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MERGER CONTROL

– EUROPEAN UNION LEVEL –

Court of Justice confirms only full-function joint ventures are notifiable in Austria Asphalt case

On 7 September 2017, the Court of Justice of the European Union ("ECJ") ruled on a reference from the Austrian Supreme Court that a change from sole to joint control over an existing business only needs to be notified to the European Commission under the EU Merger Regulation if the resulting joint venture meets the criteria of full-functionality. The ECJ's decision is consistent with the Opinion of Advocate General Kokott issued earlier this year (see VBB on Competition Law, Volume 2017, No. 5).

Prior to the ECJ's decision, there was a degree of legal uncertainty regarding whether (a) joint ventures amount to generally notifiable transactions under Article 3(1)(b) of the EU Merger Regulation, or (b) joint ventures are only notifiable under Article 3(4) if, post-transaction, they are full-function – i.e., perform all the functions of an autonomous economic entity on a lasting basis.

In its decision, the ECJ noted that Article 3(4) must be interpreted by reference to its purpose and general structure. As the purpose of the EU Merger Regulation is to ensure that changes in the control of undertakings do not result in lasting damage to competition in the internal market, the ECJ concluded that Article 3(4) of the EU Merger Regulation concerns joint ventures "only in so far as their creation provokes a lasting effect on the structure of the market". Accordingly, a transaction will require mandatory notification under the EU Merger Regulation where joint control is acquired over a previously solely controlled existing undertaking only if the joint venture created by such a transaction "performs on a lasting basis all the functions of an autonomous economic entity" and, thus, meets the criteria for full-functionality.

The case offers increased certainty for merging parties as to when transactions involving non-market-facing subsidiaries are likely to require notification. Further, it is possible that the Commission may now revise its published guidance on the notifiability of joint ventures in the Consolidated Jurisdictional Notice. This Notice currently states that it is not necessary to consider the full-functionality criteria where several undertakings acquire joint control of another undertaking – a statement which is difficult to reconcile with the ECJ's recent judgment.

European Commission proposes new rules to screen foreign investment into the EU

On 14 September 2017, the European Commission proposed a new regulation to allow the Commission and the Member States to adopt rules for screening foreign direct investment ("FDI") in the EU that raises concerns on grounds of security or public order (the "Proposal").

The Proposal aims to establish a common framework for investigating whether FDI from outside the EU might adversely affect security or public order in the EU by allowing the Commission and Member States to monitor FDI flows and, if necessary, oppose or unwind such investments. This will be facilitated through new intra-EU Member State information exchanges and a (voluntary) cooperation mechanisms. Under the cooperation mechanism, Member States must inform the Commission and the other Member States of any FDI that is undergoing screening within the framework of their national screening system within five working days. Cooperation between Member States will take place through specified contact points and Member States will have 25 working days to share views on problematic FDI. The Proposal does not provide for mandatory suspension for FDI into the EU and is envisaged to operate in parallel to the EU Merger Regulation.

It is worth noting that the Proposal defines FDI very broadly. In particular, the Commission and Member States may screen "investments of any kind" which will establish or maintain "lasting and direct links" between the foreign investor and "an economic activity" in the EU.

The Proposal comes in the wake of concerns regarding foreign investors acquiring key European technologies and infrastructure for strategic reasons, and fears that EU investors do not enjoy the same rights to invest in the country from which the investment originates. To date, there is no EU-wide regime for reviewing FDI other than the EU Merger Regulation which allows Member States limited powers to review transactions on non-competition grounds including public security, media plurality and prudential rules under Article 21(4).

In terms of next steps, the Proposal will be subject to further discussion and approval by the European Parliament and the Council, under the ordinary legislative procedure, before it can enter into force.

The Proposal is available here.

– MEMBER STATE LEVEL –

IRELAND

Ireland launches public consultation on merger notification thresholds

On 29 September 2017, the Irish Department of Business, Enterprise and Innovation launched a public consultation to review the operation of the merger control thresholds in Ireland. In particular, the consultation is examining whether the currently applicable turnover thresholds introduced in 2014 should be amended. At present, the Irish Competition Act provides for a mandatory notification requirement where (i) the aggregate turnover in Ireland of the parties involved exceeds € 50 million, and (ii) two or more parties involved each have turnover of € 3 million or more in Ireland. This low individual turnover threshold means that certain asset acquisitions (such as aircraft, office buildings, shopping centres and hotels) may require notification even though such transactions are generally not likely to give rise to competitively significant issues given that such assets often operate in smaller, localised markets. The consultation is also considering whether the 30-working day deadline available to the Irish Competition and Consumer Protection Commission to assess merger notifications in Phase I ought to be amended.

The consultation is open until 30 November 2017 and is available here.

– OTHER DEVELOPMENTS –

UNITED KINGDOM: On 5 September 2017, the Competition and Markets Authority ("CMA") announced that it made three changes to its merger guidance in order to streamline the CMA's process and reduce the information requirements on businesses. First, the CMA clarified how it imposes Initial Enforcement Orders. IEOs are put in place by the CMA during the first step of a merger investigation to prevent merging companies from integrating. Second, the CMA modified its merger notice form to improve clarity and reduce the amount of information that businesses need to provide to the CMA. Third, the CMA updated its guidance to clarify when merging companies, which do not propose to notify their transaction to the CMA, should submit a briefing note.

UNITED KINGDOM: On 20 September 2017, the UK Secretary of State referred Twenty-First Century Fox's proposed acquisition of Sky to the CMA to carry out an in-depth assessment of whether the transaction impacts media plurality and broadcasting standards in the UK. Previously, the deal was unconditionally approved by the European Commission on 7 April 2017 (see VBB on Competition Law, Volume 2017, No 4, page 6).

ABUSE OF DOMINANT POSITION

– EUROPEAN UNION LEVEL –

Court of Justice issues landmark judgment on legal treatment of fidelity rebates granted by dominant companies and sets aside General Court's judgment in Intel

On 6 September 2017, the Court of Justice of the European Union ("ECJ") issued its long-awaited judgment in the *Intel* case (Case C-413/14 P), setting aside the General Court's ("GC") judgment. The GC must now re-assess the legality of the Commission's decision in light of the ECJ's ruling. Intel was supported by the Association for Competitive Technology (ACT) represented by Van Bael & Bellis partners Jean-François Bellis and Tim Kasten.

With respect to *fidelity rebates*, the ECJ concluded that existing case-law (in particular Case 85/76, *Hoffmann-La Roche*) needed clarification, and that, where an undertaking submits evidence during the administrative procedure that its conduct is not capable of restricting competition, the Commission is required to consider the extent of the dominant position, the share of the market covered by the practice, the conditions and arrangements for granting the rebates (including duration and amount) and the possible existence of a strategy aimed at excluding competitors. In effect, this creates a rebuttable presumption for exclusivity obligations and loyalty rebates.

During the Commission investigation, Intel had argued that its rebates were not capable of restricting competition, but the Commission rejected these arguments as irrelevant after concluding that the rebates were by their nature capable of restricting competition. Nonetheless, for the sake of completeness, the Commission also examined the circumstances of Intel's rebates, and carried out an efficient competitor test ("AEC test") to determine the capability of the rebates to foreclose as-efficient competitors, and concluded that Intel failed this test. However, the Commission stated that the AEC test did not form part of the decision and was not relied upon to find that the Intel rebates were abusive.

