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VBB on Competition Law

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MERGER CONTROL

– EUROPEAN UNION LEVEL –

General Court rejects third party challenge to Commission letter on merger commitment compliance

On 9 October 2018, the General Court dismissed a legal challenge against a letter from the Commission, which set out its views on compliance with a merger commitment, finding that the letter was not justiciable.

By way of background, the Commission conditionally approved the acquisition of E-Plus by Telefónica Deutschland on 2 July 2014 (see VBB on Competition Law, Volume 2014, No. 7). In part, the Commission's approval was conditional on Telefónica Deutschland issuing a 'self-commitment' letter to all of the mobile virtual network operators ("MVNOs") that procured wholesale mobile network access from Telefónica Deutschland about the extension of existing MVNO agreements. After Telefónica Deutschland published the self-commitment letter, 1&1 Telecom, an MVNO, requested the Commission to rule on whether the self-commitment letter complied with the merger commitments. Ultimately, the Director-General of DG COMP signed a letter on 19 November 2015, which stated that he did not see any grounds to take further steps against Telefónica Deutschland. 1&1 Telecom challenged the Commission's letter before the General Court and sought an order to compel the Commission to request that Telefónica Deutschland issue a new self-commitment letter in compliance with the commitment.

The General Court held that the Commission's letter did not constitute an act which was capable of forming the subject matter of a legal challenge as it was merely a non-binding statement that the Commission was authorised to make in the context of its supervision of the implementation of merger commitments. As a result, the General Court held that 1&1 Telecom's challenge was inadmissible.

– MEMBER STATE LEVEL –

UNITED KINGDOM

CMA orders break up of laundry deal

On 11 October 2018, the Competition and Markets Authority ("CMA") ordered that JLA must undo its completed acquisition of Washstation. Both parties are active in the supply of certain laundry services.

In its 193-page decision, the CMA found that the acquisition eliminated the main competitive constraint on JLA in relation to so-called "vend share" agreements with higher education customers, such as universities, colleges and student accommodation providers. Under such arrangements, the laundry service provider supplies and installs washing machines and carries out repair and maintenance works. The customer does not pay rent to the provider, but instead receives an agreed percentage of the revenues generated from end-users of the washing machines in the form of commission from the provider. The CMA did not consider that other types of laundry services, such as fixed rental agreements or outright purchase, were alternatives to vend share agreements. For vend share services, the CMA found that the combined JLA / Washstation held a 90% market share in the UK. The CMA expected that the acquisition would have a negative effect on the merged entity's offer in new contracts and that it would not be sufficiently constrained by the remaining competitors.

Ultimately, the CMA expects that the acquisition would give rise to a substantial lessening of competition in the market for managed laundry services to higher education providers and has ordered JLA to sell Washstation to a new owner.

– OTHER DEVELOPMENTS –

FINLAND: On 12 October 2018, the Finnish Competition and Consumer Authority ("FCCA") conditionally approved the acquisition of Prevent 360 by Avarn Security. The approval is conditional upon Avarn Security selling a part of the merged entity's manned guarding and security services business. In addition, Avarn Security shall subcontract manned guarding and security services to competitors for the duration of three years. In the view of the FCCA, the commitments enable the creation of competitive conditions similar to those that currently exist on the market segment of large clients that buy manned guarding and security services.

ICELAND: On 25 October 2018, the Icelandic Competition Authority ("ICA") prohibited a proposed pharmacy store merger. The deal involved the acquisition of a single pharmacy store in Mosfellsbaer by the pharmacy chain, Lyf og heilsa. Prior to July 2016, only Lyf og heilsa operated a store in Mosfellsbaer. However, Apotek opened a rival pharmacy store which offered improved customer service and longer opening hours. Lyf og heilsa proposed to acquire Apotek. During its investigation, the ICA identified that competition in the local retail market for medical products would be harmed and prohibited the deal. While merger prohibitions in Iceland are fairly rare, the ICA previously blocked a retail pharmacy merger concerning Lyf og heilsa in 2006 for similar reasons.

IRELAND: On 2 October 2018, the Irish Government adopted an order to increase the financial thresholds for mandatory notification of a merger, acquisition or certain joint ventures to the Irish Competition and Consumer Protection Commission ("CCPC"). In particular, from 1 January 2019, the required aggregate turnover in Ireland of the merging parties will increase from € 50 million to € 60 million, and the required individual turnover in Ireland (of each of two or more parties) will increase from € 3 million to € 10 million. The changes have been introduced following a public consultation by the Department of Business, Enterprise and Innovation, which concluded in November 2017. The consultation recognised that increasing the thresholds would "reduce the burden on smaller enterprises" as they would no longer have to notify the CCPC of proposed mergers.

