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VBB on Competition Law

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MERGER CONTROL

– EUROPEAN UNION LEVEL –

European Commission conditionally approves merger of Linde and Praxair

On 20 August 2018, the European Commission conditionally approved the merger between Praxair and Linde, two of the four largest companies active worldwide in the supply of industrial gases, medical gases, specialty gases and helium.

During its in-depth investigation, the Commission identified concerns that the merger would lead to a significant reduction in the number of alternative suppliers of gases, and anticipated that the merger would lead to increased gas prices. To address these concerns, the merging parties offered to sell Praxair's entire gas business in the European Economic Area, to transfer Praxair's interest in an Italian joint venture, SIAD, to Praxair's current joint-partner FlowFin, and to divest certain helium sourcing contracts.

The case is noteworthy for the scale of the divestments required by the merging parties to remedy the competition concerns. According to reports, the combined revenue of the businesses to be sold now exceeds the €3.7 billion threshold agreed by the parties in their merger agreement of June 2017.

– MEMBER STATE LEVEL –

FRANCE

French Competition Authority fines Fnac Darty €20 million for failing to meet divestment commitment

On 27 July 2018, the French Competition Authority ("FCA") imposed a €20 million fine on Fnac Darty for failing to divest three stores, which it had previously committed to sell in connection with Fnac's acquisition of Darty in 2016 (see VBB on Competition Law, Volume 2016, No 7).

During its merger review of Fnac/Darty in 2016, the FCA found that the deal was likely to adversely affect competition on certain local retail markets for electrical products, particularly in Paris. To address these concerns, Fnac committed to divest six stores by 1 August 2017. Although Fnac Darty managed to divest three stores, it failed to identify a buyer for one store (Fnac Beaugrenelle) and the FCA rejected the buyer put forward for two other stores (Darty Belleville and Darty Saint-Ouen). The FCA found that Fnac Darty's failure to meet its divestment obligation within the deadline hindered competition in these catchment areas.

As a result of this failure, the FCA imposed a €20 million fine on Fnac Darty. This is the first time the FCA has fined a company for failure to comply with a structural commitment, although it has previously fined firms for failure to comply with behavioural commitments. Further, in light of the difficulties encountered by Fnac Darty in selling the three original stores, the FCA substituted the divestment obligation on Fnac Darty and ordered it to sell two different stores (Darty Montmartre and Darty Passy).

GERMANY

Germany prevents two foreign investments on national security concerns

On 27 July 2018, the German Federal Ministry for Economic Affairs and Energy ("Ministry") announced that it had prevented plans by State Grid Corporation, a Chinese state-owned company, to acquire a 20% share in 50Hertz, a German provider of high-voltage transmission systems. The Ministry noted it had a "major interest in protecting critical energy infrastructure".

Interestingly, since the Chinese company planned to acquire less than 25% of the voting rights in 50Hertz, the Ministry could not prohibit the transaction based on the German Foreign Trade Regulation, which only apply if, post-merger, a non-EU investor would hold 25% or more of the voting rights of the domestic company. Therefore, German officials were required to persuade 50Hertz's majority shareholder, Elia, to exercise its pre-emption rights to buy the 20% share in 50Hertz and immediately transfer it to KfW, a German state-owned bank. Following this case, it is reported that the Ministry is considering lowering the threshold for when it can scrutinise investments in Ger-

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many by non-EU investors from 25% of the voting rights to 15%.

On 1 August 2018, in a separate development, the Ministry was set to formally prohibit the proposed acquisition of Leifeld Metal Spinning, a German company specialised in high-strength metals used in aerospace and nuclear industries, under the German Foreign Trade Regulation. The Ministry raised concerns that the proposed acquisition by Yantai Taihai Group, a leading Chinese metal processor, would put German public safety at risk. However, before the German Ministry formally vetoed the deal, Yantai Taihai Group effectively abandoned the transaction.

These developments follow a recent trend in other EU Member States, including France and the UK, to strengthen the review of investments by non-EU entities in strategic domestic firms (see VBB on Competition Law, Volume 2018, No. 7).