On appeal to the GC, Intel argued, *inter alia*, that the Commission had made a number of errors in applying the AEC test. The GC did not examine Intel's arguments, agreeing with the Commission that the rebates were by their nature capable of restricting competition without a need for further analysis. The GC also noted that the Commission had not relied on the AEC test analysis in its decision.

In its judgment, the ECJ faulted the GC for not examining Intel's arguments. In light of its clarification of existing case-law, the ECJ found that the AEC test applied by the Commission played an important role in its assessment of whether the rebate scheme was capable of having foreclosure effects on as-efficient competitors. Because the GC had not addressed these arguments, the judgment was set aside and the case was remanded to the GC.

In effect, the judgment eliminates the distinction that the GC had drawn between fidelity rebates within the meaning of *Hoffmann-La Roche* ("category two rebates") and conditional rebates that may also have a fidelity-building effect ("category three rebates"). The GC had considered that it was only in the case of rebates falling within the third category that it was necessary to assess all the circumstances surrounding the rebate. The ECJ ruling now makes it clear that this additional analysis is also required for category two rebates, at least where the dominant undertaking submits evidence that its conduct is not capable of restricting competition and producing the alleged foreclosure effects.

With respect to *jurisdiction,* the ECJ agreed with the position of the GC, confirming for the first time the "qualified effects" approach to jurisdiction that was previously accepted by the Commission, GC and Advocate Generals. Rejecting both Intel's arguments and the Opinion of Advocate General Wahl, the ECJ concluded that the Commission could exercise jurisdiction over agreements with Lenovo for the supply of CPUs in China in 2006-2007 on the ground that they formed part of an overall strategy with agreements for the supply of CPUs in the EEA concluded by Intel with other companies in 2002-2005.

Finally, the ECJ confirmed that the Commission had infringed Intel's *rights of defence* during its investigation by interviewing a senior Dell executive without recording that interview. However, the ECJ considered that this procedural error was not capable as such of bringing about the annulment of the GC's judgment, as Intel had not adduced any evidence to suggest that the interview included exculpatory evidence which could have been useful for Intel's defence.

Court of Justice rules on reference on excessive pricing

On 14 September 2017, the Court of Justice of the European Union ("ECJ") handed down a judgment in Case C-177/16 on questions referred to it by the Latvian Supreme Court on the proper interpretation of point (a) of the second paragraph of Article 102 TFEU and the determination of the unfair nature of rates set by a dominant copyright management organization such as the Latvian authors' association AKKA/LAA.

The ruling was issued in response to a preliminary reference from the Latvian Supreme Court in the context of proceedings against a 2013 Latvian Competition Council decision. The decision in question found that AKKA/LAA had abused its dominant position as a result of the application of excessively high rates. In reaching this finding, the Competition Council first compared certain rates applied in Latvia with those applied in neighbouring Member States Lithuania and Estonia, and found that the rates applied in Latvia were two to three times higher. Secondly, the Competition Council considered the purchasing parity index ("PPP index") and compared the rates in force in approximately 20 other Member States and found that the rates payable in Latvia exceeded by 50% to 100% the average level of the rates charged in these other Member States. Having concluded that the Latvian fees were unfair, the Competition Council imposed a fine of LVL 45,645.83 (around € 32,000) on AKKA/LAA for abuse of a dominant position.

On appeal of this decision, the Latvian Supreme Court referred a number of questions to the ECJ, including among others: (i) whether it was appropriate to consider rates in neighbouring Member States, as well as those applicable in other Member States adjusted in accordance with the PPP index, for the purpose of examining whether a copyright management organization applies unfair prices; (ii) what was the threshold above which the difference between the rates was to be regarded as appreciable, and therefore indicative of an abuse; and (iii) what evidence the copyright management organization could adduce to demonstrate that the rates were not excessive.

In response to the first of these questions, the ECJ first recalled that an abuse within the meaning of Article 102 TFEU might lie in the imposition of a price which is excessive in relation to the economic value of the services provided. In this regard, the ECJ noted that the questions to be determined are whether the difference between the cost actually incurred and the price actually charged is excessive, and, if the answer to that question is affirmative, whether a price has been imposed which is either unfair in itself or unfair when compared with competing products. In this respect, the ECJ further noted that a method based on a comparison of prices applied in the Member State concerned with those applied in other Member States must be considered valid. The ECJ also held that when a dominant undertaking imposes fees which are appreciably higher than those charged in other Member States and a comparison of the fee levels has been made on a consistent basis, that difference is indicative of an abuse.

Next, the ECJ noted that a comparison with neighbouring Member States cannot be considered to be insufficiently representative merely because it takes a limited number of Member States into account. Such a comparison is relevant on condition that the reference Member States are selected in accordance with objective and verifiable criteria such as, *inter alia*, consumption habits and other economic and socio-cultural factors such as GDP and cultural and historical heritage.

As regards the comparison of the applicable rates with the non-neighbouring Member States, the ECJ held that such a comparison can serve to verify the results already obtained. Such a comparison must however be made on a consistent basis, and the national authority must verify whether the method of calculating rates in the selected reference Member States is analogous to the method of calculation applicable in Latvia.

Furthermore, in response to the Latvian court's question on the assessment of the appreciability of the rate difference, the ECJ noted that the difference between rates charged in the present case is not as large as in the previous case-law on excessive pricing. Nevertheless, there is no minimum threshold above which a rate must be regarded as appreciably higher. According to the ECJ, a difference between rates may be qualified as appreciable if it is both significant and persistent (as opposed to temporary or episodic) on the facts with respect in particular to the market in question.

Finally, as regards the Latvian court's question on possible justifications for applying higher rates, the ECJ stated that the copyright management organization may rely on objective dissimilarities between the situation of the Member State concerned and that of the other Member States. Such factors may include, *e.g.*, (i) the relationship between the level of fees and the amount actually paid by the rightholders, (ii) the proportion of fees that are taken up by collection, administration and distribution expenses rather than by payments to rightholders, and (iii) objective factors affecting costs, such as a national regulation or other features specific to the market concerned.

General Court confirms Commission's decision to reject complaint in interoperability case

On 14 September 2017, the General Court ("GC") issued a ruling in Case T-751/15 confirming a decision of the European Commission to reject a complaint lodged by Contact Software GmbH ("Contact Software") against Dassault Systèmes ("Dassault") and Parametric, alleging that the two companies abused their dominant position on the markets for computer aided design ("CAD") software by refusing to supply interoperability information and by engaging in tying practices.

Contact Software produces product data management ("PDM") software, which allows companies to stock and organise data relating to a certain product, and CAD software, both of which form part of the product lifecycle management of a company. In its complaint, Contact Software alleged that Dassault and Parametric infringed Article 102 TFEU by (i) refusing to provide interface information allegedly indispensable for ensuring interoperability between Contact Software's PDM software, on one hand, and Dassault and Parametric's CAD software, on the other hand, and (ii) tying their PDM and CAD software packages.

In its October 2015 decision, the Commission rejected the complaint and held that an in-depth investigation would have been too complex, costly and disproportionate in light of the weak probability of establishing an infringement.

Contact Software appealed against the Commission's decision before the GC.

