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MERGER CONTROL

– MEMBER STATE LEVEL –

FRANCE

French Government to review deal on public interest grounds for first time

On 14 June 2018, the French Ministry of Economy announced its intention to carry out, for the first time, a public interest review of Cofigeo's acquisition of the ready meals business of Agripole.

In addition to a standard merger review by the French competition authority ("FCA"), French law allows the Ministry of Economy to conduct a so-called "phase III" review of transactions on public interest grounds, rather than competition grounds, within 25 days of an FCA decision. Such public interest grounds include the protection of industrial development, competitiveness of an industry in view of international competition or the creation and stability of employment. Prior to this case, the power had never been used. In this case, the French Ministry's phase III review is expected to be concluded by 19 July 2018.

The additional review by the Ministry of Economy was announced immediately after the FCA's decision to clear the transaction on competition grounds, subject to conditions. In the decision, the FCA considered that – after the transaction – Cofigeo would hold over 70% of the market of exotic ready meals and over 80% of the market of Italian ready meals. The FCA was concerned that the acquisition would lead to price increases for products bought daily by French consumers and regarded by certain consumers, especially those with modest incomes, as essential goods. In order to address these concerns, the FCA required Cofigeo to divest one of its ready meal brands (i.e., Zapetti) as well as a production site.

UNITED KINGDOM

New national security merger thresholds come into force in the UK

On 11 June 2018, new merger control thresholds entered into force in the UK, allowing for greater intervention in transactions raising national security concerns.

Under existing rules, the UK Government is only empowered to intervene in mergers on public interest grounds of national security, plurality and other considerations relating to newspapers and other media, and the stability of the UK financial system. However, according to the UK Government, there have been significant technological advances, economic developments and changes in the nature of threats to national security, which necessitated reform of the existing merger control regime (see VBB on Competition Law, Volume 2017, No. 10).

The new rules provide the UK Government with greater scope to intervene in transactions which raise national security concerns. In particular, the UK Secretary of State may now intervene if a target business engages in one of the following three activities: (i) the development or production of items for military or military and civilian use ("dual use"), (ii) the design and maintenance of aspects of computing hardware, or (iii) the development and production of quantum technology. The UK Secretary of State may intervene in transactions in the above three areas of economic activity where:

- The annual turnover of the target business in the UK exceeds £1 million (compared to £70 million under the standard regime); or
- The target business has a share of supply or purchase of at least 25% in a substantial part of the UK.

For transactions notified at national level in the UK to the UK Competition and Markets Authority ("CMA"), the UK Secretary of State may intervene by issuing a Public Interest Intervention Notice ("PIIN"). For transactions notified to the European Commission under the EU Merger Regulation, the UK Secretary of State may intervene by issuing a European Intervention Notice ("EIN"). Following either a PIIN or an EIN, the CMA will conduct a 'phase 1' report to the UK Secretary of State. If appropriate, the CMA may open a 'phase 2' investigation. Ultimately, the UK Secretary of State can accept final undertakings or make orders to remedy, mitigate or prevent any adverse effects to the public interest or (in extremis) block a merger altogether. Interestingly, on 17 June 2018, the UK Secretary of State

issued the first PIIN in respect of the acquisition by Gardner Aerospace Holdings, a Chinese-owned company, of Northern Aerospace, an aircraft component manufacturer based in the UK.

The UK Government has published guidance on the new thresholds – available here.

UK CMA fines Electro Rent for breach of an Interim Order

On 11 June 2018, the CMA fined Electro Rent £100,000 for breaching an Interim Order imposed in relation to Electro Rent's acquisition of Microlease. According to the CMA, Electro Rent had failed to obtain the CMA's consent prior to serving a notice of termination on the lease of its only premises in the UK.

Electro Rent's acquisition of Microlease was referred for a Phase 2 merger investigation by the CMA in October 2017. In such situations, the CMA may impose an Interim Order which requires the merging parties to remain independent and prevents further acts which might implement the transaction. The purpose of an Interim Order is to avoid prejudicing competition pending completion of the CMA's review. This procedure is different to the European Commission's practice in relation to early implementation of a transaction prior to clearance at EU level, as the CMA's Interim Order imposes detailed, specified obligations on the merging parties. In this case, the CMA's Interim Order required, *inter alia*, the merging parties to maintain and preserve their separate facilities.