– OTHER DEVELOPMENTS –

AUSTRIA & GERMANY: On 20 August 2018, the Austrian Federal Competition Authority ("FCA") and the German Federal Cartel Office ("FCO") published the final version of the joint Guidance on the Transaction Value Thresholds for Mandatory Pre-merger Notification ("Guidance"). Previously, the FCA and FCO published the Guidance in draft form for public consultation (see VBB on Competition Law, Volume 2018, No. 5).

In the past, the FCA and FCO were concerned that merger control thresholds based on turnover alone could mean that certain mergers with competitive market potential could escape review because the target company or asset generated little or no turnover yet was purchased at a high price (e.g., in digital markets). In 2017, additional merger control thresholds introduced, among other things, a notification requirement where the value of consideration exceeds €200 million in Austria or €400 million in Germany. The Guidance now provides detail on how the FCA in Austria or the FCO in Germany will assess the value of consideration and the extent of domestic operations.

The guidance (in English) can be accessed via the websites of the Austrian FCA and the German FCO.

ABUSE OF DOMINANT POSITION

– EUROPEAN UNION LEVEL –

ECJ dismisses Orange Polska's appeal in abuse of dominance case

On 25 July 2018, the Court of Justice of the European Union ("ECJ") issued its judgment in Case C-123/16 P, *Orange Polska SA v Commission*, ultimately upholding a European Commission ("Commission") decision finding that Telekomunikacja Polska, now Orange Polska SA ("Orange Polska"), abused its dominant position.

The Commission had found that Orange Polska had abused its dominant position in the market for wholesale broadband access and the market for wholesale physical network infrastructure access at a fixed location by developing a strategy aimed at limiting competition at all stages of the procedure for access to its network in order to protect its position on the retail mass market. As a consequence, the Commission imposed a fine of €127.5 million on Orange Polska.

Orange Polska appealed the Commission decision before the General Court of the European Union ("GC") which upheld the Commission's findings. Orange Polska subsequently appealed the GC's judgment to the ECJ on three grounds.

First, as the infringement ended more than six months before the Commission's notification of the Statement of Objections and 18 months before the Commission's decision was adopted, Orange Polska argued that the Commission was obliged to demonstrate the existence of a legitimate interest for adopting a decision concerning an infringement committed in the past. Agreeing with the GC, the ECJ rejected this argument and found that Article 7(1) requires the Commission to establish such a legitimate interest only where *both* the infringement has ceased *and* the Commission does not impose a fine.

Second, Orange Polska submitted that the Commission was under an obligation to provide evidence of the actual or likely effects of the infringement for the purposes of calculating the fine when such effects are actually relied upon to determine the fine. On this point, the ECJ again upheld the Commission and GC. Although the Commission had made references to these effects in its decision, the Court concluded that such references could only be read as referring, in a general and abstract manner, to the nature of the infringement, a factor which was indeed taken into account by the Commission when assessing the gravity of the infringement. In contrast, it could not be inferred from these factors that the Commission had taken into account the actual effects of the infringements in determining the fine. As a result, the Commission did not have to show the existence of these effects and therefore Orange Polska's argument alleging a failure to state reasons with regard to the demonstration of the actual effects was rejected as unfounded.

Notably, on this point the ECJ departed from the Opinion of Advocate General Wathelet ("AG"). In his Opinion, AG Wathelet had advanced an expansion of the effects based approach to the assessment of the gravity of an infringement in the context of setting fines.

Finally, Orange Polska submitted that the Commission failed to take various investments made by Orange Polska into account as mitigating circumstances. More specifically, Orange Polska argued that the GC departed from the reasoning adopted in the decision for not treating those investments as mitigating circumstances and substituted its own reasoning even though it had indicated that it was confining itself to reviewing the legality of the decision and did not intend to exercise its unlimited jurisdiction. The ECJ ruled that it is not for the ECJ to substitute on grounds of fairness its own assessment for that of the GC exercising its unlimited jurisdiction to rule on the amount of the fine. It is only in as much as the ECJ considers the level of the penalty is not merely inappropriate but also excessive to the point of being disproportionate that it would have to find that the GC erred in law on account of the inappropriateness of the amount of a fine. It found that this was not the case.

