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November 2017

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# MERGER CONTROL

## – EUROPEAN UNION LEVEL –

### Commission grants Lufthansa derogation to complete Air Berlin deal

On 22 November 2017, the European Commission published its decision to conditionally grant a derogation to Lufthansa under Article 7(3) of the EU Merger Regulation so that Lufthansa could acquire Air Berlin's subsidiaries, Niki and LGW, prior to receiving formal merger control clearance.

The EU Merger Regulation does not permit parties to implement a transaction prior to receiving merger control approval from the Commission. However, the Commission may grant a derogation from this "standstill" obligation in exceptional circumstances, such as when the target company is under severe financial pressure and it is necessary for the buyer to acquire formal control of the target before the merger review is complete. In this case, the Commission accepted that, although Niki and LGW had not entered insolvency proceedings, Air Berlin was an insolvent airline. It further considered that failure to grant the derogation would lead various lessors to repossess the aircraft, which in turn would lead to the immediate cessation of all flights by Air Berlin, LGW and Niki.

The Commission's substantive merger control review is continuing.

## – MEMBER STATE LEVEL –

DENMARK

### Danish High Court upholds fine for failure to provide information

On 16 November 2017, the Danish High Court upheld a fine of DKK 50,000 (approx. € 6,720) imposed on merging parties for failing to identify other interested buyers of the target business.

In 2014, Euro Cater notified the Danish Competition and Consumer Authority ("DCCA") of its intention to acquire rival Metro Cash & Carry. During the DCCA's merger control review, the parties were asked whether any other firm had submitted bids or shown interest in buying Metro Cash & Carry. The DCCA considered that this information was crucial for its evaluation of a counterfactual scenario in which the merger did not take place. Metro Cash & Carry failed to provide this information.

In its judgment, the Danish High Court agreed with the District Court that it was clear that the information concerning other companies' bids or interest in acquiring Metro Cash & Carry should have been provided to the DCCA and that Metro's inadequate response was "objectively false and misleading". The case serves as a useful reminder of merging parties' obligation to provide requested information – including that which is potentially highly sensitive – to authorities during a merger control review.

GERMANY

### German Federal Cartel Office prohibits ticketing system merger

On 23 November 2017, the German Federal Cartel Office ("FCO") prohibited the planned acquisition of Four Artists by CTS Eventim.

Both companies are active in the ticketing systems market in Germany. A ticketing system is a platform which enables event organisers to sell tickets via different advance booking offices and online shops. It also enables advance booking offices to book tickets for different events. The FCO considered that ticketing systems offer a much wider possibility for event organisers to reach customers than other sales channels. As a result, selling tickets via a ticketing system is indispensable for many event organisers.

Following an in-depth investigation, the FCO concluded that CTS Eventim already held a dominant position in the ticketing systems market in Germany as it operates the largest German ticketing portal, selling between 60 and 70 percent of all tickets sold online for concerts throughout Germany. In addition, a number of smaller competitors are only active in certain regions of Germany and occasion-

ally need to cooperate with CTS Eventim. The FCO also noted that, through the use of exclusive contracts, CTS Eventim tied a significant share of the total market volume to its ticketing system. Further, the FCO considered that the acquisition of Four Artists would strengthen CTS's dominant position on the market for ticketing services. For these reasons, the FCO decided that the merger would significantly impede effective competition in the ticketing market and restrict competing ticketing system operators' possibilities for expansion.

Although the undertakings concerned in this case appeared to have relatively high market shares, it is interesting to note that high shares in the ticketing market are not necessarily consistent with market power. In one abuse of dominance investigation concluded by the Irish Competition Authority in September 2005, the ticketing operator TicketMaster was found not to be dominant, despite having an almost 100% market share in Ireland, as its main customers (event organisers) had substantial buying power and it was constrained from charging higher booking fees.

**– OTHER DEVELOPMENTS –**:

SWEDEN: On 1 January 2018, a change in the Swedish merger control law will come into effect. The new law will enable the Swedish Competition Authority to directly prohibit a merger. Under the current rules, the Swedish Competition Authority must seek approval to prohibit a merger from a specialist Swedish court (similar to the model in the US) if it considers that the merger would significantly impede effective competition. By enabling the Swedish Competition Authority to directly prohibit mergers, the Swedish merger regime will more closely reflect the procedure at EU level whereby Commission prohibition decisions are subject to later review by the EU Courts.

# 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**

*European Commission imposes fines on car safety equipment suppliers in cartel settlement case*

On 22 November 2017, the European Commission announced that it had imposed fines totalling € 34 million on five car safety equipment suppliers for taking part in one or more of four separate cartels for the supply of car safety equipment to some Japanese car manufacturers in the EEA. The Commission concluded the case under its cartel settlement procedure.

The Commission's investigation revealed the existence of four separate infringements of varying scope and duration. The Commission stated that the companies involved – Tokai Rika, Takata, Autoliv, Toyoda Gosei and Marutaka – acknowledged that, for several years, they had coordinated prices or markets and exchanged sensitive information for the supply in the EEA of seatbelts, airbags and steering wheels to Japanese car manufacturers Toyota, Suzuki and Honda respectively. The Commission also reported that the coordination of the cartels took place outside the EEA, particularly in Japan, through meetings at the suppliers' business premises, in hotels and restaurants, as well as through e-mail exchanges.

