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MERGER CONTROL

– EUROPEAN UNION LEVEL –

Advocate General Kokott issues opinion supporting the rights of defence of merging parties

On 25 July 2018, Advocate General ("AG") Kokott issued an Opinion in which she concludes that the General Court ("GC") was correct to annul the Commission's 2013 decision to prohibit UPS's acquisition of its package delivery rival, TNT Express.

In the decision, the Commission relied upon a "price concentration" econometric model as support for prohibiting the merger. This model exhibited significant differences from the version which the Commission had provided to UPS during the investigation, as certain "discrete" or "continuous" variables used in the final version of the econometric model were different to those previously shared with the merging parties. UPS appealed the Commission's prohibition decision to the GC and challenged the failure to provide the final version of the econometric model as a breach of its rights of defence. On 7 March 2017, the GC annulled the prohibition decision on the basis that if UPS had been properly informed of the changes, it would have been better able to defend the merger or put forward possible remedies (see VBB on Competition Law, Volume 2017, No. 3). The Commission subsequently appealed to the Court of Justice of the European Union ("ECJ").

In her Opinion, AG Kokott noted that a company's right to defend itself is a fundamental principle of EU law and stems from Article 41 of the Charter of Fundamental Rights. In merger proceedings, this general right requires that companies are given the opportunity to make known their views on the Commission's written objections against them. While the Commission argued that it was not required to mirror precisely every aspect of its statement of objections in any final prohibition decision, AG Kokott pointed out that there was a distinction between deviations in evidence which *favoured* the merging parties as opposed to deviations which were *to their detriment*. In the view of the AG, it was self-evident that any material detrimental change to the evidence used by the Commission in its prohibition decision, such as the introduction of new elements, theories or calculation models, must be presented to the merging parties in advance so as to allow them an opportunity to submit their comments. Accordingly, the Opinion recommends the dismissal of the Commission's appeal.

AG Kokott's Opinion is noteworthy for its robust view that the Commission must take great care to ensure that companies involved in merger control proceedings are afforded an opportunity to comment on the evidence used by the Commission to prohibit a merger. Should it follow the AG's non-binding Opinion, the ECJ's decision will have implications for how the Commission manages the procedural aspects of complex merger investigations.

– MEMBER STATE LEVEL –

FRANCE

French Ministry of Economy clears "Phase 3" review and imposes commitment to maintain employment

On 19 July 2018, the French Ministry of Economy ("Ministry") announced a revised clearance of Cofigeo's acquisition of the ready meals business of Agripole. This is the first time in the history of French merger control that the Ministry has reviewed a transaction on public interest grounds under the so-called "phase III" review (see VBB on Competition Law, Volume 2018, No. 6).

By way of background, Agripole encountered financial difficulties in late 2016, when its CEO passed away and significant accounting frauds were discovered. This resulted in Agripole receiving financial assistance from the French Government, even though its production sites had ceased activity. On 3 October 2017, following a court proceeding to safeguard the company's activities, the Paris Commerce Tribunal ruled that the ready meals business of Agripole would be acquired by Cofigeo. The transaction was immediately implemented as the French Competition Authority ("FCA") agreed to apply the derogation provided for in Article L. 430-4 of the French Commercial Code, which allows for a transaction to directly enter into effect "in case of duly reasoned particular necessity" and where the parties agree to follow-up with a notification to the FCA within three months of completion of the deal. During its subsequent review, the FCA cleared the transaction on the condition that Cofigeo would divest one of its meal brands (i.e., Zapetti) and a production site.

By its latest decision, the Ministry cleared Cofigeo's acquisition of Agripole's ready meals business on public interest grounds, thereby overriding the FCA's decision to clear the transaction subject to divestment commitments. According to the Ministry, the divestment commitment imposed by the FCA would jeopardise the industrial strategy to revitalise the sector and cause significant economic risk to employment. However, the Ministry will require Cofigeo to maintain employment levels for the next two years.

It should be noted that the Ministry's review under the "phase III" procedure does not constitute a competition law assessment. The assessment performed by the Ministry is solely based on public interest grounds (in this case, safeguarding employment) which, in the Ministry's opinion, would have been jeopardized if the remedy imposed by the FCA under its competition law assessment had been implemented.

UNITED KINGDOM

UK Secretary of State and CMA clear merger following national security review

On 19 and 20 July 2018, the UK Secretary of State for Business, Energy and Industrial Strategy ("Secretary of State") and the UK Competition and Markets Authority ("CMA") respectively decided not to refer the anticipated acquisition by Gardner Aerospace of Northern Aerospace for a Phase 2 investigation. The Secretary of State's decision was based on national security grounds, while the CMA opted against a referral on competition grounds. This is the first time that the UK authorities have assessed a merger under new UK national security provisions introduced in June 2018 (see VBB on Competition Law, Volume 2018, No. 6).

Previously, on 17 June 2018, the Secretary of State issued a Public Interest Intervention Notice ("PIIN") in respect of the Gardner Aerospace/Northern Aerospace deal. As a result of the PIIN, the CMA was required to report to the Secretary of State with a competitive assessment of the transaction and a summary of the national security considerations received from interested stakeholders. On 13 July 2018, the CMA reported to the UK Secretary of State. In its competition assessment, the CMA noted that Gardner Aerospace is mainly active as a Tier 2 supplier of aircraft components (i.e., it is active at an upstream level and supplies minor structures and parts), while Northern Aerospace is primarily a Tier 1 supplier (i.e., it tends to have integration capabilities and to provide whole systems and equipment). Although the CMA considered there to be a potential overlap in the supply of wing spars and fuselage frames, the CMA found that the parties were not close competitors in these markets.

In its report, the CMA also summarised the relevant national security considerations and explained that it received comments from the UK Ministry of Defence ("MoD") in relation to the merger. The MoD confirmed that potentially sensitive strategic information (such as controlled items, sensitive information or intellectual property rights relating to Gardner Aerospace or its customers) would continue to be protected following the merger. As a result, on 19 July 2018, the UK Secretary of State announced his decision not to carry out a further Phase 2 national security review of the proposed transaction, while the CMA cleared the transaction the following day.

The case is noteworthy as it marks an emerging trend whereby EU Member States closely scrutinize mergers involving businesses of national strategic importance (such as important military manufacturers, technology companies or energy providers).

ABUSE OF DOMINANT POSITION

– EUROPEAN UNION LEVEL –

European Commission fines Google for abuse of dominant position

On 18 July 2018, the European Commission adopted a decision fining Google €4.34 billion for abusing its dominant position by allegedly engaging in various illegal practices regarding the Android mobile platform.

According to its press release, the Commission found that Google holds a dominant position on the markets for: (i) general internet search services; (ii) licensable smart mobile operating systems; and (iii) app stores for the Android mobile operating system. The Commission concluded that this followed from, among other things, Google's very high market share on each market and high barriers to entry.

As regards the nature of the abuse, the Commission's press release notes that Google allegedly engaged in three types of anti-competitive practices. The first practice consists of requiring device manufacturers to pre-install the Google search app and the Chrome browser app as a condition for licensing Google's app store. The second practice consists of payments made by Google to certain device manufacturers and mobile network operators on the condition that they exclusively pre-installed the Google search app on their devices. Finally, the third practice consists of preventing device manufacturers wishing to pre-install Google apps from selling a smart mobile device running on "forked" versions of Android that were not approved by Google.