In its judgment, the GC recalled that, according to case-law, a refusal to supply by an undertaking holding a dominant position may infringe Article 102 TFEU when the following three conditions are met: (i) the refusal relates to a product or service indispensable to the exercise of a particular activity on a neighbouring market; (ii) the refusal is of such a kind as to exclude any effective competition on that neighbouring market; and (iii) the refusal prevents the appearance of a new product for which there is potential consumer demand.

In the case at hand, the GC agreed with the Commission's findings that direct access to interface information was not indispensable to be active on the PDM software market. This was due to the fact that end-customers were themselves able to acquire interface information for Dassault's and Parametric's CAD software through a licence. The GC emphasised the existence of a distinction between the direct supply of licences to competitors and the supply of licences to end-customers, and concluded that only the latter was indispensable to enable effective competition on the market. Thus, the fact that information regarding the interface interoperability was available to end-customers meant that the first condition for an infringement of Article 102 TFEU was not met, and the Commission did not err by rejecting the complaint.

– MEMBER STATE LEVEL –

SPAIN

Spanish High Court annuls € 120 million fine imposed on mobile operators for abusive pricing practices

In three judgments of 4 September 2017, the Spanish High Court annulled fines totalling € 120 million imposed by the Spanish Competition Authority ("CNMC") on mobile operators Telefónica, Vodafone and Orange for individually abusing their dominant positions in the wholesale markets for SMS and MMS in Spain by charging excessive prices.

In its 2012 decision, the CNMC found that the three operators had individually abused their dominance in the wholesale markets for access and origination of short messages (SMS and MMS) and for termination of such messages in their respective networks by setting "very high" prices between 2000 and 2009 (see VBB on Competition Law, Volume 2012, No. 12). Such abuse was further reinforced, according to the CNMC, by the collective position of dominance of the operators. The CNMC concluded that, since termination costs were passed through to retail prices, overpricing termination services allowed the three operators to maintain higher retail prices for SMS and MMS users and erected substantial barriers to entry and expansion for online mobile operators.

The High Court, however, concluded that the CNMC had not established the existence of dominance, and thus annulled the decisions without assessing the substantive findings of abuse. More specifically, the High Court concluded that the CNMC had: (i) failed to properly define the relevant market by merely relying on the market analysis and conclusions reached in previous cases that differed in their context; and (ii) not sufficiently addressed the parties' arguments in its decision, such as the existence of an increase in competition or the fact that a sectoral regulation had put in place proper mechanisms to avoid anticompetitive situations.

The High Court also concluded that it was not necessary to examine the existence of a position of collective dominance by the three sanctioned operators on the SMS and MMS market because, according to the CNMC, this alleged collective position did not concern a separate infringement, but only a reinforcement of the respective individual positions of dominance of each operator.

The CNMC has 30 days to challenge the ruling before the Spanish Supreme Court.

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 important substantive or procedural developments addressed in these cases.

Summary of Significant Case Developments

General Court reduces fine on re-hearing bathroom fixtures and fittings cartel case

On 12 September 2017, the General Court ("GC") handed down its judgment on an appeal lodged by Laufen Austria, a bathroom equipment manufacturer, against a Commission decision in connection with the *bathroom fixtures and fittings* cartel case, which was referred back to it for determination by the Court of Justice of the European Union ("ECJ") (Case T-411/10 RENV, *Laufen Austria*).

In January 2017, the ECJ upheld the appeal lodged by Laufen Austria against an earlier GC judgment, concluding that the GC had erred in finding that the turnover of Roca Sanitario (of which Laufen is a 100% subsidiary) could be taken into account for the purpose of applying the 10% fine ceiling for the period during which Laufen Austria was held solely liable for the infringement (see VBB on Competition Law, Volume 2017, No. 2). In light of the finding of the ECJ, the GC re-calculated the fine imposed on Laufen Austria and reduced it to € 4.788 million (from € 14.3 million), which corresponded to 10% of Laufen Austria's 2009 turnover (See Section 1.2).

Court of Justice upholds General Court's judgment in TV and Computer Monitor Tubes cartel case

On 14 September 2017, the Court of Justice of the European Union ("ECJ") dismissed appeals lodged by LGE and Philips against judgments of the General Court ("GC") in connection with the *TV and Computer Monitor Tubes* cartel case (Joined Cases C 588/15 P and C 622/15 P, *LG Electronics and Koninklijke Philips Electronics*).

In its judgment, the ECJ held that the Commission had not breached LGE's and Philips' rights of defence in deciding to address a Statement of Objections ("SO") to them rather than to their joint venture (LPD), whose conduct was at issue in the contested decision, as that entity had since entered into bankruptcy (see Section 1.2). The ECJ also ruled that the Commission was entitled, for the purpose of calculating the basic amount of the fine, to consider (i) the direct EEA sales of the product concerned made by LPD and (ii) the "direct EEA sales through transformed products" made by LPD's parent companies, LGE and Philips. Finally, the ECJ took the view that the principle of equal treatment was not breached as the Commission had applied the same objective criteria to all participants in the infringement in determining the amount of their fines.

Advocate General Kokott opines that EU commitment decision does not preclude national courts from examining lawfulness of conduct in Gasorba

On 14 September 2017, Advocate General ("AG") Kokott delivered an opinion on a request for preliminary ruling from Spain's Supreme Court seeking clarification as to whether a commitment decision adopted by the European Commission under Article 9(1) of Regulation 1/2003 precludes national courts from examining the conformity of the conduct covered by the commitment decision with competition rules (Case C-547/16, *Gasorba and Others*).

In her opinion, AG Kokott stated that national courts and competition authorities should remain free to assess in a more comprehensive and in-depth manner the compatibility of conduct with competition rules even where that conduct has already been the subject of a commitment decision adopted by the European Commission. At the same time, the AG suggested that national courts and competition authorities should, to a certain extent, pay deference to the legal effects of the EU commitment decision, which is a strong indication of the anti-competitive nature of the conduct concerned (see Section 1.2).

Court of Justice annuls General Court judgments in Italian concrete reinforcing bar cartel case

On 21 September 2017, the Court of Justice of the European Union ("ECJ") annulled five judgments delivered by the General Court ("GC") in connection with the Commission's re-adoption of the *Italian concrete reinforcing bar* cartel decision (Cases C-85/15 to C-89/15, *Feralpi Holding and Others*).

In line with Advocate General Wahl's Opinion (see VBB on Competition Law, Volume 2016, No. 12), the ECJ concluded that the GC had committed an error of law in holding that the Commission was not obliged to invite the competition authorities of the Member States to participate in an oral hearing before the re-adoption of the decision. This failure constituted an infringement of an essential procedural requirement, which justified the annulment of the GC judgment (see Section 1.2).

Advocate General Saugmandsgaard Øe suggests that efforts by licensor and licensee to hinder competition between respective products by issuing misleading information is restriction of competition by object

On 21 September 2017, Advocate General ("AG") Saugmandsgaard Øe delivered his opinion in the ongoing appeal of the 2014 decision by the Italian Competition Authority ("ICA") against Roche and Novartis, in which the ICA decided that the parties, a licensor and a licensee, had illegally coordinated to hinder the off-label use of Roche's lower-priced product Avastin (a cancer medicine used off-label for eye disease) instead of Novartis's higher-priced product Lucentis (a medicine approved for eye disease). The present case before the Court of Justice of the European Union ("ECJ") arose following an appeal by Roche and Novartis against the ICA's decision and a request for preliminary ruling from the Italian Council of State (Case C-179/16, *F. Hoffmann-La Roche and Others*).