The fines imposed by the Commission ranged from € 156,000 to € 12,724,000 depending on each individual infringement. Takata received full immunity from fines for three of the infringements as it had revealed their existence to the Commission, and Tokai Rika received full immunity for one of the infringements. Tokai Rika, Takata, Autoliv and Toyoda Gosei were granted fine reductions ranging between 28-50% for each cartel they were involved in based on their cooperation with the Commission investigation under the 2006 Leniency Notice. The reductions reflected the timing of each supplier's cooperation and the extent to which the evidence they provided assisted the Commission in proving the existence of the infringements in which they had been involved. The companies received a further 10% reduction of their fines under the Commission's 2008 Settlement Notice.

*General Court partially annuls decision in Yen interest rate derivatives cartel case*

On 10 November 2017, the General Court ("GC") partially upheld the appeal lodged by Icap plc, Icap Management Services Ltd and Icap New Zealand Ltd ("Icap") against a Commission decision fining Icap € 14.9 million for facilitating cartels in the market for interest rate derivatives in Japanese yen (T-180/15, *Icap and Others*).

In its judgment, the GC ruled that the Commission had not erred in law in finding that Icap had facilitated a number of infringements of Article 101 TFEU (see analysis below). However, the GC considered that the Commission was wrong with respect to the duration of Icap's participation in four of the cartels in which Icap was found to have been involved. The GC also took the view that the Commission had breached Icap's rights to presumption of innocence and good administration in the previously adopted Settlement Decision (to which Icap was not a party) but nonetheless concluded that this breach was not a sufficient basis to annul the contested decision (see analysis below). Finally, the GC annulled the part of the Commission's decision setting the fine because, due to an inadequate statement of reasons given by the Commission, Icap was not in a position to adequately understand or dispute the fining methodology followed by the Commission, which had departed from the standard fining methodology (see analysis below).

*Court of Justice dismisses appeal of British Airways in air-freight cartel case*

On 14 November 2017, the Court of Justice of the European Union ("ECJ") dismissed an appeal lodged by air carrier British Airways against a judgment of the General Court ("GC"), which had partially annulled the Commis-

sion's decision against British Airways in the *Airfreight* cartel case (VBB on Competition Law, Volume 2016, No. 1) (C-122/16, *British Airways*). In its judgment, the ECJ confirmed that EU courts are bound by the *ne ultra petita* principle - which prevents them from pronouncing an annulment that goes further than that sought by the applicant – even where the grounds for annulment constitute a matter of public policy raised by the court of its own motion (see analysis below).

*Court of Justice provides guidance to French court on relationship between EU Common Agricultural Policy and competition law in endives cartel case*

On 14 November 2017, the Court of Justice of the European Union ("ECJ") handed down a judgment on a request for preliminary ruling from the French Supreme Court regarding the relationship between the objectives of the EU's Common Agricultural Policy and those of EU competition law (C-671/15, *APVE and Others*). Following the opinion of Advocate General Wahl (VBB on Competition Law, Volume 2017, No. 4), the ECJ took the view that agricultural producer organisations and their associations may be held liable for breaching EU competition law under certain circumstances (see analysis below).

*Court of Justice provides guidance to Bulgarian court on application of competition law to setting minimum legal fees*

On 23 November 2017, the Court of Justice of the European Union ("ECJ") handed down a judgment on requests for preliminary rulings from a Bulgarian court regarding the application of competition law to the prerogative granted to the Bulgarian Supreme Council of the Legal Profession to set a minimum level of legal fees (Cases C-427/16 and C-428/16, *CHEZ Elektro Bulgaria and FrontEx International v Yordan Kotsev and Emil Yanakiev*). In its judgment, the ECJ considered that Article 101 TFEU, read in conjunction with Article 4(3) of the TEU, must be interpreted as meaning that national legislation (i) which does not allow a lawyer and his or her client to agree to remuneration below a minimum amount laid down in a regulation issued by a professional organisation of lawyers, without that lawyer being subject to a disciplinary procedure, and (ii) which does not authorise the courts to order reimbursement of fees in an amount below that minimum amount, is capable of restricting competition under Article 101 TFEU. The ECJ instructed the referring court to determine whether the regulation had legitimate objectives and whether the restrictions imposed were limited to what was necessary to ensure that those legitimate objectives were given effect.

*Court of Justice rules that adoption of EU commitment decisions does not prevent national courts from examining lawfulness of conduct*

On 23 November 2017, the Court of Justice of the European Union ("ECJ") delivered a judgment on a request for a preliminary ruling from the Spanish Supreme Court seeking clarification as to whether a commitment decision adopted by the 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 the competition rules (Case C-547/16, *Gasorba and Others*). Following the opinion of Advocate General Kokott (VBB on Competition Law, Volume 2017, No. 9), the ECJ ruled that national courts remain free to assess in a more comprehensive and in-depth manner the compatibility of conduct with the competition rules even where that conduct has already been the subject of a commitment decision adopted by the Commission. At the same time, the ECJ considered that national courts should pay deference to the legal effects of the EU commitment decision, which is an indication of the anti-competitive nature of the conduct concerned (see analysis below).