The fine imposed on Google set a new record. The press release also specifies that Google has 90 days to bring the allegedly illegal conduct to an end. Google has already indicated its desire to appeal.

– MEMBER STATE LEVEL –

GREECE

Greek Competition Authority fines GSK for reducing supplies of products to wholesalers

On 11 July 2018, the Hellenic Competition Commission ("HCC") adopted a decision (the "Decision") fining Glaxosmithkline ("GSK") a total of €4.1 million for abusing its dominant position in relation to two pharmaceutical products: Imigran (an anti-migraine product) and Lamictal (an anticonvulsant).

Following changes in GSK's system of distribution which involved stopping meeting orders placed by wholesalers and then resuming orders but in limited quantities, several wholesalers lodged a complaint with the HCC and an action before the Athens Court of First Instance claiming that GSK's conduct constituted an abuse of dominant position. The latter found that GSK's refusal to supply was justified and therefore did not constitute an abuse of dominant position. This judgment was appealed before the Athens Court of Appeal, which stayed the proceedings and referred a series of questions to the ECJ (Joined Cases C-468/06 to C-478/06 *Sot. Lelos kai Sia EE and Others v GlaxoSmithKline AEVE* - see VBB on Competition Law, Volume 2008, No. 9).

The ECJ held that pharmaceutical companies which are dominant on the relevant market could refuse to fulfil wholesalers' orders with the intention of reducing parallel exports, so long as the wholesalers' orders were "out of the ordinary". In this regard, the ECJ held that it was for the national courts to determine whether the orders were in fact out of the ordinary, in light of both the size of those orders in relation to the requirements of the market and the previous relations between supplier and wholesaler.

The ECJ therefore referred certain aspects back to the Athens Court of Appeal, which in turn requested the HCC to re-evaluate GSK's conduct based on the principles established by the EU Court. In the present decision, the HCC held that GSK had abused its dominant position in the market for migraine medication in Greece from 2000-2004 by

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initially refusing all orders placed by wholesalers for Imigran, and thereafter refusing to supply "ordinary" orders in full and instead substantially reducing the quantities supplied. Applying the principles set out by the ECJ, the HCC considered in particular the number of orders and supplies occurring annually per wholesaler, average national consumption, and the pattern of previous business relations between GSK and its wholesalers. It should be noted, however, that the HCC did not find that GSK had abused its dominant position by refusing to meet "extraordinary" orders received from wholesalers.

In total, the HCC imposed a fine of approximately €1.2 million for the two infringements and a periodic penalty payment of approximately €2.9 million for GSK's non-compliance with a previous decision imposing interim measures during proceedings before the Athens Administrative Court of Appeals.

The HCC also investigated GSK's supply policy for Serevent (a treatment for asthma and pulmonary diseases) but found that GSK was not dominant, and thus its practices did not constitute an infringement.

SWEDEN

Swedish Court finds that Swedish Match's strict labelling rules for competing products placed in its refrigerators do not infringe Article 102 TFEU

On 29 June 2018, the Swedish Higher Patent and Patent Market Court at Svea Appeal Court (the "Court") reversed a February 2017 judgment of the Patent and Market Court and held that Swedish Match had not abused its dominant position in the Swedish snus market when it introduced restrictive labelling rules for all products placed in refrigerators that it provided to retailers, including products supplied by its competitors.

According to the Patent and Patent Market Court, Swedish Match is the largest supplier of snus – a moist form of smokeless tobacco which is usually placed under the upper lip – in Sweden, with a market share of well over 70% during the period when the alleged abuse occurred.

To preserve moisture and freshness, retailers store and display snus in refrigerators with glass doors. Most refrigerators are provided to retailers by Swedish Match, which allows retailers to use up to 20% of a refrigerator for competing snus products. Until 2012, competitors could use labels of their choice when putting their snus products on the shelves of Swedish Match refrigerators, and frequently used labels with strong colors that emphasized the low price of their snus products. In 2012, however, Swedish Match introduced strict rules for all labels, which regulated text font and size, colours and firm logos. Whenever rivals did not comply with the new labelling rules, Swedish Match replaced their labels on the refrigerator shelves with compliant labels.

The Swedish Competition Authority brought an action against Swedish Match, alleging that the labelling rules infringed Article 102 TFEU. The Patent and Market Court agreed. More specifically, it found that the labelling rules had exclusionary effects and limited the ability of rivals to compete with Swedish Match, as the display in refrigerators was the principal way to attract the attention of customers.

On appeal, however, the Higher Patent and Market Court reversed this judgment. Although the Court confirmed that Swedish Match held a dominant position and that the labelling rules were capable of having exclusionary effects on rival snus producers, it found that the labelling rules were objectively justified. The Court noted that Swedish law prohibited marketing strategies for tobacco products that were intrusive, attention grabbing or encouraged the use of tobacco products. It further noted that labels used by rivals prior to the introduction of the labelling rules had not complied with Swedish law, and found that Swedish Match, as owner of the refrigerators, had a legitimate interest to ensure that retailers did not infringe applicable legal rules on tobacco marketing when using Swedish Match refrigerators. The Court emphasized that Swedish Match sought to ensure that retailers complied with clear legal rules, and had not sought to rely on health or safety arguments to exclude competitors.

The Court also dismissed the argument that Swedish Match had not consistently enforced the labelling rules, for example because it had on some occasions used non-compliant labels for its own products. It found that the Swedish Competition Authority had failed to provide sufficient evidence that Swedish Match had selectively applied the labelling rules.

CARTELS AND HORIZONTAL AGREEMENTS

– EUROPEAN UNION LEVEL –

In this section, we give a factual overview of significant case developments at EU level, and then provide a more detailed analysis of developments addressed.

Summary of Significant Case Developments

General Court confirms fine imposed for company's involvement in Bathroom Fixtures and Fittings cartel case

On 3 July 2018, the General Court, following a remand of the case from the Court of Justice of the European Union ("ECJ"), handed down a judgment dismissing the appeal brought by Sanitec Europe and its subsidiaries, including Keramag Keramische, against the 2010 Commission decision in the *Bathroom Fixtures and Fittings* cartel case.

In 2013, the General Court partially upheld the appeals brought by Sanitec and its subsidiaries and reduced the amount of the fine imposed on them (see VBB on Competition Law, Volume 2013, No 9). In 2017, however, the ECJ upheld the appeal brought by the Commission and sent the case back to the General Court (see VBB on Competition Law, Volume 2017, No. 1).

In its judgment, the General Court has held that the Commission correctly concluded that the evidence on the case file, taken as a whole, established that Sanitec's subsidiaries had participated in the infringement. Accordingly, the fines imposed on Sanitec's subsidiaries were reinstated (Joined Cases T-379/10 RENV, *Keramag Keramische Werke and Others* and T-381/10, RENV *Sanitec Europe*).

General Court annuls fine imposed in Shrimps cartel case

On 13 July 2018, the General Court ("GC") upheld the appeal lodged by Stührk Delikatessen Import against the 2013 decision of the European Commission in the Shrimps cartel case, in which the Commission imposed fines on four European North Sea shrimp traders, including €1.132 million on Stührk Delikatessen Import, for operating a price-fixing and market allocation cartel in breach of Article 101 TFEU (see VBB on Competition Law, Volume 2013, No. 11).

