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Highlights

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MERGER CONTROL

– EUROPEAN UNION LEVEL –

European Commission unconditionally clears T-Mobile's acquisition of Tele2 in the Netherlands

On 27 November 2018, the European Commission ("Commission") unconditionally approved the proposed acquisition by T-Mobile of Tele2 under the EU Merger Regulation. The transaction combines the third largest (T-Mobile) and fourth largest (Tele2) operators in the Dutch retail mobile telecommunications market.

Three main reasons were cited by the Commission in deciding to approve the deal. First, the Commission found that the proposed merger was unlikely to lead to significant price increases, as the merged entity will have a limited combined market share of approximately 25% of the mobile customers in the Netherlands, trailing the two larger operators KPN and VodafoneZiggo. The Dutch mobile market already has some of the lowest mobile prices in the EU, and Tele2 only has a minor share of the market (approximately 5%). Second, the Commission found that the transaction would not increase the likelihood of coordinated behaviour between the merged entity and the other mobile network operators, because KPN and VodafoneZiggo have different market strategies. Third, the Commission considered that the merger would not have a serious impact on competition for virtual mobile network operators ("MVNOs"), as Tele2 is only active in the provision of MVNO services at a wholesale level, and then only to a limited extent.

The *T-Mobile/Tele2* case is a rare example of an unconditional clearance of a four-to-three mobile telecommunications merger following the issuance of a statement of objections ("SO") by the Commission. In fact, since Commissioner Vestager took office in October 2014, no other deal in any market has received an SO and yet obtained unconditional merger approval. In previous cases, the Commission has imposed significant conditions on four-to-three telecommunications mergers, for example, in Italy in *3GItaly/Wind/JV* (see VBB on Competition Law, Volume 2016, No. 9), in Germany in *Telefónica/E-Plus* (see VBB on Competition Law, Volume 2014, No. 7), in Ireland in *Hutchison/Telefónica Ireland* (see VBB on Competition Law, Volume 2014, No. 6) and in Austria in *Hutchison/Orange Austria* (see VBB on Competition Law, Volume 2013, No. 1). In the UK, the Commission prohibited a four-to-three mobile telecommunications merger in *Hutchison/Telefónica UK* (see VBB on Competition Law, Volume 2016, No. 5), while in Denmark, the four-to-three joint venture in *TeliaSonera/Telenor* was withdrawn due to the Commission's competition concerns (see VBB on Competition Law, Volume 2015, No. 9).

It appears that a key reason for the Commission's more lenient approach in the *T-Mobile/Tele2* case is the significant uncertainty about Tele2's ability to compete on a standalone basis and to invest in next generation 5G mobile networks in the Dutch market. In addition, it is no doubt helpful that the Dutch Competition Authority appears to support the Commission's analysis, as it has publicly stated that it "shares" the Commission's conclusions.

ABUSE OF DOMINANT POSITION

– EUROPEAN UNION LEVEL –

European Commission accepts commitments from TenneT to settle investigation into conduct affecting Germany and Denmark

On 7 December 2018, the European Commission ("Commission") adopted a decision accepting a number of commitments from TenneT to address the Commission's competition concerns regarding TenneT's conduct that allegedly limited southward capacity at the electricity interconnector between Western Denmark and Germany.

TenneT is the largest of the four German transmission system operators that manage the high-voltage electricity network in Germany. Transmission system operators transport electricity over the grid from generation plants to regional or local electricity distribution operators and large industrial electricity consumers.

During its investigation, the Commission expressed concerns that TenneT's conduct discriminated against non-German electricity producers. TenneT's conduct allegedly prevented the importation of cheaper electricity from the Nordic countries, where it is largely generated from renewable energy sources, to Germany, resulting in less competition between electricity producers on the German wholesale market and higher electricity prices.

To remedy these concerns, TenneT offered to make available to the market the maximum capacity compatible with the safe operation of the interconnector between Western Denmark and Germany, and in any event, to guarantee a minimum of hourly capacity of around 75% of its technical capacity. In addition, TenneT offered to progressively increase the hourly capacity of this interconnector by 1 January 2026, following the planned expansion of the interconnector in 2020 and 2022. Finally, TenneT offered that it would only reduce the capacity of this interconnector below a minimum guaranteed level in a very limited number of exceptional circumstances.

