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VBB on Competition Law

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MERGER CONTROL

– EUROPEAN UNION LEVEL –

General Court annuls Commission clearance in *Liberty Global/Ziggo*

On 26 October 2017, the General Court annulled the European Commission's conditional merger clearance decision in *Liberty Global/Ziggo*.

The Commission had approved the acquisition of Ziggo by Dutch rival cable TV operator Liberty Global in 2014, subject to extensive conditions including the divestiture of a pay TV film channel and commitments not to impede the provision of audio visual content online (see VBB on Competition Law, Volume 2014, No. 10). KPN, a competitor, appealed the clearance decision on 17 July 2015, alleging, in part, that the Commission had breached its duty to explain why the transaction would not create anti-competitive vertical effects on the market for premium pay TV sports channels.

The General Court found that the Commission failed to include express reasoning in its clearance decision to explain why vertical concerns on the market for premium pay TV sports channels would not arise even though KPN had raised these vertical concerns during the Commission's in-depth merger review and the Commission admitted during the hearing before the General Court that such a market was conceivable. As a result, the General Court annulled the Commission's clearance decision.

This judgment is a rare example of a case where the General Court has overturned a Commission merger approval decision upon appeal by a third party. While a number of prohibition decisions have been annulled on appeal, annulments of approval decisions have been few and far between. The last time the General Court set aside a Commission clearance was when IMPALA challenged the *Sony/BMG* transaction in 2006 (although that judgment was later overturned by the ECJ).

The Commission will now need to re-assess Liberty Global's acquisition of Ziggo in light of current market conditions. It is possible that the Commission may yet find that vertical concerns are not likely to arise. Indeed, the Commission conditionally approved the creation of a joint venture between Liberty Global and Vodafone in the Netherlands as recently as August 2016 (see VBB on Competition Law, Volume 2016, No 8). In that case, the Commission discussed the (possible) market for pay TV premium sports channels and noted that "even if the joint venture would foreclose KPN (or other competitors) with respect to Ziggo Sport Totaal and/or HBO, these channels cannot be considered 'must have' and there are sufficient alternatives".

Marine Harvest loses appeal against € 20 million fine for failure to file

On 26 October 2017, the General Court dismissed an appeal by Marine Harvest against a € 20 million fine imposed on it by the Commission for implementing its acquisition of sole control over Morpol without first obtaining approval under the EU Merger Regulation (see VBB on Competition Law, Volume 2014, No. 7).

By way of background, Marine Harvest acquired 48.5% of Morpol in December 2012. Later, Marine Harvest acquired the remaining shares of Morpol through a public bid. This second acquisition of shares was notified to the Commission, which conditionally cleared it in August 2013. However, in January 2014, the Commission informed Marine Harvest that it was conducting an investigation into whether a notification should have been made at the time of the December 2012 acquisition.

On 23 July 2014, the Commission decided that the December 2012 acquisition gave Marine Harvest *de facto* sole control over Morpol and should have been notified to, and approved by, the Commission prior to the acquisition of that shareholding. In particular, the Commission found that the other shareholdings in Morpol were widely dispersed and that this enabled Marine Harvest, by virtue of its 48.5% stake, to obtain a stable majority at shareholder meetings, which in turn gave Marine Harvest control over Morpol. The Commission fined Marine Harvest € 10 million for failure to notify prior to acquiring control (Article 4(1) of the EU Merger Regulation) and € 10 million for breach of the standstill obligation (Article 7(1) of the EU Merger Regulation).

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The EU Merger Regulation imposes a standstill obligation on merging parties that requires them to refrain from implementing a transaction prior to the deal receiving clearance from the Commission. However, Article 7(2) of the EU Merger Regulation provides an exception to the standstill obligation if a party (a) acquires control of a company through a public bid or (b) acquires shares in a series of transactions from various sellers – so long as the transaction is notified without delay and the voting rights attached to the acquired shares are not exercised or only exercised after a formal derogation is obtained from the Commission. In its appeal against the Commission's decision, Marine Harvest argued that Article 7(2) of the EU Merger Regulation applied to the December 2012 acquisition of shares as that acquisition was conditionally linked to the later public bid for the remaining shares in Morpol. Essentially, Marine Harvest claimed that its acquisition constituted a single transaction taking place in two stages, which was duly notified in a timely manner at the time of the second stage of the transaction. According to Marine Harvest, it was only at the time of the second stage that its obligation to notify the transaction and obtain approval arose.

In a lengthy judgment, the General Court rejected this argument. First, the General Court held that the December 2012 acquisition was not a public bid but rather an acquisition of shares by a single private purchaser which had already closed before the public bid was submitted in January 2013. Second, the General Court held that control was not acquired from various sellers but was rather acquired from just one seller. As such, Article 7(2) did not apply. As a result, the General Court found that although Marine Harvest did not *exercise* control following its acquisition of 48.5% of the shares in Morpol, the possibility of decisive influence had been acquired in "the formal sense", and that this required notification to the Commission of the December 2012 acquisition. On this basis, the fines imposed by the Commission were justified.

The General Court's judgment serves as a warning to merging parties to carefully assess not just whether control is being acquired but *when* control is being acquired.