However, in April 2018, it came to the CMA's attention that Electro Rent had served a notice to terminate the lease on its UK premises. The lease had been included in the remedial package proposed to resolve the CMA's competition concerns. Following an investigation, the CMA found that Electro Rent had "no reasonable excuse" for failing to seek the prior consent of the CMA before serving notice of termination of its lease. The CMA issued a fine of £100,000 which it considered to reflect the significance of the breach and the adverse impact on the CMA's investigation.

– OTHER DEVELOPMENTS –

Three different mergers withdrawn due to competition concerns in Germany, Portugal and the UK

- On 18 June 2018, Horizon and Brink, two large towbar suppliers, abandoned a merger after significant competition concerns were identified by the German Federal Cartel Office ("FCO") and the UK Competition and Markets Authority ("CMA"). During the review, the FCO and the CMA coordinated closely and raised concerns that the deal would give the merged entity a market share of over 50% and would leave only one other major competitor on the towbar market, which would significantly harm consumers.

- On 19 June 2018, the Portuguese Competition Authority ("ADC") announced that Altice had abandoned its proposed acquisition of Media Capital. The ADC confirmed it had intended to prohibit the deal as the parties did not submit structural commitments to address concerns that the merged company would foreclose access of rival competitors' telecom platforms to Media Capital's media content and TV channels.

- On 20 June 2018, two suppliers of diesel fuel to ships on the Rhine river in Germany abandoned a merger after the FCO threatened to prohibit the transaction. According to the FCO, the deal would have created by far the leading supplier of diesel fuel for inland waterway vessels and only leave one remaining major competitor.

ABUSE OF DOMINANT POSITION

– MEMBER STATE LEVEL –

ITALY

Italian Competition Authority's decision to fine Unilever for abusing its dominant position upheld by the Rome Administrative Court

On 31 May 2018, the Regional Administrative Court of First Instance in Rome (the "Court") rejected Unilever's challenge of the decision of the Italian Competition Authority ("ICA") finding that Unilever abused its dominant position on the market for "impulse ice cream". The decision found that Unilever implemented a strategy aimed at excluding its competitors by using exclusivity clauses and loyalty-inducing rebates (see VBB on Competition law, Volume 2017, No. 12).

In the appeal, Unilever relied on the ECJ's ruling in the *Intel* case to argue that the ICA's assessment lacked an economic analysis of whether Unilever's conduct was capable of excluding "as efficient competitors" from the market. The Court, however, rejected this plea for several reasons.

First, the Court clarified that the ICA's decision mainly concerned Unilever's extensive use of exclusivity clauses. The exclusivity obtained from customers was only "reinforced" by the application of a series of fidelity rebates.

Secondly, the Court explained that the so-called "as efficient competitor" ("AEC") test is not mandatory when the alleged abuse consists of several anticompetitive practices, and is thus not limited to a pricing policy. The Court also pointed out that the Intel judgement was based on a "particular factual situation" and did not impose a general principle, according to which the AEC test is essential for the completeness of an investigation concerning rebates.

Finally, the Court considered that the AEC test does not constitute a necessary condition for a finding of abuse, by reference to what was said in Case C-23/14 *Post Danmark A/S v Konkurrencerådet* (ECJ, 6 October 2015).

CARTELS AND HORIZONTAL AGREEMENTS

– MEMBER STATE LEVEL –

GERMANY

Federal Cartel Office's decision on joint marketing in the timber market overturned by Federal Court of Justice

On 12 June 2018, the German Federal Court of Justice ("FCJ") overturned a prohibition decision of the Federal Cartel Office ("FCO") concerning the timber marketing practices of the federal state of Baden-Württemberg. The FCJ ruled on procedural grounds without assessing the substance of the case.