ABUSE OF DOMINANT POSITION

– MEMBER STATE LEVEL –

FRANCE

French Competition Authority fines provider of medical waste management services in Corsica for excessive pricing

On 20 September 2018, the French Competition Authority ("FCA") imposed a fine of € 199,000 on the waste management provider Sanicorse for abusing its dominant position on the market for management of infectious medical waste in Corsica. The FCA found that Sanicorse had imposed excessive prices by increasing abruptly, significantly, durably and without any valid justification the prices charged to hospitals and clinics in Corsica.

According to the FCA, Sanicorse, which was the sole provider of management services for infectious medical waste in Corsica, increased its prices on average by around 60% between 2011 and 2016. Some of the hospitals concerned reported a yearly price increase of 194%. The FCA also found that, simultaneously with the price increases, Sanicorse had threatened to terminate the the hospitals' and clinics' contracts or to refrain from bidding for tenders.

The FCA dismissed the justifications put forward by Sanicorse, which alleged that the price increases were justified by its investments and the increase in its own costs. According to the FCA, however, the price increases were not justified, but constituted an unfair pricing practice amounting to an abusive exploitation of its dominant position under Article L. 420-2 of the French Code of Commerce.

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CARTELS AND HORIZONTAL AGREEMENTS

– EUROPEAN UNION LEVEL –

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

Summary of Significant Case Developments

General Court upholds GEA group appeal in heat stabilisers cartel case

On 18 October 2018, the General Court upheld an appeal lodged by the GEA group against the European Commission's readopted decision in the heat stabilisers cartel case and annulled the Commission's decision in so far as it concerns GEA group.

By way of background, in 2009, the European Commission imposed fines on a number of undertakings active in the heat stabilisers market, including on the GEA group, for their participation in two infringements. In relation to one of these infringements, GEA was found jointly and severally liable for the fine with one other company (ACW) and, in relation to the other, was found jointly and severally liable for the fine with two other companies (ACW and CPA). In 2010, the Commission adopted an amended version of the decision in which it reduced the fine imposed on ACW, as the fine imposed on it exceeded the 10% turnover ceiling. However, the amended decision maintained the total amount of the fines imposed on the GEA group and CPA. The amended decision was subsequently annulled by the General Court on procedural grounds and readopted by the Commission in 2016. The GEA group appealed against the readopted decision.

In its recent judgment, the General Court held GEA's appeal to be admissible on the ground that, although the total amount of the fines imposed had not changed, the GEA group's interests were affected by the reallocation of the joint and several liability for the fines between the three companies (the GEA group, ACW and CPA) as a result of the fine reduction granted to ACW. The General Court also found that the Commission had breached the principle of equal treatment by treating the GEA group differently from CPA when reducing the fine for which ACW was liable and annulled the Commission decision accordingly (see below for further details) (Case T-640/16, *GEA Group v. Commission*).

Analysis of Important Substantive and Procedural Developments

Heat stabilisers cartel case – Calculation of the fine: principle of equal treatment

The principle of equal treatment is a general principle of law that is enshrined in Articles 20 and 21 of the Charter of Fundamental Rights of the European Union. According to this principle, comparable situations should not be treated differently and different situations should not be treated in the same way, unless such treatment is objectively justified.

In the present case, the Commission adopted its original decision in 2009, in which it found that a number of companies had participated in anti-competitive arrangements or concerted practices concerning the tin stabiliser sector and the epoxidised soybean oil and esters sector in the EEA. In that decision, the Commission found: (i) the GEA group (the applicant), ACW and CPA jointly and severally liable for one infringement ("infringement A"); and (ii) the GEA group and ACW jointly and severally liable for another infringement ("infringement B"). In 2010, the Commission adopted a decision amending its original decision due to the fact that the fine imposed on ACW exceeded the ceiling of 10% of its total turnover. The Commission reduced the amount of the fine imposed on ACW, but the total fines for which the GEA group was held jointly and severally liable remained unchanged.

In July 2015, the General Court annulled the 2010 decision in so far as it concerned the GEA group on the grounds that the Commission had breached the GEA group's rights of defence by adopting the 2010 decision without having first heard the GEA group. Subsequently, in June 2016, the Commission re-adopted the contested decision (see VBB

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on Competition Law, Volume 2015, No. 7). GEA appealed against the 2016 readopted decision.

On appeal, the GEA group claimed, *inter alia*, that the Commission had infringed the principle of equal treatment when allocating the fine reduction granted to ACW to the fines imposed for infringement A (for which the GEA group, ACW and ACP were held jointly and severally liable) and infringement B (for which the GEA group and ACW were held jointly and severally liable). In essence, the Commission reduced by 100% the part of ACW's fine (in respect of infringement B) for which ACW and the GEA group were jointly and severally liable (thus leaving the GEA group solely liable for that part of the fine), but reduced by only 43% the part of ACW's fine (in respect of infringement A) for which the GEA group was jointly and severally liable with ACW and CPA. The GEA group claimed that this amounted to discriminatory treatment in favour of CPA since CPA did not have to bear a higher share of the fine, unlike GEA, which had been found liable for a higher share of the fine as both joint and several co-debtor and as sole debtor.