– MEMBER STATE LEVEL –

FRANCE

French Competition Authority allows early closing of meats deal

On 23 October 2017, the French Competition Authority ("FCA") cleared Cooperl Arc Atlantique's acquisition of control of the cured meat division of Financière Turenne Lafayette. The FCA granted a derogation on 24 May 2017 to allow the buyer to acquire control of the target company prior to FCA clearance.

Similar to the situation under EU merger control law (see the article on *Marine Harvest,* directly above), the French Commercial Code enables the FCA to issue a derogation from the obligation of merging parties to suspend the implementation of their transaction until receiving FCA approval. In order to qualify for this derogation, the parties must demonstrate an urgent need to complete the transaction at issue and must undertake to file a complete notification within three months. Such derogations are considered exceptional but may be justified where the financial stability of the target is seriously threatened. In this case, the Financière Turenne Lafayette group had initiated insolvency proceedings.

In its decision, the FCA approved the transaction even though the parties' activities overlapped significantly in a number of markets, including in pâtés, liver-based products and the supply of cooked hams to large supermarkets and the hospitality sector. However, the FCA found that despite high combined market shares, the transaction posed few risks to competition as the parties faced substantial competitive pressure with respect to pâtés and liver-based products, as well as strong countervailing pressure from large-scale buyers in the relevant cooked ham markets, in which neither party controlled essential brands.

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GERMANY

Düsseldorf Court upholds prohibition of EDEKA/Kaiser's Tengelmann merger

On 23 August 2017, the Higher Regional Court of Düsseldorf ("Court") upheld the March 2015 decision of the German Federal Cartel Office ("FCO") prohibiting the Edeka/Kaiser's Tengelmann merger (see VBB on Competition Law Volume 2015, No. 4). According to the Court, the FCO correctly reasoned that the merger would have led to a dominant position of Edeka, with a combined share of 60%-65% on the food retail market in at least two districts of Berlin.

Although the FCO prohibited the merger, the German Minister of Economic Affairs authorised the merger by overruling the FCO's prohibition in March 2016, and the merger was later implemented (see VBB on Competition Law Volume 2016, No. 3). Competitors appealed the Ministerial authorisation but later withdrew these appeals after Edeka agreed to divest 65 supermarkets (see VBB on Competition Law Volume 2016, No. 12). Separately, Edeka appealed the FCO's prohibition decision, and it is this appeal that was the subject of the Court's judgment.

In its appeal, Edeka argued that the FCO's prohibition decision erred by not finding that the whole of Berlin should be considered as a single geographic market. The Court rejected this argument and confirmed the validity of the FCO's market analysis. The Court found that the geographic markets could have been defined even more narrowly than the FCO had done. While the FCO's analysis had subdivided Berlin's food retail market into administrative districts, the Court reasoned that these districts were not representative of the much smaller local markets for food retail in which competition in fact took place.

By upholding the FCO's prohibition decision, the Court has effectively barred potential damages claims by Edeka against the FCO and has also likely hindered future acquisitions by Edeka due to the Court's approval of the FCO's narrow geographic market definition.

HUNGARY

Hungarian Competition Authority conditionally clears ready-mix concrete merger

On 3 October 2017, the Hungarian Competition Authority ("GVH") cleared the acquisition by Duna-Dráva Cement ("DDC") of Readymix Hungária ("Readymix"). For the first time, the GVH has required the appointment of an independent trustee to oversee the divestment of certain assets.

DDC is a joint venture equally owned and jointly controlled by HeidelbergCement and Schwenk Zement and is active in the cement and ready-mix concrete markets in Hungary. The Readymix business involved in the transaction notified to the GVH is only active in Hungary and supplies ready-mix concrete in competition with DDC.

Originally, DDC intended also to acquire a Readymix group company in Croatia. The combined transaction was subject to review by the Commission, although the review of the Hungarian aspects of the transaction was referred to the GVH by the Commission in June 2016 under Article 4(4) of the EU Merger Regulation. In April 2017, the Croatian part of the deal was prohibited by the Commission, which found that the merger would lead to higher cement prices in Croatia (see VBB on Competition Law Vol. 2017, No. 4). That decision has been appealed to the General Court. As a result of the Commission's prohibition decision, the GVH terminated its review and DDC submitted a new notification to the GVH in July 2017.

In its review, the GVH found that ready-mix concrete can only efficiently be transported short distances (*i.e.*, 25 km-40 km), justifying a narrow geographic market definition. The GVH then found that six geographic markets for ready-mix concrete within Hungary were likely to be adversely affected by the transaction as DDC would have market shares of significantly more than 20% and more than 50% in certain regions. As a result, DDC offered to divest six of the ready-mix concrete plants in an area where DDC would operate more than one plant after the transaction. The GVH also approved the appointment of a trustee to oversee this divestment. The divestment must take place within six months to a buyer approved by the GVH. This is the first time that the GVH has required a trustee to safeguard the economic viability and competitive-

ness of assets to be divested in order to resolve competition concerns.

UNITED KINGDOM

UK Government proposes significant changes to merger control regime

On 17 October 2017, the UK Government announced a set of short- and long-term proposals to amend the UK merger rules. These proposals are significant and seek to more closely scrutinise foreign investment deals that affect national security.