In his opinion, the AG takes the view that coordination by a licensor and licensee to issue misleading information about the relative safety of their products, and to thereby reduce competition between their products, constitutes a restriction of competition by object. Conversely, the AG considers that such coordination does not violate the competition rules if the information communicated is not misleading. The question of whether the specific conduct of Roche and Novartis was misleading is not addressed, as the AG considers this is a factual matter to be decided by the Italian courts.

In this context, the AG rejects arguments that the applicable rules on licensing agreements allow a licensor and licensee to restrict competition among their products, taking the view that such rules, while allowing certain restrictions, do not extend to allow the parties to issue misleading communications. The AG also indicates that the fact that one of the products is used off-label, possibly in violation of the applicable regulatory framework, does not mean that the product falls outside of the relevant market for the purposes of the competition law assessment, and does not justify actions by the parties themselves to hinder the off-label use of the medicine through misleading statements.

European Commission imposes € 880 million fine on manufacturer for participating in truck cartel

On 27 September 2017, the European Commission announced that it had imposed a fine of over € 880 million on Scania, a truck manufacturer, for colluding with five other truck manufacturers on truck pricing and on passing on the costs of new technologies to meet stricter emission rules.

According to the Commission's press-release, Scania engaged in restrictive practices which involved coordinating: (i) prices at "gross list" level; (ii) the timing of the introduction of emission technologies to comply with EU emissions standards; and (iii) the passing-on to customers of the cost for the emissions technologies required to comply with EU emissions standards. These activities covered the entire EEA and lasted 14 years, from 1997 until 2011.

The other five truck manufacturers involved in the infringement (DAF, Daimler, Iveco MAN and Volvo/Renault) reached a settlement with the Commission (see VBB on Competition Law, Volume 2016, No. 7). Scania decided not to settle with the Commission, and the investigation against it was therefore carried out under the standard cartel procedure.

General Court dismisses appeal on bank guarantees in connection with Animal Feed Phosphates cartel case

On 26 September 2017, the General Court ("GC") dismissed the appeal lodged by Quimitécnica and José de Mello against a European Commission decision requiring them to provide an "AA" rated bank guarantee for the € 2.8 million fine imposed on them for their participation in the *Animal Feed Phosphates* cartel (Case T 564/10 RENV, *Quimitécnica.com - Comércio e Indústria Química, SA and José de Mello - Sociedade Gestora de Participações Sociais, SA v European Commission*).

The case was referred back to the GC after the Court of Justice of the European Union ("ECJ") had annulled the judgment of the GC in so far as it found that the Commission had not sufficiently assessed the appellants' arguments so that they could understand why they had to post an "AA" rated bank guarantee on the fine imposed on them (see VBB on Competition Law, Volume 2016, No. 2). In its judgment, the GC once again dismissed the appeal in its entirety, holding that the Commission had not infringed its duty to state reasons, as the requirement of an "AA" rated bank guarantee is considered standard practice to protect the financial interest of the EU. In addition, the GC concluded that the rating requirement is proportionate to the objective pursued, as it ensures that the EU can recover the amount of the fine imposed.

Analysis of Important Substantive and Procedural Developments

Bathroom fittings and fixtures cartel case – calculation of 10% ceiling for fines

Under Article 23(2) of Regulation 1/2003 on the Implementation of the Rules on Competition ("Regulation 1/2003"), a fine imposed for a competition law infringement may not exceed 10% of the undertaking's total worldwide turnover in the business year preceding the imposition of the fine.

In the *Bathroom Fixtures and Fittings* cartel case, the Commission found that Laufen Austria had been involved in the cartel between 1994 and 2004. However, in 1999 (*i.e.*, during the infringement period), Laufen was acquired by another cartelist, Roca Sanitario. In its decision, the Commission held that Laufen was solely liable for its participation during the first five years of the infringement (that is, before it was acquired by Roca Sanitario) and jointly and severally liable with Roca Sanitario for the period following its acquisition by the latter. When calculating the fine, in particular the 10% ceiling for the infringement committed by Laufen Austria, the Commission took into account the turnover of parent company Roca Sanitario, even though part of the infringement period pre-dated Laufen Austria's acquisition by Roca Sanitario. As a consequence of this approach, the fine for that period exceeded 10% of Laufen Austria's own turnover in the preceding reference business year. The GC upheld the Commission's reasoning (see VBB on Competition Law, Volume 2013, No. 9) and this point was appealed to the ECJ.

Before the ECJ, Laufen Austria argued that, during the period for which it was held solely liable for the infringement (*i.e.*, 1994-1999), it did not form an economic unit with Roca Sanitario and that, therefore, the 10% ceiling of the fine for that period should be calculated solely on the basis of Laufen Austria's own turnover (rather than on the basis of the turnover of its parent company, Roca Sanitario). According to the ECJ, the GC had indeed made an error of law when it held that the Commission did not need to determine whether the part of the fine for the period in which the parent company was not held jointly and severally liable for the conduct of its subsidiary would exceed 10% of the turnover of the subsidiary in the preceding year (see VBB on Competition Law, Volume 2017, No. 2). After the ECJ determined that it did not have the relevant turnover data achieved by Laufen Austria, the case was referred back to the GC for the purpose of calculating the fine.

In its judgment, the GC noted that Laufen Austria's turnover in 2009 was € 47,880,013. Thus, the maximum fine that could be imposed on Laufen Austria for its sole participation in the infringement from 1994 to 1999 should amount to € 4,788,001 (rather than € 14,300,000).

TV and Computer Monitor Tubes cartel case – rights of defence

Under Article 27(1) of Regulation No 1/2003, the Commission must, prior to adopting a decision establishing an infringement of EU competition law, give the parties subject to the proceedings the opportunity to have their views heard. This principle is also enshrined in Article 41(2)(a) and (b) of the Charter of Fundamental Rights, which provides for the observance of the rights of defence in a proceeding before the Commission.

LGE and Philips claimed that the GC erred in law by finding that the Commission had not infringed their rights of defence and had not committed a procedural error in deciding not to address a Statement of Objections ("SO") to LPD – LGE's and Philips' joint venture – although it was involved in the infringement. LGE claimed that the ability of a parent company to exercise its rights of defence depended on its subsidiary being involved in the procedure. LGE considered that if the Commission had sent the SO to LPD, LPD could have produced evidence useful to its defence. Philips, for its part, argued that its liability was 'purely derivative' of that of its joint venture and that, without LPD being held directly liable, its liability as a parent company would exceed the liability of its joint venture. Both parties also claimed they no longer had control over LPD during the Commission's proceedings, as that entity had since entered into bankruptcy.

In its judgment, the ECJ first noted that LPD had participated in the infringement. Following the Advocate General's Opinion (see VBB on Competition Law, Volume 2017, No. 5), the ECJ recalled that the SO is designed to ensure the exercise of the right of defence by each natural or legal person concerned by the EU competition proceedings. However, the ECJ considered that, if the Commission does not intend to establish that an infringement was committed by a certain company, then the rights of defence do not require an SO to be sent to that company. The ECJ clarified that the sending of an SO to a company is meant to ensure that the rights of defence of that particular company are respected rather than those of a third party, regardless of the fact that this third party may also be affected by the same proceedings. In the present case, it was clear that the Commission chose to pursue proceedings against LGE and Philips, the parent companies of LPD, alone rather than LPD itself. Therefore, the ECJ dismissed LGE's and Philips' arguments as insufficient to lead to the setting aside of the GC's judgments.