In 2008, following the opening of an investigation by the FCO, the German federal state of Baden-Württemberg committed to refrain from jointly marketing timber of forest owners who own areas of more than 3,000 hectares. The FCO accepted the commitments and closed the case at that time via a commitment decision, but later reopened proceedings and issued a new decision in 2015 setting a lower limit of 100 hectares (see VBB on Competition Law, Volume 2015, No.8). On appeal, the Higher Regional Court of Düsseldorf upheld the FCO's decision (see VBB on Competition Law, Volume 2017, No.6), which was appealed to the FCJ.

According to a press release dated 12 June 2018, the FCJ has now overturned the FCO decision to reopen proceedings. While the FCO claimed that reopening proceedings was justified by new information obtained after the commitment decision was adopted, the FCJ disagreed, finding that the information was already available at the time the commitment decision was adopted. The FCJ concluded that there was no objective change of factual circumstances and, accordingly, annulled the 2015 decision.

VERTICAL AGREEMENTS

– MEMBER STATE LEVEL –

GERMANY

Higher Regional Court of Hamburg addresses ban on online sales via third-party platforms for non-luxury products

On 22 March 2018, the Higher Regional Court of Hamburg (the "Court") upheld a ruling of the Regional Court of Hamburg ordering an authorized dealer in a selective distribution system to cease and desist from selling non-luxury products via third-party platforms and found that such ban imposed in the context of a selective distribution system did not violate EU competition law.

The case concerned a company supplying a range of food supplements, cosmetics and fitness drinks, which are considered high-end and are sold at higher prices than comparable supplements. The company marketed its products via a selective distribution system in order to ensure that customers were provided with tailor-made advice in order to identify their particular individual needs, taking into account factors such as age, gender, athletic focus, weight, lifestyle, diseases and allergies, before recommending a product. For a small monthly fee, the company also allowed authorized sales partners to use its internet retail shops to make online sales. The distribution system required websites of authorized partners to provide detailed product information, to display the full range of products and to include the partner's contact details to motivate customers to receive personalized advice.

In 2008, the company discovered that its products were sold on eBay and similar trading platforms anonymously and with false or misleading product information. These sales (even if not authorized by the company) led to legal actions against it under the German Foods, Consumer Goods and Foodstuffs Act, with courts holding the company liable for such unfair practices. The company thus complemented its qualitative selective distribution criteria with a ban of all sales of its products via eBay and similar platforms "for the time being". When, in 2014, the defendant, a distribution partner of the company, offered the company's goods via eBay, despite having agreed to the distribution criteria and without the company's consent, the company first admonished the defendant and then brought an action to cease and desist.

In the present judgment, the Court held that the company's action to ban sales via eBay and similar platforms was compliant with EU competition law, specifically Article 101 TFEU. In reaching this conclusion, the Court first held that a non-discriminatory selective distribution system for the distribution of the food supplements and cosmetics at issue may comply with competition law even if the goods sold are not luxury goods, as the products are of high quality and as the system involves advice and services being provided to the customer for sophisticated and high-end products, which among other purposes, aims to establish or maintain a particular product image.

In its reasoning, the Court referred to the ECJ's recent judgment in C-230/16 - Coty (see VBB on Competition Law Volume 2017, No.12), holding that a qualitative selective distribution system does not violate Article 101 TFEU where the system is intended to ensure the luxury image of these products. The ECJ in that case further held that a ban on sales via third party online platforms in such a system likewise does not violate Article 101, and in any event is exempted by the Vertical Agreements Block Exemption Regulation ("VABER").

The Court in the present case did not see any clear grounds to distinguish between high-value and luxury goods on one hand and other goods, which, without being luxury goods, are also of high quality. There would, in the Court's view, be no legal basis for such a distinction, which would disregard the fact that a selective distribution system for high quality products may also be necessary in order to establish and maintain the quality or specifications of the product, as well as to ensure the appropriate presentation of the products and the availability of advice for consumers.

