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GCR GLOBAL COMPETITION REVIEW

Global Competition Review 2017 Law Firm of the Year – Europe

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MERGER CONTROL

– EUROPEAN UNION LEVEL –

Court of Justice upholds General Court ruling in UPS/TNT

On 19 January 2019, the Court of Justice of the European Union ("ECJ") upheld on due process grounds the 2017 judgment of the General Court ("GC") annulling the decision of the European Commission ("Commission") in the UPS/TNT Express merger (Case C-265/17P, *Commission v. United Parcel Service*).

The Commission prohibited UPS' acquisition of TNT Express in January 2013, citing concerns that the operation would have led to a significant impediment to effective competition on the market for the international express delivery of small parcels in fifteen Member States. On 7 March 2017, the GC annulled the decision on the basis that the Commission had infringed UPS' rights of defence (Case T-194/13, *United Parcel Service v. Commission*). Specifically, the Commission was found to have relied upon an econometric model different to that which had been shared with the notifying parties (see VBB on Competition Law, Volume 2017, No. 3).

The ECJ has now rejected the Commission's subsequent appeal. The ECJ held that the Commission had indeed infringed UPS' rights of defence by failing to place UPS in a position in which it could effectively make known its views on the accuracy and relevance of "*all factors that the Commission intends to base its decision on*" – particularly with respect to the econometric models the Commission used in examining how the concentration might affect competition on the relevant markets. According to the ECJ, the Commission must reconcile the "*need for speed*" that characterises EU merger control proceedings with the observance of the notifying parties' rights of defence. In particular, the ECJ noted that the disclosure of the econometric models used by the Commission and the methodological choices underpinning their calculations is fundamental to maintaining the quality and impartiality of the Commission's decisions in merger cases.

Furthermore, the ECJ rejected the Commission's claim that the notifying parties must demonstrate that – but for the procedural irregularity – the decision in question would have been *different in content* in order to justify an annulment. Instead, the ECJ confirmed that an infringement of the rights of defence resulting from a failure to disclose the methodological choices inherent to econometric models constitutes grounds for annulling a Commission decision where the notifying parties can establish that – in the absence of the procedural irregularity – there was "*even a slight chance that* [the notifying party] *would have been better able to defend itself*".

The ECJ's ruling is particularly interesting in light of the pending action for damages brought by UPS before the General Court on 29 December 2017, seeking € 1.7 billion in compensation from the Commission for the loss suffered as a consequence of the acquisition being unfairly prohibited (Case T-834/17, *United Parcel Service v. Commission*).

– MEMBER STATE LEVEL –

AUSTRIA

REWE fined € 212,000 for providing misleading information

On 20 November 2018, the Austrian Cartel Court fined the retail chain REWE Group € 212,000 for providing misleading and/or incorrect information in a merger notification. The judgment concerns REWE's acquisition of 30 stores from competitor Zielpunkt, which the FCA conditionally cleared in 2016, subject to a set of remedies.

These remedies, among other things, required REWE to close one of the group's BILLA stores. When offering this remedy, REWE failed to mention that another BILLA store would be opening imminently on the same street.

This omission created the impression that closing the first BILLA store would help offset the anti-competitive effects of the merger. REWE did not dispute the facts of the case, and the Cartel Court's judgment is final.

This judgment forms part of a growing focus in Europe on procedural violations in the context of merger investigations. In May 2017, the Commission fined Facebook € 110 million for providing incorrect or misleading information during the Commission's 2014 investigation of Facebook's acquisition of WhatsApp (see VBB on Competition Law, Volume 2017, No. 5). Similarly, in July 2017, the Commission issued a statement of objections to GE concerning the GE/LM Wind transaction, alleging that the company omitted critical information concerning GE's research and development activities and the development of a specific product from the original notification (see VBB on Competition Law, Volume 2017, No. 7).

