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| HIGHLIGHTS

MERGER CONTROL:

| German FCO clears glass recycling deal on the basis of minor market clause

CARTELS AND HORIZONTAL AGREEMENTS:

| Greek Competition Authority imposes € 80.7 million fine on Greek construction companies for bid-rigging cartel

| Italian Competition Authority imposes fines of over € 140 million on steel rebar producer

VERTICAL AGREEMENTS:

| Advocate General Wahl opines in Coty that a ban imposed by a luxury-goods supplier on sales by authorised retailers over third-party online marketplaces does not infringe the competition rules

| French Supreme Court confirms the contractual freedom of a supplier not to renew a selective distribution contract

| German FCO imposes a total fine of € 10.9 million for vertical price fixing in the clothing industry

| CMA hits Ping with UK£ 1.45 million fine for online golf club sales ban

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS:

| FCO publishes report on sector inquiry into the cement and ready-mix concrete industry

TOPICS COVERED IN THIS ISSUE

MERGER CONTROL 3
CARTELS AND HORIZONTAL AGREEMENTS 4
VERTICAL AGREEMENTS 6
LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS 11
JUDICIAL DEVELOPMENTS OF GENERAL SIGNIFICANCE 12

JURISDICTIONS COVERED IN THIS ISSUE

EUROPEAN UNION 6, 12
DENMARK 3
FRANCE 8
GERMANY 3, 9, 11
GREECE 4
ITALY 4, 9
SPAIN 5
UNITED KINGDOM 10

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VBB on Competition Law | Volume 2017, Nº 8

Table of contents

| MERGER CONTROL 3

MEMBER STATE LEVEL.......... 3

German FCO clears dominant glass recycling deal on minor market clause.......... 3

OTHER DEVELOPMENTS.......... 3

| CARTELS AND HORIZONTAL AGREEMENTS 4

MEMBER STATE LEVEL..........4

Greek Competition Authority imposes € 80.7 million fine on Greek construction companies for bid-rigging cartel..........4

Italian Competition Authority imposes fines of over € 140 million on steel rebar producers..........4

Italian Competition Authority imposes total fines of over € 184 million on cement manufacturers..........4

Spanish High Court annuls € 22.6 million fine imposed on REPSOL.......... 5

| VERTICAL AGREEMENTS 6

EUROPEAN UNION LEVEL.......... 6

Advocate General Wahl opines in Coty that a ban imposed by a luxury-goods supplier on sales by authorised retailers over third-party online marketplaces does not infringe the competition rules... 6

MEMBER STATE LEVEL.......... 8

French Supreme Court confirms the contractual freedom of a supplier not to renew a selective distribution contract.......... 8

German FCO imposes a total fine of € 10.9 million for vertical price fixing in the clothing industry.......... 9

Italian Competition Act bans price-parity clauses in the hotel booking sector.......... 9

CMA hits Ping with UK£ 1.45 million fine for online golf club sales ban..........10

CMA withdraws immunity from fines for supplier in third mobility scooters sector online sales case..........10

| LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS 11

MEMBER STATE LEVEL..........11

FCO publishes report on sector inquiry into the cement and ready-mix concrete industry..........11

| JUDICIAL DEVELOPMENTS OF GENERAL SIGNIFICANCE 12

EUROPEAN UNION LEVEL..........12

European Commission Intervenes in Belgian bpost Case to Suggest a Preliminary Reference to the European Court of Justice..........12

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| MERGER CONTROL

– MEMBER STATE LEVEL –

GERMANY

German FCO clears dominant glass recycling deal on minor market clause

On 4 August 2017, the German Federal Cartel Office ("FCO") approved the acquisition by the German Rethmann group of two Belgian companies, GRI Glasrecycling and VSB Holding. Both the Rethmann group and the two target Belgian companies are active in the recycling of waste glass in Germany and operate a glass recycling facility in the city of Dormagen in North Rhine-Westphalia.

The FCO investigation focused on the recycling of hollow glass (so-called 'cullet') in the region around the Dormagen facility, which also receives substantial quantities of recycled hollow glass cullet imports from Belgium and the Netherlands. On this market, the Rethmann group and the two target Belgian companies combined market shares post-transaction far exceeded 40 percent.

Under the German Competition Act, an undertaking is presumed to be dominant if it has a market share of at least 40 per cent. However, German law generally excludes the possibility of prohibiting a merger on a market on which goods or commercial services have been offered for at least five years and where the sales volume generated in Germany is less than € 15 million in the previous calendar year (the so-called "minor market" clause).