The first set of proposals seeks to lower the merger notification thresholds for two key sectors: the sector of design and production of military and dual use items and the advanced technology sector. For transactions in these sectors, the proposal seeks to allow the UK Secretary of State to intervene when the UK turnover of the target exceeds GBP 1 million (currently, the threshold is set at GBP 70 million). Further, the proposal would remove the current requirement for such transactions to increase the share of supply to or over 25%. According to the UK proposal, small businesses which undertake niche activities or produce highly specialised products in these sensitive sectors may hold information or items which carry significant national security risks. The UK Government proposes to address the anomaly that transactions concerning such small businesses may evade UK review as they fall below the existing merger control thresholds. The proposal would apply equally to foreign and UK investors. It is open for consultation until 14 November 2017.

In addition, the UK Government has proposed a second set of far-reaching measures. These seek: (i) to enhance the call-in power of the UK Secretary of State to review transactions when it is reasonable to believe that UK national security is at risk and when "significant influence or control" is acquired by a national or foreign investor over a UK company; and (ii) to adopt a mandatory notification regime for the acquisition by a foreign investor of significant influence or control over an enterprise active in key national security sectors, such as the civil nuclear, defence, communications, energy and transport sectors. These more wide-reaching proposals are open for consultation until 9 January 2018.

According to the proposal document, the UK Government considers that the proposed reforms are not mutually exclusive. In other words, a reform package could include some or all of the proposals in order to allow the UK Government to find the best balance between its "need to know and ability to act".

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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 the substantive developments addressed in these cases.

Summary of Significant Case Developments

Court of Justice upholds General Court's judgments in pre-stressing steel cartel case

On 26 October 2017, the Court of Justice of the European Union ("ECJ") dismissed appeals in the pre-stressing steel cartel case brought by four Spanish manufacturers belonging to the Spanish Celsa group (Global Steel Wire, Moreda-Riviere Trefilerías, Trefilerías Quijano and Trenzas y Cables de Acero). In the judgments, the Court rejected allegations that the General Court ("GC") had erred in upholding the Commission's infringement decision (see VBB on Competition Law, Volume 2016, No. 6), including in relation to the attribution of liability (see Section 1.2), the existence of a single and continuous infringement, the calculation of the fine and the applicants' ability to pay the fine (Joined Cases C-454/16 to C-456/16 P and C-458/16, *Global Steel Wire and Others v Commission*; Joined Cases C-457/16 and C-459/16 to C-461/16, *Global Steel Wire and Others v Commission*).

Analysis of Important Substantive and Procedural Developments

Pre-stressing steel cartel case – Assessment of parent company's derivative liability

Under settled EU-case law, an undertaking may be held liable for violations of competition law committed by a subsidiary with a distinct legal identity, where the two nonetheless form part of a single economic unit. A subsidiary will be considered to form part of the same economic unit as its parent company where it does not determine its own market conduct independently, but instead follows the direction of its parent company. Where a parent company holds all or nearly all the capital of its subsidiary, EU law establishes a rebuttable presumption that the parent can, and in fact does, exercise decisive influence over the subsidiary's market conduct. A parent company can rebut this presumption by bringing forward sufficient evidence that its subsidiary acted autonomously on the market.

In the case at hand, the appellant companies contended that the GC had erred in law by imputing liability to Global Steel Wire (GSW) for infringements committed by several of its subsidiaries. First, they argued that the Commission had not effectively established the presumption of GSW's control over one of the infringing companies, Trefilerias Quijano (TQ), during part of the relevant period because it had failed to show that Trenzas y Cables de Acero, a company to which GSW was the successor, had controlled all or almost all of the capital of TQ during the period of the infringement. Second, the appellants contended that the GC had erred in its finding that their evidence of autonomous conduct – largely in the form of statements from company directors – was insufficient to reverse the presumption that GSW had exercised decisive influence over subsidiaries Trenzas y Cables and Tysca PSC.

In its judgment, the ECJ affirmed that the Commission's finding of decisive influence of a parent company over its subsidiary need not be exclusively based on the presumption created by the parent's control of the subsidiary's capital. Rather, it can be based on a combination of other factors taken alone, or in combination with the presumption.

The ECJ consequently held that the Commission had already established GSW's liability for the relevant time period through other means – first as successor to Trenzas y Cables de Acero, which had participated directly in the infringement, and later through its exercise of decisive influence over its wholly-owned subsidiary Trenzas y Cables and its subsidiary Tysca PSC. Consequently, the ECJ found that the Commission did not need to establish Trenzas y Cables de Acero's exercise of decisive influence over TQ to establish GSW's liability for the full period of the infringement. Moreover, the ECJ held that, while the GC had considered the probative value of the declarations the appellants had submitted in seeking to rebut GSW's

presumptive exercise of decisive influence over Trenzas y Cables and Tysca PSC, it had weighed this against a variety of other factors showing the existence of a single economic unit between GSW and those subsidiaries during the relevant period.

– MEMBER STATE LEVEL –

FRANCE

French Competition Authority imposes fines totalling € 302 million in PVC and linoleum flooring cartel case

On 18 October 2017, the French Competition Authority ("FCA") issued a decision imposing fines totalling € 302 million on three flooring companies (Forbo, Gerflor and Tarkett) and a trade association (Syndicat Français des Enducteurs Calandreurs: the "SFEC") for engaging in cartel activities between 1990 and 2013.