## Analysis of Important Substantive and Procedural Developments

*Yen Interest Rate Derivatives cartel case – Clarification of concept of 'facilitation'*

Under EU case-law, the burden of proof with respect to the establishment of participation by an undertaking in an infringement and liability for all of its constituent elements is on the Commission. To that end, the Commission has to prove that the undertaking concerned intended to contribute by its own conduct to the common objectives pursued by all the participants and that it was aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and that it was prepared to take the attendant risk.

Before the General Court ("GC"), Icap, a broker, challenged the Commission's finding that it was involved with a number of banks in the *Yen interest rate derivatives* cartel case as a "facilitator". The GC examined whether Icap had knowledge of the collusion, whether Icap had actually contributed to the common objectives pursued by the colluding banks, and whether Icap had intended to contribute. For the reasons explained below, the GC concluded that all three conditions were met, thus confirming the Commission's decision in that regard.

First, Icap argued that it did not have knowledge of, and could not have reasonably foreseen, the conduct planned or put into effect by the banks that were involved in the infringement. In particular, Icap claimed that the requests received from two of the banks, UBS and Citi, could reasonably have been understood to have been unilateral attempts to manipulate the Yen Libor rates, rather than evidence of collusion. The GC agreed that these requests by themselves did not imply collusion, but nonetheless held that other communications between Icap and the banks demonstrated that Icap should have inferred the existence of collusion on the part of the banks.

Second, Icap argued that its conduct was so different from that of the banks that it could not have contributed to the common objectives of the cartel. For example, Icap claimed a distinction had to be made between the conduct of the banks in manipulating their own Libor submissions, and the conduct of Icap in attempting to manipulate the Libor submissions of other banks on the Libor panel. The GC disagreed, holding that the conduct was highly complementary: the facilitation of interest rate manipulation had a higher chance of success due to Icap's role in compiling the various banks' submissions and therefore contributed to the common objectives pursued by all parties to the cartel.

Finally, the GC concluded that Icap intended to contribute to the common objectives of the cartel. The fact that Icap had knowledge of (or could have reasonably foreseen) the collusion between the banks, and the "very high degree of complementarity" between the conduct of Icap, on one hand, and the conduct of the banks, on the other hand, were sufficient to impute intention.

*Yen Interest Rate derivatives cartel case – breach of the principles of presumption of innocence and good administration*

The principle of the presumption of innocence is a general principle of EU law enshrined in Article 48(1) of the Charter of Fundamental Rights. It applies to procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments. The principle of the presumption of innocence implies that every person accused is presumed to be innocent until his/her guilt has been established according to law.

In the *Yen interest rate derivatives* cartel case, the Commission followed a "hybrid" procedure whereby it first adopted a settlement decision in 2013 against a number of banks (the "Settlement Decision"), and then an infringement decision in 2015 against Icap who had not settled with the Commission (the "Infringement Decision"). Icap submitted that the Commission's Infringement Decision should be annulled because it breached the principle of the presumption of innocence and the principle of good administration as the Commission took a position on Icap's liability for facilitation of the infringement in the Settlement Decision.

In its judgment, the GC noted that the Commission described in the Settlement Decision how Icap had "facilitated" the unlawful conduct imputed to the banks taking part in the settlement procedure, albeit in the part of the decision setting out the facts. The GC stated that, while the Settlement Decision did not make any finding regarding the legal qualification of Icap's liability for its conduct, the Commission's position on that issue could nonetheless be easily inferred from it. Notably, the GC held that the rapidity and efficiency of the settlement procedure do not justify the distortion of the principle of the presumption of innocence, no matter how laudable those objectives may be. The GC considered that the Commission should conduct its settlement procedure in a manner that is compatible with the requirements of Article 48 of the Charter of Fundamental Rights.

The GC also clarified that, in the case of "hybrid" settlements, the Commission is entitled to adopt: (i) under a simplified procedure, a decision addressed to the parties who decide to enter into a settlement and (ii) under the standard infringement procedure, a decision addressed

to those who decide not to settle. The GC emphasised that the implementation of this hybrid procedure must be carried out in accordance with the presumption of innocence of the party that has decided not to take part in the settlement.

The GC further explained that, when the Commission is not in a position to determine the liability of settling parties without also taking a view on the participation in the infringement of non-settling parties, the Commission should take "necessary measures". One solution used in the *Animal Feed Phosphate* cartel case in relation to Timab (see VBB on Competition Law, Volume 2015, No. 5) was the adoption of simultaneous decisions relating to all undertakings concerned by the cartel on the same date, which enabled the presumption of innocence to be safeguarded.

In addition, under the principle of good administration enshrined in Article 41 of the Charter of Fundamental Rights, every person has the right to have his or her affairs handled impartially by the institutions of the European Union. The GC recalled that the Commission is required to respect this right during the administrative procedure relating to anticompetitive practices.