According to the President of the FCO, Andreas Mundt, the parties combined to have "a strong lead over their small and medium-sized competitors, of which there are only a few. Ultimately, we still had to clear the acquisition, however, because the market affected is a *de-minimis* market". The FCO noted that it is carrying out a sector inquiry into the collection of household waste to identify possible problems and analyse how competition in this area can be improved.

– OTHER DEVELOPMENTS–

DENMARK: On 16 August 2017, the Danish Competition Authority conditionally approved the acquisition of sole control of Inspiration by Imerco. Both companies are active in the market for the retail sale of housing articles (e.g., tabletop, kitchenware, electronic household appliances etc). Based on concerns that the transaction would significantly impede effective competition in the Danish market by leading to higher prices and a reduction in the level of service offered to customers, the parties submitted remedies. Specifically, the seller of Inspiration will maintain control of 20 of the 45 Inspiration shops that were to be transferred to Imerco under the planned merger and will operate the shops in a new retail chain in competition with Imerco. The parties also offered several behavioural commitments regarding the future operation of the new retail chain in order to ensure its viability, including a commitment to invest substantial resources in the marketing of the new retail chain.

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CARTELS AND HORIZONTAL AGREEMENTS

– MEMBER STATE LEVEL –

GREECE

Greek Competition Authority imposes € 80.7 million fine on Greek construction companies for bid-rigging cartel

On 3 August 2017, the Hellenic Competition Commission ("HCC") imposed fines amounting to € 80.7 million on a group of ten undertakings active in the construction sector in Greece for breaching Article 101 TFEU and Article 1 of the Greek Competition Act. This marks the largest fine the HCC has ever imposed on a group of undertakings, as well as the largest fine against an individual undertaking, namely a € 38.5 million fine imposed on Aktor ATE.

The HCC found that a number of undertakings, including Aktor ATE, J&P-Avax AE, Terna AE, Aegek Kataskevastiki AE, Technical Olympic AE and Intrakat AE participated in a single and continuous infringement by which they colluded to rig bids on tenders for public construction work between 2005 and 2012, in particular in relation to metro rail projects, public-private partnerships and infrastructure work. According to the HCC, the companies coordinated their business conduct in response to invitations to tender by agreeing among themselves which company would submit the winning bid. The participants submitted cover bids and agreed to jointly execute upcoming projects before submitting their respective bids. The HCC found that the scheme was implemented through regular meetings of company representatives and the conclusion of compensatory contracts.

The HCC's decision was adopted under the 2016 Greek settlement procedure (see VBB on Competition Law, Volume 2015, No.7). Technical Olympic AE was the first company to successfully obtain full immunity from fines under the Greek leniency programme. The other ten companies received a 10% fine reduction for acknowledging their participation in the infringement and their respective liability. In addition, HCC for the first time accepted applications for inability to pay and granted a fine reduction to two of the undertakings on that ground.

The HCC is expected to issue a separate decision in the coming months for a number of other companies involved in the HCC's investigation which chose not to take part in the settlement proceedings.

ITALY

Italian Competition Authority imposes fines of over € 140 million on steel rebar producers

On 19 July 2017, the Italian Competition Authority ("ICA") imposed fines totalling over € 140 million on eight suppliers operating in the reinforcing bar and welded steel mesh markets for their involvement in a price-fixing cartel. The companies involved in the infringement represented more than 80% of those markets.

The ICA found that between 2010 and 2016, the companies concerned had exchanged sensitive business information on their levels of production and had coordinated their prices on the wholesale market.

Interestingly, when calculating the fines, the ICA used its discretionary power to reduce the fines by half on account of the crisis that has hit the steel and construction sector. This is the first time that the ICA has applied this type of reduction since the adoption of the Guidelines in 2014.

Italian Competition Authority imposes total fines of over € 184 million on cement manufacturers

On 25 July 2017, the Italian Competition Authority ("ICA") imposed fines amounting to over € 184 million on several Italian cement producers. The ICA found that between 2011 and 2016 the main cement manufacturers (representing 85% of the Italian cement market), their trade association (AITEC) and a cement distributor (TSC) had put in place a concerted practice in violation of Article 101 TFEU. In particular, the ICA found that, in seven instances, the cement manufacturers agreed to coordinate price increases and then monitored the market for compliance.