CARTELS AND HORIZONTAL AGREEMENTS

– MEMBER STATE LEVEL –

BELGIUM

Belgian Supreme Court confirms that joint lobbying activities do not constitute restriction of competition

On 22 June 2018, the Belgian Supreme Court confirmed an earlier judgment of the Brussels Court of Appeal annulling a decision of the Belgian Competition Authority ("BCA") that imposed a fine on a group of cement companies for allegedly anti-competitive joint lobbying efforts *vis-à-vis* the Belgian public authorities.

In its decision of 30 August 2013, the BCA found that the joint lobbying efforts of the cement companies CCB, CRB and Holcim, together with the Federation for the Belgian Cement Industry and the National Centre for Scientific and Technical Research for the Cement Industry, which were undertaken *vis-à-vis* the Belgian regulatory authorities to delay the approval process for ground granulated blast furnace slag (a substitute for cement in ready-mix concrete), constituted a concerted practice restricting competition by object. The BCA imposed a fine of €14.7 million in respect of this infringement.

In June 2016, the Brussels Court of Appeal annulled the BCA's decision (see VBB on Belgian Business Law, Volume 2016, No. 8). In its judgment, the Court of Appeal considered that lobbying is an activity that seeks to influence governmental policy making and decisional processes, which are activities outside of the market. In addition, the Court held that the lobbying efforts in question were not excessive, taking into account the fact that the defendants were invited to the approval process by the public authorities, that their presence was appropriate in light of their expertise, that they did not hold power in the relevant decision-making bodies and that the lobbying took place in an open, objective, transparent and non-discriminatory public consultation framework. The Court concluded that such conduct was not incompatible with competition law, the application of which presupposes conduct on the market.

The BCA challenged the Court of Appeal's judgment before the Supreme Court, which in its recent ruling affirmed the Court of Appeal's reasoning, finding that it had not made any error of law in holding that joint lobbying activities do not fall within the ambit of the competition laws.

FRANCE

French Competition Authority fines wholesale distributors of veterinary medicinal products €16 million

On 26 July 2018, the French Competition Authority ("FCA") published a decision finding eleven wholesale distributors of veterinary medicinal products and their professional association €16 million for violating Article 101(1) TFEU by colluding in the supply of veterinary medicines to the French public authorities, thereby knowingly misleading the public authority purchaser and compromising the proper use of public funds.

The FCA initiated the proceedings *ex officio* following an investigative report from the French Ministry of Economy's Directorate General for Competition Policy, Consumer Affairs and Fraud Control (DGCCRF). The FCA found, in particular, that (i) the top three companies in the sector (constituting 70% of veterinary medical products sales) had concluded bilateral agreements to freeze competition and share customers and (ii) distributors and their professional association had agreed to fix logistics costs relating to the supply of the bluetongue disease vaccine.

None of the undertakings under investigation contested the facts and all accepted the terms of the settlement procedure as proposed by the FCA's general rapporteur. In its decision of 26 July 2018, the FCA fixed a high level of fines, within the upper limit of the settlement, underlining the seriousness of the infringements. First, it noted that the practices were clear and serious violations of the competition rules. Secondly, and most importantly, the FCA highlighted the emergency situation in which the logistics price-fixing agreement was implemented. Between 2007 and 2010, France faced a rapid spread of bluetongue disease, which led the French authorities to order three

mandatory vaccination campaigns. However, the wholesale distributors of bluetongue disease vaccine colluded to present with authorities with higher logistics costs and to maximise their revenues. In particular, the distributors had presented a logistics cost of 4% per vaccine while in reality the cost was around 1%.

The FCA concluded that the cartelists had taken advantage of the emergency situation under which it was not possible for the French government to call for tenders, and had misled the public authority purchaser, thereby compromising the proper use of public funds.