Finally, the GC examined whether the breach by the Commission of Icap's presumption of innocence and the principle of good administration at the time of the adoption of the Settlement Decision would be capable of vitiating the Infringement Decision. The GC concluded that the irregularity arising from a possible lack of objective impartiality on the part of the Commission could not have had an impact on the substance of the Infringement Decision as the Commission had established Icap's participation in the infringements to the requisite legal standard. The GC therefore dismissed Icap's claim that the Infringement Decision should be annulled on the basis of a breach of the principle of good administration.

*Yen Interest Rate Derivatives cartel case – Commission must state reasons for departing from standard fining methodology*

Under point 37 of the 2006 Fining Guidelines (the "Fining Guidelines"), the Commission may depart from its standard fining methodology if this is justified by the particularities of a given case or if there is a need to achieve deterrence. In such circumstance, the Commission is required to provide a statement of reasons for this departure, indicating the factors which enabled it to determine the gravity of the infringement and its duration, as well as explaining the weighting and assessment of the factors taken into account. The purpose of the obligation to state reasons is to provide the person concerned by a decision with sufficient information to know whether the decision may be vitiated by an error enabling its validity to be challenged, as well as permitting review by EU courts.

In the *Yen interest rate derivatives* cartel case, the Commission departed from its standard fining methodology for calculating the fines imposed on Icap by relying on point 37 of the Fining Guidelines. The Commission justified this departure by the fact that Icap was not active on the Japanese Yen interest rate derivatives market and that, therefore, taking account of the value of sales (i.e., ICAP's brokerage fees) would not be an appropriate proxy to reflect the gravity and nature of the infringement at issue. Icap argued before the General Court ("GC") that the Commission had not properly justified its departure from the Fining Guidelines.

In its judgment, the GC held that the Fining Guidelines lay down rules of conduct indicating the approach to be adopted by the Commission and that the Commission cannot depart from them without giving reasons that are compatible with the principle of equal treatment. The GC continued that, because point 37 of the Fining Guidelines simply makes a vague reference to the 'particularities of a given case' and thus leaves the Commission broad discretion to decide to make an exceptional adjustment of the basic amount of the fine, the Commission's respect for the rights guaranteed by the EU legal order in administrative procedures, including the obligation to state reasons, is of an even more fundamental importance. The GC added that, with respect to a decision imposing a fine, the Commission is required to provide a statement of reasons for the amount of the fine imposed and for the method chosen in that regard, by at least explaining the weighting and assessment of the factors taken into account.

In the present case, the GC determined that the Commission had not provided information on the alternative method, but had limited itself to a general assurance that the fines reflected the gravity, duration and nature of Icap's involvement in the infringements at issue as well as the need to ensure sufficient deterrence. As a result,

neither Icap nor the GC could understand the justification for the methodology favoured by the Commission.

The GC further noted that exploratory and informal discussions with Icap during the administrative procedure did not relieve the Commission of its obligation to explain, in the contested decision, the methodology that it had applied for the purposes of determining the amounts of the fines imposed. Similarly, the Commission could not remedy its failure to state reasons by explaining its fining methodology later before the EU courts.

As a result, the GC ruled that the Commission's decision was insufficiently reasoned and annulled the Commission's decision in so far as it concerned the determination of the fines imposed on Icap.

*French Endive cartel case - Clarification of relationship between EU Common Agricultural Policy and competition law*

The objectives of the EU's common agricultural policy ("CAP") differ from those of EU competition law. While the CAP aims to actively address certain perceived failures in agricultural markets, EU competition rules are premised on the objective of market liberalisation. Under Article 42 TFEU, the objectives of the CAP take precedence over the objectives of EU competition law. Hence, although agricultural producers' organisations ("POs") and their associations ("APOs") constitute forums for concerted action, which would normally be considered problematic from a competition law perspective, they nevertheless escape the application of Article 101 TFEU in situations where the EU's common rules for agricultural markets provide for explicit derogations. These derogations are framed narrowly. The question arises whether further derogations may follow implicitly from the POs/APOs' responsibility to (i) adjust production to demand and concentrate supply; (ii) reduce production costs; and (iii) stabilise producer prices.

The underlying case relates to a 2012 decision adopted by the French Competition Authority in which it fined a number of endive producers' organisations and associations a total of € 4 million for their involvement in a price-fixing, output restriction and market-sharing cartel. The organisations and associations concerned appealed against the authority's decision, arguing that they had a responsibility, under EU law, to stabilise endive producer prices and to adjust production to demand. The French Court of Appeal upheld their argument, which was subsequently appealed before the French Supreme Court. The French Supreme Court stayed proceedings and requested guidance from the ECJ.

In its judgment, the Grand Chamber of the Court of Justice of the European Union ("ECJ") considered that, although the EU's common organisations of the agricultural markets are not a competition-free zone, actions taken by POs and APOs may escape the application of EU competition law where these actions (i) relate to objectives specifically assigned to them under the CAP; and (ii) do not go beyond what is strictly necessary to achieve these objectives. This implies that the practices concerned must be adopted by a PO/APO that is recognised by an EU Member State and remain within the framework of the same PO/APO. In other words, the practices discussed within a PO/APO (e.g., production and marketing of products) must be limited to the activity of the PO or APO members. Conversely, practices occurring between (i) different POs or APOs, (ii) a PO/APO and entities not recognised by a Member State in the context of the implementation of the CAP or (iii) several non-recognised entities are all subject to EU competition law.