The ICA also found that the trade association AITEC allowed its members to discuss prices in the course of its meetings. The monthly statistics circulated by AITEC on cement production were considered to have helped the cement manufacturers monitor their market shares. Finally, the ICA found that a cement distributor, TSC, had - for two weeks - facilitated the implementation of the infringement by circulating new price lists among the cement manufacturers.

The fines were calculated under the 2014 Italian Fining Guidelines. The fines of some of the companies involved in the infringement were reduced due to their implementation of an antitrust compliance programme. On the basis of its discretionary power, the ICA also reduced the fines imposed by half on account of the crisis in the construction sector.

Most of the parties have already announced that they will appeal against the decision.

SPAIN

Spanish High Court annuls € 22.6 million fine imposed on REPSOL

On 28 July 2017, the Spanish High Court ("Audiencia Nacional") delivered a judgment annulling a 2015 decision adopted by the Spanish Competition Authority ("CNMC") against REPSOL S.A. In its 2015 decision, the CNMC fined REPSOL S.A. € 22.6 million for anticompetitive practices on the market for the distribution of automotive fuel, which included price coordination and the exchange of strategic price information with certain associated petrol stations established in key areas of Spain.

In its decision, the CNMC found that the anticompetitive behaviour was carried out by a distribution subsidiary of the REPSOL group. However, the CNMC adopted the decision solely against REPSOL S.A., and not against its 99.78%-owned subsidiary, which was involved in the infringement. The authority based its decision on the fact that REPSOL S.A. exercised decisive influence over the subsidiary during the relevant time.

On appeal, REPSOL S.A. did not contest the anticompetitive nature of the conduct of its subsidiary, but claimed that the fundamental principle of personal responsibility had been infringed because the CNMC had not addressed its decision to REPSOL S.A.'s subsidiary and because REPSOL S.A. was held solely liable for the infringement committed by its subsidiary. In addition, REPSOL S.A. argued that it was not active on the affected market and merely provided centralised services to the subsidiaries of the REPSOL group.

In its judgment, the Court agreed with REPSOL S.A. and clarified that, under Spanish law, responsibility for an infringement of competition law can be attributed to the following entities: (i) to the company that actually committed the infringement, or (ii) to the company that committed the infringement and its parent company where the latter exercised actual and decisive influence over the former during the relevant period.

Since the CNMC had held REPSOL S.A. solely responsible for the payment of the fine arising from an infringement attributed to its subsidiary over which it exercised actual and decisive influence, rather than considering REPSOL S.A and its subsidiary jointly liable for such conduct, the Court annulled the CNMC's decision.

The CNMC has announced its intention to appeal against the ruling.

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| VERTICAL AGREEMENTS

– EUROPEAN UNION LEVEL –

Advocate General Wahl opines in *Coty* that a ban imposed by a luxury-goods supplier on sales by authorised retailers over third-party online marketplaces does not infringe the competition rules

On 26 July 2017, the non-binding opinion of Advocate General Nils Wahl was published in proceedings involving Coty Germany GmbH ("Coty"), a producer of branded luxury cosmetics, and Parfümerie Akzente GmbH ("Parfümerie Akzente"), a retailer which was a member of Coty's selective distribution system. The Higher Regional Court of Frankfurt referred questions related to the use of selective distribution for luxury goods and the ban on the use of online platforms in selective distribution agreements for a preliminary ruling by the Court of Justice of the European Union (the "ECJ") (see VBB on Competition Law, Volume 2016, No 4).

By way of background, under the terms of its selective distribution agreement, Coty prohibits authorised retailers, when making internet sales, from using a different name or from engaging an unauthorised third party in a manner discernible to the public. This in practice prevents authorised retailers from selling Coty's products on online platforms such as eBay and Amazon.com. Parfümerie Akzente violated this prohibition by selling Coty's products on Amazon's online marketplace and Coty initiated legal proceedings. The Frankfurt Court referred the matter to the ECJ for a preliminary ruling, asking:

- first, whether selective distribution systems for luxury goods that primarily serve to ensure the luxury image of the goods comply with Article 101(1) TFEU;
- second, whether an undertaking can impose a general prohibition on authorised retailers from engaging third party undertakings discernible to the public to handle online sales regardless of whether the manufacturer's legitimate quality standards are violated; and
- third, whether such a prohibition constitutes a "restriction of competition by object" under Articles 4(b) or (c) of the Vertical Agreements Block Exemption Regulation ("VABER").