Gasorba – non-binding nature of commitment decisions adopted by the Commission on national courts

Under the EU commitment procedure (set out in Article 9 of Regulation 1/2003), companies may offer commitments to address the competition concerns identified by the European Commission. If they are deemed satisfactory, the Commission closes the case without any finding of infringement or the imposition of a fine. A commitment decision is then adopted and is binding on the undertaking.

The underlying case relates to a 2006 decision adopted by the Commission, in which it declared the commitments made by Repsol binding and brought antitrust proceedings against Repsol to an end. The Commission had raised concerns as to the compatibility with Article 101 TFEU of long-term supply agreements concluded between Repsol and its service station tenants in Spain. Repsol offered several commitments to address these concerns, including that: (i) it would not conclude long-term exclusivity agreements; (ii) it would offer service station tenants a financial incentive to prematurely terminate their existing long-term supply agreements with Repsol; and (iii) it would not buy, for a certain period of time, any independent service station that it did not already supply.

In 2008, a service station tenant petitioned the Spanish courts challenging under Article 101 TFEU the long-term supply agreement it had concluded with Repsol. The case eventually reached the Spanish Supreme Court, which stayed proceedings and requested guidance from the Court of Justice of the European Union ("ECJ") on the binding nature of EU commitment decisions adopted by the Commission before national courts.

In her opinion, Advocate General ("AG") Kokott assessed whether commitment decisions adopted by the Commission under Article 9(1) of Regulation 1/2003 ("commitment decisions") have a binding effect on national courts and competition authorities. The issue is of particular importance in light of the need to ensure a uniform application of EU competition law and the prohibition on national courts adopting decisions running counter to decisions adopted by the Commission (Article 16 of Regulation 1/2003). After confirming that Article 16 of Regulation 1/2003 extends to commitment decisions, AG Kokott considered that this prohibition on reaching divergent decisions only related to the 'prescriptive' content of Commission decisions (i.e., the binding nature of the commitments and the end of the proceedings against that undertaking).

In support of these findings, AG Kokott recalled that commitment decisions are adopted without any in-depth competitive assessment and contain no binding findings on the lawfulness of the conduct that is the subject of the commitments. AG Kokott also referred to recitals 13 and 22 of Regulation 1/2003, according to which a commitment decision does not preclude national competition authorities and courts from applying Articles 101 and 102 TFEU and possibly finding an infringement. As a consequence, AG Kokott took the view that the adoption of commitment decisions does not prevent national courts from conducting their own analysis as to the compatibility of given conduct with EU competition law.

Nonetheless, AG Kokott pointed out that, to some extent, commitment decisions have legal effect before national courts. First, interested parties may take legal action before national courts in the event of non-compliance with the commitment decision. Second, the provisional competition assessment carried out by the Commission must be regarded as a strong indication of the anti-competitive nature of the conduct concerned. That said, AG Kokott insisted that national courts are not prevented from deviating from the Commission's preliminary assessment if they conduct a more detailed examination of the case and provided they consult with the Commission.

Finally, AG Kokott examined whether commitment decisions may operate as an individual exemption within the meaning of Article 101(3) TFEU. AG Kokott considered they did not for two reasons. First, AG Kokott recalled that for an individual exemption to be granted, a restriction of competition must first be found. However, commitment decisions confine themselves to closing the proceedings without any finding of an infringement. Second, AG Kokott emphasised that Regulation 1/2003 abolished the mechanism by which the Commission granted individual exemptions. Under Regulation 1/2003, the Commission may adopt a declaratory decision stating that the conditions laid down in Article 101(3) TFEU are fulfilled only under Article 10 of Regulation 1/2003. Commitment decisions fall under Article 9 and are therefore excluded.

The ECJ is expected to deliver its judgment in the next few months. The judgment is highly anticipated given how rarely commitment decisions are subject to review by the EU courts.

Italian concrete reinforcing bar cartel case – rights of defence

Under Article 12 of Regulation 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 101 and 102 TFEU, the Commission must give the parties to whom it has addressed a Statement of Objections ("SO") the opportunity to present their arguments at an oral hearing, if they have requested such a hearing. The holding of an oral hearing is a significant procedural step within the scheme laid down by the EU legislator for the enforcement of EU competition rules. Furthermore, pursuant to Article 14(3) of Regulation 773/2004, the Commission must also invite the competition authorities of the Member States to take part in the oral hearing.

The present case has a complex procedural history. The Commission re-adopted the *Italian concrete reinforcing bar* infringement decision in 2009 after the General Court ("GC") annulled an earlier 2002 decision, which had been taken on the wrong legal basis. In December 2014, the GC confirmed that the Commission was entitled to adopt the 2009 decision, which had found an infringement of the competition provisions of the European Coal and Steel Community ("ECSC") Treaty, on the basis of Regulation 1/2003 (see VBB on Competition Law, Volume 2014, No. 12).

In its recent judgment, the Court of Justice of the European Union ("ECJ") set aside the GC's judgment, holding that the GC had erred in law in finding that the Commission did not have to organise a new hearing that included the competition authorities of the Member States before re-adopting the decision at issue, on the ground that the undertakings involved in the infringement already had the opportunity to be heard orally. The ECJ stated that the procedure followed by the Commission in its re-adoption of the contested decision did not comply with the provisions set out in Regulations 1/2003 and 773/2004, and thus breached the appellants' rights of defence.

The Commission had argued that it was not necessary to repeat the first oral hearing (which had been held on 13 June 2002) since that hearing (which Member States representatives did not attend) had been conducted in conformity with the procedural rules of the ECSC Treaty, which were applicable at the time. The ECJ recalled established case-law according to which the procedure for a decision adopted on the basis of Regulation 1/2003 must follow the rules laid down in that regulation, regardless of the fact that the procedure started before the regulation had come into force. The ECJ considered that, before adopting the decision under appeal, the Commission should have given the appellants the opportunity to develop their arguments during a hearing to which the competition authorities of the Member States were invited. In this case, the representatives of the Member States did not take part in the hearing concerning the substance of the case, but were only invited to the hearing in which the legal consequences of the expiry of the ECSC Treaty were discussed.

Citing AG Wahl's Opinion (see VBB on Competition Law, Volume 2016, No. 12), the ECJ reinforced the point that failure to hold an oral hearing to which Member State competition authorities are invited – in the context of Regulations 1/2003 and 773/2004 procedures – constitutes an infringement of an essential procedural requirement.

VERTICAL AGREEMENTS

– MEMBER STATE LEVEL –

FRANCE

French Supreme Court anticipates Court of Justice ruling in Coty by referring case on online platform sales ban back to lower court

On 13 September 2017, the French Supreme Court ordered the Paris Court of Appeal to rehear a case for failing to sufficiently substantiate its finding that an obligation in Caudalie's selective distribution system constituted a probable restriction of competition by object.