The ECJ examined the alleged cartel on the French endive market in the light of the above principles.

First, as regards the exchange of strategic information, the ECJ considered that the mission of POs/APOs necessarily entails the exchange of strategic information between individual producers that are members of the PO/APO concerned. Therefore, exchanges of strategic information between producers of the same PO/APO may escape the application of EU competition rules, if they are (i) actually made for the purposes of one or more of the objectives assigned to that PO or APO and (ii) limited to information that is strictly necessary for those purposes.

Second, as regards the concertation on the quantities placed on the market, the ECJ held that such concertation can escape the application of EU competition rules only if it takes place within the same PO/APO and if it is genuinely intended to regulate production to stabilise the prices of the products concerned.

Finally, the ECJ found that the objective of concentrating supply to strengthen the position of producers against the concentration of demand may also justify a certain form of coordination of the pricing policy of individual agricultural producers within a PO/APO, in particular where the PO/APO concerned has been assigned by its members with the responsibility for marketing all their products. In contrast, the collective fixing of minimum sale prices within a PO/APO cannot be considered proportionate to the objectives of stabilising prices and concentrating supply when producers are prevented from selling their products at a price below the fixed minimum price, because this further reduces the already low level of competition in the markets for agricultural products.

The judgment is of great practical interest to the agricultural sector and is in line with Advocate General Wahl's opinion (see VBB on Competition Law, Volume 2017, No. 4). It is also noteworthy that the Commission has submitted *amicus curiae* briefs to the French Supreme Court in the proceedings on the merits, which is exceptional.

*Airfreight cartel case – EU Courts bound by ne ultra petita principle even when ruling of own motion*

In the *Airfreight* cartel case, British Airways had lodged an appeal against the General Court ("GC") judgment which had partially annulled the Commission's decision (the "Decision") in so far as British Airways was concerned, while annulling it in its entirety for all other appealing carriers. The GC justified the partial annulment of the Decision for British Airways on the ground that its application for annulment was limited to four specific elements of the Decision, rather than covering the Decision in its entirety (see VBB on Competition Law, Volume 2016, No. 1).

According to British Airways, by raising a plea of its own motion, the GC had grounds to go beyond the form of order set out in British Airways' application for annulment, in particular as it related to a ground involving a matter of public policy. British Airways also argued that the judgment was discriminatory since, on the basis of that very same plea, the GC had annulled the Decision in its entirety with respect to all other appellant carriers involved in the infringement.

In its judgment, the Court of Justice of the European Union ("ECJ") upheld the findings of the GC and dismissed the appeal lodged by British Airways. Consistent with the opinion of Advocate General Mengozzi, the ECJ found that the concept of *ne ultra petita* precluded the GC from annulling the Decision in its entirety with respect to British Airways, even though the Decision had been annulled on a ground of public policy. Similarly, the ECJ concluded that, while the GC is empowered to raise on its own motion a plea involving public policy, it nonetheless lacks jurisdiction to amend the form of order sought by an appellant.

The ECJ further ruled that the GC was right not to treat British Airways and the other appellants involved in the infringement in the same way, since, contrary to British Airways, all the other carriers had requested the full annulment of the Decision and, therefore, the GC could legitimately annul the entire decision in relation to them without breaching the *ne ultra petita* principle.

*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 Commission. If such commitments are considered satisfactory, the Commission may close the case without any finding of infringement or the imposition of any fine. The Commission then adopts a commitments decision which is binding on the undertaking concerned.

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. In response, Repsol had offered several commitments to address these concerns, including that (i) it would not conclude new 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 ECJ on the extent of the binding nature before national courts of EU commitments decisions adopted by the Commission.

In its judgment, the ECJ first recalled the fundamental importance of the uniform application of EU competition law, which requires national courts and competition authorities not to take decisions contrary to those adopted by the Commission in proceedings under Regulation 1/2003.

The ECJ also noted that decisions adopted by the Commission under Article 9(1) of Regulation 1/2003 have the effect of making commitments binding upon an undertaking to address the competition law concerns identified by the Commission in its preliminary assessment. At the same time, the commitments decision does not certify whether the practice complies with Article 101 TFEU and, therefore, the adoption of a commitments decision cannot create a legitimate expectation for the undertaking concerned as to whether its conduct complies with competition law.

Therefore, the ECJ concluded that national courts cannot be precluded from examining whether an agreement, which is the subject of a commitments decision, infringes competition law rules and, if necessary, find that this agreement is void under Article 101(2) TFEU.

## – MEMBER STATE LEVEL –

FRANCE

### French Supreme Court overturns fine reduction in wallpaper cartel case

On 8 November 2017, the French Supreme Court overturned the Paris Court of Appeal judgment in connection with the Wallpaper cartel case, by annulling the reduction of fine granted to two wallpaper makers, Société de Conception et d'Edition ("SCE") and MCF Investment ("MCF"). The French Supreme Court referred the case back to the Paris Court of Appeal for a second review.