The General Court agreed with the GEA group's submissions. In its judgment, the General Court considered that this situation conferred an undue advantage on CPA, which was in a comparable situation to the GEA group. According to the Court, the Commission should have allocated the reduction of the amount of ACW's fine proportionally in both cases of joint and several liability (i.e., to infringement A and infringement B). By not doing so, the Commission had breached the principle of equal treatment and, accordingly, the General Court annulled the Commission's 2016 decision.

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VERTICAL AGREEMENTS

– OTHER DEVELOPMENTS –

AUSTRIA: According to a press release of the Austrian Competition Authority dated 11 October 2018, by a decision dated 29 August 2018, the Cartel Court of Vienna fined Devolo Austria, a computer hardware manufacturing company, a total of € 223,000 for infringing Article 101 and the national equivalent by engaging in resale price maintenance. The infringement was found to have lasted from March 2012 until December 2015 and concerned home connectivity devices. Devolo Austria did not dispute the facts of the case. The decision cannot be appealed.

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INTELLECTUAL PROPERTY/LICENSING

– MEMBER STATE LEVEL –

UNITED KINGDOM

English Court of Appeal delivers judgment in FRAND royalty case

On 23 October 2018, the English Court of Appeal issued a judgment in a licence dispute involving Standard Essential Patents ("SEPs") pitting Unwired Planet, a US based patent assertion entity, against Huawei, a Chinese telecommunications company. This case results from an appeal against the judgments delivered by Justice Birss of the English High Court of Justice in April 2017 and June 2017 (see VBB on Competition Law, Volume 2017, Nos 5 and 6).

Unwired Planet sued Huawei for infringement of a number of UK patents which it had acquired from Ericsson as part of a portfolio comprising about 2,000 patents. The patents were considered as essential to the 2G, 3G and 4G wireless telecommunications standards developed under the auspices of the European Telecommunications Standards Institute ("ETSI"). As Ericsson had participated in the development of the standards under ETSI, any SEP patent acquired from it would be encumbered by Fair, Reasonable and Non-Discriminatory ("FRAND") commitments to ETSI.

On appeal, the Court of Appeal held as follows:

- *The imposition of a global licence is not contrary to FRAND terms*. The Court of Appeal dismissed the argument made by Huawei according to which the imposition of a global licence for the patents at issue was by definition not made on FRAND terms. The Court of Appeal considered that it would not be feasible for an SEP owner to negotiate licences on a country-by-country basis and that it would be extremely expensive for that SEP holder to enforce its rights by litigating in each individual country.

- *The non-discriminatory part of FRAND does not mean that the rates for similarly positioned licensees should be identical for the entire industry*. The Court of Appeal rejected Huawei's claim that the non-discriminatory part of FRAND meant that the rates for similarly positioned licensees should be the same across the industry. Huawei had taken issue with the fact that it would have to pay more than Samsung for the same portfolio of patents. In its judgment, the Court of Appeal considered that the non-discriminatory aspect of FRAND was not "hard-edged" and that differential pricing was not objectionable per se. In fact, the Court of Appeal pointed out that a 'hard-edged' non-discrimination rule would be excessively strict on the SEP holder and that obliging the SEP owner to accept a compensation which does not reflect the value of the licensed technology could potentially harm the technological development of standards. The Court also noted that the 'hard-edged' interpretation of the non-discrimination rule would be equivalent to a 'most favoured licensee' clause, which was considered and ultimately rejected by ETSI.

- *The specific steps laid down by the Court of Justice of the European Union ("ECJ") in Huawei v. ZTE are not mandatory in this case*. In its judgment, the Court of Appeal considered that the ECJ had not laid down specific mandatory conditions which had to be satisfied before proceedings seeking injunctive relief are started (see VBB on Competition, Volume 2015, No. 7). The ECJ had clarified the steps for parties to take in order to prevent an action for injunctive relief from being regarded as abusive (Case C-170/12, *Huawei Technologies Co. Ltd v. ZTE Corp. and ZTE Deutschland GmbH*). In the present case, even though Unwired Planet had not followed those steps, the Court of Appeal noted that the parties had been in contact before the proceedings were issued, that Huawei had sufficient notice that Unwired Planet owned particular SEPs, that Huawei knew or ought to have known

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that a licence was required and that Unwired Planet was willing to grant a licence. According to the Court of Appeal, this was sufficient to avoid the finding of an abuse of dominance. According to the Court of Appeal, as the present litigation started before the ECJ delivered its judgment in *Huawei v. ZTE*, it would have been unfair to have concluded that Unwired Planet abused its dominant position for not complying with steps set forth only later.