In the judgment, the GC has dismissed the claims brought by Stührk Delikatessen Import challenging its involvement in a single and continuous infringement but upheld its claim with respect to the calculation of the fine. The GC found that the decision's statement of reasons did not allow the applicant to usefully challenge the reason why the Commission decided to depart from the standard fining methodology and to rely on point 37 of the Fining Guidelines. As a result, the GC annulled the Commission's decision with regard to the fines imposed on Stührk Delikatessen Import (Case T-58/14, *Stührk Delikatessen Import*).

General Court dismisses appeals in Power Cables cartel case

On 12 July 2018, the General Court ("GC") delivered fourteen judgments dismissing all of the appeals brought by the companies involved in the *Power Cables* cartel case.

By way of background, in 2014, the European Commission adopted a decision in which it imposed fines totalling €302 million on a number of producers of underground and submarine high voltage power cables for their involvement in a customer and market allocation cartel. According to the decision, Japanese and Korean producers refraining from competing for projects in the European territory, while European producers would stay out of Japan and Korea. The parties also allocated projects in most of the rest of the world. The European producers also allocated territories and customers inside the European territory.

In its judgments, the GC held that the Commission had correctly established the involvement of every undertaking in the infringement and rejected the arguments on appeal with respect to, among other matters, the evidence relied on to establish the duration of the infringement, the Commission's territorial jurisdiction, the attribution of liability and the calculation of the fine (Cases T-419/14, *The Goldman Sachs Group*; T-422/14, *Viscas*; T-438/14, *Silec Cable and General Cable Corporation*; T-439/14, LS *Cable & System*; T-441/14, *Brugg Kabel and Kabelwerke Brugg Holding*; T-444/14, *Furukawa Electric*; T-445/14, *ABB*; T-446/14, *Taihan Electric Wire*; T-447/14, *NKT Veraltungs*

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and NKT Holding, T-448/14, *Hitachi Metals*; T-449/14, *Nexans France and Nexans*; T-450/14, *Sumitomo Electric Industries and J-Power Systems*; T-451/14, *Fujikura*; T-455/14, *Pirelli*; T-475/14, *Prysmian*).

Analysis of Important Substantive and Procedural Developments

Bathroom Fittings and Fixtures cartel case – rules of evidence in cartel cases

Under EU case law, the Commission has the burden of producing firm, precise and consistent evidence to support the finding of an infringement of competition law rules. In practice, however, as the anticompetitive practices or agreements generally take place in a secretive and clandestine way, the existence of anticompetitive practices or agreements must, in most cases, be inferred from a number of coincidences or indicia which, taken together, may constitute evidence of an infringement of the competition rules. This means that it is not necessary for every item of evidence produced by the Commission to be firm, precise and consistent in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on by that institution, viewed as a whole, meets that requirement.

In 2017, the Court of Justice of the European Union ("ECJ") overturned the GC's judgment in the *Bathroom Fittings and Fixtures* cartel case. The GC had reduced the fine imposed on a group of companies on the ground that the Commission had not been able to prove to the requisite legal standard their participation in the cartel for its entire duration. More specifically, the GC took the view that the Commission had not established that these companies had participated in the infringement in France as of 25 February 2004 because the piece of evidence on which the Commission relied to establish the existence of the infringement (in this case, a graph showing the minimum and maximum prices applied on the market for six standard products which was examined by the companies during a meeting on 25 February 2004) did not, in itself, prove the actual infringement (see VBB on Competition Law, Volume 2013, No. 9). The ECJ concluded that the GC had erred in its assessment of the probative value of that piece of evidence. In particular, the ECJ overturned the GC's findings of law by concluding that: (i) one leniency statement can be used to verify another; and (ii) the existence of an infringement can be established on the basis of all the pieces of evidence viewed as a whole, rather than on the basis of each individual piece of evidence (see VBB on Competition Law, Volume 2017, No. 2). The matter was referred back to the GC.

In the present case, the GC took into account the ECJ's instructions and revised the conclusions it had reached in 2013. In particular, the GC found that a single piece of evidence (in this case, the graph) submitted in a leniency application does not have to, by itself, conclusively confirm the existence of an infringement. Rather, that document should be considered together with other relevant pieces of evidence of the case file, namely (i) the statements of another leniency applicant which corroborate the anticompetitive nature of the meeting (although these statements were contested by other undertakings) and (ii) statistics reporting price trends which correspond to the information reported by the graph and which were submitted by another leniency applicant. Thus, the GC considered that all of this evidence, taken as a whole, confirmed the conclusion reached by the Commission in the decision.

Accordingly, the GC corrected its earlier judgment and upheld the fine originally imposed by the Commission.

Shrimps cartel case – Commission must provide adequate reasoning when departing from standard fining methodology

Under point 37 of the 2006 Fining Guidelines, the Commission may depart from its standard fining methodology if it is justified by the particularities of a given case or if there is a need to achieve deterrence in a particular case. In such circumstances, the Commission is required to provide a statement of reasons for this departure, including an explanation of the factors which enabled it to determine the gravity of the infringement and its duration, as well as explaining the weighting and assessment of the factors taken into account. The purpose of the obligation to state reasons is to provide the person concerned by a decision with sufficient information to know whether the decision may be vitiated by an error enabling its validity to be challenged, as well as permitting review by the EU Courts.

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In the *Shrimps* cartel case, the Commission found that German company Stührk was involved in price fixing in Germany from March 2003 to November 2007. When calculating the fine, the Commission exercised its discretion by applying point 37 of the Fining Guidelines on the grounds that the parties mainly operated on a single market and participated in a cartel for a relatively long duration.

Before the GC, Stührk argued that the Commission had applied point 37 of the Fining Guidelines in a purely arbitrary manner and therefore breached the principle of equal treatment. More specifically, Stührk argued that the Commission had not sufficiently taken into account the actual participation of the other cartel participants when calculating their fines by granting them a greater reduction than Stührk despite their major role in the infringement.

The GC noted that, as the sale of shrimps from the North Sea accounted for 22% of total turnover for Stührk, compared to 25-35% for Heiploeg and 90-100% for Kok Seafood, the Commission erred in its finding that the cartelists achieved their sales in a single market, which was in reality the case for only one participant. Accordingly, the GC found that it was not possible to determine whether the undertakings were in comparable situations and whether the Commission treated them equally as the Decision did not provide any information in this regard.

The GC further determined that the Commission's decision to rely on point 37 of the Fining Guidelines seemed to be based on three cumulative criteria: (i) the concentration of overall turnover in the participants' North Sea shrimps sales; (ii) the different levels of participation of the companies involved in the infringement; and (iii) the need to ensure a deterrent effect. The GC therefore noted that it was not clear why, given that Stührk's cartel activity represented a relatively small percentage of its overall turnover, the Commission granted a lower fine reduction to Stührk in comparison with the other cartel participants. Thus, the GC determined that Stürhk was not in a position to dispute the validity of the Commission's approach as regards the principle of equal treatment.

The GC then referred to settled case law which established that the obligation to state adequate reasons is an essential procedural requirement. According to the GC, the duty to state reasons must be complied with all the more rigorously where the Commission – as in this case – departs from its own Guidelines. With regard to the principle of equal treatment when determining the amount of the fines, the GC recalled that the duty to state reasons encompasses all relevant factors necessary for determining whether or not the undertakings concerned were in a comparable situation, whether the situations of those undertakings were treated in the same way or differently and whether any equal or different treatment of those situations was objectively justified.