The Court concluded that the product characteristics at issue justified the selective distribution system, including its criteria for online sales, which currently would exclude sales via eBay where only specific products can be displayed, as opposed to the entire product portfolio. The Court also noted that online sales were not prohibited altogether, but only via certain third-party platforms, and

only temporarily. According to the Court, such restrictions, aiming to preserve the product image and (in this case) to prevent product and image-damaging business practices of sales partners identified in the past, are allowed not only for luxury products but also for high quality products. Hence, the judgment applies the *Coty* reasoning beyond luxury products also to high quality goods.

This result is in line with the Commission's assessment in its Competition policy brief of April 2018, where it took the view that the findings of the ECJ in Coty are equally applicable to non-luxury products and that marketplace bans do not represent a hardcore restriction under the VABER.

STATE AID

EUROPEAN UNION: On 31 May 2018, the General Court of the European Union (the "General Court") issued a judgment in Case T-160/16, Groningen Seaports v European Commission, relating to the tax treatments of Dutch seaports. The European Commission (the "Commission") has investigated the functioning and taxation of ports in various EU Member States. In 2016, it adopted its first negative decision, requiring the Netherlands to abolish the exemption from corporate tax granted to seaports. Groningen Seaports requested the annulment of that decision, claiming that the Commission should have terminated all parallel investigations into state aid to ports in EU Member States simultaneously or that it should have allowed the Dutch ports to benefit from a transitional period so that all ports would be subject to corporate tax at the same time. The General Court rejected all pleas raised by the applicant. The Court reminded the applicant, inter alia, that aid cannot be justified on the grounds that other Member States offer similar advantages and that the elimination of aid (rather than extending the duration of aid in a Member State) is required to ensure equal conditions of competition.

EUROPEAN UNION: On 20 June 2018, the European Commission (the "Commission") found that Luxembourg granted selective tax advantages to Engie. According to the press release of the Commission, Engie put in place complex hybrid convertible loan structures between three Engie group companies, which the Luxembourg tax authority endorsed by two sets of tax rulings. According to the Commission, these tax rulings artificially lowered Engie's tax burden, without any valid justification. Luxembourg is ordered to recover the unpaid tax amounting to approximately EUR 120 million.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– EUROPEAN UNION LEVEL –

Commission agrees framework for dialogue on competition policy issues with Mexico

On 4 June 2018, the European Commission and the Comisión Federal de Competencia Económica ("COFECE"), the Mexican competition authority, signed a cooperation arrangement which provides a framework for dialogue on competition policy issues and for sharing views, as well as non-confidential information on individual cases. In particular, the arrangement provides for:

- the exchange of information on competition laws and policies, on multilateral initiatives and advocacy efforts;
- coordination of the enforcement activities of the two competition authorities when working on the same or related matters (e.g. merger cases subject to review in both jurisdictions);
- the possibility for one of the two competition authorities to refer a case to the other, if it involves anti-competitive practices carried out in the latter's territory; and
- cooperation on technical matters, for instance through training or exchange of officials.

The signing of this framework for a dialogue on competition policy issues reflects the ambition of enhanced cooperation on competition matters between the EU and Mexico.

ECJ rejects Nexans' appeal against the publication by the Commission of confidential information

On 12 June 2018, the Court of the Justice of the European Union ("ECJ") rejected the appeal lodged by Nexans against the Order of the President of the General Court of 23 November 2017, which had rejected Nexans' request to prevent the publication by the Commission of confidential information in the public version of the *Power Cables* cartel decision (see VBB on Competition Law, Volume 2014, No. 6).

The ECJ first took into consideration the fact that the information was five years old, which indicated the historical nature of the information, and noted that Nexans failed to provide substantial proof that the information had not lost its secret or confidential nature due to the passing of time. As a result, the ECJ dismissed the claim that the information was covered by professional secrecy.

The ECJ also rejected Nexans' argument that the General Court failed to protect Nexans' right to an effective judicial remedy. The General Court had rejected Nexans' argument that the decision at issue should have been suspended until the outcome of the pending annulment proceedings against the Commission's cartel decision, notably on account of the illegal nature of the seizure of the information at issue during the dawn raid carried out by the Commission. The ECJ found no error of law in the General Court's assessment.