HUNGARY

Hungarian Competition Authority substantially reduces fines on loan prepayment cartel

On 22 August 2018, the Hungarian Competition Authority ("GVH") imposed fines totalling around HUF 5 billion (approximately €15.5 million) on eight leading financial institutions for engaging in concerted practices at the end of 2011 and at the beginning of 2012 with the intention of restricting the prepayment of certain foreign currency loans. The fine represents a substantial reduction on an earlier fine of HUF 9.4 billion that was imposed by the GVH on 19 November 2013 in respect of the same conduct (see also VBB on Competition Law, Volume 2013, No. 11); this fine was overturned by Hungary's Supreme Court in December 2016, which ordered the GVH to recalculate the fines.

The reduction of the fine is due to the modification of two main factors in the calculation. First, in the original proceeding, the fine was based on revenues earned from the whole volume of the mortgage loans, including HUF and foreign-currency-based mortgage loans, whereas, in the second proceeding, the fine was based on revenues earned from foreign currency loans alone. Second, in the original proceeding, the GVH considered that the majority of the banks had already violated competition law on an earlier occasion, which was taken into account as an aggravating factor, whereas, in the second proceeding, the GVH did not take this aggravating factor into account on the grounds that the decision that had established the earlier infringement was still subject to judicial review.

ITALY

Italian Competition Authority imposes fine of over €3 million on Italian Football Association

On 27 June 2018, the Italian Competition Authority ("ICA") fined the Italian Football Association (*Federazione Italiana Gioco Calcio* ("FIGC")) around €3.3 million for having adopted regulations and subsequent calls for tender that restricted access to the activities of a range of football professions (directors of football, football scouts, technical management staff and match analysts) in breach of Article 101 TFEU.

Based on EU case law in the sport sector (such as Case, C-49/07, *MOTOE*), the ICA identified FIGC as an association of undertakings within the meaning of Article 101 TFEU when adopting the measures in question. The ICA took into account the fact that FIGC's members, such as football clubs but also directors of football, scouts, technical management staff and analysts, carry out economic activities.

On this basis, the ICA found that FIGC, by imposing disproportionate and unnecessary qualifications for access to the football professions concerned, had engaged in a restriction of competition by object. In particular, the ICA found that FIGC's regulations required, for the lawful exercise of these professions, participation in *ad hoc* courses open only to limited number of participants as well as the possession of Italian residence and/or citizenship. The ICA concluded that the football professions concerned were effectively organised in the same way as "regulated professions", without there being any clear legal basis for doing so. The ICA found that the need to increase the professionality of the professions concerned could not justify the application of Article 101 (3) TFEU, as the measures could not be regarded as indispensable to this objective.

SPAIN

Port cargo-handling operators and trade unions sanctioned in Spain for cartel practices

On 26 July 2018, the Spanish Competition Authority ("CNMC") fined five port cargo-handling companies and five trade unions for cartelising the provision of certain cargo-handling services in the port of Vigo. In particular,

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the CNMC found that agreements concluded by the entities effectively impeded the provision of roll-on and roll-off services for non-registered vehicles and the reception and delivery of goods by staff other than cargo-handlers. The CNMC concluded that such restrictions undermined the applicable legislation, which fully liberalises the provision of such services. In this regard, the CNMC concluded that the agreements could not be considered as (i) sectoral collective agreements since they did not regulate the working conditions of cargo-handlers but rather governed the internal organisation of all cargo-handling companies operating on the market (not only the cartel participants); or (ii) internal organisational measures of the companies concerned, given that they were concluded between competitors. The amount of the fines imposed exceeds €3 million.

Spanish Competition Authority fines eleven data-processing and IT companies €29.9 million

On 26 July 2018, the Spanish Competition Authority ("CNMC") imposed fines totalling €29.9 million on eleven companies that had cartelised the market for the supply of IT and data-processing services to the Spanish public administration. In particular, the CNMC found that, in the period from 2005 to 2015, the companies concerned had fixed prices and trading conditions, allocated customers and shared sensitive commercial information affecting public bids across the whole of Spain. The highest fines were imposed on Indra (€13.5 million) and SAG (€6 million), considered by the CNMC to be the instigators of the cartel. Several of the companies fined have already announced their intention to appeal against this decision.