The commitments have now been accepted by the Commission and are binding on TenneT for a period of nine years. Breach of the commitments will render TenneT liable to a fine of up to 10% of its worldwide turnover, without the need for the Commission to prove an infringement of EU competition law.

VERTICAL AGREEMENTS

– EUROPEAN UNION LEVEL –

European Commission fines clothing company Guess close to € 40 million for restricting cross-border trade

According to a press release issued on 17 December 2018, the European Commission ("Commission") has fined the clothing company Guess € 39.8 million for infringing Article 101(1) Treaty on the Functioning of the European Union ("TFEU") by imposing various types of resale restrictions on authorised members of its selective distribution system. The decision is further evidence of the priority being given by the Commission to tackling resale restrictions in vertical agreements, including in relation to e-commerce, sparked in part by the results of the E-commerce Sector Inquiry.

According to the press release, the Commission found that Guess' distribution agreements contained a number of restrictions which led to a partitioning of European markets. In particular, the agreements restricted authorised retailers from:

1. using the Guess brand names and trademarks for the purposes of online advertising;

2. selling online without a prior specific authorisation by Guess (which had full discretion over whether to grant this authorisation as it was not based on any specific quality criteria);

3. selling to consumers located outside the authorised retailers' allocated territories;

4. cross-selling among authorised wholesalers and retailers; and

5. independently deciding the retailer price for the contract products.

The infringement lasted from 1 January 2014 to 31 October 2017. The Commission suggested that the restrictions imposed by Guess allowed it to charge artificially high prices, noting that retail prices for its products in Central and Eastern European markets are on average 5-10% higher than in Western Europe.

This is the first decision in which the Commission has ruled on restrictions on the use of brand names and trademarks for the purposes of online advertising, and comes after potential concerns with such practices were identified by the Commission in the E-commerce Sector Inquiry Report and after they were found to infringe the competition rules in the *Asics* case in Germany. The remaining elements of the infringement do not appear novel.

The fine imposed on Guess was substantially reduced as a result of the extent of its cooperation with the Commission during the investigation, which went beyond what its legal obligation required. In particular, Guess informed the Commission of the restriction on the use of Guess' brand name and trademarks in online advertising, of which the Commission was not aware. In addition, Guess provided evidence of significant added value and acknowledged the infringements in question. As a result, Guess was granted a 50% reduction of the fine. This appears to be the third time that a substantial reduction of fines has been granted under the Commission's informal "cooperation procedure", following most recently the reduction of fines imposed on four consumer electronics manufacturers in July 2018 (see VBB on Competition Law, Volume 2018, No. 7).

The case comes just two weeks after the Geo-blocking Regulation entered into force as part of a broader initiative to prevent unjustified cross-border sales restrictions (see VBB on Competition Law, Volume 2018, No. 2). Acknowledging this, Commissioner Vestager commented that the fine imposed on Guess complements the Geo-blocking Regulation in that "both address the issue of sales restrictions that are at odds with the Single Market". The Commissioner noted that the restrictions on passive sales imposed by Guess would be invalid as a consequence of Article 6 of the Geo-blocking Regulation.

INTELLECTUAL PROPERTY/LICENSING

– EUROPEAN UNION LEVEL –

General Court rules that territorial exclusivity clauses in copyright licensing agreements raise competition concerns

On 12 December 2018, the EU General Court ("GC" or "Court") dismissed the application for annulment which Canal + SA ("Canal +") had brought against a European Commission ("Commission") decision that had made commitments offered by Paramount Pictures Ltd ("Paramount") in the context of copyright licensing agreements binding (Case T-873/16).

On 13 January 2014, the Commission opened an investigation regarding possible restrictions affecting competition in the supply of pay television services through licensing agreements between six American studios and main EU broadcasters. The Commission raised concerns with: (i) specific territorial exclusivity clauses by which a studio would grant an exclusive territorial licence to a broadcaster, while at the same time committing not to grant to any other third party any licensing rights on the territory concerned; and (ii) clauses which prevented broadcasters from responding to any unsolicited service requests from customers located in a Member State different from that of the broadcaster (the "contested clauses"). The Commission took the preliminary view that these clauses had the object of eliminating all transnational competition between broadcasters in breach of Article 101(1) of the Treaty on the Functioning of the European Union ("TFEU"). To address these competition concerns, Paramount, a US film studio, offered the commitment that, over a five-year period, it would not implement the contested clauses. These commitments were made binding by a Commission decision dated 26 July 2016.