GERMANY

Germany lowers threshold for foreign direct investment screening to protect national security interests

In December 2018, Germany amended its foreign direct investment ("FDI") screening rules. According to the German Foreign Trade Regulation, acquisitions of voting rights in a German company by foreign (non-EU) investors can be screened by the German Federal Ministry for Foreign Affairs and Energy in order to determine if the investment endangers public order or security.

The amendment, which entered into force on 29 December 2018, reduces the threshold for screening FDI from an acquisition of 25% of voting rights to 10% in defence-related businesses and private operators of infrastructure relevant to security – such as electricity, gas, drinking water or telecommunications. Due to the key role the media plays in the functioning of democracy, the media sector has also been added to the list of industries covered by this amendment.

The previous 25% threshold will remain in force for acquisitions in other sectors. In July 2018 (see VBB on Competition Law, Volume 2018, No. 8), two planned acquisitions had already raised concerns about risks to national security, one of which could not be prohibited under the old rules. The German legislation is indicative of a growing movement in Europe to protect key sectors of the economy against potentially risky FDI. For instance, at EU level, a political agreement was reached in November 2018 between the Council, the Parliament and the Commission on the 2017 Commission Proposal for a Regulation establishing a framework for screening of foreign direct investments into the European Union (see VBB on Competition Law, Volume 2018, No. 11; Volume 2017, No. 9).

ABUSE OF DOMINANT POSITION

– EUROPEAN UNION LEVEL –

General Court slightly reduces Slovak Telekom fine to account for European Commission's failure to establish exclusionary effects over limited period

On 13 December 2018, the General Court (the "GC") issued a judgment upholding in large part an October 2014 decision of the European Commission (the "Commission") against Slovak Telekom, in which it found that Slovak Telekom had abused its dominant position by engaging in a constructive refusal to supply and margin squeeze from August 2005 to at least December 2010. However, the GC found that the Commission had failed to establish the exclusionary effects of the margin squeeze for a period of several months at the beginning of the infringement period, leading to a fine reduction of € 776,037 (Case T-851/14, *Slovak Telekom v. Commission*).

Background

Slovak Telekom held a legal monopoly in the Slovakian telecommunications market prior to 2000. By virtue of Regulation 2887/2000 of 18 December 2000 on unbundled access to the local loop, Slovak Telekom was legally required to provide unbundled access to its fixed-line telecommunications network ("local loop") in order to allow other operators to compete.

In the decision under appeal, the Commission had found that Slovak Telekom abused its dominant position following the entry into force of Regulation 2887/2000 by (i) setting unfair terms and conditions in its offer for unbundled access to its local loop, which was characterised as a constructive refusal to supply, and (ii) setting access prices so high that an equally efficient competing operator could not cover its costs to supply retail customers, which was characterised as a margin squeeze.

Alleged failure by the Commission to satisfy the "indispensability" condition for a refusal to supply access

Slovak Telekom contested the Commission's first finding of abuse, arguing that the Commission had failed to prove that access to the local loop was "indispensable" for rivals to compete. The GC dismissed this argument on the grounds that the relevant regulatory framework clearly acknowledged the need for access to Slovak Telekom's local loop in order to allow the emergence and development of effective competition in the Slovak market for high-speed internet services. In light of this finding, it was unnecessary for the Commission to separately demonstrate that such access was indispensable within the meaning of the *Bronner* case law.

Duration of the margin squeeze

With respect to the margin squeeze, the Commission had found that Slovak Telekom's prices from 2005 until 2010 resulted in an abusive margin squeeze, i.e., that the difference between its wholesale and retail prices was either negative or insufficient for an equally efficient competitor to cover the costs incurred to supply the retail market.

Nonetheless, the Commission's analysis in support of this conclusion showed that an equally efficient competitor would have been in a position to achieve a positive margin during the last four months of 2005. Despite this result, the Commission held that this did not affect the finding of infringement because market entry over four months could not be considered as entry on a lasting basis, and that operators consider their ability to earn a reasonable return over a longer period, which extends over several years, when investing in the telecommunications industry.