VERTICAL AGREEMENTS

– MEMBER STATE LEVEL –

GERMANY

Higher Regional Court of Frankfurt applies criteria set by the Court of Justice of the European Union in Coty

On 12 July 2018, the Higher Regional Court of Frankfurt (the "Court") handed down its judgment in a dispute between Coty Germany GmbH ("Coty"), a supplier of cosmetics, and Parfümerie Akzente, a member of its selective distribution system. The Court found that, within the framework of a selective distribution system, a contractual provision prohibiting the recognisable engagement of third parties (in particular sales platforms) by authorised retailers for the purpose of making online sales does not constitute a hardcore restriction within the meaning of Article 4(b) and (c) of the Vertical Agreements Block Exemption Regulation ("VABER"), as long as the manufacturer does not prohibit the use of price search engines or price comparison sites. As part of its analysis under Article 101(1) TFEU, the Court also affirmed that Coty's products enjoy a luxury image, although this factor was not relied on in the Court's finding that the prohibition at issue was exempted under the VABER. For a summary of the judgment based on the press release, please see VBB on Competition Law, Volume 2018, No. 7.

The reasoning of the recently published judgment provides some interesting insights concerning (i) whether products enjoy a luxury image, and (ii) whether the manner in which a supplier allows its products to be sold or promoted calls into question whether a selective distribution system for luxury products containing a platform prohibition meets the requirement of the case law that the supplier's quality criteria should be applied in a non-discriminatory manner. These factors are particularly important where it is necessary to individually assess whether a selective distribution system is compatible with Article 101(1) TFEU, rather than the simpler assessment of whether the system is covered by the VABER. Of additional interest are the doubts expressed by the Court concerning the prior finding by the Court of Justice of the European Union ("ECJ") in its *Coty* ruling that, in the context of an individual assessment under Article 101(1) TFEU, the platform prohibition was proportionate to the objective pursued.

Luxury image

The Court considered whether Coty's products enjoyed a luxury image in assessing whether the requirement of the Article 101(1) case law was met that the nature of its products must justify the use of selective distribution.

In this regard, the Court acknowledged that, in general, consumer perception is important to assess whether a product has a luxury image. However, the Court rejected Parfümerie Akzente's request that it should gather evidence concerning the actual perception of consumers as it considered there were sufficient other indications that Coty's products had a luxury image. In this respect, the Court noted that the luxury image of a given product is actively created by the producer through marketing and the positioning of the product in a high-quality market segment. The Court recognised that a separate sub-market exists for luxury cosmetics, which are distinct from and not interchangeable with mass-market cosmetics, and that, in the present case, Coty deliberately positioned the products concerned as luxury cosmetics by means of a separate distribution channel. While the Court stressed that a producer's view that it needs to put such a selective distribution system in place in order to establish or maintain a luxury image is not sufficient to justify such a system, Coty's positioning and distribution of the products indicated that the products concerned were luxury products. Against this background, the Court considered that the gathering of evidence on consumer perception would only have been necessary if Parfümerie Akzente had brought forward concrete evidence showing that consumers do not associate the products with a luxury image, which it had failed to do.

Parfümerie Akzente also challenged the luxury image on the basis that not all products distributed through Coty's selective distribution system were high-priced, but the Court found this irrelevant, stating that the mere fact that certain products in a product line are not high-priced does not affect the luxury image associated with the overall product line.

Non-discriminatory application

As part of its Article 101(1) assessment, the Court also considered whether the quality criteria set by Coty were

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applied uniformly and without discrimination as is required by the case law.

Parfümerie Akzente made claims that this condition was not met, all of which were rejected by the Court. Among these claims, Parfümerie Akzente pointed to the fact that Coty sold its products in airports and on board aircraft and, as a result, in the same environment as low-price products. In rejecting this claim, the Court stated that it is still common practice in the industry to make what were formerly known as "duty free sales". Even though nowadays air travel is no longer perceived as something "special" *per se*, access to duty free shops is necessarily linked to the purchase of a flight ticket, which distinguishes sales in duty free shops from sales in an environment accessible to all outside an airport or online. Therefore, the luxury image of the products was not threatened by airport sales, even if the products were on very rare occasions offered in a "shabby environment".