The complainant, Canal +, a French broadcaster, had concluded a licensing agreement with Paramount in which it was granted exclusive broadcasting rights for the French territory. Following the Commission proceedings against Paramount, Canal + received a letter from Paramount stating that, pursuant to its commitments, it would no longer apply the contested clauses. Canal + took issue with the Commission's commitment decision and sought its annulment. Canal + argued that the contested clauses did not raise competition concerns, that imposing geographical restrictions on intellectual property, including copyright, favoured cultural diversity and supported creative activities and that these activities enabled right holders to receive adequate remuneration.

In its judgment, the GC first emphasized that, in the context of a claim for annulment, there was a different standard of review for decisions adopted under Article 9 of Regulation 1/2003 (i.e., commitment decisions) and those adopted under Article 7 of Regulation 1/2003 (i.e., infringement decisions). With respect to Article 9, the role of the Commission is limited to ensuring that the commitments offered address the competition concerns which it had raised and which were shared with the parties. Since the commitments were made voluntarily by the companies, the Court would only review whether the circumstances laid out in the Commission decision raised competition concerns and whether the commitments adequately addressed those concerns.

Second, the Court shared the Commission's position that the contested clauses raised competition concerns because they partitioned national markets, in breach of the objective of the TFEU to establish a single market. In its analysis, the Court examined the possible competition concerns in the light of "both the object and the economic and judicial context to which these clauses apply". Under established EU case law, as a matter of principle, an IP right holder may conclude exclusivity agreements for defined periods of time. However, these agreements are in breach of Article 101(1) TFEU if they prohibit passive, unsolicited sales to geographical markets located outside the Member State(s) for which the broadcaster had been granted exclusive rights. The Court added that the specific economic and judicial context (as the contested clauses concerned intellectual property rights) did not

change that analysis.

Third, and finally, the Court considered that it was not required to carry out an analysis under Article 101(3) TFEU when passing judgment on the legality of a commitment decision. The Court added that a commitment decision did not prevent the complainant from bringing an action before a national court in order to challenge the compatibility of the contested clauses with Article 101(1) TFEU and, for example, request the judge to take interim measures to preserve the interests of the complainant until a final decision is issued.

STATE AID

– OTHER DEVELOPMENTS –

EUROPEAN UNION: On 7 December 2018, the European Commission announced its decision to prolong the period of validity of Commission Regulation No. 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union ("TFEU") to *de minimis* aid granted to undertakings providing ser-vices of general economic interest (the "SGEI *de minimis* Regulation") until 31 December 2020. The SGEI *de minimis* Regulation provides that compensation measures granted to an undertaking for the provision of a service of general economic interest are deemed not to constitute state aid under Article 107(1) TFEU, provided that the total amount of the aid measures does not exceed € 500,000 over any period of three fiscal years. Such measures are exempted because they are deemed to be too small to affect competition or trade between Member States. The validity period of the SGEI *de minimis* Regulation is now the same as the other EU rules relating to services of general economic interest.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– EUROPEAN UNION LEVEL –

Court of Justice of European Union sets aside General Court judgments granting damages for excessively long judicial proceedings

On 13 December 2018, the Court of Justice of the European Union ("ECJ") delivered three judgments on separate appeals brought against judgments of the General Court ("GC") by Gascogne Sack Deutschland ("Gascogne"), Kendrion and Plasticos Españoles (together with its parent company Armando Álvarez) in relation to actions claiming damages for alleged excessive duration of previous proceedings before the GC concerning the *Industrial Bags* cartel case (Joined Cases C-138/17P and C-146/17P; Case C-150/17P and Case C-174/17P).

In 2006, the claimants brought a series of actions before the GC seeking annulment of the European Commission's 2005 decision fining a cartel in the industrial bags sector. While both the GC and the ECJ ultimately dismissed the actions for annulment in their entirety, the ECJ took the view that the duration of the proceedings before the GC – over five years and nine months – was excessive and sufficiently serious to give rise to liability on the part of the EU (see, respectively, VBB on Competition Law, Volume 2011, No. 11 and VBB on Competition Law, Volume 2013, No. 11).