On appeal, the Paris Court of Appeal had reduced the fines imposed on SCE and MCF under the French Fining Guidelines to account for the single-product nature of their companies whose turnovers on the wallpaper market would have exceeded 90% (see VBB on Competition Law, Volume 2016, No. 4). This argument had been accepted for two companies (i.e., L'Editeur and Zambaiti) in the initial decision of the French Competition Authority ("FCA") (see VBB on Competition Law, Volume 2015, No. 1).

In its judgment, the French Supreme Court upheld the arguments raised by the FCA in relation to the determination of the single-product nature of companies and concluded that the proportion of SCE and MCF turnovers in the wallpaper market had been calculated incorrectly. The French Supreme Court considered that account should be taken of the group's total turnover, rather than the company's total turnover. As a consequence, SCE and MCF could not be considered as single-product companies. Notably, the FCA relied on the judgment of the Court of Justice of the European Union in the Pilkington case (C-101/15), to argue that the fact that a company's activities are less diversified "does not, as such, constitute a sufficient justification for departing from the method of calculation that the Commission imposed on itself" because "that would be tantamount to conferring an advantage on the least diversified undertakings on the basis of criteria that are irrelevant in the light of the gravity and the duration of the infringement." The French Supreme Court confirmed this position to avoid granting single-product companies an automatic reduction of fines.

ITALY

### Italian Competition Authority imposes fines on auditing firms for bid-rigging

On 18 October 2017, the Italian Competition Authority ("ICA") published a decision imposing total fines of € 23 million on four auditing firms for coordinating bids for a government tender that related to EU funds. The companies involved in the infringement were Deloitte, Ernst & Young, KPMG and PricewaterhouseCoopers.

The ICA found that the auditing companies allocated lots amongst themselves within a 2015 government tender for the provision of technical assistance to public administration in the management of EU structural funds. The entire tender was reportedly valued at € 66.5 million.

In calculating the fine, the ICA considered the practice at issue a restriction of competition by object and, for the purpose of determining the basic amount of the fine, took into account 30% of the value of sales of the auditing firms. The ICA then granted Deloitte, Ernst & Young and PWC a 5% fine reduction for implementing compliance programmes, but did not do so for KPMG because it implemented its programme too late. The ICA imposed fines of € 8.56 million on Ernst & Young, € 7.66 million on KPMG, € 5.95 million on Deloitte and € 1.52 million on PricewaterhouseCoopers.

# VERTICAL AGREEMENTS

**– MEMBER STATE LEVEL –**

CYPRUS

**Cypriot Competition Authority fines fuel companies for retail price agreements**

On 15 November 2017, the Cyprus Commission for the Protection of Competition ("CPC") imposed an overall fine of € 20,775,630 on four Cyprus-based fuel companies for anticompetitive vertical agreements with service station operators. The CPC stated that ExxonMobil Cyprus, Hellenic Petroleum Cyprus, Petrolina Holdings, and Lukoil Cyprus breached section 3(1)(a) of the Cypriot Law on the Protection of Competition by entering into vertical agreements with their respective service station operators between October 2004 and December 2006. Such agreements included direct or indirect resale price maintenance which, according to the CPC, had the object or effect of preventing, restricting or distorting competition within Cyprus. The CPC concluded that the anticompetitive practices lasted until 2015.

LITHUANIA

**Lithuanian Competition Authority fines supplier and distributor of bone regeneration products for resale price maintenance**

On 31 October 2017, the Lithuanian Competition Council ("LCC") imposed fines totalling € 175,500 on Italian-based supplier Tecnoss Dental and its Lithuanian distributor, UAB Implamedica, for fixing minimum resale prices of bone regeneration products used in implant dentistry. Tecnoss Dental received a fine of € 114,300 and Implamedica received a fine of € 61,200. The LCC found that Tecnoss Dental and Implamedica entered into an anticompetitive agreement that restricted Implamedica's ability to sell bone regeneration products to its customers, including dental clinics, at a price lower than a pre-determined price. The infringement took place between 2011 and 2016.

ROMANIA

**Romanian Competition Authority fines car battery producer and distributors for anticompetitive agreements**

On 7 November 2017, the Romanian Competition Council ("RCC") imposed fines amounting to approximately € 120,000 on one Romanian car battery producer and its seven distributors for infringing Romanian competition law by entering into anticompetitive agreements concerning the pricing and sale of car batteries. According to the RCC, the agreements between car battery producer Caranda Baterii and its distributors (i.e., Ani Auto Sport, Auto-Ovarom, Barady Services, Beda Impex, Marcat Invest, Mecantu, and Stanciu-Service) between 2010 and 2015 contained anticompetitive clauses fixing resale prices, dividing up the market and (otherwise) restricting sales of Caranda brand car batteries. The producer and six of the seven distributors admitted their participation in the infringement and received a 30% reduction in their fines.

SWITZERLAND

**Federal Supreme Court of Switzerland rejects BMW's appeal against CHF 157 million fine**

On 24 October 2017, the Federal Supreme Court of Switzerland (the "Court") rejected an appeal by BMW against a fine of CHF 157 million (approx. € 135 million) for impeding parallel imports.