In the selective distribution agreement in question, Caudalie (a French manufacturer of body care products and perfumes) prohibited online sales by retailers via websites other than their own. Based on this contractual prohibition, on 31 December 2014, Caudalie obtained an injunction at first instance against eNova, a federation of pharmacies that operates the online sales platform 1001pharmacies, prohibiting it from selling Caudalie's products on that platform. The injunction was granted on the ground that sales over the platform were "manifestly illegal" (the legal standard applicable for injunctive relief under French law) in light of the terms of Caudalie's distribution agreement. (The legality of this agreement had been confirmed by the French Competition Authority in a decision of 8 March 2007). The first instance ruling was appealed by eNOVA to the Paris Court of Appeal which, on 2 February 2016, found that, taking account of what it considered to be a solid body of French and German precedents and supporting literature, the clause at issue constituted a probable restriction of competition by object. As the conduct of Enova could not be considered manifestly illegal, the Paris Court of Appeal annulled the injunction ordered by the lower court. This ruling was then appealed by Caudalie to the French Supreme Court.

The French Supreme Court ruled that the Court of Appeal had failed to substantiate why prohibiting sales via an online platform constituted a probable restriction of competition, which would prevent the standard for the grant of injunctive relief from being met. In light of this, the Supreme Court referred the case back to the Paris Court of Appeal.

The facts of this case are similar to those in *Coty*, a case currently before the Court of Justice of the European Union ("ECJ") (see VBB on Competition Law, Volume 2017, No 8). In his Opinion of 26 July 2017 ("Opinion"), Advocate General Wahl found that a ban imposed by a supplier of luxury goods on sales by authorised retailers over third-party online marketplaces does not infringe the competition rules. The Opinion is not binding and the ruling of the ECJ is awaited. In the meantime, by referring the case back to the Paris Court of Appeal, the French Supreme Court may be erring on the side of caution until a final decision has been taken by the ECJ.

SPAIN

Spanish Court annuls a fine of € 25.78 million imposed on Telefónica

On 31 July 2017, a Spanish High Court ("Audiencia Nacional") annulled a € 25.78 million fine imposed on Telefónica Móviles ("Telefónica") by the Spanish Competition Authority ("CNMC") in October 2014.

In its initial decision, the CNMC found that Telefónica had created an anticompetitive parallel network of vertical agreements with its SME customers by which Telefónica offered substantial discounts subject to the inclusion of a minimum duration clause. The contracts, which renewed automatically upon expiration of the term, imposed penalties for early cancellation and required one month's notice for termination. The CNMC found that these contract terms disproportionately restricted the ability of customers to switch providers, and increased the cost to competitors of winning customers from Telefónica.

On appeal, the Spanish High Court concluded that the agreements did not constitute a vertical restriction of competition. The Court noted that the structure of the contracts was economically logical as the customers received discounts in exchange for committing to a specified term with the same provider. Alternatively, they could pay a higher price but change providers at any time. According to the Court, contract penalties were not only proportionate to the applied discount, but they were also justified in order to ensure that Telefónica would obtain an actual benefit from its discount policy. The contracts, furthermore, affected only a small part of the market and did not prevent customers from switching operators or create barriers to entry for competitors of Telefónica.

The CNMC has one month to appeal the judgement before the Supreme Court.

UNITED KINGDOM

CMA opens probe into price comparison website's contract with insurers

On 26 September 2017, the United Kingdom's Competition and Markets Authority ("CMA") opened an investigation into suspected breaches of the Chapter I prohibition in the Competition Act 1998 and of Article 101 TFEU concerning a price comparison website's use of retail most-favoured-nation ("MFN") clauses in relation to home insurance products. Such clauses require the provider of the product to price it via the price comparison website at a price that is as low as or lower than its price at rival outlets.

Statements of objections have not been issued to any of the parties to the agreements under investigation as the CMA has yet to assess whether there is sufficient evidence of an infringement. The CMA will continue its investigation through information gathering and will take a decision as to whether to proceed with or close the investigation in March 2018.

The probe comes in the wake of the conclusion of the CMA's year-long market study on comparison sites and apps and its issuance of a final report on 26 September 2017. In its final report, the CMA found that such sites offer a range of benefits, including making it easier for consumers to shop around and improving competition. However, the CMA asserted that it will take action where websites are not working in the best interest of consumers and has opened the investigation into the use of MFNs in relation to home insurance products on this basis.

INTELLECTUAL PROPERY/LICENSING

– EUROPEAN UNION LEVEL –

Advocate General Mengozzi takes a new look at exhaustion of trademark rights and seems prepared to accept erosion of such rights in Schweppes

On 12 September 2017, Advocate General Mengozzi ("AG") delivered an opinion in the *Schweppes* case in the context of a request for a preliminary ruling to the Court of Justice of the European Union ("ECJ") from a Spanish Court. In particular, the AG proposed to develop the case-law on the exhaustion of trademark rights in the case of a voluntary fragmentation of parallel rights by significantly broadening the interpretation of 'economic links' between the parallel rights owners. According to the AG, a key consideration is the correct balance to be struck between protecting the rights of trademark owners and the free movement of goods.

The Coca-Cola Company ("TCCC") owns the Schweppes® brand in the United Kingdom and in ten other EU Member States, while Orangina Schweppes Holding BV ("OSHBV") owns the brand in Spain and in 16 other Member States. Schweppes SA ("Schweppes") is the exclusive licensee of the Schweppes® brand in Spain. This fragmented situation arose in the late 1990s as a result of the objection of the European Commission to the transfer of the Schweppes trademarks in all Member States to TCCC alone.

Schweppes took issue with parallel imports of UK (and therefore TCCC-originating) products into Spain and commenced proceedings in Spain against Red Paralela, the main parallel importer, as well as OSHBV. In the main proceedings, Red Paralela counterclaimed that Schweppes had committed acts of unfair competition and acted in breach of Article 101 TFEU by making agreements with suppliers to restrict parallel imports of Schweppes®-branded products. This counterclaim was withdrawn when the Spanish Competition Authority began an investigation into Schweppes's behaviour. That investigation concluded without a finding of infringement after Schweppes agreed to a number of amendments to the agreements. These were: first, that the restriction of parallel imports would concern only products originating in the UK and manufactured by TCCC; second, that the scope of any future agreements would be similarly restricted to UK products; and third, that, in relation to on-going judicial proceedings in which Schweppes was challenging certain distributors, Schweppes would similarly limit its arguments and urge the court to rule in a manner consistent with this commitment (see VBB on Competition Law, Volume 2017, No 7). While this appeared to be consistent with the settled case-law of the ECJ on the principle of exhaustion, the AG's opinion now suggests an extension of that principle.

The referring Spanish court sought guidance as to the scope of the principle of exhaustion provided for by Article 7(1) of Directive 2008/95/EC and Article 15(1) of Directive 2015/2436. These articles are identical and provide that a trademark does not give its proprietor the right to prohibit its use in relation to goods which have been put on the market in the Union under that trademark, whether by the proprietor itself or with its consent. The case-law has established that the proprietor's consent includes situations in which the trademarks have a common origin (Case 192/73 *Van Zuylen*, but reversed in Case C-10/89 *HAG GF*), or are held by 'economically linked' entities (Case C-9/93 *IHT Internationale Heiztechnik*). Conversely, if a trademark is no longer under 'unitary control' (*e.g.,* as a result of an assignment limited to specific territories), the original proprietor of the mark loses the ability to regulate the quality of products manufactured in territories controlled by the new proprietor and therefore cannot be considered to have given its consent to their commercialisation (*Ibid.*)

In essence, the AG proposes a development of the principle of exhaustion to cover branded products whose trademarks do not have common ownership but are nonetheless considered to be 'economically linked' in substance if not in form.