The FCA opened the proceedings against the companies *ex officio,* focussing on the supply of PVC and linoleum flooring sold either in slab or in rolls and retailed through professional and private customer distribution channels. The FCA found that the companies under investigation engaged in three different anti-competitive practices:

- Between 2001 and 2011, Forbo, Gerflor and Tarkett secretly met in different French hotels to coordinate their pricing policies, in particular through minimum price-fixing, and to coordinate other strategic commercial issues.
- Between 1990 and 2013, Forbo, Gerflor and Tarkett exchanged individualised strategic information including on volumes, profits and business forecasts. The SFEC played an active role in exchanging detailed communications with its members.
- Between 2002 and 2011, Forbo, Gerflor, Tarkett and the SFEC agreed not to communicate on the environmental performance of their products to remove any "marketing competition based upon products' environmental characteristics".

None of the findings were contested by the parties. Two companies (Forbo and Tarkett) filed leniency applications and all undertakings decided to settle with the FCA in order to benefit from a reduction in their fines. The FCA ultimately imposed fines of € 165 million on Tarkett, € 75 million on Forbo, € 62 million on Gerflor and € 300,000 on SFEC.

GREECE

Greek Competition Commission fines luxury cosmetic wholesalers for anticompetitive agreements

On 4 October 2017, the Grand Chamber of the Hellenic Competition Commission ("HCC") imposed fines totalling approximately € 19 million on six undertakings active in the wholesale trade of luxury cosmetics for indirectly fixing the resale price charged by retailers, through the setting of uniform discounts, between 2003 and 2006, in breach of Article 1 of the Greek Competition Law, the Greek equivalent of Article 101 TFEU. The companies involved in the infringement were L'Oreal Hellas, Estee Lauder Hellas, Sarantis, Parfums Christian Dior Hellas, Notos Com and Gerolymatos Cosmetics.

ROMANIA

Romanian Competition Council fines eleven companies for anti-competitive agreements on the Romanian heat meter market

On 5 October 2017, the Romanian Competition Council ("RCC") imposed fines totalling € 798,626 on eleven companies for entering into anti-competitive agreements on the Romanian market for heating cost allocators. According to the decision, four companies (Ista Romania, Techem Energy Services, Elsaco Brunata and Elsaco Electronic) agreed to fix prices and allocate geographic areas. In addition, two companies (Elsaco Brunata and Techem Energy Services) and seven of their partners agreed to fix tariffs for the provision of heat metering services. Ista and Elsaco Brunata admitted their involvement in the infringement and received a fine reduction of 15%.

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SLOVAKIA

Slovak Competition Authority Council upholds fines for anti-competitive agreements on market for meal and benefits vouchers

On 11 October 2017, the Council of the Antimonopoly Office of the Slovak Republic (the "Council") upheld the decision of the Slovak Antimonopoly Office to impose fines on companies active on the market for the issue, distribution and sale of meal and benefits vouchers, and related services. The Council confirmed that five companies (DOXX – Stravné lístky, Edenred Slovakia, Le Chèque Déjeuner, Sodexo Pass and VAŠA Slovensko) entered into two separate anti-competitive agreements – one based on market allocation and another based on limiting the maximum number of meal vouchers accepted by retail chains. The fines imposed on the companies ranged from € 20,307 imposed on Sodexo Pass to € 1,127,401 imposed on Le Chèque Déjeuner.

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VERTICAL AGREEMENTS

– EUROPEAN UNION LEVEL –

General Court endorses selective distribution of spare parts for luxury watches

On 23 October 2017, the General Court of the European Union (the "Court") dismissed an action brought by Confédération européenne des associations d'horlogers-réparateurs ("CEAHR") against the European Commission (the "Commission") for the annulment of the Commission's decision to reject a complaint lodged by CEAHR concerning alleged infringements of Articles 101 and 102 TFEU by several Swiss watch manufacturers (Case T-712/14 *Confédération européenne des associations d'horlogers-réparateurs (CEAHR) v Commission*).

CEAHR is an association of nine national associations of independent watch repairers. In 2004, it lodged a complaint with the Commission against several Swiss watch manufacturers, alleging an infringement of Articles 101 and 102 TFEU resulting from their refusal to continue to supply spare parts to independent repairers. In 2008, the Commission decided not to pursue the complaint on the grounds that there was insufficient EU interest to continue the investigation (see VBB on Competition Law, Volume 2010, No. 12.), and CEAHR sought to annul this decision. The Court in that case, T-427/08 *CEAHR v Commission,* held that the Commission had made manifest errors in its assessment of the complaint and annulled the decision. As a result, CEAHR made a new complaint in relation to the same practices, which was again refused by the Commission in 2014.

In its further appeal of this 2014 rejection decision, CEAHR brought six pleas, the four substantive arguments being that the Commission had erred: (1) in its description of the market power of Swiss watch manufacturers; (2) in its assessment of the existence of an abuse arising from the refusal to supply spare parts to independent retailers; (3) in its assessment of the objectively justified nature of the selective repair system and refusal to supply spare parts; and (4) in its assessment of the existence of an agreement or concerted practice among watch manufacturers. All of these pleas were rejected by the Court. The Court's assessment of each of the first three pleas is described below.