By way of background, in May 2012, the Competition Commission of Switzerland ("COMCO") fined BMW for impeding direct and parallel imports into Switzerland by prohibiting authorised dealers within the European Economic Area ("EEA") from selling new BMW and MINI vehicles to customers outside the EEA, including Switzerland (see VBB on Competition Law, Volume 2012, No. 5). BMW appealed this decision to the Federal Administrative Court, which rejected the appeal in 2015.

The further appeal against this judgment of the Federal Administrative Court has now been rejected by the Court, rendering the fine final. In its judgment, the Court found BMW's export restraints to constitute a 'by object' restriction. Consistent with its 2016 Gaba ruling, the Court held

that it is not necessary to examine the actual effects of the agreement, as it is sufficient that the territorial restraint potentially affects competition. Furthermore, it found that BMW had not provided sufficient efficiency-based arguments to justify the restriction.

# INTELLECTUAL PROPERY/LICENSING

## – EUROPEAN UNION LEVEL –

### European Commission publishes communication on Standard Essential Patents

On 29 November 2017, the European Commission published a communication titled "Setting out the EU approach to Standard Essential Patents" (the "Communication") in which it seeks to offer guidance and recommendations in relation to the licensing, valuation and enforcement of Standard Essential Patents ("SEPs").

SEPs are patents that cover technology considered as essential to implement a specific standard or technical specification needed to allow industry participants to create interchangeable products, such as mobile devices that rely on, for example, Wi-Fi or 4G/5G networks. The SEPs are developed under the auspices of standard-setting organisations, such as the European Telecommunications Standards Institute. According to the Commission, once a standard is established and the holders of SEPs have given a commitment to license them on fair, reasonable and non-discriminatory ("FRAND") terms, the technology included in the standard should be available to any potential user of the standard.

The Commission considers that the framework for SEPs should enable product manufacturers to have access to technologies under transparent and predictable licensing rules while, at the same time, rewarding patent-holders for their investment in R&D and standardisation activities. To attain these objectives, the Commission takes the view that there is a need for a more transparent environment for negotiations between SEP holders and potential licensees, a need for more transparent valuation principles for SEPs as well as a need for a balanced and predictable enforcement regime. These items will be reviewed in turn.

*Transparent environment for negotiations*

First, to ensure a more transparent environment for negotiations between SEP holders and potential licensees, the Commission considers that information on the existence, scope and relevance of SEPs is important for fair licensing negotiations and for allowing potential users of standards to identify their exposure to SEPs and licensing partners. However, the Commission notes that the only information on SEPs available to users is contained in declaration databases maintained by standards developing organisations ("SDOs") which may lack transparency. In this context, the Commission makes the following recommendations:

- SDOs should ensure that their databases contain information to support SEP licensing and that they are easily accessible through user friendly interfaces for patent holders, implementers and third parties. For example, the Commission suggests that all declared information should be searchable based on the relevant standardisation projects;

- SDOs should improve the quality of their databases by, for example, eliminating duplications and providing links to patent office databases;

- SDOs should transform their declaration systems into a tool providing more up-to-date and precise information on SEPs, such as a reference to the section of the standard that is relevant to the SEP or contact information of the owner/licensor of the declared SEPs;

- Declared SEPs should be subject to reliable scrutiny of their essentiality for a standard, the scrutiny of which could be performed by an independent party with technical capabilities and market recognition at the request of either right-holders or prospective users.

*Transparent valuation principles*

Second, with respect to the valuation of SEPs, the Commission takes the view that the licensing of SEPs is hampered by unclear and diverging interpretations of the meaning of FRAND which risk delaying the uptake of new technologies, standardisation processes and the roll-out of the Internet-of-Things ("IoT") in the European Union. As a result, the Commission establishes the following principles in relation to SEP licensing:

- There is no one-size-fits-all solution on what FRAND licensing is - what can be considered fair and reasonable differs from sector to sector and over time. For this reason, the Commission encourages stakeholders to pursue sectoral discussions to establish common licensing practices on the basis of efficiency considerations and reasonable licence fee expectations for both parties;

- The FRAND value should be determined by taking into account the present value added of the patented technology. That value should be irrespective of the market success of the product, which is unrelated to the value of the patented technology;

- In determining a FRAND value, the parties should not consider an individual SEP in isolation, but rather should account for a reasonable aggregate rate for the standard to avoid "royalty stacking";

- The non-discriminatory component of FRAND means that the SEP-holder cannot discriminate between users that are similarly situated;

- For products with a global circulation, SEP licences granted on a worldwide basis (rather than country-by-country) may contribute to a more efficient approach and can therefore be compatible with FRAND.

*Enforcement of SEPs*

Finally, the Communication provides guidance to right holders and users in relation to the enforcement of SEPs. The Commission notes that parties have a duty to negotiate in good faith, including responding in a timely manner, and does not exclude the use of injunctive relief against parties acting in bad faith provided such relief is used proportionally. The Commission will work with stakeholders to develop and use methodologies that allow for more efficient and effective SEP litigation. It will also facilitate mediation and alternative dispute resolution tools and monitor the impact of Patent Assertion Entities ("PAEs") (i.e., non-practising firms that solely acquire patents for the purpose of generating revenues through licensing fees) in the European Union. At the same time, the Commission maintains that PAEs should be treated on the same footing as any other patent owner.