In addition, Parfümerie Akzente argued that allowing retailers to display Coty's products on the *Google-Shopping* website while prohibiting sales on *www.amazon.de* was discriminatory. However, the Court followed Coty's reasoning that there was a decisive difference between the two platforms: while *www.amazon.de* hosts actual sales, *Google-Shopping* redirects customers to the online shop windows of the authorised retailer, which are subject to Coty's quality requirements.

Proportionality of the platform ban

The Court also questioned the assessment of proportionality made by the ECJ as part of its Article 101(1) TFEU analysis, without ultimately ruling against it.

The ECJ had held that the platform ban is proportionate in the light of the legitimate objective pursued, *i.e.*, that it is appropriate for preserving the luxury image of Coty's products, and that it does not go beyond what is necessary to achieve that objective. In finding that the platform prohibition at issue in the main proceedings did not go beyond what is necessary for the attainment of the objective pursued, one factor emphasised by the ECJ was that Coty did not prevent retailers from selling through their own online stores and that, as is apparent from the E-commerce Sector Inquiry, sales through own online stores remains the main online distribution channel used by distributors (being operated by over 90% of the distributors surveyed) despite the increasing importance of third-party platforms. The ECJ further stated that, given the absence of any contractual relationship between Coty and the third-party platforms (which it could use to require those platforms to comply with the quality criteria imposed on its authorised distributors), an alternative of allowing those distributors to use such platforms subject to their compliance with pre-defined quality conditions cannot be regarded as being as effective as the platform ban.

Expressing doubts concerning the ECJ's reasoning, the Court envisaged arrangements that would be less restrictive towards the authorised retailer without disproportionally impairing the legitimate interest of Coty. It noted that Coty had conceded that platforms capable of sufficiently preserving the luxury image of the products in question could be developed. Furthermore, the Court found that platforms could be designed in a way that leaves no doubt to the end user that the sale is being made by an authorised retailer and not by the platform operator. It would then be for the authorised retailer to ensure that its presence on the third-party platform satisfies the qualitative criteria. Even if control of compliance with the quality requirements of the selective distribution system would be more difficult for a supplier with respect to sales on platforms, this could be made easier by, e.g., contractually obliging the retailer to disclose to Coty the third-party platforms through which it was selling Coty's products. The Court further stated that the ECJ did not appear to have taken into consideration that, particularly in Germany, distribution via platforms plays a far more important role than in other EU Member States.

However, since the ECJ in its ruling assessed the validity of the specific clause used by Coty which prohibited sales on third-party platforms, the Court questioned the competence of a national court to review such assessment and therefore did not decide on the proportionality of the restriction. Instead, it concluded that a prohibition on selling Coty's products concerned on third-party platforms was, in any event, exempted by the VABER.

The Court refused Parfümerie Akzente the right to appeal its judgment. This decision is currently being challenged before the Federal Court of Justice.

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SWEDEN

Swedish Court finds that Booking.com's narrow vertical price parity clauses infringe Article 101 TFEU

On 20 July 2018, the Swedish Patent and Market Court ("Court") found that so-called narrow vertical price parity clauses in contracts between Booking.com and hotels in Sweden, which prevented the hotels from setting lower prices on their own websites than those advertised on Booking.com's platform, infringed Article 101 TFEU and its Swedish equivalent.

In its ruling addressing an action brought by the Swedish tourism industry organisation Visita, the Court acknowledged that the Swedish Competition Authority, after an investigation coordinated with several other European competition authorities, had not objected to these contractual restraints (and had only objected to restrictions on the hotels' right to set lower prices on other booking platforms, *i.e.*, so-called wide price parity clauses). Nevertheless, the majority of judges found that Visita had demonstrated that the narrow vertical price parity clauses had the effect of restricting competition both on the market for hotel booking services as well as on the market for hotel rooms. In particular, the Court held that the narrow vertical price parity clauses not only prevented hotels from offering lower prices on their own websites, which they would have done absent the challenged restraints, but also reduced the incentives of hotels to offer prices on rival booking platforms lower than the prices offered on Booking.com's platform (because the narrow price parity clauses would prevent the hotels from matching those lower prices on their own websites, thereby damaging their own competiveness). The majority also found that Booking.com had not met the burden of proving that the narrow vertical price parity clauses fell outside Article 101 TFEU because they should be considered an ancillary restraint, or that they benefitted from an Article 101(3) exemption.