Commission issues report on Competition Policy 2017

On 18 June 2018, the European Commission published its annual Report on Competition Policy for the year 2017. This Report provides a non-exhaustive summary of activities undertaken by the Commission in the field of competition policy over the last year. Further information can be found in the accompanying Commission Staff Working Document.

In the Report, the Commission stresses its efforts in enhancing the effectiveness of competition enforcement and refers, in particular, to the ongoing ECN+ initiative, the purpose of which is to enable Member States' competition authorities to be more effective enforcers of EU antitrust rules (see VBB on Competition Law, Volume 2018, No. 5). This proposal seeks to further empower Member States' competition authorities and make sure they have all the tools they require to achieve this.

The Commission also stresses that competition policy is an integral part of its strategy to improve and strengthen the Digital Single Market and, in this respect, it highlights its activities in the digital sector in 2017, such as its landmark decision against Google (see VBB on Competition Law, Volume 2017, No. 6) and the final report of the Commission's

e-commerce sector inquiry (see VBB on Competition Law, Volume 2017, No. 5).

The Commission then summarizes its antitrust enforcement and merger review in the pharmaceutical sector, key merger operations in the agro-chemical sector, decisions protecting competition in network industries (such as the Commission's work towards a European Energy Union), as well as decisions tackling competition distortions in the taxation and financial sector, including the Amazon state aid decision (see VBB on Competition Law, Volume 2017, No. 10).

Both the Report on Competition Policy 2017 and the accompanying Commission Staff Working Document can be found here.

– MEMBER STATE LEVEL –

BELGIUM

BCA Publishes Annual Report for 2017

On 16 May 2018, the Belgian Competition Authority ("BCA") published its annual report for the year 2017 (the "Report"). The Report reveals, amongst other matters, an increase in personnel available for investigations, a slight decrease in antitrust investigations (resulting however in a noticeably higher amount in fines) and a slight increase in merger control notifications. The BCA's activities are estimated to have resulted in an impact valued at approximately EUR 380 million. The Report also includes the BCA's enforcement priorities, as previously published on 27 April 2018. The BCA's Report is available in Dutch and in French.

GERMANY

Higher Regional Court of Düsseldorf rules on access to evidence

On 3 April 2018, the Higher Regional Court of Düsseldorf rendered a judgment on the newly introduced preliminary injunction procedure for the disclosure of competition decisions.

As part of the implementation of the EU damages directive in June 2017, the German legislator introduced into the German Act against Restraints of Competition ("ARC") a proceeding for a preliminary injunction with a view of obtaining the disclosure of information. Section 89b (5) of the ARC allows claimants to obtain from the infringer a copy of the infringement decision of the competition authority. According to the transitional rules of the implementing act, this provision shall only be applicable in legal actions filed after 26 December 2016, which was the deadline for transposing the EU damages directive into national law.

In its recent judgment, the Higher Regional Court of Düsseldorf rejected a request for disclosure of the infringement decision in the trucks cartel case (see VBB on Competition Law Volume 2016, No.7). It ruled that Section 89b (5) ARC, which refers to the right to have evidence surrendered and information disclosed pursuant to Section 33g ARC, only applies to damages claims which arose after the entry into force of Section 33g ARC, together with the amendment of the ARC, on 9 June 2017. The Court also noted that claims must be brought with urgency, as a claimant may not meet the conditions for a preliminary injunction if it does not initiate the matter in a timely manner. Unless special circumstances apply, the Court held that exceeding the narrow time limit of four weeks shows a lack of urgency. Finally, the Court clarified that Section 89b (5) ARC is limited to the obligation to provide a copy of the infringement decision and does not extend to documents and evidence referred to in such decision.

UNITED KINGDOM

CMA consults on draft guidance on investigation procedures

On 21 June 2018, the UK's Competition and Markets Authority ("CMA") published a consultation document which sets out draft guidance on how the CMA will investigate suspected infringements of competition law.