As a result, the GC ruled that the Commission's decision was vitiated by inadequate reasoning with regard to the fine imposed on Stührk and annulled the Commission's decision with regard to the fine imposed.

Power Cables cartel case – need for unequivocal public distancing to cease participation in infringement

In the appeal to the General Court ("GC") in *Sumitomo* (Case T-450/14), JPS argued that the Commission incorrectly concluded that it continued to participate in the cartel following its withdrawal in July 2006. In the decision, the Commission had concluded that JPS had failed to publicly distance itself from the cartel at that time, and so its participation in the cartel did not cease until 10 April 2008, the date on which JPS clearly and definitively told the other cartel members to refrain from contacting it.

In the judgment, the General Court ("GC") found that, contrary to the Commission's position, the mere fact that JPS had not publicly distanced itself from the cartel until 10 April 2008 was not *in itself* sufficient to find that JPS continued to participate in the cartel. Nonetheless, the ultimate conclusion was the same because the GC found that JPS's failure to publicly distance itself formed one part of a body of evidence which, taken together, constituted sufficient evidence of JPS's continuous participation in the cartel until 10 April 2008.

Further, with respect to the question of whether or not JPS had, in fact, publicly distanced itself, the GC interpreted the concept of public distancing narrowly. JPS argued that it had distanced itself by ignoring communications from other cartel members or responding to such communications with refusals to engage on anticompetitive matters. The GC, however, emphasised that the principle of public distancing must be assessed according to the objective

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perception of the other cartel participants, not the subjective perception of the undertaking which claims to have distanced itself. In this respect, the GC found that the evidence of JPS ignoring communications from other cartel members actually demonstrated that those members still believed that JPS was participating in the cartel. Accordingly, the GC concluded that JPS' attempt to distance itself from the cartel by ignoring the other members was not firm and unequivocal.

Power Cables cartel case – evidence of alternative explanation for conduct is irrelevant where the Commission has sufficient evidence of an anti-competitive agreement

EU case law provides that where the Commission supports a finding of an infringement of Article 101 TFEU solely on the basis of conduct of the undertakings in question on the market, or where the Commission relies on insufficient evidence to support such a finding, undertakings are entitled to present circumstances which cast the facts established by the Commission in a different light. These circumstances allow for another plausible and exculpatory explanation for those facts to be substituted for the Commission's interpretation.

In *Furukawa* (Case T-444/14), the applicant argued that the Commission erred by failing to take into account the existence of an alternative plausible explanation for the lack of competition by Asian producers in the European Economic Area ("EEA"), namely that Asian producers were precluded from entering the EEA markets because of technical and commercial barriers to entry.

The General Court ("GC") dismissed this claim, stating that "*where the Commission has succeeded in gathering evidence in support of the alleged infringement and where that evidence appears to be sufficient to demonstrate the existence of an agreement of an anticompetitive nature, there is no need to examine the question whether there is a plausible alternative explanation for the conduct complained of*" (para 90).

Applying this principle, the GC found that the Commission was entitled to consider, on the basis of the evidence it collected (e.g., statements from other cartel participants supported by contemporaneous documentary evidence, such as minutes from meetings involving the cartel members) that an agreement had been concluded to share markets, which involved a commitment on the part of Asian producers not to compete in the EEA. Accordingly, this conclusion meant there was no need to reply to the applicant's argument that its absence from the EEA could be explained by barriers to entry to the EEA market.

Power Cables cartel case - jurisdiction

While the law on the issue of jurisdiction is not yet fully settled, based on the most recent findings of the EU courts, it appears that Article 101 TFEU can apply extraterritorially if: (i) the practices are implemented in the European Economic Area ("EEA") ("the implementation doctrine"); or (ii) the practices have foreseeable, direct and substantial effects in the EEA ("the qualified-effects doctrine").

In *Power Cables*, the Commission found that European, Japanese and Korean producers had allocated territories and customers on a worldwide basis. On appeal, Brugg (in case T-441/14), Taihan Electric Wire (in case T-446/14) and NKT (in case T-447/14) claimed that Article 101 TFEU was inapplicable since: (i) the practices were not implemented in the EEA; and (ii) the Commission had not shown that each of the projects to be implemented outside the EEA had foreseeable, direct and substantial effects in the internal market.

In its judgments, the General Court ("GC") found that the Commission's jurisdiction could be based on either the implementation doctrine or the qualified effects doctrine. The GC considered that the implementation doctrine was applicable where European and Asian producers allocated among themselves worldwide projects in so-called "export" territories. Conversely, the GC considered that the qualified-effects doctrine was applicable to an agreement by which European producers agreed not to compete on the national territories of their Asian counterparts.

All the applicants argued that the Commission had applied an incorrect definition of the territorial scope of the single and continuous infringement, and erroneously applied the effects criterion, in order to justify the application of Article 101 TFEU. The applicants argued that this incorrect and erroneous application would lead to the Commission obtaining unlimited territorial jurisdiction. For example, NKT argued that the Commission abusively broadened the territorial scope of the single and continuous infringement by including the sales it made outside of the EEA and by including conduct relating to projects outside the EEA which could not have any foreseeable, direct and substantial effects in the EEA. Similarly, Taihan argued that its involvement in the anti-competitive behaviour could not have any effect on trade in the EEA market because it was unable to compete in the EEA market due to insurmountable barriers to entry.

The GC rejected all of these arguments and upheld the jurisdiction of the Commission by stating that "*Article 101 TFEU is capable of being applied to practices and agreements that serve a common anticompetitive objective, where it is foreseeable that, taken together, those practices and agreements have direct and substantial effects in the internal market*". In essence, the Commission does not need to demonstrate that each project had a sufficient effect in the EU to justify its jurisdiction since they were part of a "single and continuous infringement". The GC then concluded that this infringement had a single objective to restrict competition on projects of high voltage cables and it had foreseeable, direct and substantial effects in the EEA.

Power Cables cartel case – Presumption of actual exercise of decisive influence for parent companies controlling 100% of voting rights

Under settled EU-case law, an undertaking may be held liable for competition law violations committed by a subsidiary where the two form part of a single economic unit within the meaning of Article 101 TFEU. A single economic unit will exist where the parent company exercises decisive influence over its subsidiary such that the subsidiary does not determine its market conduct independently. EU law establishes a rebuttable presumption that parent companies who own all or nearly all the capital of their subsidiaries actually do exercise such decisive influence.

In the case at hand (Case T-419/14, *Goldman Sachs Group*), Goldman Sachs ("Goldman") argued that the European Commission had erred by holding it liable for its subsidiary's participation in the *Power Cables* cartel from 2005 to 2009. Goldman contended that the Commission had improperly applied the presumption of actual exercise of decisive influence to the period 2005-2007, in which Goldman controlled 100% of the voting rights in Prysmian but only 84-91% of its share capital. Goldman also maintained that the Commission had incorrectly considered that it had, in fact, exercised decisive influence over Prysmian for the entire period by improperly assessing the factual evidence of control and by failing to consider Goldman exempt from parental liability as a "pure financial investor."