In *IHT Internationale Heiztechnik*, the ECJ held that the principle of exhaustion applies, "where the owner of the trade mark in the importing State and the owner of the trade mark in the exporting State are the same or where, even if they are separate persons, they are economically linked. A number of situations are covered: products put into circulation by the same undertaking, by a licensee, by a parent company, by a subsidiary of the same group, or by an exclusive distributor." Seeing potential in this apparently indicative list of situations, the AG proposes to extend the idea of an economic link to include the practice of a "unitary policy and commercial strategy" on the part of the proprietors of parallel trademarks. Thus, by coordinating commercial strategies and by giving the impression of historical and commercial continuity in their marketing policies, the formally independent enterprises are to be considered 'economically linked' by reference to the effects of their cooperation.

In his analysis, the AG notes a shift in the ECJ's language, from a formal criterion of "economic or legal dependence" to a more substantive criterion indicated by a "potentially broader spectrum of relations between undertakings". In the present case, the coordination of commercial policies with a view to exercising joint control of the use of the proprietors' respective parallel marks would be sufficient to establish economic links, resulting in an exhaustion of the right to object to parallel importation. This would appear to constitute a departure from *IHT Internationale Heiztechnik* and create scope for an erosion of trademark rights.

The AG does not directly address competition law concerns in his opinion. His analysis is framed in terms of the balance to be struck between the protection of trademark rights and the free movement of goods.

In determining what he considers to be the correct balance, the AG notes that "excessive" protection of trademark owners' rights could result in anticompetitive practices, such as the partitioning of markets and the promotion of price differences between Member States. He observes, perhaps with an eye to the settlement reached between the Spanish Competition Authority and Schweppes, that parties could agree to a territorially limited assignment of a trademark, and "subject to observance of the competition rules, to stipulate a reciprocal prohibition on selling in their respective territories, as is the case with an exclusive licence agreement. The movement of the trademarked goods from one territory to another would accordingly be possible, without breaching the assignment agreement, only where imports are made by a third party."

Nonetheless, it remains to be seen whether the ECJ will consider the competition law implications and, more broadly, whether the ECJ will wish to side with its AG.

STATE AID

– EUROPEAN UNION LEVEL –

Court of Justice rules that Polish renewable energy support scheme does not involve state resources

On 13 September 2017, the Court of Justice of the European Union ("ECJ") issued its judgment on a request for a preliminary ruling from the Polish Supreme Court regarding the qualification of a national renewable energy support scheme as state aid (Case C-329/15, *ENEA S.A. v Prezes Urzędu Regulacji Energetyki*).

The case concerns a Polish support scheme for electricity produced by co-generation. For the period from 1 January 2003 to 1 July 2007, the Polish energy legislation obliged private and public undertakings selling electricity to end-users connected to the Polish electricity network to purchase a minimum amount of electricity produced by co-generation. The Polish energy regulator had the power to fix the price of electricity produced by co-generation when fixing the maximum electricity price for sales to end-users.

In 2006, ENEA S.A. ("ENEA"), an electricity producer and supplier wholly-owned by the Polish state, did not fulfil its quota obligation for that year. Consequently, the Polish energy regulator imposed a financial penalty on ENEA. ENEA brought an action against that decision claiming, *inter alia,* that the purchase obligation constituted unlawful state aid. The Polish Supreme Court considered that the Polish renewable energy support scheme conferred a selective advantage on producers of electricity by co-generation, distorted or threatened to distort competition, affected trade between EU member states and could be attributed to the Polish state. However, it entertained doubts as to whether the purchase obligation constituted an advantage granted directly or indirectly through state resources within the meaning of Article 107(1) TFEU. Therefore, it decided to stay the proceedings and to refer the question to the ECJ for a preliminary ruling.

In its judgment of 13 September 2017, the ECJ reiterated that the condition that there must be an advantage granted through state resources is satisfied not only where aid is granted directly by the state, but also where it is granted by public or private bodies established or designated by the state with a view to administering the aid. This includes cases in which sums corresponding to the aid measure are not permanently held by the treasury, but constantly remain under public control, and are therefore available to the national authorities. On the basis of this interpretation of Article 107(1) TFEU, the European Commission and the EU courts have applied the state aid rules to many national renewable energy support schemes.

However, the ECJ noted that the circumstances of these cases must be distinguished from those in which undertakings are not appointed by the state to manage a state resource, but are merely bound by an obligation to purchase using their own financial resources. This was the case in *PreussenElektra* (Case C-379/98, *PreussenElektra v Schleswag*), a landmark case as regards the interpretation of the condition of state intervention.

The ECJ came to the same conclusion in the case at issue. The advantage granted to producers of electricity by co-generation was not granted directly or indirectly through state resources. First, according to the ECJ, the fact that the Polish State held the majority of the capital in ENEA and some other electricity suppliers bound by the purchase obligation does not lead to the conclusion that their resources should be equated to state resources. In particular, the ECJ found that the public nature of these undertakings does not imply that the state exercised a dominant influence that enabled it to direct the use of the resources of those undertakings. By contrast, the case file indicated that ENEA's electricity purchases stem from wholly autonomous business decisions.

Second, the Polish legislation did not contain a financing mechanism administered by the state either. Unlike many other national renewable energy support schemes, the Polish state did not organise the collection of compulsory contributions from end-users to offset the electricity suppliers' additional costs. Rather, because of the fixed maximum electricity prices, the electricity suppliers had to fund the purchase obligation imposed on them by having recourse to their own financial resources.

The judgment of the ECJ of 13 September 2017 is interesting as it follows many decisions of the European Commission and judgments of the EU courts finding a direct or indirect involvement of state resources in a variety of support schemes. The ECJ has now confirmed its *PreussenElektra* case-law and has shown that, under specific circumstances, support schemes may fall outside the scope of the EU state aid rules.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– MEMBER STATE LEVEL –

AUSTRIA

Austrian Supreme Court rejects appeal against search warrant

In May 2017, the Federal Competition Authority ("FCA") conducted a dawn raid at the business premises of a construction company suspected of illegal agreements concerning procurement procedures. According to the FCA, the collusion concerned at least 80 calls for tender for construction projects between 2005 and 2015.

The search warrant issued by the Cartel Court upon request of the FCA also covered the premises of five other companies of the same construction group having their seats within the same complex of buildings. In issuing the search warrant, the Cartel Court considered that, although those companies were not under suspicion, there was a risk that evidence may have been suppressed by rapidly transferring business documents from the suspected company to other group entities.

On appeal, the company argued that the scope of the search warrant was too broad and based on unreasonably vague facts. The Austrian Supreme Court upheld the search warrant. The Supreme Court found that the conditions for granting a search warrant were met, namely (i) a coherent allegation of a cartel infringement, (ii) circumstances giving rise to reasonable suspicion, and (iii) an explanation as to why the search was necessary and proportionate for confirming the suspicion.

With regard to the other group companies, the Court held that, according to settled case-law, the addressee of the search warrant must not necessarily be suspected of an infringement of competition rules. A search warrant can in principle be extended to corporate affiliates and, in this context, cover an entire building complex.