The GC accepted the Commission's argument that a positive margin did not necessarily disprove an abuse. However, the GC noted that if the margin was positive, the Commission must demonstrate that the application of the pricing practice was likely to have the consequence that it would be at least more difficult for the operators concerned to trade on the market concerned.

The GC considered that the Commission did not demonstrate such exclusionary effects. In this regard, the GC concluded that the mere claim that the operators consider their ability to earn a reasonable return over a longer period cannot constitute such proof. The GC found that such a claim, assuming it is established, is based on a prospective examination of profitability, which is necessarily hypothetical. Moreover, the GC noted that the positive margins appeared at the very beginning of the period under consideration, at a time when no negative margin could yet have been found. In those circumstances, the GC considered that a finding of infringement covering this period infringed the principle of legal certainty because Slovak Telekom would not have been in a position to assess the conformity of its conduct with Article 102 Treaty on the Functioning of the European Union. In this respect, the GC further dismissed the relevance of the Commission's finding, made on the basis of the documents established by the applicant's regulatory department, that Slovak Telekom knew, from 1 August 2005, that the prices for wholesale access at local loop level were squeezing the margins of alternative operators. The GC considered that such information was not sufficient to establish the infringement in the light of positive margins during the period 12 August to 31 December 2005.

Accordingly, the GC annulled the Commission's decision insofar as it found that Slovak Telekom's pricing prior to January 2006 was abusive, and reduced the fine imposed on the parties from € 38,838,000 to € 38,061,963.

European Commission fines Bulgarian Energy Holding Group over € 77 million for abuse of dominant position on Bulgarian gas markets

On 17 December 2018, the European Commission (the "Commission") adopted a decision imposing a fine of € 77,068,000 on Bulgarian Energy Holding ("BEH"), its gas supply subsidiary Bulgargaz, and its gas infrastructure subsidiary Bulgartransgaz (together, the "BEH Group") for infringing Article 102 of the Treaty on the Functioning of the European Union ("TFEU") by foreclosing competitors' access to key gas infrastructure.

BEH is a state-owned company active in the energy sector in Bulgaria. BEH controls several Bulgarian energy companies, including Bulgargaz (the main supplier of gas at the downstream wholesale level in the country) and Bulgartransgaz (the owner of the Bulgarian transmission network and the only storage facility in Bulgaria). According to the Commission's press release, the Commission found that BEH group holds a dominant position on the markets for (i) gas infrastructure and (ii) gas supply.

As regards the nature of the abuse, the Commission's press release notes that the BEH Group foreclosed entry onto the gas supply market in Bulgaria by unduly restricting access to the infrastructure it owned and operated. Bulgartransgaz allegedly leveraged its dominant position on the market for gas infrastructure to protect BEH's position on the market for gas supply. Furthermore, Bulgargaz allegedly hoarded capacity on the only import pipeline bringing gas through Romania to Bulgaria to prevent it from being used by competitors.

The Commission therefore found that, by blocking the access to the domestic Bulgarian gas transmission network, the only gas storage facility and the only import pipeline bringing gas into Bulgaria, the BEH Group prevented potential competitors from entering the market for gas supply in Bulgaria in breach of Article 102 TFEU.

In its own press release, BEH criticized the Commission for refusing its attempts to resolve the case with commitments and no fines. According to BEH, it fully cooperated with the Commission and offered significant concessions, but the Commission rejected these proposals. BEH also distinguished its outcome from that of the cooperative approach of the Commission with respect to other recent antitrust cases related to the natural gas trade in Central and Eastern Europe, an apparent reference to the recent Gazprom settlement that involved no fines being imposed (see VBB on Competition Law, Volume 2018, No. 5).

– MEMBER STATE LEVEL –

DENMARK

Danish Competition Appeals Tribunal upholds decision fining CD Pharma for excessive pricing

On 14 December 2018, the Danish Competition Appeals Tribunal upheld a 31 January 2018 decision of the Danish Competition Authority ("DCA") finding that CD Pharma abused its dominant position on the Danish market by charging excessive prices for the sale of oxytocin, a hormone that acts as a neurotransmitter in the brain and plays an important role in sexual reproduction.