Selective distribution systems for luxury products

As to the first question, although the use of selective distribution for luxury products had been endorsed subject to certain conditions in earlier case law of the EU Courts, doubts had been expressed as to whether such an approach was still valid in the light of the more recent *Pierre Fabre* ruling of the ECJ (where the Court had stated that the prestige image of products could not justify a restriction of competition).

In essence, AG Wahl adopts a positive view of the practice of selective distribution, influenced by the economic literature, which he sees as generally having either pro-competitive or at least neutral effects on competition. Acting within the constraints of the long-established case law (based on *Metro SB v. Commission*), which makes AG Wahl's extensive intermediate reasoning of greater interest than his necessarily more formalistic conclusion, he reaffirms that the use of selective distribution for high quality products in general, including for luxury and prestige products, is justified by the characteristics of the products. He notes in this respect that the relevant characteristics of the products to consider include not only their physical characteristics, but also the perception which consumers have of the products, in particular the aura of luxury which prestige products enjoy and which distinguishes them from other products. Finding inspiration in the Court's case law concerning trade marks (in particular the ruling in *Copad*, where the Court held that, in certain circumstances, a licensee could violate a licensor's trade mark rights where the licensee permits the resale of licensed luxury products in discount stores), he notes that an impairment of this aura of luxury may adversely affect the quality of the products themselves in the eyes of consumers. Selective distribution, which enables the network head to ensure that its products are only sold in outlets which enhance their value, thus serves to protect the image, and therefore the quality, of the products, which otherwise would be undermined if sold in an inappropriate retail environment. The protection of the brand image of these products is therefore, in his view, a legitimate goal of selective distribution. As selective distribution systems favour and protect the development of a brand, they in turn also constitute a factor that

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stimulates inter-brand competition between suppliers of branded goods.

AG Wahl rejects the view that the ECJ intended to reverse this approach in *Pierre Fabre*, a ruling which, he emphasises, concerned the legitimacy of a prohibition on internet sales in the context of selective distribution as opposed to the legitimacy of the use of selective distribution.

Finally, relying primarily on (but broadening to some extent) the principles outlined in *Metro*, he concludes that the use of selective distribution for luxury and prestige products, when mainly intended to maintain their luxury image, complies with Article 101(1) provided that three cumulative conditions are satisfied:

- resellers are selected on the basis of objective criteria of a qualitative nature which are determined uniformly for all potential resellers and applied in a non-discriminatory manner;
- the use of selective distribution is justified by the nature of the products in question including the prestige image; and
- the criteria defined must not go beyond what is necessary.

Prohibitions on engaging third party undertakings discernible to the public to handle online sales (i.e., online third-party marketplaces)

This is a question that AG Wahl felt was closely linked to the first issue. Therefore, the starting point of the analysis is that selective distribution systems based on obligations of a qualitative nature do not infringe Article 101(1) TFEU, provided that the *Metro*-based criteria set out above are met. AG Wahl considers that the objective of preserving the image of luxury and prestige products is always a legitimate objective in the context of selective distribution. He therefore considers that the head of a selective distribution network may, for this purpose, prohibit its distributors from using third undertakings in a discernible manner to sell over the internet.

This prohibition is, in his view, likely to improve the luxury image of the products by ensuring that retailers supply services of a certain level when the contract products are sold, thereby preserving the guarantees of quality, safety and identification of origin of the products. He also considers that such a prohibition helps combat counterfeiting and makes it possible "*to guard against the phenomena of parasitism*", *i.e.*, the prohibition ensures, by preventing free-riding, that the investments and efforts made by suppliers and authorised distributors to improve the image and quality of the products do not benefit other undertakings.

Although AG Wahl acknowledges that third party platforms are capable of ensuring that the products are presented for sale in an appealing manner, he importantly concludes that an absolute ban on the use of platforms is nonetheless proportionate as a network head has no contractual link with, and consequently no control over, third party platforms used by its retailers.

AG Wahl distinguishes the facts of the case from *Pierre Fabre*. Whereas *Pierre Fabre* involved an absolute ban on online sales by authorised retailers, which was found to restrict Article 101(1), Coty permitted its retailers to sell online through their own websites and only prohibited them from selling over internet platforms. Referring to the results of the Commission's e-commerce sector inquiry, he notes that sales by retailers over their own online stores are in practice the preferred method for retailers to sell online, even if marketing through third party platforms is of increasing significance. Therefore, he concludes that, in the present stage of development of e-commerce, the contested prohibition on sales over platforms does not represent a substantial restriction of internet sales.