The Court ordered Booking.com and its Swedish subsidiary to remove the vertical price parity clauses from all contracts and to refrain from creating equivalent incentives for hotels to maintain price parity between their websites and Booking.com's platform. In case of non-compliance within three months of the date of the judgment, Booking.com and its Swedish subsidiary will have to pay 30 million SEK (€2.9 million) and 5 million SEK (€485,000) respectively.

The judgment represents a further hardening of approach to so-called narrow price parity clauses, which has occurred in a number of Member States through either the adoption of targeted legislation, enforcement action by a competition authority or, as in the case of Sweden, a ruling by the national courts.

SWITZERLAND

Swiss Competition Commission drops investigation into luxury watch manufacturers' alleged abuse of dominance in the supply of spare parts, citing the European Commission's assessment of the practices

On 28 August 2018, the Swiss Competition Commission ("COMCO") closed a preliminary investigation into the alleged abuse of dominance in the supply of spare parts by luxury watch manufacturers Swatch, Rolex, LMVH, Richemont, Audemars Piguet and Breitling. The COMCO's main reason for dropping the investigation was the fact that, in the EU, the European Commission had rejected a complaint that the watch manufacturers' selective repair systems (which it considered to be based on qualitative criteria) infringed Article 101(1) TFEU and that the refusal to supply spare parts to independent repairers amounted to an abuse of a dominant position under Article 102 TFEU, a decision that was subsequently upheld on appeal by the General Court of the European Union (see VBB on Competition Law, Volume 2017, No. 10). In the absence of any essential elements suggesting that its assessment should differ from that of the European Commission, the COMCO found no reason to continue the investigation. It did, however, expressly leave open the question of whether requiring authorised repairers to also perform watch sales in order to be admitted to the selective repair network (and obtain spare parts) raises competition concerns.

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STATE AID

– EUROPEAN UNION LEVEL –

ECJ sets aside General Court's judgment in "Spanish Tax Lease System" case

On 25 July 2018, the Court of Justice of the European Union ("ECJ") handed down its judgment in a case arising from the European Commission's 2013 decision on the "Spanish tax lease system" ("STLS") (Case C-128/16 P, *Commission v Spain and others*). In the new judgment, the Court sets aside the earlier judgment of the General Court of the European Union ("GC") (see VBB on Competition Law, Volume 2016, No. 1) and refers the case back for further consideration by the GC.

The STLS consisted of five fiscal measures that stimulated the sale of sea-going ships by Spanish shipbuilding companies due to a 20%-30% rebate for ship-owning companies that purchased such a vessel. The system was based on a complex structure, whereby a bank introduced an intermediate leasing company and an Economic Interest Grouping ("EIG") between the seller and the purchaser of a ship. The gains generated by the agreement between the shipbuilder and the ship-owner were, through the leasing companies, transformed into tax credits for the investors in the EIGs. The STLS thus benefited EIGs and their investors, whose investments in turn benefited shipbuilding companies and ship-owners.

On 17 July 2013, the European Commission (the "Commission") issued a decision finding that three out of the five fiscal measures in the STLS constituted illegal state aid to EIGs and to investors in the EIGs. Thereafter, in response to actions brought by Spain and other parties, the GC annulled the Commission's decision in a judgment of 17 December 2015. The GC ruled that: (i) as a result of the tax transparency of the EIG's, only the EIG's investors were beneficiaries of the aid and not the EIGs themselves; (ii) although only investments in particular assets to the exclusion of other assets or other types of investments were eligible for the STLS, the advantage conferred on the EIG's investors was not selective since it was open to all undertakings, without distinction; and (iii) the Commission gave insufficient reasons for its finding that the measures were likely to distort competition and affect trade between Member States.