CD Pharma, a pharmaceutical distributor, entered the Danish market in February 2014 following the conclusion of an exclusive distribution agreement with Sigma-Tau, the producer of Syntocinon, an oxytocin drug. Amgros, the pharmaceutical organisation that procures drug supplies for public hospitals in Denmark, put out a tender for Syntocinon for the period of 1 April 2014 to 31 March 2015, which Orifarm, a parallel importer and CD Pharma's only competitor, won.

Orifarm proved unable to procure a sufficient amount of Syntocinon from other countries to cover Amgros' demand, and Amgros bought the residual amount from CD Pharma. During this period (28 April to 27 October 2014), CD Pharma increased its price for a pack of Syntocinon from DKK 45 (approximately € 6) to DKK 945 (approximately € 127), corresponding to a price increase of approximately 2,000%.

The Tribunal upheld the DCA's finding that CD Pharma held a dominant position on the Danish market for the sale of oxytocin on the basis of its very high market share and its exclusive distribution agreement with Sigma-Tau, which guaranteed supply of Syntocinon and provided a competitive advantage in comparison to Orifarm. The Tribunal also considered that the fact that the market is opened to competition every year was not relevant for assessing whether a company is dominant within the meaning of competition law.

As regards the nature of the abuse, the Tribunal further upheld the DCA's finding that CD Pharma abused its dominant position by charging excessive prices. The DCA established that CD Pharma's profit margin amounted to 80-90%, which led the Tribunal to hold that there was an unreasonable relationship between the costs incurred and the price charged.

– OTHER DEVELOPMENTS –

SPAIN: On 20 December 2018, the Spanish Supreme Court upheld a judgment of the Spanish High Court annulling a € 120 million sanction imposed by the Spanish Competition Authority (the "Authority") on Orange, Telefónica and Vodafone for individually abusing their dominant positions in the wholesale markets for SMS and MMS in Spain by charging excessive prices (see VBB on Competition Law, Volume 2017, No. 9). The Spanish Supreme Court rejected the Authority's argument that the High Court lacked competence to review elements of its decision.

CARTELS AND HORIZONTAL AGREEMENTS

– MEMBER STATE LEVEL –

FRANCE

French Competition Authority fines household appliance manufacturers for price-fixing

On 6 December 2018, the French Competition Authority ("FCA") imposed a total fine of € 189 million on six household appliance manufacturers (BSH, Candy Hoover, Eberhardt Frères, Electrolux, Indesit and Whirlpool) for participating in two distinct cartels.

In the first cartel, which lasted from September 2006 to April 2009, the six manufacturers agreed to increase the recommended retail prices of "white products" (i.e., refrigerators, freezers, washing machines, dryers, dishwashers, cooking hobs and stoves, whether built-in or free-standing) sold in specialized retailers, neighbourhood shops or food superstores, by distance selling or through kitchen installers. More specifically, the FCA found that the companies' managers defined the increase in prices and their marketing managers discussed implementation measures. The managers also met regularly to monitor the price increases. These price discussions had an effect on the purchase prices charged by the manufacturers to their distributors because any increase in the recommended retail price led to an increase in the base price (i.e., the price on the basis of which the distributors' purchase price is calculated). The FCA also noted that the companies involved in the infringement covered 70% of the relevant market.

When determining the amount of the fine, the FCA attributed the limited effects of the cartel to the significant bargaining power of distributors and the fact that the Asian producers, which were increasingly present on the market, did not participate in the cartel.

In the second cartel, which was implemented from May to September 2009, five household appliance manufacturers (the six named above, excluding Electrolux) agreed to reduce the cost to the appliance manufacturers of providing kitchens for display by kitchen installers. According to the FCA, this second cartel had a very limited impact on the market.

All the participants in the cartels took part in the settlement procedure. BSH was granted additional fine reductions pursuant to both the leniency program and its enhanced cooperation during the FCA's investigation. The resulting fines imposed by the FCA amounted to: € 56 million on Whirlpool, € 48 million on Electrolux, € 46 million on Indesit, € 23 million on BSH, € 15 million on Candy Hoover and € 1 million on Eberhardt Frères.