Even if the *Metro* criteria were not met, AG Wahl concludes forcefully that a ban on engaging third party undertakings discernible to the public to handle online sales does not imply a sufficient harm to competition so as to constitute a restriction of competition by object within the meaning of Article 101(1) TFEU. Instead, an effects analysis would be required to determine if it infringes Article 101(1) TFEU. Even if Article 101(1) TFEU is infringed, a separate assessment would be needed to assess whether the prohibition could meet the exemption requirements of Article 101(3) either on an individual assessment or under the VABER.

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Application of the VABER

AG Wahl concludes that the restriction imposed by Coty would be exempted under the VABER as it does not represent a hardcore restriction. Although he makes a distinction between a hardcore restriction under the VABER and an object restriction under Article 101(1) (in the sense that a hardcore restriction is not necessarily an object restriction under Article 101(1)), he acknowledges that the criteria to be applied in determining the existence of both are similar.

He finds no reason to conclude that the clause at issue constituted either a restriction on sales to particular territories or customers within the meaning of Article 4(b) of VABER or a restriction of passive sales to end users within the meaning of Article 4(c) VABER. In addition to repeating earlier analysis concerning the positive purpose of the restriction, he notes that no particular customer group or market could be identified to which users of platforms would correspond. He also opines that these provisions of the VABER do not catch mere restrictions on the methods by which products are sold, which may be key quality criteria in the context of selective distribution. The fact that authorised retailers are permitted to cooperate with third parties to advertise over search engines is a further factor demonstrating that the prohibition does not prevent customers accessing authorised retailers online.

Conclusion

The opinion is of considerable importance. It will be music to the ears of luxury brands, and very disappointing for online platforms such as Amazon and eBay as it suggests that restrictions imposed by brands applicable to sales over online platforms will be very difficult to challenge. More broadly, it represents a very positive endorsement of selective distribution, which could be significant even where the qualitative requirements of the *Metro* case law are not met.

The opinion is also in keeping with the Commission's approach. In particular, Paragraph 54 of the Commission's Guidelines on Vertical Restraints provides a basis for legitimate bans on sales through online marketplaces: "*where the distributor's website is hosted by a third party platform, the supplier may require that customers do not visit the distributor's website through a site carrying the name or logo of the third party platform*". AG Wahl's approach is also consistent with the results of the Commission's e-commerce sector inquiry (see VBB on Competition Law, Volume 2017, No. 5) which outlined that a marketplace ban does not generally amount to a *de facto* ban on the use of the internet as a means of marketing and is exempted by the VABER.

It remains to be seen if the ECJ will fully endorse the approach of the Opinion.

– MEMBER STATE LEVEL –

FRANCE

French Supreme Court confirms the contractual freedom of a supplier not to renew a selective distribution contract

On 8 June 2017, in an appeal against a judgment of the Paris Court of Appeals, the French Supreme Court issued a judgment confirming the contractual freedom of a supplier operating a selective distribution system not to renew a selective distribution contract, despite the fact that the distributor met the required qualitative criteria in the contract. The judgment is of particular importance since it appears to represent a reversal in the Supreme Court's jurisprudence.

In 2008, Caudalie (a French manufacturer of body care products and perfumes) entered into a one-year tacitly renewable selective distribution contract with a pharmacist in Normandy (the "Contract"). In October 2011, complying with the two-month notice period, Caudalie notified the pharmacist that the contract ending on 31 December 2011 would not be renewed, and that as of this date it would no longer be entitled to sell Caudalie's products.

The pharmacist challenged Caudalie's decision not to renew the contract arguing that it was abusive as Caudalie was applying the required qualitative criteria included in the contract in a *discriminatory* manner inconsistent with Article 101 TFEU, Regulation 330/2010 (the Vertical Agreements Block Exemption: "VABER"), and Article L420-1 of the French Commercial Code.

The pharmacist's claims appeared to be consistent with one interpretation of past French jurisprudence. Indeed, on 25 October 1991, the Paris Court of Appeals affirmed that the renewal of a selective distribution contract for distributors fulfilling the contractually required quality criteria was "*a*

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right". Additionally, on 27 April 1993, the French Supreme Court considered that the operator of a selective distribution system was *liable* where it refused to renew a selective distribution contract without an *objective justification*, such as a reorganisation of the network or a violation of the set qualitative criteria.