Whether the selective repair system and the refusal to supply spare parts were objectively justified (Third plea)

The watch manufacturers had each set up authorised repair and maintenance networks for their products, membership of which required investment in machinery and training. Spare parts were supplied only by a manufacturer to the members of its authorised repair network and an authorised repairer could resell spare parts only to other resellers who were themselves members of the same authorised repairer network. In its decision, the Commission had considered that what it regarded as a qualitative selective repair system would be likely to fall outside the scope of Article 101(1) TFEU because it was likely to satisfy the three conditions of the case-law, which requires the system to be: (i) objectively justified, (ii) non-discriminatory and (iii) proportionate.

In its appeal, CEAHR argued that - in order for a selective repair system to escape Article 101(1) - a fourth condition needed to be met that the Commission had failed to apply, namely that the system must not have the effect of eliminating all competition. The Court rejected this argument, finding that the Commission's approach was consistent with the *Metro* case-law, and declining to extend the test to include an examination of whether the repair system eliminates all competition.

The Court then examined whether the Commission's findings in relation to each of the three conditions of the selective distribution case-law suggested that it had made manifest errors.

Objective justification. In its decision, the Commission had concluded that the selective repair systems were objectively justified by four factors: (i) the increased complexity of prestige watches; (ii) the maintenance of high and uniform quality repair services; (iii) the prevention of counterfeiting; and (iv) the protection of the supplier's brand. The Court did not find fault with the Commission's reliance on the first three factors, but, basing itself on the ruling of the Court of Justice ("ECJ") in *Pierre Fabre,* it held that

the goal of protecting a prestigious brand image could not prevent a restriction from falling within Article 101(1) and, therefore, the Commission was not entitled to rely on this objective in assessing compliance with Article 101(1). This assessment could be considered to be inconsistent with the Opinion of Advocate General Wahl in *Coty* (Case C-230/16), in which he considered that the protection of the brand image of luxury and prestige products is a legitimate goal of selective distribution in considering the application of Article 101(1).

Despite this legal defect in the Commission's analysis, and taking into account that the goal of preserving the quality, and ensuring the proper use, of the manufacturers' watches would - according to the case-law - be capable of justifying the system, the Court nonetheless considered that the other three factors relied on by the Commission described above would be sufficient in themselves to provide an objective justification for the selective repair systems.

Non-discrimination. The Court did not find fault with the Commission's view in the decision that the selective repair systems were likely to meet the non-discriminatory requirement taking into account that their membership was determined by objective criteria.

Proportionality. Likewise, the Court did not find fault with the Commission's view in the decision that the obligations placed on members of the selective repair systems were proportionate taking into account, for example, that the obligations were similar to those imposed by associations of independent repairers on their members.

Whether there was an abuse arising from the refusal to supply spare parts to independent retailers (Second plea)

CEAHR argued that the Commission wrongly assessed the possibility of an abuse under Article 102 TFEU, claiming: (i) that the refusal to supply amounted to an abuse unless it was objectively justified; and (ii) that it was impermissible to infer lawfulness under Article 102 from the fact that the selective repair network was lawful under Article 101.

The Court recalled that, in order to establish an infringement of Article 102, the refusal of a dominant undertaking to supply the goods in question must meet three conditions: (i) the refusal must be likely to eliminate all competition on the market on the part of the customer; (ii) it must not be capable of being objectively justified; and (iii) the goods must be indispensable to the customer's business. Thus, only in these specific circumstances will there be a finding of abuse, and a mere lack of an objective justification is insufficient in this regard.

On the interaction between Articles 101 and 102, the Court held that lawfulness under one Article may be indicative, but not conclusive, of lawfulness under the other. On the facts, however, the Commission had considered other factors in its assessment which were capable of demonstrating that not all effective competition would be eliminated, including the existence of competition between authorised repairers and the possibility of new entrants to the repair system. Further, the Commission had not, as CEAHR claimed, given undue weight to the expressed intent of the watch manufacturers. Thus, the Commission had not erred in its finding that the refusal was unlikely to be an abuse contrary to Article 102.

Whether the market power of the watch manufacturers was correctly assessed (First plea)

CEAHR submitted that the manufacturers held a monopoly on the market for the supply of spare parts and criticised the Commission's decision for failing to take into account the effects of this monopoly (as distinct from dominance) in assessing whether their conduct was an abuse. In this respect, the Court held that there was no need to depart from the case-law under which the degree of dominance is irrelevant to the assessment of abusive conduct. It is relevant to an assessment of the effects of abusive conduct, but not to its existence as such.

Conclusion. The Court held that the Commission was justified in deciding not to further investigate the manufacturers' selective repair systems. It had applied the correct legal tests and concluded (in light of the complaints) that there was insufficient evidence to indicate that an eventual finding of anticompetitive behaviour was likely. In so doing, the Court robustly declined to apply the stricter rules applied by the Commission in the motor vehicle sector, which for example require authorised repairers to be able to sell to independent repairers even in the context of a selective repairer system, citing the specific factors applicable in that sector.

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– MEMBER STATE LEVEL –

AUSTRIA

Austrian Constitutional Court upholds ban on price parity clauses in the hotel booking sector

On 29 September 2017, the Austrian Constitutional Court (the "Court") dismissed Booking.com's and Expedia's requests to repeal the Austrian ban of price parity clauses for hotel operators which came into force at the beginning of 2017. The amendments to the Federal Act against Unfair Competition made all price parity clauses between hotels and online booking platforms illegal, classifying them as "aggressive commercial practices" (see VBB on Competition Law, Volume 2016, No. 11).