HUNGARY

Hungarian Competition Authority imposes fines in bid-rigging case in well-drilling sector

The Hungarian Competition Authority ("GVH") has imposed fines totalling HUF 105 million (around € 330,000) on the well-drilling companies Aquazit Szolgáltató Kft. ("Aquazit"), Drillingwater Kft. ("Drillingwater"), Geo-Sivo Építőipari, Környezetvédelmi Tervező és Kivitelező Kft. and Vikuv Vízkutató és Fúró Zrt. ("Vikuv") for restricting competition in public procurement tenders relating to water well drilling, restoration and utilisation in certain cities in Hungary.

The GVH found that the companies concerned had entered into an anti-competitive agreement whereby they coordinated their bids and agreed on the winner of various tenders. Vikuv, Aquazit and Drillingwater claimed that their cooperation did not violate competition rules on the grounds that Aquazit and Drillingwater belonged to the Vikuv group, as the CEO of Vikuv was the brother-in-law of the majority shareholder of Aquazit and the son-in-law of the main shareholder of Drillingwater. However, the GVH found that, in the absence of other relevant elements of control (such as shareholding), such kinship was not enough to consider that Vikuv legally exercised full and permanent control over the two other undertakings.

ITALY

Italian Competition Authority imposes fines totalling € 678 million on banks for automotive financial services cartel

On 9 January 2019, the Italian Competition Authority ("ICA") published a decision imposing fines totalling around € 678 million on a number of banks for operating a cartel in the sale of financial products in the motor vehicle sector between 2003 and 2017. Two trade associations were also fined.

The companies involved in the infringement were: Banca PSA Italia SpA, Banque PSA Finance SA, BMW AG, BMW Bank GmbH, CA Consumer Finance SA, Daimler AG, FCA Bank SpA, FCA Italy SpA, FCE Bank PLC, Ford Motor Company, General Motor Financial Italy SpA, General Motors Company, Mercedes-Benz Financial Services Italy SpA, RCI Banque SA, Renault SA, Santander Consumer Bank SpA, Toyota Financial Services PLC, Toyota Motor Corporation, Volkswagen AG and Volkswagen Bank GmbH.

The investigation was initiated following a request for leniency filed by Daimler AG and Mercedes-Benz Financial Services Italy SpA. The ICA found that the companies concerned implemented a single, complex and continuous agreement through the exchange of sensitive information concerning their commercial policies relating to financial products for motor vehicles (e.g., coordination of their sales policies and of their consumer credit and finance lease conditions). The ICA found that the exchange of information took place through direct bilateral and multilateral contacts between the banks and through indirect contacts in trade associations.

In calculating the fine, the ICA considered the practice at issue a restriction of competition by object. The ICA took into account only 4% of the companies' value of sales in determining the basic amount of the fine because it considered that the resulting fines were sufficiently deterrent and proportional to the nature of the infringement. The ICA granted immunity to Daimler AG and Mercedes Benz Financial Services Italy SpA, which thereby escaped a fine of over € 60 million.

SPAIN

Spanish High Court annuls € 57.7 million of cartel fines after Competition Authority misses deadline by three days

On 28 December 2018, the Spanish High Court annulled on procedural grounds fines amounting to € 57.7 million which were imposed on eighteen companies active in the cardboard sector, as well as a trade association, for having exchanged commercially sensitive information, coordinated price increases and allocated customers (see VBB on Competition Law, Volume 2015, No. 6).

Under Spanish law, investigations relating to competition law infringements must be concluded within eighteen months from the date on which the investigation is initiated. In this case, the High Court annulled the decision of the Competition Authority in its entirety on the ground that the decision had been notified to the companies concerned three days after the expiry of the deadline for concluding the investigation.