However, in its judgment of 7 October 2015 concerning Caudalie's decision not to renew the agreement, the Paris Court of Appeals had essentially affirmed that, based on the principle of contractual freedom, a supplier is free, as long as it falls under the 30% market share threshold of the VABER and does not include hardcore restrictions in its distribution agreements, to organise its network as desired, choose its contractors, and terminate past contracts pursuant to their terms.

The French Supreme Court endorses this approach in the judgment and confirms the right of the supplier "not" to renew a contract at the end of its term "without" any need to motivate this decision. This apparent reversal of jurisprudence may be explained by a change in French law itself, as, before 1 July 1996, a refusal to sell between professionals was prohibited without "due cause", such as the violation of set qualitative criteria. Since the removal of the "due cause" criterion in 1996, recent jurisprudence has favoured contractual freedom in a manner that is consistent with EU competition law. For example, the Paris Court of Appeals in a ruling dated 30 September 2015 stated that "*the termination with notice of a selective distribution contract cannot in itself be described as discriminatory*".

GERMANY

German FCO imposes a total fine of € 10.9 million for vertical price fixing in the clothing industry

On 25 July 2017, the German Federal Cartel Office ("FCO") fined Wellensteyn, a producer of outdoor jackets, and Peek & Cloppenburg, a retailer based in Düsseldorf, for infringing competition law by engaging in resale price maintenance from April 2008 until February 2013.

According to the findings of the FCO, Wellensteyn had imposed a minimum resale price for their products. Retailers which failed to comply were threatened with delivery stoppages, which were applied on several occasions. Wellensteyn itself checked compliance with its pricing policy by test purchases. In addition, retailers reported non-compliance by their competitors to Wellensteyn. Peek & Cloppenburg complied with Wellensteyn's requirements and, in return, was granted the possibility to return unsold goods.

Wellensteyn also prohibited internet distribution, which the FCO assessed together with the overall pricing strategy which it aimed to uphold.

The level of the fines imposed takes account of the fact that both companies settled. The settlement decisions are final.

ITALY

Italian Competition Act bans price-parity clauses in the hotel booking sector

On 14 August 2017, the Law of 4 August 2017 n. 124 (the "Competition Act") was published. The Competition Act provides, among other things, that any contractual obligation shall be declared null and void which impedes hotels from offering to customers better conditions, for example price conditions, than those offered by intermediaries such as online travel agents.

The ban covers all types of price-parity clauses, both so-called "narrow" and "wide" price-parity clauses. In brief, the former prohibits a hotel from displaying prices lower than those offered on an online agent's portal, whilst the latter is more restrictive and requires a hotel to offer travel agent the lowest available room prices, maximum room availability and most favourable booking and cancellation conditions (see VBB on Competition Law, Volume 2017, No. 4).

This legislative ban is one of the many (and varying) initiatives taken by the EU Member States to curb the use of parity clauses that favour online travel agents, both through the enforcement of existing competition law rules by national competition authorities and through the adoption of specific legislative provisions (see VBB on Competition Law, Volume 2015, No.5; Volume 2016, No.1; and Volume 2016, No.11). The new Italian rules underscore a risk of continued divergence with respect to the treatment of these restrictions throughout the EU, where only a few Member States provide for this type of wide ban.

UNITED KINGDOM

CMA hits Ping with UK£ 1.45 million fine for online golf club sales ban

On 24 August 2017, the CMA fined Ping Europe ("Ping") UK£ 1.45 million for banning two UK retailers from selling Ping golf clubs on their websites. This case is further evidence of the CMA's commitment to increasing enforcement against unlawful online sales restrictions.

In November 2015, the CMA opened an investigation into the restrictions imposed by Ping on its retailers. The CMA took the view that Ping must allow its retailers to sell golf clubs online, but may require them to meet certain conditions before doing so. The CMA found that, while Ping was pursuing a genuine commercial aim of promoting in-store custom golf club fitting, it could have achieved this goal through less restrictive means. The CMA found Ping's online sales ban was not objectively justified and infringed Article 101 TFEU and the UK law equivalent. According to the CMA, the level of the fine imposed on Ping reflects that the breach of competition law occurred in the context of a genuine commercial aim of promoting in-store custom fitting, implying that it would otherwise have been higher.