The General Court ("GC") affirmed the Commission's application of the presumption of the actual exercise of decisive influence to Goldman's ownership of all voting rights in Prysmian. In particular, it held that the Commission is entitled to apply the presumption where the parent is in a similar position to that of a sole owner with respect to its power to influence the subsidiary. Holding 100% of the voting rights in combination with a high majority of shares places the parent in such a position. The GC further noted that the parent could bring evidence to rebut the presumption if minority shareholders were nevertheless able to influence the subsidiary's market conduct through other means, but that Goldman had failed to do so convincingly.

The GC also upheld the Commission's finding that Goldman did indeed exercise decisive influence over Prysmian for the full period it owned shares in the company. It found that the Commission had validly considered eight factors showing economic, legal and organisational links between the two companies, including Goldman's power to appoint members of the board of directors and call shareholder meetings, the level of Goldman's representation on the board and on committees and the power it exercised in these bodies, the fact that Goldman received regular reports, and other evidence of behaviour typical of an industrial owner.

In addition to contesting the evidentiary value of these factors, Goldman argued more broadly that EU case law specifically excludes from liability parent companies acting as pure financial investors. Goldman noted in particular that the mandate of its GSCP Fund V, which acquired Prysmian, did not include operating the company and that moreover the fund managers were investment professionals with no management experience. The GC dismissed these arguments as irrelevant to the question of whether Goldman in fact controlled Prysmian. The GC further observed that, while pure financial investor status is an example of an argument that could be used to rebut the imputation of control over a subsidiary, Goldman had not met the burden of proving, in light of the factors the Commission had analysed, that it had refrained from man-

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agement and control of the company. While the Commission considered Goldman's involvement in Prysmian to extend far beyond that of a typical investor, this judgment does not establish a clear rule indicating when the participation of a private equity firm in a company will cross the line from pure investment to management and control.

– MEMBER STATE LEVEL –

FRANCE

Paris Court of Appeal reduces fines in parcel delivery cartel

On 19 July 2018, the Paris Court of Appeal (the "Court") delivered a judgment in connection with the parcel delivery services cartel case (see VBB on Competition Law, Volume 2016, No. 1). The Court confirmed most of the findings of the French Competition Authority ("FCA"), including that the companies participated in a price-fixing cartel, but nevertheless reduced the amounts of the fines imposed on several companies.

In its judgment, the Court reduced the fine imposed on Geodis by €30 million (from an original amount of €162 million) on the ground that the FCA failed to provide evidence that the company had attended anticompetitive meetings in the course of the tariff campaign of 2005-2006 (11 months) and therefore reduced the period taken into account for sanctioning the company's participation in the cartel. Interestingly, the Court found that the sole fact that Geodis was receiving emails which related to the cartel was not sufficient evidence to support its involvement in the cartel for that period. For the two other tariff campaigns in which Geodis took part (2009-2010 and 2010-2011), the Court upheld the findings of the FCA.

The Court also found that the FCA had incorrectly calculated the value of sales of two companies, namely DHL and TNT, which were granted fine reductions of €11.1 million and €3.98 million respectively. The Court also found that the FCA wrongly calculated the turnover of one company, XPO, which was granted a €93,000 fine reduction. The fine imposed on Drachser was also reduced by €3.33 million because of its limited involvement in the cartel. Finally, DPD and Chronopost benefitted from reductions of €1.09 million and €6.75 million respectively under the French settlement procedure.

The total reduction in fines amounted to €57 million out of the €670 million originally imposed by the FCA.

GERMANY

German Federal Cartel Office imposes fines totalling €205 million for price-fixing in the steel sector

According to a press release of the German Federal Cartel Office ("FCO") published on 12 July 2018, six producers, processors and traders of special steel products, a trade association and ten individuals were fined a total of €205 million for operating a price-fixing cartel between 2004 and 2015.

The companies receiving fines include ArcelorMittal Commercial Long Deutschland, Dörrenberg Edelstahl, Kind & Co. Edelstahlwerke, Saarstahl, Schmidt + Clemens and Zapp Precision Metals, which all agreed to a settlement. Four other companies and one other trade association are still being investigated. The trade association Edelstahl Vereinigung has already been dissolved. The case arose following a leniency application by Voestalpine.

The cartel covered long steel products, in particular engineering steel, tool steel and high-speed steel as well as stainless steel. The price model for these products consists of a base price and extra charges for specific input materials, notably scrap metals and alloys. The charges constitute a considerable part of the final price – one-third in the case of engineering steel, about one-half in the case of tool steel and high-speed steel and about two-thirds in the case of stainless steel.

The companies involved were found to have agreed and implemented a calculation method for extra charges uniformly across the sector and they agreed to pass on surcharges to customers. The investigations revealed that, at least in the sector of engineering steel, company representatives also agreed on increases to the base price. Furthermore, the companies exchanged sensitive information concerning outstanding orders, development of stocks, capacity, production standstill and intended price increases. The trade association played a significant role in the infringement not only by providing the companies with a platform but also by actively processing data necessary for coordinating the scrap metal and alloy charges.

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The fines can be appealed to the Higher Regional Court of Düsseldorf.

ITALY

Italian Administrative Court annuls decision in steel rebar cartel case

On 12 June 2018, the Regional Administrative Court of First Instance in Rome (the "Court") upheld the appeals made by seven suppliers of reinforcing bar and welded steel mesh against the 2017 decision of the Italian Competition Authority (the "ICA") imposing fines totalling over €140 million for the alleged exchange of sensitive business information on production levels and for coordination of prices on the wholesale market (see VBB on Competition Law, Volume 2017, No. 8).

The Court took issue with the fact that the ICA had not initiated formal proceedings within a reasonable time once it had gathered all relevant information, in breach of the principles of sound administration and efficiency (the ICA had gathered all relevant information by February 2014, but only initiated proceedings in October 2015). The Court noted that it would have been in the ICA's interests to initiate proceedings quickly in order to put an end to the anticompetitive conduct.

The Court also ruled that the ICA had not proven that the exchange of information on an input product (ferrous scrap) impacted on the price of the final product (rebar and welded mesh), and also had not proven that the alleged exchange of information affected the market. The Court also underlined that the exchange of prices, recorded by the Chamber of Commerce, concerned a price range and not a single value. Given the lack of conclusive evidence, the Court found that the ICA had not taken due consideration of the alternative explanations provided by the parties.

In light of the above, the Court annulled the fines imposed on all seven producers which amounted to approximately €140 million.

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VERTICAL AGREEMENTS

– EUROPEAN UNION LEVEL –

European Commission fines consumer electronics' manufacturers a total of €111 million for resale price maintenance, granting substantial reductions in the fines for cooperation

According to a press release and statement issued on 24 July 2018, the European Commission has, in four separate decisions, fined consumer electronics manufacturers Asus, Denon & Marantz, Philips and Pioneer a total of €111 million for engaging in resale price maintenance during periods between 2011 and 2015. These decisions mark the first concrete results in a series of Commission investigations involving the application of Article 101 TFEU to resale restrictions in vertical agreements, in particular those involving e-commerce, and underscore the key importance for businesses of ensuring compliance in this field, which is now a clear enforcement priority for the Commission.

Proceedings were initiated in relation to alleged anticompetitive practices of the four manufacturers on 2 February 2017 (see VBB on Competition Law, Volume 2017, No. 2). The investigations revealed that the manufacturers monitored, through the use of sophisticated monitoring tools, the online prices set by their retailers in certain Member States and intervened where they considered the prices too low (in some instances, the manufacturers' interventions concerned price increases of over €100). Where a retailer did not adapt its prices to what the manufacturer requested, the retailer faced sanctions, including the potential withdrawal of supplies of the manufacturers' products, which included, among others, computers, household appliances and hi-fi products.