VERTICAL AGREEMENTS

– MEMBER STATE LEVEL –

AUSTRIA

Austrian Cartel Court fines electronics distributor € 288,888 for resale price maintenance

According to an announcement of the Austrian Federal Competition Authority dated 14 December 2018, the Austrian Cartel Court has fined electronics distributor Ingram Micro € 288,888 for engaging in resale price maintenance. The infringement concerned mobile devices such as smartphones, tablets and navigation systems and was found to have lasted from March 2012 until October 2017. Ingram Micro did not dispute the facts of the case. The order of the Cartel Court cannot be appealed.

FRANCE

French Competition Authority imposes fines of € 355,000 on four liquid fertilizer manufacturers and two wholesale distributors for resale price maintenance

On 20 December 2018, the French Competition Authority fined four liquid fertilizer manufacturers (Bertels, Biobizz, Canna France and GHE) and two wholesale distributors (CIS and Hydro Factory/Hydro Logistique) a total of € 355,000 for engaging in resale price maintenance during differing periods between 2010 and 2013. The highest fine of € 152,000 was imposed on Canna France. The lowest fine of € 1,000 was imposed on Hydro Factory/Hydro Logistique following a 99% fine reduction taking into account its financial difficulties. The decision may be appealed to the Paris Court of Appeal.

INTELLECTUAL PROPERTY/LICENSING

– EUROPEAN UNION LEVEL –

General Court offers a mixed review of patent settlement agreements in the pharmaceutical sector in *Servier* case

On 12 December 2018, the General Court ("GC") once again passed judgment on a number of patent settlement agreements in the pharmaceutical sector. It had already reviewed such agreements in September 2016 when it upheld the decision of the European Commission (the "Commission") in the *Lundbeck* case and ruled for the first time that pharmaceutical "pay-for-delay" agreements breach EU competition rules (T-691/14, *Servier and Others v. Commission*, see VBB on Competition Law, Volume 2016, No. 9). In such agreements, an original pharmaceutical manufacturer pays generics producers to stay out of the market.

Background

The Commission imposed total fines of € 427.7 million on Servier and five producers of generic medicines for entering into a series of transactions which allegedly were designed to protect Servier's blood pressure medicine perindopril from generic price competition. According to the Commission, Servier implemented a strategy to exclude competitors and delay generic market entry. The generic rivals were supposedly induced to take part in this scheme by a range of value transfers, including cash payments and market allocation arrangements. The Commission found all parties involved were in breach of Article 101 Treaty on the Functioning of the European Union ("TFEU") because the arrangements at issue constituted, in its view, restrictions of competition both by object and effect. Additionally, the Commission found that Servier had violated Article 102 TFEU by abusing its dominant position on various national markets for perindopril (see VBB on Competition Law, Volume 2014, No. 7).

The GC has now partially annulled the Commission decision in *Servier* and reduced the fine meted out to Servier by more than € 100 million, while annulling completely the fine imposed on generic manufacturer Krka.

Application of Article 101 TFEU by the General Court

The GC made two important pronouncements on the assessment of patent settlement agreements under Article 101 TFEU. First, in light of the protection afforded to intellectual property rights by the Charter of Fundamental Rights along with the presumption of validity attached to patent rights and the significance of ownership rights in such patents, patent settlement agreements that bring litigation to an end should be encouraged and are, in principle, pro-competitive.

However, and second, the General Court added that the picture may change if a settlement agreement does not merely end litigation, but also gives benefits to a generic company as a form of compensation to refrain from entering the market. The GC sided with the Commission's assessment that the agreements between Servier and its generic competitors fell into the category of market exclusion agreements restrictive of competition by object because of the inducements given to the generic companies.

Despite this analysis, the GC reduced the fine imposed on Servier for a specific agreement concluded with Matrix on account of overlaps with other infringements that formed the subject of separate fines. The fine imposed on Krka was annulled in its entirety because the Commission had failed to demonstrate the existence of an inducement by Servier in exchange for Krka's withdrawal from the market.