CMA withdraws immunity from fines for supplier in third mobility scooters sector online sales case

On 23 August 2017, the UK's Competition and Markets Authority ("CMA") withdrew immunity from fines for a mobility scooter supplier, Mobility Limited and 2DS & TGA Holdings Limited (together, "TGA"), that is considered to have restricted retailers from advertising prices online.

Under section 39 of the UK's Competition Act, firms with a combined turnover of less than UK £20 million that enter into "small" anti-competitive agreements (other than price-fixing agreements) are immune from fines. However, the CMA may withdraw the benefit of this immunity for the future if it considers that such agreements are likely to break competition law. In April 2017, the CMA opened an investigation into TGA's practices (having previously in 2013 issued it, and others, with a warning concerning their conduct). The CMA now considers that TGA's resale restrictions are likely to have breached competition law as they restricted retailers from advertising prices online. Following the withdrawal of its immunity from fines, TGA risks a penalty of up to 10% of its worldwide turnover if it continues to restrict the freedom of retailers to advertise prices online. This is the first time that immunity has been withdrawn at this early stage of a competition law investigation. TGA has now taken action to bring the restrictions to an end and to institute competition compliance training.

In announcing the withdrawal of immunity, the CMA emphasised that retailers of mobility scooters must be allowed to freely advertise prices online. This is the third CMA investigation within the mobility scooter sector. Previously, the CMA's predecessor, the Office of Fair Trading, issued infringement decisions for similar behaviour against Pride Mobility Products in March 2014, and Roma Medical Aids in August 2013.

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| LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– MEMBER STATE LEVEL –

GERMANY

FCO publishes report on sector inquiry into the cement and ready-mix concrete industry

On 24 July 2017, the German Federal Cartel Office ("FCO") published the results of its inquiry into the cement and ready-mix concrete sector aimed at identifying business practices that might restrict competition. The inquiry examined the German cement and ready-mix concrete sector over a period of two years and gathered information about approximately 680 undertakings. This led to the initiation of formal proceedings against one company for predatory pricing. In addition, the FCO discovered that the structural conditions on the markets concerned restrict competition.

The report shows that both industries operate in stable markets with well-developed and homogenous products or product ranges. Competitive advancement through innovation is almost impossible. Furthermore, the market entry barriers are high due to the necessary investments and regulatory approval requirements. The FCO concluded that the conditions on both the cement market and, to a lesser extent, the ready-mix concrete market facilitate collusion of competitors.

The FCO focused on two points. First, it examined the assessment of joint ventures and supply associations that are common in the ready-mix concrete sector. One of the key findings of the report is that in regions with a high number of joint ventures, price levels were higher than in regions with fewer joint ventures. The report also points out that cooperation between parent companies in a joint venture can constitute a restriction of competition, in particular if the parents continue to operate independently in the market outside of the joint venture, thereby facing each other as actual or potential competitors. The sector inquiry further revealed that forming supply associations is a common practice in the industry. The report explains that it follows from case-law that supply associations (especially joint marketing), which unlike joint ventures are project-specific, are only admissible under three criteria: (i) an undertaking on its own is incapable of supplying, (ii) an economically viable offer can only be made through the cooperation of the two undertakings and (iii) such cooperation constitutes a reasonable entrepreneurial decision.

Second, the sector inquiry identified certain practices of companies that facilitate anti-competitive behaviour, such as market information systems or circular price announcement letters which make the market behaviour of competitors predictable. The FCO found that the 10 biggest cement suppliers, which cover 93% of the market, use generic circular letters to announce price increases to their customers. As a rule, this information rapidly reaches competitors and thereby noticeably increases price transparency. The FCO considers these circular price increase letters as an invitation to competitors, without an explicit agreement, to increase their prices in parallel. Other cartel authorities in Europe, such as the UK's Competition and Markets Authority in January 2016, have already prohibited similar practices. In July 2016, the European Commission forced container shipping companies to abandon their public price announcements (see VBB on competition law Volume 2016, No. 7).

The report does not contain a final assessment of these two points and the FCO announced that it would further examine them in future. The report states that 58 joint ventures and supply associations are identified as "problematic", *i.e.* potentially anti-competitive. They will be subject to further investigation, and potentially will not be allowed to act in this form in the future or will need to be dissolved. As an effect of the sector inquiry, 24 potentially anti-competitive joint ventures have been discontinued on a voluntary basis. The FCO announced that it will inform companies who have made use of circular price announcement letters of its assessment and that it will continue to monitor existing market information systems.