According to the CMA, the purpose of the revised guidance is to facilitate procedural efficiencies and to develop the existing guidance in light of the experience gained since it came into effect in March 2014. The proposed changes are also in response to a notable increase in enforcement by the CMA, with 60% more cases launched in 2016 and 2017 than in previous years. Further, the CMA estimates that the UK's exit from the EU may result in it taking on an additional five to seven complex cartel/antitrust cases per year.

In summary, the CMA proposes to make five substantive changes to its existing guidance. First, the CMA will change how it handles complaints by limiting the status of "formal complainant" (i.e., by removing the "two-tier" distinction between "formal" and "standard" complainants) and how complainants contact the CMA. Second, the CMA will introduce, as standard, a streamlined access to the case file by only providing documents referred to in the Statement of Objections (although parties may still request non-key documents). Interestingly, the CMA estimates that key documents only constitute around 5% to 15% of the average case file. Third, the CMA will clarify the process for applying for interim measures. It added that it will not issue interim measures where a person adduces evidence to the CMA that, on the balance of probabilities, shows that an agreement under investigation would satisfy the relevant conditions for exemption. Fourth, the CMA will introduce a more efficient procedure for oral hearings on draft penalty statements and allow greater flexibility for parties to respond to requests for information. Fifth, the CMA will clarify its practice around accepting commitments from a business relating to its future conduct. Helpfully, the CMA also published a 117-page marked-up copy of the draft guidance which identifies all of the proposed substantive and other minor technical changes proposed by the CMA.

The CMA's consultation will run until 2 August 2018 and is available here.

PRIVATE ENFORCEMENT

– MEMBER STATE LEVEL –

BELGIUM

Belgian Supreme Court removes one more hurdle in European Commission's claim for damages against elevator cartel

On 22 March 2018, the Belgian Supreme Court (the "Supreme Court") dismissed an appeal against an interim judgment of the Brussels Court of Appeal (the "Court of Appeal") on the damages claim introduced by the European Commission (the "Commission"). This claim arose following the Commission's 2007 decision fining four elevator companies, Kone, Otis, Schindler and ThyssenKrupp (the "Defendants"), a total of EUR 992 million for their participation in a cartel on the markets for the sale, installation, maintenance and renewal of lifts and escalators in Belgium, Germany, Luxembourg and the Netherlands (the "Cartel Decision" - see VBB on Competition Law, Volume 2007, No. 3).

In June 2008, the Commission brought an action for damages before the Brussels Commercial Court (the "Commercial Court") based on its Cartel Decision as it considered that it had suffered injury due to the cartel. On 24 November 2014, after having requested a preliminary ruling from the Court of Justice of the European Union, the Commercial Court dismissed the Commission's action for damages for lack of sufficient evidence.

The Commission appealed the judgement of the Commercial Court of 24 November 2014 before the Court of Appeal. On 28 October 2015, the Court of Appeal issued an interim judgment ordering the four Defendants to disclose documents from the Commission's cartel file (the "Judgment"). The Court of Appeal ordered the disclosure of: (i) specific paragraphs of the Commission's Cartel Decision discussing the Belgian market; and (ii) a copy of the documents from the Commission's investigation file as referred to in the Cartel Decision. Following the Judgment, the Defendants were required to hand over two versions of each set of documents: one complete version and one version leaving out specific confidential information listed in the Judgment (e.g., personal data of natural persons, information which could lead to the identification of the leniency applicant and internal documents of the Commission).

The four Defendants lodged an appeal before the Supreme Court to annul the Judgment, based on two arguments. First, the Defendants argued that the Court of Appeal's interpretation of the documents of the leniency programme which benefit from the confidentiality obligation is too narrow. The Supreme Court held that, in accordance with the ECJ's judgment in *Donau Chemie and Others* (C-536/11, *Donau Chemie and Others*, EU:C:2013:366), it is up to the national courts to balance: (i) the interests of the claimant to review the documents in view of the preparation of its claim to seek damages, taking into account any possible alternatives at the claimant's disposal; and (ii) the concrete potential negative effects of disclosure to the public interest or legitimate interests of third parties. According to the Supreme Court, solely invoking the risk that the disclosure may undermine the leniency programme is insufficient. Non-disclosure is justified only if there is a risk that a specific document may actually undermine the public interest relating to the effectiveness of the national leniency programme.