According to Commissioner Vestager, not only did these practices restrict the retailers' ability to set their own prices, but they also impacted the overall online prices of the products in question because, as revealed by the Commission's e-commerce sector inquiry, many online retailers use pricing algorithms and price comparison websites to monitor the price set by their competitors and adjust their own prices accordingly. In light of this, when the low priced retailers increased their prices following the manufacturers' intervention, this could result in other retailers also increasing their prices. It will be interesting to see how this factor is reflected in the legal analysis in the decisions when they are made available.

In addition to resale price maintenance, Pioneer also restricted parallel trade by limiting cross-border sales, for example by blocking orders of retailers who sold cross-border.

The geographic scope of the infringements also varied, with the infringement committed by Philips being limited to France while the infringement committed by Pioneer covered twelve countries.

The fines of all the companies were substantially reduced as a result of the cooperation they provided during the investigations. This involved providing evidence of significant added value, as well as admitting both the facts and the infringements before the statements of objections were issued. This resulted in what the Commission considered to be a more effective and swift enforcement of competition rules. Pioneer received the greatest reduction of 50%, as it came forward with better quality evidence. The other four manufacturers received a reduction of 40%. After applying the reductions, Asus was fined €63.5 million, Denon & Marantz €7.7 million, Philips €29.8 million and Pioneer €10.1 million.

These cases appear to be the second time that the "cooperation procedure" has been used by the Commission, the first having been in 2016 in the ARA abuse of dominance case (see VBB on Competition Law, Volume 2016, No. 6). On this occasion, the use of the procedure appears to have involved elements of both leniency (in terms of the (presumably) voluntary provision of evidence judged to be of significant added value) and settlement (in terms of the acknowledgment of infringement before the statement of objections). In contrast to the position in respect of both leniency and settlement in cartel cases, there is as yet no formal guidance concerning the "cooperation procedure", for example indicating the precise obligations of the companies and the available range of fine reductions.

The decisions mark the first time since 2003 that the Commission has fined a company for resale price maintenance. The last fine the Commission imposed in this respect was on Yamaha in July 2003, when Yamaha was fined €2.56 million for resale price maintenance and restrictions on parallel trade. They are also the first decisions imposing a fine for any distribution-related infringement of Article 101 TFEU since 2004, when the Commission fined Topps, a producer of collectibles and confectionery, a total of €1.59 million for restricting parallel trade.

The current renewed interest of the Commission in the area of vertical agreements was sparked by the e-commerce sector inquiry. The consumer electronics' investigations were one of a series of three investigations into suspected anticompetitive practices in e-commerce launched by the Commission on 2 February 2017. The other two series of apparently pending investigations concern practices in the video games sector and the hotel industry. The former relates to geo-blocking practices in bilateral agreements between Valve Corporation, the owner of the Steam game distribution platform, and five PC video game publishers. The latter relates to potential price discrimination for hotel accommodation between customers based on their nationality or country of residence in agreements between, on one hand, Kuoni, REWE, Thomas Cook and TUI, four of the largest European tour operators, and, on the other hand, Meliá Hotels.

– MEMBER STATE LEVEL –

GERMANY

Higher Regional Court of Frankfurt finds Coty's prohibition on sales via amazon.de to be justified for luxury products

According to a press release of 12 July 2018, the Higher Regional Court of Frankfurt has handed down its judgment in a dispute between Coty Germany GmbH ("Coty"), a supplier of luxury cosmetics, and Parfümerie Akzente, a member of its selective distribution system. The Higher Regional Court of Frankfurt found that Coty did not violate competition law by prohibiting Parfümerie Akzente from advertising and distributing its products via the third-party platform *amazon.de*.

Parfümerie Akzente distributed the products in its brick-and-motor stores, on its own online shop and via the third party platform *amazon.de*. Following the entry into force of the 2010 Vertical Agreements Block Exemption Regulation ("VABER"), Coty revised its contracts to stipulate that 'the authorised retailer is entitled to offer and sell the products on the internet, provided, however, that that internet sales activity is conducted through an "electronic shop window" of the authorised store and the luxury character of the products is preserved'. The recognisable engagement of a third party undertaking other than an authorised retailer in making such sales was prohibited, but authorised retailers were permitted to advertise their online shops on platforms.

After Parfümerie Akzente refused to sign the amendments to the selective distribution contract, Coty Germany brought an action before the Regional Court of Frankfurt, seeking an order prohibiting, in accordance with the amended clause on online sales, Parfümerie Akzente from distributing certain branded products via the platform 'amazon.de'.

The Regional Court of Frankfurt dismissed the claim in 2014 finding that: (i) Coty's selective distribution system, of which the amended online sales clause formed part, restricted competition and could not be justified by the goal of maintaining the prestigious image of the mark; and (ii) the amended online sales clause constituted a hardcore restriction under Article 4(c) of the VABER.

Coty appealed to the Higher Regional Court of Frankfurt, which, in the course of the appeal, referred three questions to the Court of Justice of the European Union ("ECJ") for a preliminary ruling, which handed down its judgment in case C-230/16 on 6 December 2017 (see VBB on Competition Law, Volume 2017, No. 12). The key findings of the ECJ were that: (i) the nature of luxury products justifies the use of selective distribution under Article 101(1) to preserve their luxury image (provided that the system itself meets the remaining established conditions of the case law); (ii) a prohibition on selling those goods on third-party online platforms in a manner discernible to consumers is in principle compatible with Article 101(1) where it is intended to ensure the luxury image of those goods; and (iii) a prohibition on selling those goods on third-party platforms in this manner is, in any event, exempted by the VABER.

The present judgment applies the criteria set out in the ECJ's judgment to the facts of the case, and finds that Coty was entitled to prohibit the defendant from distributing its branded products via *amazon.de*.

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The Higher Regional Court of Frankfurt considered Coty's amended online sales clause as part of its qualitative selective distribution system. It noted that, as held by the ECJ, a selective distribution system can be justified to ensure the high quality presentation and luxury image of the products, which would be jeopardized if third-party undertakings, such as *amazon.de*, were involved in their sale. It found that the quality criteria used by Coty were applied uniformly and in a non-discriminatory manner.

The Court therefore considered that there were good reasons to consider that the clause at issue is compatible with Article 101(1) TFEU. Ultimately, however, it did not need to decide this, since it considered that the agreement in any event fell within the scope of the exemption under Article 101(3) provided by the VABER (which applies provided that the market shares of each of the contracting parties do not exceed 30% and that the agreement contains no hardcore restrictions).

In the present case, the market shares of each party were found not to exceed the 30% threshold, and the agreement was not found to contain any hardcore restrictions. In particular, the restrictions relating to the use of third party platforms were not found to amount to hardcore customer or passive sales restrictions. The restriction did not amount to a customer restriction because customers of third-party platforms were not considered to form a distinguishable group to whom sales were restricted, but instead to be online purchasers (to whom sales were not prohibited). Furthermore, the Higher Regional Court of Frankfurt held that there was no restriction on passive sales to end consumers within the meaning of Article 4 (c) of the VABER.

The judgment is not yet final as it can be challenged before the Federal Court of Justice.