Application of Article 102 TFEU by the General Court

The GC annulled the Commission's decision to the extent it had found an abuse of a dominant position by Servier on the product market for perindopril. This is because, according to the GC, the Commission defined the relevant product market too narrowly.

First, the GC noted that the Commission wrongly focused on price. This is because the demand for prescription medicines is not driven by cost-conscious patients, but by prescribing physicians who, in choosing a treatment, are primarily guided by therapeutic considerations rather than the cost of treatment.

Second, the GC considered that the Commission wrongly highlighted specific characteristics of perindopril while ignoring the broader category of ACE inhibitors which treat the same condition and may therefore be deemed to be substitutable by prescribing physicians.

Third, the GC stressed the absence of significant differences between efficacy and side effects of perindopril and competing products, which caused treatments to be changed frequently.

Fourth, the GC noted the competitive constraints exercised on perindopril by rival products.

On a broader relevant market, Servier could not be found to be dominant and therefore could not be considered guilty of an abuse of a dominant position.

STATE AID

– EUROPEAN UNION LEVEL –

European Commission to prolong EU state aid rules and launch evaluation

On 7 January 2019, the European Commission (the "Commission") announced its decision to prolong for two years, until the end of 2022, the validity of seven sets of state aid rules that would otherwise expire by the end of 2020. The state aid rules concerned are the following: (i) the General Block Exemption Regulation; (ii) the De Minimis Regulation; (iii) the Guidelines on regional State aid; (iv) the Guidelines on State aid to promote risk finance investments; (v) the Guidelines on State aid for environmental protection and energy; (vi) the Guidelines on State aid for rescuing and restructuring; and (vii) the Communication on important projects of common European interest.

In addition, the Commission announced that it will evaluate the above rules ((i) to (vii)), as well as (viii) the Framework for State aid for research and development and innovation; (ix) the Guidelines on State aid to airports and airlines; (x) the Guidelines on State aid for railway undertakings; and (xi) the Communication on short-term export-credit insur-ance. This evaluation will involve internal analyses by the Commission and public consultations, as well as, in some cases, studies prepared by external consultants or targeted consultations of specific stakeholders. On the basis of the results, the Commission will decide whether to further pro-long or possibly update the rules.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– MEMBER STATE LEVEL –

FRANCE

French Competition Authority adopts guidelines on settlement procedure, with significant differences to the EU procedure

On 27 December 2018, the French Competition Authority ("FCA") published guidelines on the settlement procedure (the "Guidelines"), which aim to provide companies with increased predictability as to the application of the settlement procedure provided for in Article L. 464-2 of the French Commercial Code. The preparation of these Guidelines was announced in October 2017.

The settlement procedure as set out in the Guidelines is beneficial to companies, as it speeds up the procedure, provides certain procedural advantages and allows companies to better predict the level of fines that may be incurred. The procedure is equally beneficial to the FCA as it enables it to adopt decisions faster and save resources.

It is made explicit in the Guidelines that they apply both to anti-competitive agreements and abuses of a dominant position, which distinguishes the French settlement process from the one in place at EU level. They also state that the new settlement procedure and the existing leniency procedure may apply together, which means that a leniency applicant embarking on a settlement process will continue to retain the benefit of its leniency status and the application of the leniency notice.

Companies are entitled to question the FCA about the availability of the settlement process at any given time in the course of a procedure. In particular, the Guidelines provide that companies may contact the investigation services of the FCA to explore the possibility of settlement even before a statement of objections is issued.

After they have received a statement of objections, companies may ask the General Rapporteur to initiate the settlement procedure. If there is an agreement with the investigation services, a settlement report must be adopted within two months of the receipt of the statement of objections. This differs from the settlement procedure at the EU level, where the settlement submission is produced by the settling parties prior to the issuance of a statement of objections by the Commission.

The Guidelines also set out the conditions companies must satisfy in order to qualify for the settlement procedure, which include a declaration whereby the company waives its right to challenge the practices at issue, as well as their legal qualification and imputability. Such a waiver shall cover the materiality of the facts, but also the duration of the practices, their geographical scope and the parties involved. If, at a later stage, the company directly or indirectly challenges the FCA's objections, the FCA Board will consider that the company has renounced the benefit of the settlement. The Guidelines explicitly state that the company's waiver to challenge the objections does not, in itself, constitute an admission of liability for the practices at stake, which is again a major difference compared with the EU system.