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LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– MEMBER STATE LEVEL –

ITALY

New ICA Guidelines on antitrust compliance

On 25 September 2018, following a public consultation, the Italian Competition Authority ("ICA") adopted new guidelines on the content of antitrust compliance programmes and on the assessment of compliance programmes in the framework of requests for a fine reduction (the "Guidelines"). The Guidelines list the criteria that are taken into account by the ICA when rewarding compliance programmes, namely, the timing of adoption of the programme, its suitability to prevent and detect competition infringements and its concrete implementation.

Concerning the content of compliance programmes, the Guidelines provide that effective programmes should include, inter alia, the identification of the antitrust risks specific to the undertaking concerned, the design of management processes suitable to reduce those risks, as well as periodic monitoring and possible updating processes of the programme.

Undertakings' requests for a fine reduction must be submitted to the ICA within 6 months from the notification of the decision to open proceedings, together with an explanatory report which should account for the compliance programme's suitability and its concrete implementation.

The Guidelines indicate a three-tier threshold as well as criteria for the determination of a possible fine reduction.

For programmes adopted before the opening of the ICA's proceedings, a fine reduction of maximum 15% may be granted in return for "*effective and adequate programmes*" which enabled the company to promptly detect and put an end to the infringement. In the absence of prompt detection and interruption of the infringement, a reduction of maximum 10% may still be granted for programmes that are "*not manifestly inadequate*" and a 5% reduction for "*manifestly inadequate*" programmes. In these last two scenarios, the ICA will however require the programmes to be improved in view of their (partial) inefficiency. The amendments required by the ICA, or even substantial changes in the last scenario, will have to be implemented within six months from the opening of proceedings.

Programmes adopted after the opening of proceedings may also give rise to a reduction in the fine of up to 5% on the basis of their effective implementation, which will be assessed by the ICA in the course of the proceedings.

The Guidelines are available here (an English translation is provided).

PRIVATE ENFORCEMENT

– EUROPEAN UNION LEVEL –

ECJ confirms validity of broadly-worded jurisdiction clauses in Article 102 damages actions

On 24 October 2018, the Court of Justice of the European Union ("ECJ") issued a judgment concerning the interpretation of Article 23 of Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the "Brussels I Regulation", renumbered Article 25 under the recast Brussels I Regulation) in the context of a competition damages action based on an alleged infringement of Article 102 of the Treaty on the Functioning of the European Union ("TFEU") (Case C-595/17, *Apple Sales International and Others v. MJA*). Article 23 of the Brussels I Regulation gives effect to exclusive jurisdiction clauses whereby parties have agreed in writing that any dispute in connection with their particular legal relationship will be settled by the courts of a given Member State.

By way of background, in 2002, eBizcuss had entered into an authorised reseller agreement with Apple. The reseller agreement contained a jurisdiction clause in favour of the Irish courts, but did not make specific mention of EU competition law disputes. eBizcuss initiated an action for damages for breach of Article 102 TFEU against Apple in France. The French Supreme Court referred the case to the ECJ to clarify whether Article 23 of the Brussels I Regulation requires national courts to give effect to a broadly-worded jurisdiction clause between a supplier and reseller asserting a breach of Article 102 TFEU. The French Supreme Court also asked whether the absence of a prior finding of a competition law infringement by a national competition authority or the European Commission has an impact on the response to its question.

The ECJ referred to its prior case law concerning the application of jurisdiction clauses to competition law disputes. In particular, in its CDC judgment in 2015, the ECJ held that it was for the national court to interpret the clause conferring jurisdiction, and that a clause which abstractly refers to disputes arising from "contractual relationships" did not ground jurisdiction for damages actions based on cartel conduct (Case C-352/13, *CDC Hydrogen Peroxide v. Evonik Degussa GmbH and Others*). However, in the case at hand, the ECJ distinguished the CDC case on the basis that, unlike a cartel between suppliers, anti-competitive conduct covered by Article 102 can materialize in contractual relations between a supplier and reseller. Thus, the ECJ held that Article 23 of the Brussels I Regulation must be interpreted as meaning that jurisdiction could be based on a broadly-drafted clause, even though it did not expressly refer to competition law disputes – although this is ultimately for the national court to determine. Further, the ECJ held that it is not a prerequisite for the application of a jurisdiction clause, in the context of an action for damages brought by a distributor against its supplier on the basis of Article 102 TFEU, that there be a prior finding of an infringement of competition law by a competition authority.

In light of the 2014 Damages Directive and the increased number of competition-based private actions for damages in the EU, the case is noteworthy as it clarifies an important jurisdictional issue concerning broadly-drafted jurisdiction clauses.

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