The Commission's Communication is not binding.

# STATE AID

## – EUROPEAN UNION LEVEL –

### ECJ Annuls General Court Judgment in TV2/Danmark – State Resources

On 9 November 2017, the Court of Justice of the European Union (the "ECJ") issued its judgments on appeal in three cases: Case C-656/15 P, *European Commission v TV2/Danmark*, Case C-657/15 P, *Viasat Broadcasting UK v TV2/Danmark* and Case 649/15 P, T*V2/Danmark v European Commission*.

All three cases concern state aid granted by the Danish state to TV2/Danmark ("TV2"), a Danish broadcasting company. The many measures in favour of TV2 included interest- and repayment-free loans, a state guarantee for operating loans, a corporate tax exemption and licence fee revenue. In addition, TV2 also benefitted from advertising revenue. In the years 1995 and 1996, the advertising space on TV2 was sold not by TV2 itself, but by a third company, TV2 Reklame, and the income from those sales was transferred to TV2 through another company, TV2 Fund. TV2, TV2 Reklame and TV2 Fund were owned by the Danish State. The judgments of the ECJ of 9 November 2017 relate to this latter measure.

In its second decision relating to the measures granted to TV2 (the "TV2 II Decision"), the Commission found that all measures in favour of TV2 constituted state aid within the meaning of Article 107(1) TFEU. Specifically as regards the advertising revenue, the Commission decided that this revenue constituted state resources, since it was transferred through TV2 Reklame and TV2 Fund, two public undertakings over whose funds the Danish state exercised control. The Commission however found that the aid was compatible with the internal market within the meaning of Article 106(2) TFEU, i.e., the provision allowing a derogation from the EU state aid rules for services of general economic interest.

Both Viasat, a commercial television broadcaster, and TV2 brought actions for annulment against the TV2 II Decision before the General Court ("GC"). The action for annulment brought by Viasat against the TV2 II Decision was dismissed both by the GC and the ECJ (see VBB on Competition Law, Volume 2016, No. 11 and Volume 2017, No. 3).

The action for annulment brought by TV2 against the TV2 II Decision was upheld by the GC in so far as the Commission had held that the advertising revenue for 1995 and 1996 paid to TV2 constituted state aid. In particular, the GC found that the advertising revenue did not constitute state resources within the meaning of Article 107(1) TFEU. The rest of the TV2 II Decision was upheld by the GC. TV2, Viasat and the Commission appealed.

On 9 November 2017, the ECJ ruled on the three appeals. The ECJ dismissed the appeal brought by TV2 (Case 649/15 P), but (partly) upheld the appeals brought by Viasat (Case C-657/15 P) and the Commission (Case C-656/15 P). The main question submitted to the ECJ concerned the qualification of the advertising revenue paid to TV2 in 1995 and 1996 as state resources within the meaning of Article 107(1) TFEU. 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. As regards public undertakings, the ECJ recalled that their resources constitute state resources, since they are subject to the control of the state and are therefore at its disposal.

The ECJ found that the present case concerns public undertakings, TV2 Reklame and TV2 Fund, that were created, owned and appointed by the Danish state to administer the revenue produced by the sale of advertising space of another public undertaking, TV2. Accordingly, the entire distribution channel of that revenue was governed by Danish legislation. As a consequence, the ECJ concluded that the advertising revenue was under the control and at the disposal of the state and constituted state resources within the meaning of Article 107(1) TFEU. The ECJ added that it was of no relevance that the source of the revenue was private. The ECJ thus set aside the judgment of the GC to the extent that it annulled the TV2 II Decision.

## – OTHER DEVELOPMENTS –

EUROPEAN UNION: On 23 November 2017, the European Commission published new and updated analytical grids on the application of state aid rules to the public financing of infrastructure. The grids provide sector-specific guidance as to when a notification is required. The analytical grids were first published following the second General Court judgment in the Leipzig-Halle airport state aid case (see VBB on Competition Law, Volume 2011, No. 3) and were updated in September 2015 and December 2016 (see VBB on Competition Law, Volume 2015, No. 10 and Volume 2016, No. 12). The Commission has now published new and updated analytical grids relating to port infrastructure, culture, heritage and nature conservation, airports, broadband, research, sports and multifunctional recreational infrastructures, energy infrastructure and waste management infrastructure.

# LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

## – MEMBER STATE LEVEL –

GERMANY

### German Federal Cartel Office and Federal Network Agency publish joint energy monitoring report

On 20 November 2017, the German Federal Cartel Office and the Federal Network Agency jointly published their annual Energy Monitoring Report. It attests an overall positive development of the German electricity and gas markets in 2017. It highlights an increase of competition in the electricity market and a decrease in that market of the market power of incumbent producers following structural changes, including (i) the future closure of nuclear power plants and the increased importance of energy production from renewable sources, an area where large producers have a lower cumulative market share, and (ii) an increase of electricity-generating capacity through recently introduced auctions for capacity from renewable energy sources which have resulted in decreased costs and greater switching possibilities for consumers. In relation to the gas sector, the report finds a continuous improvement of the conditions for competition in the various natural gas markets, namely a decrease in wholesale prices and market concentration.

The report in German is available here.

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