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INTELLECTUAL PROPERTY/LICENSING

– MEMBER STATE LEVEL –

GERMANY

Higher Regional Court of Düsseldorf allows luxury cosmetics manufacturer to prohibit online and offline sales of its products by German supermarket chain

On 6 March 2018, the Higher Regional Court of Düsseldorf held that Japanese luxury cosmetics manufacturer Kanebo could prevent German retail chain Real from selling its products under the brands Kanebo and Sensai EU-wide, both online and in brick and mortar stores.

Kanebo's skin and hair care products, makeup and perfumes are marketed under a qualitative selective distribution system. Kanebo holds word and figurative trade mark registrations with the European Union Intellectual Property Office ("EUIPO"). The retail chain Real, which does not form part of Kanebo's selective distribution network, mainly sells groceries, but also sells household products, electrical appliances, textiles and cosmetics. Real placed Kanebo's products on the market in both physical stores and online.

As a general rule, under the exhaustion principle, the owner of an EU trade mark cannot prevent the re-sale of his product which was placed on the EEA market by himself or with his consent.

Kanebo, which did not have any contractual links with Real, based its action on Article 15(2) of Regulation 2017/1001 (the European Union Trade Mark Regulation or "TMR") which was implemented by Section 24(2) of the German Trade Mark Act. This provision states, as an exception to the principle of exhaustion, that a trade mark owner is entitled to prohibit the use of his trademark if there are legitimate reasons to oppose further commercialisation of the goods, especially where the condition of the goods is changed or impaired after they have been put on the market.

The Higher Regional Court of Düsseldorf considered that the exception to the principle of trade mark rights exhaustion has to be interpreted restrictively, but still applies if, like in the present case, there is a threat of reputational damage.

The Court referred to the case law of the Court of Justice of the European Union (the "ECJ") which has repeatedly recognised the interest of owners of prestigious brands to secure the luxury image of their goods. The ECJ held in *Copad* (Case C-59/08) that the reputation of a luxury trade mark may be harmed by the sale of products through discounters (see VBB on Competition law, Volume 2009, No.4). A selective distribution network for luxury goods that primarily aims to preserve the luxury image of the goods was considered compatible with Article 101(1) TFEU since it secures the quality of the luxury goods and their proper use. The Higher Regional Court of Düsseldorf also relied on *Coty* (Case C-230/16), in which the ECJ held that producers of luxury products may prohibit the distribution of their goods through third party online platforms, as long as online sales are not *per se* prohibited (see VBB on Competition law, Volume 2017, No.12).

The Higher Regional Court of Düsseldorf recognised that the above case-law did not emerge exclusively in a competition context as some cases only involved trade mark law. It justified the reference to competition cases by pointing out that the ECJ in competition cases such as *Coty* equally relied on reasoning that was used in trade mark cases, such as *Copad*. The Higher Regional Court of Düsseldorf, therefore, concluded that the ECJ takes the view that such cases have to be dealt with in a uniform fashion, irrespective of whether competition law or trade mark law applies.

The Court then found that the circumstances of the sale of Kanebo's luxury cosmetics by Real were likely to damage the reputation of the trademark. The sales environment, both online and offline, was not comparable to the luxurious environment in which the products were usually sold by the manufacturer through its selective distribution system.

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The Court considered of particular relevance that Real sold the goods alongside mass-produced and discounted products of all kinds, that no product consultation took place, that the platform (on which third parties could sell as well) focused on price, with highlighted special offers, crossed out prices and the indication of the percentage saved compared to the original price. Furthermore, the Court noted that the products counted towards a PAYBACK system which included all products and that financing was possible, which made them seem easily affordable.

The Court concluded that all these factors seriously undermined the prestigious image of the products, since this form of distribution ultimately negates Kanebo's claim of the exclusive and luxurious appeal of its branded products.

This conclusion was not affected by the fact that the goods were available on online sales platforms such as Douglas, www.ebay.de and www.amazon.de. Douglas forms part of Kanebo's selective distribution system. Therefore, the Court considered that the danger resulting from the fact that Kanebo does not have the possibility to control the conditions of sale does not apply. Furthermore, the Douglas online shop was not open to products of all kinds, was not mainly focused on price, had a different presentation from that of Real and provided detailed product descriptions. In relation to eBay and Amazon, Kanebo succeeded to convince the Court that the products sold on these platforms were grey market products which were not offered by Kanebo or its authorised distribution partners. In addition, Kanebo showed that it took action against such offers, where possible.

The present decision is interesting in that it expressly aligns trademark and competition law. It demonstrates the potential for trade mark owners and brand manufacturers of other high-quality products, such as technical devices with a prestigious image, to claim that the online and offline sales of products offered outside a qualitative selective distribution network should be prohibited, not only where there is a danger that the product has been changed or impaired after being placed on the market, but also where the sales may harm the products' reputation.

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STATE AID

– EUROPEAN UNION LEVEL –

ECJ clarifies reference framework for assessing selectivity

On 28 June 2018, the Court of Justice of the European Union (the "ECJ") rendered four judgments in a case relating to German tax legislation concerning the possibility of carrying certain losses forward to future tax years (Cases C-203/16, C-208/16 P, C-209/16 P and C-219/16 P).

German law allows losses made in the course of a tax year to be carried forward to later tax years (the loss carry-forward rule). This possibility is excluded where 25% or more of the shares in a company are acquired (the rule governing the forfeiture of losses). A further derogation from this latter rule exists in case of restructuring (the restructuring clause) and was subject to an investigation by the European Commission (the "Commission"). The Commission assessed the selectivity of the restructuring clause with reference to the rule governing the forfeiture of losses, and found the clause to be incompatible state aid. In two judgments, the General Court confirmed the Commission's assessment.

With its judgments of 28 June 2018, the ECJ annulled the judgments of the General Court as well as the decision of the Commission. According to the ECJ, the relevant reference framework for the purposes of examining the selective nature of the measure at issue was with reference to the general loss carry-forward rule and not to the more restrictive rule governing the forfeiture of losses. The ECJ ruled that the selectivity of a tax measure cannot be precisely assessed on the basis of a reference framework consisting of some provisions that have been artificially taken from a broader legislative framework. The fact that the restructuring clause was worded in the form of an exception to the rule governing the forfeiture of losses was not relevant, as the regulatory technique used cannot be decisive for the purposes of the determination of the reference framework.

Commission adopts new Code of Best Practices

On 16 July 2018, the European Commission (the "Commission") adopted a new Code of Best Practices for the conduct of state aid control procedures (the "Code of Best Practices" or "Code").

The reform of the state aid rules implemented over recent years allows the Member States to quickly implement certain state aid, in particular aid covered by the General Block Exemption Regulation, leaving the Commission to focus its state aid control on cases most likely to distort competition. These developments had an impact on the cooperation between Member States and the Commission and on the way the Commission conducts its state aid investigations. Therefore, the Commission considered it necessary to publish a new Code of Best Practices which replaces the previous code published in 2009. The Code clarifies, *inter alia*, how the Commission deals with pre-notification contacts, formal investigation procedures and complaints. It also explains how Member States can indicate the priority of a specific case and how they can agree with the Commission on the timeline of an investigation in a specific case.