Secondly, the Court dismissed the argument of the Defendants that the Court of Appeal did not take into account the extent to which the public interest would be affected by ordering the disclosure of evidence which the Commission had obtained in the framework of the leniency programme. According to the Supreme Court, the Court of Appeal did take into account the specific circumstances of the case justifying the disclosure of the documents, referring, in particular, to the following considerations:

- the specificity of the follow-on procedure and the fact that no evidence could be collected at the time when the harmful practices occurred and the relevant evidence therefore necessarily came into possession of the parties in an asymmetrical manner;
- the burden of proof in these proceedings required a factual and economic analysis which is generally too complex for a claimant to produce on its own;
- the relevance of the documents requested to be disclosed and whether these will likely serve to substantiate the claim of the Commission;

- the fact that the Cartel Decision notes that the cartel has effectively had anticompetitive effects, confirms the existence of the cartel and assumes that the cartel has negatively impacted the Belgian market; and

- the opinion of the Commission constitutes at least prima facie evidence that the harmful practices have caused an injury to the market players.

The judgment of the Supreme Court comes as a welcome ruling for the Commission, which has had to overcome several hurdles to recover damages before the Belgian courts. The judgment is also a valuable tool for claimants seeking to substantiate their damage claims with documentation which the Commission obtained through the leniency programme.

The Supreme Court has now referred the case back to the Court of Appeal, which will further assess the Commission's claims for damages.

GERMANY

German Federal Court of Justice rules on the statute of limitations for follow-up damages claims

On 12 June 2018, the German Federal Court of Justice ("FCJ") delivered a highly anticipated judgment that clarified that the suspension of the limitation period for cartel damages claims also applies to claims that arose prior to the entry into force of the new provision setting out the suspension.

The case giving rise to this ruling concerned damages claims against grey cement producers. The claimant, a trader of building materials, filed for damages against a producer of grey cement on the basis of the defendant's participation in the grey cement cartel between 1993 and 2002, for which it was fined by the *Bundeskartellamt* (the German Federal Cartel Office) in 2003. The judgment of the Regional Court of Mannheim, which initially granted the claim, was overturned by the Higher Regional Court of Karlsruhe on the grounds that the claim was time-barred (see VBB on Competition Law, Volume 2017, No.1).

The provision at issue, section 33(5) of the German Act against Restraints of Competition in the version dated 7 July 2005, states that the limitation period for a claim for damages pursuant to paragraph (3) of the same provision (which lays down the claim for damages against a cartel infringer) shall be suspended if and when cartel proceedings are initiated by a competition authority. The issue at hand was whether this provision, which came into force on 1 July 2005, applies retroactively to damages claims based on infringements which occurred prior to its entry into force. The majority of German courts had ruled in favour of such a retroactive effect (see VBB on Competition Law, Volume 2017, No.6 and No.9; Volume 2015, No.4).

The FCJ confirmed this view. The full decision is not available yet, but according to a press release of 12 June 2018, the reasoning of the FCJ follows the general legal concept concerning limitation periods, pursuant to which claims arising prior to the date of entry into force of a new provision fall under the new legal regime, provided that they were not yet time-barred at that moment.

This ruling will extend the possibility of bringing damages claims, namely for past infringements. Before the FCJ's decision, different courts in Germany had issued opposing decisions on the issue. Shortly before the FCJ's ruling, the Regional Courts of Stuttgart and Hannover granted three distinct follow-on damages claims for truck purchases in judgments dated 16 April 2018 and 30 April 2018, joining the view of the majority of German Higher Regional Courts in the matter. The claims followed from the infringement decision of the European Commission of July 2016 establishing the participation of MAN, Volvo/Renault, Daimler, Iveco and DAF in a price-fixing cartel between 1997 and 2011 (see VBB on Competition Law, Volume 2016, No.7). These decisions are in line with the outcome of the FCJ's ruling which now creates legal certainty on the matter.

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