Following this ECJ judgment, the claimants relied on Article 218 of the Treaty on the Functioning of the European Union ("TFEU") in bringing a new set of tort actions against the EU before the GC for damages relating to the material and non-material harm suffered as a result of the excessively long duration of the initial proceedings before the GC. In its judgments, the GC first recalled the three cumulative conditions to be met in determining whether the EU incurred non-contractual liability, namely: (i) the conduct of the institution must be unlawful; (ii) actual damage must have been suffered; and (iii) there must be a causal link between the unlawful conduct and the damage suffered. Having found the three conditions to be fulfilled, the GC granted compensatory damages of between € 47,000 and € 588,000 for the costs incurred by the claimants in relation to the bank guarantee they had provided to secure payment of the 2005 fine during the excessively long proceedings (material harm) and € 10,000 and € 6,000 to Gascogne and Kendrion respectively for non-material harm suffered (see VBB on Competition Law, Volume 2017, No. 2). These GC judgments are noteworthy insofar as they mark the first time the EU has been ordered to pay damages for the excessive length of judicial proceedings.

Both the claimants and the EU lodged appeals, or cross-appeals, against the GC judgments. The latest ECJ judgments set aside the decisions by the GC to award compensation for material damages suffered by the claimants as a result of the GC's original breach of its obligation to adjudicate within a reasonable time, and dismisses the claimants' appeals on all points.

In its judgments, the ECJ considered that the GC had failed to establish that the third condition for non-contractual liability had been met – i.e., that there was a sufficient causal link between the breach of the obligation to adjudicate within a reasonable time and the damage resulting from the payment of bank guarantee fees during the period by which the reasonable time was exceeded. The ECJ noted that when a decision requiring the payment of a fine is coupled with the option of lodging a security pending the outcome of an action brought against that decision, the loss consisting of the guarantee fees results from the interested party's own choice to provide such a guarantee rather than fulfil its payment obligation immediately.

With this in mind, the ECJ held that the decision to provide and maintain a bank guarantee is a matter for which the undertakings concerned have discretion in light of their financial interests. Therefore, although the GC breached its obligation to adjudicate within a reasonable time, and the claimants suffered material damage in connection with said breach, it could not be established that the breach was the determining cause of the damage suffered by the claimants.

Furthermore, the ECJ judgments address Kendrion and Gascogne's appeals relating to the GC's alleged miscalculation of non-material damages awarded, dismissing these in their entirety. Specifically, the ECJ upheld the GC's decision to award symbolic damages of € 10,000 and € 6,000 for non-material harm suffered as a result of the uncertainty created by the excessive length of the original proceedings before the GC. In so finding, the ECJ ruled that although the length of the original proceedings was not justifiable, once the GC has established the existence of damage, it is the GC alone that has jurisdiction to assess the means and extent of compensation for that damage. Therefore, insofar as the GC's decision on damages for non-material harm was sufficiently reasoned and based on clear criteria, there was no basis for alleging that the GC had erred in law in only granting symbolic damages.

European Commission issues Decision on rules for processing of personal data in competition investigations

On 5 December 2018, the European Commission ("Commission") adopted a decision laying down the rules relating to the processing of personal data by the Commission in the field of competition (the "Decision"). The main purpose of the Decision is to set out the conditions under which the Commission may restrict the application of certain data subjects' rights in the context of competition investigations.

The Decision allows the Commission to restrict data subjects' rights where the exercise of these rights and obligations would jeopardize the purpose of the Commission's investigative and enforcement activities, including by revealing its investigative tools and methods. Where the personal data were obtained through another EU institution, authorities of Member States or third countries, or international organizations, the restriction of data subjects' rights may apply where the exercise of these rights could be restricted by the said institutions/authorities/organizations or where it would jeopardize the Commission's cooperation with third countries or international organizations in competition investigations.

These restrictions of data subjects' rights will continue to apply as long as the reasons justifying such restrictions remain applicable. Once they cease to apply, the restrictions will be lifted and the data subject will be provided with the reasons for the restrictions.

The Decision provides that, at any time, the data subject whose rights have been restricted can lodge a complaint with the European Data Protection Supervisor.

Finally, the Decision states that the Commission will publish on its website data protection notices that inform data subjects of its activities involving processing of their personal data.