The companies argued that the ban was contrary to the Constitution. They alleged that it infringed the companies' constitutional right to property, freedom of employment and the principle of equal treatment. The Court, however, found that the prohibition was not in breach of constitutional law and therefore dismissed the requests.

In accordance with settled case-law, the Court stated that the assessment of the legality of measures concerning competition law is not within the scope of its jurisdiction as the legislator has a wide margin of discretion. It is not the task of the Court to examine the validity of competition policy decisions, but only to assess whether the legislator has acted within the limits set by the Constitution.

In the present case, the Court found no infringement of the Constitution by the amendments to the Federal Act against Unfair Competition, even though it stated that the Act interfered with the companies' rights, as the contested provisions were an admissible restriction of the companies' constitutionally guaranteed rights.

According to the Court, the contested provisions were introduced in the public interest of securing fair competitive conditions between booking platforms and accommodation suppliers. In particular, the Court underlined that it is for the legislator to decide how to regulate competition and which conduct infringes the competition rules.

THE NETHERLANDS

Dutch Court renders judgment on legality of Nike's platform sales restrictions

On 4 October 2017, the District Court of Amsterdam (the "Court") rendered a judgment in a case brought by Nike European Operations Netherlands B.V. ("NEON") against Action Sport SOC. COOP, A.R.L. ("Action Sport"), an Italian retailer of Nike's sportswear, footwear and related products.

The facts of the case were that Action Sport, a member of NEON's selective distribution system in Europe, had offered Nike products on Amazon, contrary to NEON's Selective Retailer Distribution Policy (the "Policy"), which only permitted a NEON authorized retailer to display Nike products for sale online either on its own webstore or on a webstore of another NEON authorized retailer. While NEON had appointed e-tailers/platforms such as Zalando, La Redoute and Otto as authorized retailers, Amazon was not a NEON authorized retailer. As a result, NEON requested Action Sport to cease sales on Amazon and, when the company failed to comply with the request, NEON terminated its agreement with Action Sport. Grounded on Action Sport's failure to comply with the Policy, NEON requested a declaratory judgment to confirm the legal validity of the termination of the agreement with Action Sport, and that Action Sport was not entitled to damages. In defence, Action Sport, ***inter alia,*** claimed that the Policy was null and void because it violated competition law.

Having confirmed that the Policy established a selective distribution system within the meaning of EU competition law, the Court stated that it needed to consider whether the Policy complied with Article 101(1) TFEU and, if not, whether it was exempted under the Vertical Agreements Block Exemption Regulation ("VABER").

The Court found that the Policy met the requirements stipulated in the European Court of Justice's ("ECJ") case-law concerning the application of Article 101(1) for the following reasons.

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First, it considered that the conditions set by NEON were objective criteria of a qualitative nature relating to the technical qualifications of the distributor, his staff and the suitability of his trading premises, and were not applied in a discriminatory manner.

Second, the Court considered that the selective distribution system was necessary in the light of the nature of the products. It noted that, in line with the ECJ's case law, the characteristics and nature of luxury goods may require the implementation of a selective distribution system. In this respect, the Court concluded that Nike products must be regarded as luxury products and that the Policy was implemented for the purpose of preserving Nike's brand image.

Third, the Court considered that the specific restriction in the Policy which prohibited distributors from offering the products via a non-authorized web shop was justified to preserve the luxury image of the products. In this regard, the Court considered Advocate General ("AG") Wahl's recent Opinion in the *Coty* case where AG Wahl, *inter alia,* found that a platform sales prohibition could be an appropriate means to ensure that the objectives of a selective distribution system are met since compliance with the qualitative criteria of the system can only be effectively ensured where the internet sales environment is devised by an authorised distributor, who is contractually linked with the supplier (see VBB on Competition Law, Volume 2017, No. 8). The Court found the Opinion convincing and saw no reason to defer deciding the case until the ECJ rendered its final judgment. The Court further noted that the case at issue differed from the facts in *Coty* because NEON had admitted a number of platforms to the selective distribution system and, under the Policy, distributors were permitted to sell through those platforms.

With respect to the prohibition on offering products on third party platforms, the Court additionally considered Action Sport's arguments that NEON had failed to reason why Amazon did not meet the Policy's qualitative criteria. The Court dealt with this briefly, merely stating that Amazon was not an authorized retailer and that, accordingly, NEON would have no means to enforce its selective distribution system against Amazon. The Court added that, if Amazon met the qualitative criteria and were to request admission to the selective distribution system, NEON would be obliged to accept Amazon as a member. In making this claim, it should be noted that the Court seems to have been applying the conditions required for a selective distribution system to escape Article 101(1). However, despite recognising earlier in the judgment that systems that do not meet these requirements may be exempted by the VABER, it did not consider whether the VABER would oblige NEON to appoint Amazon in these circumstances. In this respect, it is noteworthy that the VABER enables a supplier to operate a quantitative selective distribution system and to exclude candidates regardless of whether they meet the system's qualitative criteria.

The Court finally concluded that by offering Nike products via Amazon, Action Sport failed to comply with the obligations under the Agreement, giving NEON the right to terminate the contract.