The Supreme Court also rejected the argument that the search warrant was broadly formulated and not limited to the construction sector and geographic areas explicitly mentioned in incriminating documents that led to the request for a search warrant. It found that the suspicion of the FCA was backed by sufficient rational evidence to justify the scope of the search warrant. The Supreme Court decided that there was no reason to restrict the search warrant to certain geographic regions or a specific construction sector as the previously confiscated, incriminating documents contained references to activities in the whole of Austria and to projects that could not yet be clearly attributed to a specific construction sector.

GERMANY

German Federal Constitutional Court expected to rule on scope of legal privilege under German law

On 25 July 2017, the German Federal Constitutional Court issued preliminary injunctions temporarily preventing the public prosecutor from accessing documents and data of Volkswagen ("VW") seized at the law firm Jones Day in Germany. In September 2015, Volkswagen had mandated lawyers of Jones Day, among others in Germany, to conduct internal investigations and to advise and represent the company in criminal investigations in the USA in relation to alleged manipulations of exhaust emissions of diesel vehicles. Under this mandate, Jones Day had reviewed numerous VW internal documents and surveyed 700 employees.

In the course of a criminal investigation for fraud and misleading advertising of VW's subsidiary Audi in relation to three-litre diesel vehicles, the German public prosecutor conducted a search at Jones Day's premises in Munich on 15 March 2017. The search was aimed at looking for documents which had been compiled by the law firm during its internal investigation and resulted in the seizure of 185 binders with a large number of documents as well as downloaded data from an external server in Belgium.

After appeals against the seizure were rejected by the District Court and the Regional Court of Munich, the lawyers concerned and the vehicle manufacturer (together, "the complainants") filed constitutional complaints and sought preliminary injunctive relief. The Federal Constitutional Court may provisionally decide a matter by way of a preliminary injunction if, for instance, such an injunction is urgently required to avert a severe disadvantage. According to established case-law, the injunction should be granted if the constitutional complaint is neither obviously inadmissible nor obviously unfounded and if the possible disadvantages of refusing the preliminary injunction in case the constitutional complaint subsequently succeeds outweigh those incurred by adopting the preliminary injunction.

The German Code of Criminal Procedure provides that written correspondence between the person against whom the public prosecutor has initiated an investigation and his attorney as well as the attorney's notes concerning confidential information entrusted to him by the person under prosecution or concerning other circumstances covered by the right of refusal to testify shall not be subject to seizure if they are in the custody of the attorney. According to settled case-law, the prohibition to seize documents does not extend to documents resulting from a relationship of custodians of professional secrets with persons against whom a (criminal) investigation had not (yet) commenced. In the present case, an investigation was directed at persons so far unknown.

The complainants argue that the District Court and the Regional Court of Munich have not adequately taken into account the fundamental protection of the attorney-client relationship in their interpretation of the Criminal Procedure Code. In their view, it is not the formal status conferred by the initiation of a criminal investigation that is decisive for the applicability of the rules on legal privilege, but the protection of trust placed in the attorney by his client. They argue that the search warrant was disproportionate and the seizure was unconstitutional.

The Federal Constitutional Court granted preliminary injunctive relief. In a summary assessment, it held that the possibly irreparable damage to the attorney-client relationship and the risk of other clients terminating their mandates outweighed the limited delay in the evaluation of the potentially unlawfully obtained documents, especially as there is no risk that the documents concerned would disappear. The Court instructed the public prosecutor's office to deposit the documents and data backups made during the search under seal at the District Court of Munich, pending a decision on the constitutional complaint, for a maximum period of six months.

The Federal Constitutional Court reasoned that the constitutional complaints raise the question of the extent to which the attorney-client relationship of trust is protected by constitutional law, and to what extent a state investigation can interfere when the client, who is not (yet) formally under prosecution, mandated his attorney to conduct an internal investigation, the results of which the investigating authorities wish to access. This question is expected to be answered by the decisions on the constitutional complaints.

Although this case concerns the powers of the public prosecutor in criminal investigations, it carries implications for dawn raids under German competition law which are performed on the basis of the same provisions.

NORDIC COUNTRIES

Nordic competition authorities sign new cooperation agreement on information gathering and exchange and merger reviews

On 8 September 2017, the governments of Denmark, Finland, Iceland, Norway and Sweden announced that they have signed a new Nordic cooperation agreement to strengthen and formalize cooperation between their national competition authorities and to ensure effective enforcement of their national rules.

The aim of the new Nordic cooperation agreement is to make it easier for the national competition authorities in these countries to exchange information and to assist each other during dawn raids and merger reviews by, among other matters, notifying a national authority when an investigation or proceeding can be expected to affect its country's important interests, by coordinating their investigations or proceedings where appropriate, and by providing each other with investigative assistance.

Under the agreement, the circumstances that may justify the notification of an investigation or a proceeding to another national authority include (but are not limited to) (i) when non-public information is sought that is located in the territory of another national authority; (ii) when the investigation concerns a company located in, or incorporated or organized under, the laws of the country of another national authority; (iii) when the practice investigated occurred in whole or in part in the territory of another country; and (iv) when remedies are considered that would require or prohibit conduct in the territory of another country.

The agreement also provides that the national competition authorities shall have the power to provide one another with any matter of fact or law, including confidential information. Such exchanged information can however only be used in evidence in respect of the subject-matter for which it was collected by the transmitting authority.

The competition authorities may also, in their own territory, carry out requests for information on behalf and for the account of each other. Similarly, the competition authorities may carry out inspections or take other fact-finding measures on behalf and for the account of each other in order to establish whether there has been an infringement of the requesting authority's competition rules.

The new Nordic cooperation agreement replaces a previous, more limited, cooperation agreement. In order for the agreement to enter into force, it must first be approved by the parliament of each country.

PRIVATE ENFORCEMENT

– MEMBER STATE LEVEL –

GERMANY

Regional Court Dortmund grants damages against members of rail track cartel

On 28 June 2017, the Regional Court Dortmund (the "Court") ruled that the claim of a public transport company for damages against members of a rail track cartel is well-founded, while the amount of damages is to be determined by a subsequent judgment. The claim was a follow-on action to an infringement decision of the Federal Cartel Office ("FCO") against the defendants which had established that they had participated in a cartel between 2001 and 2011 in the rail track sector. The defendants argued that the damages claim was time-barred.

The Court held that Section 33 (5) of the Act against Restraints of Competition ("GWB") – according to which the statute of limitations for claims for damages is suspended during the proceedings of the FCO – also applies to claims that came into existence before this provision became effective. In this debated issue, the Court sides with the judgments of the Higher Regional Court in Düsseldorf of 18 February 2015 (see VBB on Competition Law, Volume 2015, No. 4) and of the Thuringian Higher Regional Court of 22 February 2017 (see VBB on Competition Law, Volume 2017, No. 6), as opposed to the judgments of the Higher Regional Court Karlsruhe of 9 November 2016 (see VBB on Competition Law, Volume 2017, No. 1) and the Regional Court in Mannheim of 24 January 2017 (see VBB on Competition Law, Volume 2017, No. 2).

The Court reasoned that new legal provisions pertaining to the suspension of limitation periods are also applicable to claims which have arisen under the old regime and were not yet time-barred at the time of the entry into force of the new regime. With reference to settled case-law, it argued that as long as the claim is not yet time-barred under the law in force, neither the claimant nor the debtor can legitimately expect that the statutory period of limitation will remain unchanged.

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