The Commission appealed the GC's judgment before the ECJ. In its judgment of 25 July 2018, the ECJ disagreed with the GC's ruling on each of the three points.

First, the ECJ ruled that the GC was wrong to find that the EIGs could not be the beneficiaries of the advantages arising from the STLS. In reaching this conclusion, the ECJ firstly considered that the EIGs carried on an economic activity and were accordingly "undertakings" within the meaning of Article 107(1) TFEU. Secondly, while the ECJ recognised that because the EIGs are fiscally transparent, their profits or losses were automatically transferred to their members, it stated that the tax measures at issue were applied to the EIGs and therefore they were the direct beneficiaries of the advantages arising from those measures.

Second, in accordance with its above conclusion, the ECJ found that the GC had erred in its assessment of the selectivity criterion as the GC had only examined selectivity by reference to the EIG investors and not the EIGs. Furthermore, the ECJ reviewed the GC's examination of the condition of selectivity as regards EIG investors. In this respect, the ECJ relied on its judgment of 21 December 2016 in Joined Cases C-20/15 P and C-21/15 P, *Commission v. World Duty Free Group and Others*, which had been handed down since the GC judgment concerning the STLS (see VBB on Competition Law, Volume 2016, No. 12). In accordance with this case law, the GC should ascertain whether the Commission has established that the tax measures at issue, by their practical effects, introduce differentiated treatment of operators, where the operators which benefit from the tax advantages and those which are excluded from it, are, in view of the objective pursued by that tax system, in a comparable factual and legal situation. As the GC did not make this assessment, but rather merely took account of the fact that the STLS was available, on the same terms, to any undertaking, the ECJ concluded that the GC committed an error of law.

Third, the ECJ found that there was no failure to state reasons in the Commission's decision or contradictory reasoning.

For the above reasons, the ECJ set aside the judgment of the GC and referred the case back to the GC.

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The judgment of the ECJ is interesting as it confirms the ECJ's expansive interpretation of the criterion of selectivity as opposed to the strict interpretation that had been advocated by the GC. According the interpretation of the ECJ, the selectivity criterion is fulfilled when a category of economic transactions (such as investments in particular assets), rather than a particular category of undertakings, benefit from aid.

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LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– MEMBER STATE LEVEL –

GERMANY

German ministry evaluates impact of transparency measures adopted to increase fuel price competition

On 10 August 2018, the German Federal Ministry for Economic Affairs and Energy ("Ministry") presented a report to the German Federal Parliament and the Federal Council evaluating the activities of the Market Transparency Unit for Fuels at Germany's Federal Cartel Office ("Unit") since its creation in 2013.

Since 31 August 2013, companies operating petrol stations are obliged to report price changes for the most commonly used types of fuel in real time to the Unit. This Unit gathers information on fuel prices and provides it to information service providers which in turn make the information accessible to consumers via the internet. Currently, there are 58 information service providers registered with the Unit which offer the data to consumers via apps. Through this service, consumers are informed of current fuel prices and can find the cheapest petrol station in their vicinity or along a specific route.

In its report, the Ministry found indications that the Unit's work is increasing competition by raising consumer awareness of prices and their willingness to switch petrol stations. Also, prices were found to be less volatile generally speaking since fuel prices are published. Furthermore, the report referred to other countries' experience concerning different transparency mechanisms and provisions on pricing adjustments. Belgium, for instance, obliges petrol stations not to exceed a maximum fuel price which is calculated based on the mineral oil price, among other factors. However, the report found the evidence base for such experience to be too scarce and therefore did not recommend introducing similar regulations in Germany. The activities in their current form shall be re-evaluated in five years.

In March 2018, the German Federal Cartel Office ("FCO") also published its latest annual report on the work of the Unit. The report is available on the FCO's website in German. In the report, the FCO evaluated fuel prices throughout Germany for the period between 1 June 2017 and 30 November 2017.

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