While the validity of selective distribution systems which prohibit distributors from selling via third party platforms will only be definitively decided when the ECJ renders its judgment in *Coty* (Case C-230/16), the case is a further positive outcome for manufacturers of luxury and prestige products which operate selective distribution systems restricting sales through third party platforms that are not a member of the system.

Dutch court rules exclusive purchasing clause in breach of competition law

On 29 September 2017, a ruling of the Arnhem-Leeuwarden Court of Appeal dating back to October 2016 was published. The Dutch Court held that agreements between the health insurer VGZ and its suppliers concerning the supply of liquid food were in breach of EU and Dutch competition law.

Following a tender procedure, VGZ appointed suppliers to deliver liquid foods to patients covered by its insurance. These agreements with VGZ provided that the preferred product could only be obtained by the suppliers from Fresenius Kabi Nederland NV.

Since the suppliers could only purchase the products from the Dutch branch of the Fresenius group, the Court found that the aim of the agreement was to prohibit or limit parallel trade, thus restricting competition by object.

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In this respect, the claimant had argued that the restriction imposed by VGZ enabled Fresenius to charge higher prices in The Netherlands than in other countries.

Further, the Court did not accept VGZ's argument that the agreement was an exclusive purchasing agreement that should be block exempted under the Vertical Agreements Block Exemption Regulation ("VABER"). The Court reached that conclusion on the basis of two distinct findings.

First, there was no vertical agreement. According to the VABER, a vertical agreement is an agreement entered into between two or more undertakings operating at a different level of the production or distribution chain. That would be the case if VGZ purchased the liquid foods directly from Fresenius. VGZ was not, however, in practice part of the distribution chain.

Second, since the exclusivity clause in the agreement aimed to prohibit parallel trade, the Court considered it to be a hardcore restriction in the sense of Article 4 of the VABER.

As the Court concluded that the agreement breached competition law, it ordered VGZ to stop executing the supplier agreements.

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STATE AID

– EUROPEAN UNION LEVEL –

Commission declares Luxembourg tax ruling favouring Amazon illegal

On 4 October 2017, the European Commission (the "Commission") adopted a decision that forces Luxembourg to recover unpaid taxes from Amazon amounting to € 250 million, plus interest. According to the press release, Luxembourg granted Amazon tax benefits that are illegal under EU State aid rules.

The decision concerns two Amazon group companies, both based in Luxembourg: Amazon EU (the "Operating Company") and Amazon Europe Holding Technologies (the "Holding Company"). The Operating Company is subject to corporate taxation in Luxembourg, while the Holding Company is not subject to any taxation, due to its legal form. The Operating Company operates Amazon's retail business throughout Europe and all sales and profits resulting from these sales pass through this company. The Holding Company acts as an intermediary between the Operating Company and Amazon in the US. In that role, the Holding Company holds certain intellectual property rights under a "cost-sharing agreement" with Amazon in the US and grants a licence to these rights to the Operating Company. The Operating Company uses the intellectual property rights to run Amazon's retail business.

Luxembourg issued a tax ruling to Amazon in 2003 and prolonged that ruling in 2011. The ruling endorsed a method to calculate the Operating Company's taxable base and, indirectly, the royalty payments made by the Operating Company to the Holding Company. In its decision of 4 October 2017, the Commission found that these payments exceeded, on average, 90% of the Operating Company's operating profits and were significantly higher than what the Holding Company paid to Amazon in the US in exchange for the intellectual property rights. According to the Commission, under this tax ruling, Amazon unduly attributed almost three quarters of its profits to the Holding Company, where they remained untaxed.

The Commission concluded that the tax ruling issued by Luxembourg endorsed payments between two companies in the same group, which are not in line with the arm's length principle, requiring intra-group transfer prices to be calculated as though they were agreed between two independent parties. As a result, the tax ruling enabled Amazon to pay substantially less tax than other companies and thus granted a selective advantage to Amazon in breach of the EU State aid rules. Consequently, Luxembourg has to recover the aid, i.e. the difference between what the company paid in taxes and what it would have been liable to pay without the tax ruling.

However, the EU Commissioner for Competition, Ms. Vestager, confirmed that the final amount that Luxembourg has to recover will be determined by the outcome of a case in the US between the Internal Revenue Service (the "IRS") and Amazon. The IRS claims that the dealings between Amazon in the US and the Holding Company were not at arm's length. More specifically, according to the IRS, the Holding Company should have paid more to Amazon in the US for the intellectual property, where the IRS would have been able to tax it. Amazon won this case in March of this year, but the IRS has filed an appeal. If the IRS ultimately wins, the Holding Company will have to pay more to its US parent company. As such, the court decision in the US affects the profits due to be taxed in Luxembourg.