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| JUDICIAL DEVELOPMENTS OF GENERAL SIGNIFICANCE

– EUROPEAN UNION LEVEL –

European Commission Intervenes in Belgian bpost Case to Suggest a Preliminary Reference to the European Court of Justice

On 23 August 2017, it was made public that the European Commission will request the Belgian Supreme Court to lodge with the Court of Justice of the European Union ("ECJ") a request for a preliminary ruling on the issue of whether distinct fines imposed by both a postal regulatory authority and a competition authority for the same facts can amount to double jeopardy contrary to the "*ne bis in idem*" principle.

This is an interesting development in a long-standing legal battle between bpost, the Belgian incumbent postal company, and the Belgian Competition Authority ("BCA") concerning the impact of bpost's quantitative rebate scheme on so-called "consolidators", *i.e.*, intermediaries offering postal services such as preparing, processing and transporting mail to bpost's distribution points.

On 10 December 2012, further to a complaint filed by consolidators, the BCA imposed a fine of € 37.4 million on bpost for abusing its dominant position by applying a discriminatory rebate system. From January 2010 until July 2011, bpost applied a "model per sender" rebate system, which awarded rebates to large clients on the basis of the volume of the mail or the degree of preparation of the mail for further treatment. bpost's discount applied to both senders and consolidators but was calculated on the basis of the turnover generated by each sender individually. As a result, this rebate system did not allow consolidators to aggregate all the mail they processed for different senders. In practice, a sender which provided a large volume of mailings to bpost benefited from a higher rebate than that obtained by a consolidator which handed over an equivalent volume of mail on behalf of several senders. The BCA found that this system was discriminatory.

However, in July 2011, bpost had already been subjected to a € 2.3 million fine by the postal regulator, the Belgian Institute for Postal Services and Telecommunications ("BIPT"), when the BIPT decided that this rebate system was incompatible with postal regulations. The BCA reduced the amount of its own fine to take into account the prior fine imposed by the BIPT.

bpost appealed both decisions before the Brussels Court of Appeal. As regards the BIPT decision, the Court of Appeal requested the ECJ to issue a preliminary ruling on the case. In a judgment of 11 February 2015, the ECJ held that bpost's quantity discount scheme did not discriminate against consolidators. The difference in treatment between senders and consolidators would constitute a form of discrimination prohibited by Article 12 of Directive 97/67/EC on common rules for the development of the internal market of Community postal services and the improvement of quality of service only if: (i) senders and consolidators were in comparable situations on the postal distribution market; and (ii) there were no objective justifications for the difference in treatment. The ECJ found that senders and consolidators were not in comparable situations, since quantity discounts aim to increase the volume of mail handled by bpost in order to achieve economies of scale, which consolidators cannot do since they only consolidate mail, rather than sending it, and have thus no impact on actual volumes sent. Following this preliminary ruling, the Brussels Court of Appeal annulled the BIPT's decision on 10 March 2016.

Subsequently, the Brussels Court of Appeal also annulled the decision of the BCA, but for an entirely different reason: the Court of Appeal found that the decision infringed the "*ne bis in idem*" principle, pursuant to which one cannot be tried or punished for an infringement for which one has already been convicted or acquitted. The Court found that the BCA infringed this principle as the BIPT had already fined bpost for the same rebate scheme. Although the BIPT had based its reasoning on a different legal ground (the postal regulation and not competition law), the Court of Appeal found that the three conditions for the application of the "*ne bis in idem*" principle were satisfied: (i) both the BIPT's and the BCA's fines were of a criminal nature; (ii) both proceedings concerned the same facts (the rebate scheme); and (iii) the judgment of the Court of Appeal of 10 March 2016 had made the BIPT decision final. As a result, the Brussels Court of Appeal annulled the BCA's decision.

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The BCA filed a further appeal against this latter judgment before the Belgian Supreme Court (appeal limited to points of law only). The BCA argues that the Brussels Court of Appeal did not properly assess whether the BCA's fine amounted to a breach of the "*ne bis in idem*" principle. It is in the context of these ongoing proceedings before the Supreme Court that the European Commission intends to request the Court to refer the case to the ECJ for a preliminary ruling, which would lead the highest European Court to review this case for the second time.

The impact of this preliminary ruling is expected to be significant as it will help shape the legal relationship between decisions adopted by antitrust authorities and regulatory bodies across the European Union.

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