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LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– MEMBER STATE LEVEL –

HUNGARY

Fine imposed on individual for disclosing identity of protected witness

When a witness is likely to suffer serious harm due to his involvement in competition law proceedings, the witness may request that the Hungarian Competition Authority designate them as a protected witness, in which case the identity and other personal data of the protected witness may not be disclosed to anyone. In a recent proceeding against Essity Hungary investigating an infringement of Article 101 TFEU, the Hungarian Competition Authority imposed a procedural fine of HUF 50,000 (approx. €150) on Essity Hungary's legal representative for summoning a protected witness to appear before a public hearing and for disclosing the name of the witness in non-confidential versions of documents.

– OTHER DEVELOPMENTS –

EUROPEAN UNION: On 3 July 2018, the European Court of Auditors (ECA) announced that it is conducting an audit of whether the European Commission has been effective in enforcing EU competition law through its antitrust proceedings, merger control and cooperation with national competition authorities. The auditors will interview Commission officials and review Commission documents on its enforcement activities and will also visit the competition authorities in some Member States. The audit report is expected to be published in mid-2019.

EUROPEAN UNION: The European Commission is inviting comments on draft guidelines to help national courts address actions for damages, particularly with respect to how to estimate the share of price increases caused by a cartel that are passed on to indirect purchasers and final consumers. The draft guidelines describe the procedural instruments available to national courts when assessing the existence of overcharges passed on to indirect customers, as well as the national courts' power to estimate the amount of the overcharge that was passed on. The guidelines also provide an overview of the most common economic methods and techniques to quantify passed-on overcharges. The Commission invites views and comments on the draft guidelines by 4 October 2018. The consultation document is available here.

THE NETHERLANDS: On 13 July 2018, the Netherlands Authority for Consumers and Markets (ACM) announced that Martijn Snoep, currently a partner at law firm De Brauw Blackstone Westbroek, will become the new Chairman of the ACM as from 1 September 2018. He will succeed Chris Fonteijn, who left office on 1 May 2018.

PRIVATE ENFORCEMENT

– EUROPEAN UNION LEVEL –

ECJ clarifies territorial jurisdiction criteria for damages proceedings resulting from competition infringements

On 5 July 2018, the Court of Justice of the European Union (ECJ) rendered a preliminary ruling on territorial jurisdiction in a long-running dispute brought by Lithuanian Airlines ("flyLAL") against Air Baltic and Riga Airport. The case was referred to the ECJ by a Lithuanian court in order to determine whether Lithuania was the appropriate forum in which to hear the dispute.

By way of background, Riga Airport was the subject of scrutiny for anticompetitive discriminatory pricing practices and agreed to pay a fine of approximately €70,000 to the Competition Council of Latvia. In a separate action before a Lithuanian court, flyLAL sought compensation of the loss caused by the alleged infringement of Articles 101 TFEU and 102 TFEU by Air Baltic and the Riga airport. In particular, flyLAL alleged that it was the subject of predatory pricing by Air Baltic on routes on which both airlines competed, and that these predatory practices had been funded by reductions granted to Air Baltic on fees for airport services provided by Riga Airport. According to flyLAL, these practices caused it to enter into bankruptcy.

In a lower court ruling, Air Baltic was ordered to pay €16.1 million in compensation to flyLAL. On appeal, the Lithuanian court asked the ECJ to clarify which courts held jurisdiction under EU Regulation No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the "Brussels I Regulation"). In particular, the ECJ was asked to clarify the scope of the jurisdiction criteria relating to the "place where the harmful event occurred" in Article 5(3) and to "the dispute arising out of the operations of a branch" in Article 5(5).

The ECJ ruling focuses essentially on whether flyLAL ought to have brought its claim in the courts of its home base (Lithuania) or in the market in which it suffered harm (Latvia). The ECJ ruled that where an airline is seeking compensation for damage caused by anti-competitive conduct, the "place where the harmful event occurred" covers the location where the loss of income occurred (i.e., loss of sales). The Court clarified that this is the location of the market which was affected by the anticompetitive conduct. As flyLAL mainly operated its flights to and from Vilnius Airport in Lithuania, which was the focus of its sales activities and therefore the place where the damage occurred, the ECJ ruled that it may bring its action before the Lithuanian courts.

The appeal court also asked the ECJ whether the term "place where the harmful event occurred" may be understood as meaning either the place of conclusion of an anticompetitive agreement contrary to Article 101 TFEU, or the place of commission of acts infringing Article 102 TFEU. The ECJ recalled that Article 5(3) of the Brussels I Regulation provides the claimant with the possibility of bringing proceedings either before the courts of the place where the damage occurred or the place of the event which caused the damage. As for the determination of the place of the event which caused the damage, the ECJ distinguished infringements of Article 101 TFEU from Article 102 TFEU. For the former, the ECJ ruled that the courts of the place where the anticompetitive agreement was concluded should have jurisdiction, while the courts of the place where abusive practices are applied should be competent in cases concerning the infringement of Article 102 TFEU.

The ECJ also examined Article 5(5) of the Brussels I Regulation which provides that disputes arising out of the operations of a branch may be brought before the courts of the place in which the branch is situated. The ECJ clarified that this may cover damages actions related to Article 102 TFEU where a branch of the dominant undertaking actually and significantly participated in the abuse. The ECJ held that it is for the Lithuanian court to decide whether Air Baltic's branch located in Lithuania fulfils these conditions.

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– MEMBER STATE LEVEL –

GERMANY

Germany introduces a new framework for collective redress

On 12 July 2018, the Act on the Introduction of a Model Declaratory Action ("*Gesetz zur Einführung einer zivilprozessualen Musterfeststellungsklage*") introduced a framework for consumer class actions into the German Code of Civil Procedure.

Under the new procedure, qualified non-profit consumer associations can bring class actions for declaratory court decisions of fact and/or law against companies, but not collective motions for payment. The declaratory action will be applicable in situations where a large number of consumers are affected in a comparable manner by the same conduct (e.g., unjustified increases of utility provider fees or product liability litigation).

The association has to represent the interests of at least ten consumers in order to bring an action; in order to continue with the proceedings, a total of at least 50 affected consumers have to sign up to a register within 2 months of tthe action's public announcement. Further consumers affected by the alleged conduct can opt in by registering until the day before the first hearing. Opting out is possible until the same date. Registration is free of charge and consumers will not incur any procedural costs.

The action has the following effects: it suspends the limitation period of individual claims. While a model declaratory action is pending, registered consumers cannot take further legal action against the defendant. Companies cannot register for the model declaratory action, but ongoing lawsuits initiated by companies against the same defendant can be stayed pending final judgment in the model declaratory action.

A model declaratory action can have two outcomes: (i) a declaratory judgment of fact and/or law which is binding in a subsequent trial for all consumers who opted in (in this case, consumers will still have to bring an action to quantify their individual claim) or (ii) a settlement on behalf of all registered consumers which has to be approved by the competent court. Consumers have one month in which to opt out of the settlement, which will only become valid if less than 30% of the registered consumers explicitly opt out.

The new procedure is scheduled to enter into force on 1 November 2018.

On one hand, the new procedure has been welcomed as a means to facilitate the exercise of consumer rights, particularly by safeguarding consumers against the risk of litigation costs and by allowing consumers to act as witnesses, which would not be possible under German procedural law if they were party to the lawsuit. On the other hand, the model declaratory action has been criticised as not being efficient enough, since it only provides consumers with a basis on which to initiate an individual action to quantify damages at a second stage.

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