Commission refers Ireland to ECJ for failure to recover illegal tax benefits from Apple

On 4 October 2017, the European Commission (the "Commission") announced its decision to refer Ireland to the Court of Justice of the European Union (the "ECJ") for failing to recover illegal tax benefits from Apple. By decision of 30 August 2016, the Commission found that Ireland's tax rulings in favour of Apple were illegal under EU State aid rules and ordered Ireland to recover up to € 13 billion (see VBB on Competition Law, Volume 2016, No. 9, and No. 12). The deadline to implement the Commission's decision was 3 January 2017, but Ireland has not yet recovered any of the illegal aid. While Ireland and Apple have brought actions for annulment against the decision, this does not suspend Ireland's obligation to recover the illegal aid. Therefore, in its decision of 4 October 2017, the Commission decided to refer Ireland to the ECJ. In a statement, the Irish government has criticized this measure, claiming that Ireland has made significant progress on the complex issue of recov-

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ering such a large amount. It also indicates that it is close to the establishment of an escrow fund, which needs to be set up in accordance with the Irish and EU public procurement rules, in which the recovered monies will be paid.

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LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– MEMBER STATE LEVEL –

GERMANY

German Federal Cartel Office publishes first paper in a series on "Competition and Consumer Protection in the Digital Economy"

On 6 October 2017, the German Federal Cartel Office ("FCO") launched a series of papers on the digital economy. The papers aim to contribute to relevant competition policy issues such as the connection between digitalisation, competition and consumer protection.

The topic of the first paper is "Big Data and Competition". It discusses the particularities of digital markets and the role of data in a competitive analysis. It provides an overview of the types of data typically collected by companies as well as the methods of collection. The paper examines data as a source of market power.

The paper identifies the ambivalent effects of big data: on the one hand, it can increase market transparency on the consumers' side, thereby lessening information asymmetries and strengthening competition. On the other hand, higher transparency carries a potential for collusion and could facilitate anti-competitive practices such as discriminatory pricing or market foreclosure if the data are an essential facility.

The paper also points out the significance of data protection rules for competition, and briefly mentions the FCO's ongoing investigation initiated in March 2016 into Facebook's potential abuse of dominance through its terms and conditions on the use that can be made of user data (see VBB on Competition Law, Volume 2016, No. 3).

The paper is available on the FCO's website (in German only).

ROMANIA

Romania introduces fuel price monitoring platform

On 23 October 2017, the Romanian Government approved the introduction of a fuel price monitoring system designed to improve market transparency and competition on the automotive fuel retail market in Romania.

In this context, the Romanian Competition Council ("RCC") is planning to create a database containing a list of all companies selling fuel in Romania, the geographic location of their gas stations, the types of gas sold and their prices. In order to be able to implement the scheme, the RCC wishes to amend existing Romanian competition law rules so as to create a legal framework that can serve as a basis for requesting information from companies active on the Romanian fuel retail market, which may allow the active monitoring of prices.

By way of background, at the beginning of this year, the RCC launched a sector inquiry into the automotive fuel market triggered by the rigidity of fuel retail prices in Romania as compared to those applicable in the rest of the EU. The RCC also recently issued a set of recommendations as part of its efforts to stimulate competition on the Romanian fuel market. These include the simplification of the procedures for setting up gas stations in Romania, so as to remove any potential market entry barriers and put pressure on companies that are already active on the Romanian fuel retail market.

– OTHER DEVELOPMENTS –

AUSTRIA: On 24 October 2017, the Austrian Federal Competition Authority ("FCA") published a guidance paper on dawn raids. The paper aims to improve legal certainty in relation to and transparency of the dawn raid procedure. It describes the complete dawn raid procedure from beginning to end and sets out the rights and obligations of the FCA as well as the rights and obligations of the undertakings and employees subject to a dawn raid. The paper takes into account current legal provisions, latest case-law and best practices. It dedicates a special section to the access to, and collection of, electronic data. An English version of the guidance paper is available on the FCA's website.

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PORTUGAL: On 13 October 2017, the Portuguese Competition, Regulation and Supervision Court upheld a € 150,000 fine imposed by the Portuguese Competition Authority ("PCA") in 2015 on Ford Lusitana, pursuant to the Portuguese Competition Act, for providing incomplete information in response to a request for information from the PCA. The Court noted that the company was aware of its illegal conduct. The request for information was sent following competition concerns regarding allegedly restrictive extended motor vehicle warranty contracts.

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PRIVATE ENFORCEMENT

– MEMBER STATE LEVEL –

GERMANY

Regional Court of Dortmund dismisses cartel damages claim due to arbitration clause

On 13 September 2017, the Regional Court of Dortmund (the "Court") dismissed a follow-on damages claim against the legal successor of a member of the rail track cartel for lack of jurisdiction. The existence of the rail track cartel had been established by the German Federal Cartel Office, which had fined multiple steel companies for bid-rigging in rail track tenders in July 2013 (see VBB on Competition Law, Volume 2013, No. 7).

The claimant, who awarded contracts to the legal predecessor of the defendant between 2001 and 2011, filed a declaratory action for damages against the defendant. The Court, however, dismissed the action as inadmissible, holding that due to an arbitration agreement between the contracting parties, the Court did not have jurisdiction.

The claimant argued that the arbitration clause did not apply to such cartel damages claims, as the claims are not strictly contractual. In accordance with settled case-law, the Court interpreted the arbitration clause contained in the contract in an arbitration-friendly manner.

This judgment is one more example of a growing tendency to place cartel damages claims outside the jurisdiction of domestic courts, either by arbitration clauses or by settlements.

In this context, it is noteworthy that another damages proceeding before the same Court, between CDC and chemicals firm Kemira, member of the hydrogen peroxide cartel, was terminated by a settlement against payment of EUR 12.7 million, according to the company's press release.

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