but dismissed the action brought by Aalbert (see VBB on Competition Law, Volume 2017, No. 2).

*Damages linked to "sufficiently serious infringement of the principle of equal treatment"*

The GC dismissed Guardian's claim that it suffered damages as a result of the Commission and the General Court's "*sufficiently serious infringement of the principle of equal treatment*". In essence, Guardian claimed that it had to provide a bank guarantee of € 37 million (in addition to the € 111 million it paid directly to the Commission), on which it had to pay interest. This would not have been necessary had the Commission or the General Court correctly applied the principle of equal treatment (as mentioned above, the ECJ reduced the fine imposed on Guardian from € 148 million to € 103.6 million after taking the view that the principle of equal treatment had been breached). The GC however considered that the bank guarantee taken out by Guardian was not a direct consequence of the unlawfulness of the Commission's decision. Guardian had the option to pay the amount of the fine in full, yet it decided at its own discretion to take out a bank guarantee and, therefore, incur the related costs.

The GC also rejected Guardian claim that it suffered damages of € 14.8 million (i.e., 10% of the fine) related to a loss of reputation, as the decision created a misleading impression concerning Guardian's involvement in an infringement of competition rules. The GC noted that Guardian had only sought the annulment of the Commission's decision in part, which meant that Guardian had not questioned its actual participation in the cartel. Rather, Guardian had merely contested the gravity of its involvement in the infringement. In any event, Guardian had not substantiated by evidence how the "*sufficiently serious infringement of the principle of equal treatment*" was likely to have an effect on its reputation beyond the effect linked to its participation in the cartel. The GC rejected on similar grounds Guardian's claim that it suffered loss of reputation as a result of the excessive duration of the proceedings.

## – MEMBER STATE LEVEL –

GERMANY

### German Bundestag introduces electronic federal registry of companies convicted of criminal or administrative offences

On 1 June 2017, the German Parliament (Bundestag) adopted the Law on the introduction of an electronic central federal registry of companies ("Wettbewerbsregistergesetz - WRegG"). The Law aims to deter corruption and economic crime and to protect competition in public procurement and tenders for concessions. The federal registry, which will be kept by the Federal Cartel Office, will replace similar registries currently maintained by German federal states.

Under the new law, the authorities responsible for the prosecution of criminal and administrative offences are obliged to transmit relevant information about certain criminal and administrative cases to the federal registry. This information will be used to assess whether companies may be excluded from a public procurement procedure. Contracting authorities must exclude companies that have been convicted of certain, exhaustively listed criminal offences, such as withholding of taxes or social contributions, corruption and corruptibility, fraud and subsidy fraud, money laundering, terrorist funding and human trafficking.

In addition, contracting authorities may exclude a company from participating in a procurement procedure that has been found guilty, e.g., of bid rigging or another infringement of EU or German competition law, if the fine for the infringement amounts to € 50,000 or more.

Contracting authorities will be obliged to consult the registry before accepting a bid with a contract value of € 30,000 or more. In certain sectors, such as water, energy, gas and heat, transport and postal services, the relevant EU threshold values are applicable, which may be lower. Public authorities may optionally consult the registry for lower contract values.

Companies must be informed of the information that concerns them before it is included in the registry. The entry will be removed after five years at the latest, depending on the gravity of the infringement. Companies may ask for the entry to be removed earlier if they can prove a legitimate interest.

The WRegG will enter into force on the day following its publication, but will become effective only from the date of the entry into force of an ordinance with implementing rules.

## – OTHER DEVELOPMENTS –

EUROPEAN UNION: On 31 May 2017, the European Commission published its 2016 Report on Competition policy, which provides detailed information on the most important policy and legislative initiatives, and on decisions adopted by the European Commission in application of EU competition law during the year. The report is composed of two documents: a Communication from the Commission and the Commission Staff Working paper describing the developments in more detail. Both documents are available at [http://ec.europa.eu/competition/publications/annual_report/index.html](http://ec.europa.eu/competition/publications/annual_report/index.html)

GERMANY: According to a press release of the Federal Cartel Office ("FCO") issued on 12 June 2017, a newly established department for consumer protection will shortly be operational. Following the 9th amendment of the Federal Cartel Act ("GWB") (see VBB on Competition Law, Volume 2017, No 5), the FCO has been granted powers in the area of consumer protection, which will be pooled in the new division. Under its new consumer protection remit, the FCO can carry out sector inquiries if it suspects serious, permanent or repeated violations of consumer protection law which affect a large number of consumers. Furthermore, the FCO will be able to join ongoing court proceedings as *amicus curiae* concerning these kinds of infringements.

# | PRIVATE ENFORCEMENT

**– MEMBER STATE LEVEL –**

GERMANY

**Thuringian Higher Regional Court upholds judgment on cartel damages in the rail construction sector**

On 22 February 2017, the Thuringian Higher Regional Court in Jena ("the Court") upheld an earlier judgment of the Regional Court of Erfurt of 3 July 2015 which had ruled that the claimant, a public transport company, was in principle entitled to damages, although the amount of damages was to be determined in a subsequent judgment.

The Court held that the claim was admissible despite the fact that the quantification of damages was to be decided in a subsequent judgment. As the facts of the case were controversial, in particular with regard to the amount of damages and the legal question whether the claim was time-barred, this two-step approach was deemed necessary for reasons of procedural efficiency.

The claim was a follow-on action to a 2003 decision of the Federal Cartel Office (FCO) that had established that the defendants had participated in a cartel in the rail construction sector. The Court held that it could be *prima facie* assumed that the cartel in question caused damage. This is in line with Article 17 of Directive 2014/104/EU (the Damages Directive), which stipulates that it shall be presumed that cartel infringements cause harm.

Interestingly, the contract between the plaintiff and the defendant included the following liquidated damages clause: "*If it is demonstrated that the contractor has entered into an agreement which constitutes an unlawful restraint on competition, it has to pay 15% of the billing sum to the client, unless it is demonstrated that the actual amount of the damage deviates*". The Court held that such a liquidated damages clause in standard contract terms was valid. In particular, it ruled that the clause did not fall within the catalogue of forbidden clauses as it is not a contractual penalty clause but a lump sum damages clause that provided the defendant the possibility of proving a lesser damage.

With regard to the limitation period, the Court found that the damages claims were not time-barred. The Court had to decide whether Section 33 (5) of the Act against Restraints of Competition ("GWB") – according to which the statute of limitation for claims for damages is suspended during the proceedings of the FCO – also applies to claims that came into existence before this provision became effective. The Court found that it does, and therefore was applicable to the present claims. In this regard, it sides with the decision of the Higher Regional Court in Düsseldorf from 18 February 2005 (see VBB on Competition Law, Volume 2015, No. 4) and disagrees with the judgments of the Higher Regional Court Karlsruhe from 9 November 2016 (see VBB on Competition Law, Volume 2017, No. 1) and the Regional Court in Mannheim from 24 January 2017 (see VBB on Competition Law, Volume 2017, No. 2). The Court bases its reasoning mainly on the consideration that the purpose of the amendment of the GWB was to facilitate the enforcement of damages claims.

The judgment is under appeal before the Federal Court of Justice ("BGH"). A pronouncement of Germany's highest civil court on this controversial issue can therefore be expected soon.

 

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