New European Commission guidelines facilitate access to antitrust files

On 12 December 2018, the European Commission ("Commission") published two new guidance documents facilitating access to the Commission's files by undertakings subject to antitrust proceedings. These documents are part of the Commission's efforts to increase the transparency of competition procedures, guarantee due process and ensure the undertakings' rights of defence. They follow the Best Practices on Data Rooms as well as the Guidance on confidentiality claims published by the Commission in 2015 and the Recommendations for the use of electronic document submissions published in 2016.

The first new guidance document (available here) covers the use of "confidentiality rings" in antitrust access-to-file proceedings and represents a mere codification of DG Competition's practice based on its experience. A confidentiality ring is defined as a negotiated disclosure procedure through which a restricted circle of individuals is given access to confidential information contained in the Commission's file. According to the Commission, confidentiality rings have the dual purpose of safeguarding the rights of defence, while both respecting the legitimate interest in confidentiality of the information providers and reducing the burden of preparing non-confidential versions of documents.

According to the procedure laid out in the guidance, the party seeking access to information filed with the Commission negotiates with the party that provided the documents to reach an agreement on which individuals should be allowed to have access to the files; these individuals constitute the confidentiality ring. In this context, the Commission plays the role of a facilitator and has discretion to decide whether a confidentiality ring is appropriate in a particular case.

The guidance document is accompanied by a template for a negotiated disclosure agreement which must be signed by all parties in the confidentiality ring. It includes, inter alia, provisions on removing any liability from the Commission in the event that documents are leaked as a result of a breach of the negotiated disclosure agreement by a member of the confidentiality ring. In addition, if counsel for one of the parties breaches the confidentiality ring, the Commission can report such counsel to his or her bar association and recommend that disciplinary action be taken. The destruction of the documents included in the confidentiality ring after a certain time limit is also foreseen.

The role of the Hearing Officer in accessing files is also developed upon in the guidance in the event that an undertaking subject to an antitrust investigation considers that further access to files is necessary for the proper exercise of its right to be heard or where the Commission intends to disclose information that is considered confidential by the information provider.

The second new document (available here) provides guidance on confidentiality claims during antitrust procedures and can be regarded as an updated version of the Commission's 2012 guidance document on business secrets and other confidential information. It provides up-to-date case law references and improved practical information for undertakings claiming confidentiality in antitrust proceedings.

More precisely, this document provides definitions of business secrets and other confidential information, as well as what is not considered to be a business secret or other confidential information. It is made clear that the assessment of whether any given information contains business secrets or other confidential information has to be done on a case-by-case basis. This being said, according to the guidance, all the following conditions must be met for information to be regarded as confidential:

1. such information must be known only to a limited number of persons;

2. its disclosure must be liable to cause serious harm to the person who has provided it or to third parties; and

3. the interests liable to be harmed by the disclosure must be objectively worthy of protection.

In addition, the guidance outlines the manner in which non-confidential versions of documents must be submitted. A complete non-confidential version must be provided of each document for which confidentiality is claimed. Redactions must be limited to specific pieces of information; confidentiality cannot be claimed for an entire document or a whole section of it. Reasons must be provided in writing to support each claim for confidentiality, coupled with an explanation as to why the information in question constitutes a business secret or other confidential information, in particular, how the disclosure of this information would cause serious harm to the undertaking. A concise but meaningful non-confidential summary of each piece of information claimed to be confidential must also be submitted.

Importantly, it is expressly provided that in the event of non-compliance with the guidance, the Commission may assume that the submissions/documents do not contain any business secrets or other confidential information and, therefore, that there are no objections to the disclosure of that information.

– OTHER DEVELOPMENTS –

EUROPEAN UNION: On 4 December 2018, the Council adopted the ECN+ Directive which is aimed at granting national competition authorities more effective investigation, decision-making and sanctioning tools so that they can better detect and tackle competition law infringements. The text was approved by the European Parliament in November 2018 (see VBB on Competition Law, Volume 2018, No. 11). The Directive will enter into force twenty days after its publication in the Official Journal and will have to be transposed by Member States into their national legal frameworks within two years of its entry into force.

EUROPEAN COMMISSION: On 30 November 2018, the Commission announced that Cecilio Madero Villarejo, Deputy Director-General in charge of antitrust enforcement, will take over the supervision of mergers as from 1 March 2019. The current Deputy Director-General for mergers, Carles Esteva Mosso, will switch to state aid, a position vacant since Gert-Jan Koopman left. The successor of Cecilio Madero Villarejo for the position of Deputy Director-General for antitrust matters has not yet been named.

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