The Guidelines emphasize that the General Rapporteur has broad discretion in relation to the opportunity to make use of the settlement procedure. As a matter of principle, only cases where all the defendants agree to settle will benefit from the settlement procedure. The FCA is not in favour of so-called "hybrid cases", where some defendants settle while others challenge the objections, as the advantages of the settlement procedure are generally more limited in such cases.

If the General Rapporteur agrees to initiate the settlement process, preparatory discussions will take place with each of the parties involved, in particular regarding the level of the fines that may be imposed. In this regard, the Guidelines state that the Notice on the setting of fines of 16 May 2011 (the "Fining Notice") is a "relevant point of reference" for the discussions. Following the discussions, the General Rapporteur will make a proposal which will contain the minimum and maximum amounts of the fine. Unlike under EU law, the French settlement procedure does not provide for a predetermined level of fine reduction for settling parties (10% at the EU level). Instead, the reduction is set on a case-by-case basis.

In the course of the settlement discussions, companies may offer commitments in order to alleviate the competition concerns of the FCA. The General Rapporteur will assess whether these commitments are substantial, credible and verifiable.

The settlement report will therefore include: (i) the declaration that the objections are not contested; (ii) any commitments offered; and (iii) the range of the fine. The settlement report will have to be signed by the settling party.

The FCA Board will then assess the case and, if it considers that a fine is appropriate, it will impose an amount within the range provided in the settlement report. If, however, the Board is not convinced that the objections are well-founded or that there are grounds for imposing a fine within the range indicated in the settlement report, it may refer the case back to the investigation services, which will invalidate the settlement report.

An oral hearing before the Board will be held in two stages. A hearing will first take place with all settling parties in order to discuss the objections, the facts of the case and their legal qualification. Complainants may also attend the hearing at this stage and submit observations. In a second stage, each company will be heard individually and will be given the opportunity to comment on the amount of the fine within the range specified in the settlement report.

The Guidelines make it clear that the Fining Notice, even if it may be referred to in the discussions between the companies and the General Rapporteur, does not apply to the Board's decision in the context of the settlement procedure, even though the Board will follow the basic legal criteria and apply the fine ceiling provided for in the French Commercial Code.

The Board will also assess any commitments offered by the companies and provide them with the possibility of improving such commitments if appropriate. The Board may take these commitments into account when setting the fine within the range determined in the settlement report.

GERMANY

German Federal Cartel Office publishes results of sector inquiry into online comparison websites for services

On 12 December 2018, the German Federal Cartel Office ("FCO") published a consultation paper on its sector inquiry into online comparison websites for certain services. The sector inquiry was launched in October 2017 on the basis of the FCO's new competencies in the area of consumer protection. The FCO has the power to carry out investigations, without however having any sanctioning power, regarding consumer protection.

The FCO investigated comparison websites in the travel, energy, insurance, telecommunications and financial services sectors. The sector inquiry revealed a number of practices that may constitute violations of the German Act against Unfair Competition ("UWG").

The consultation paper identified several practices that might mislead consumers. For example, the sector inquiry showed that fees or commissions paid by suppliers may influence the results provided by the comparison portal. It also showed that some portals, instead of genuinely comparing offers, merely reproduce data and/or calculations made by other cooperating portals and that, in some sectors, market coverage was quite poor (less than 50% of all available offers).

Taking into account past and ongoing proceedings for infringements of competition law in the field of online portals (e.g., ASICS, HRS, Booking.com and Amazon Marketplace), the FCO considers that it should be entrusted with the same powers it has for the enforcement of cartel law to also enforce provisions of the UWG. In the view of the FCO, the enforcement of the UWG by private actors is unlikely to remedy the UWG infringements identified in the sector inquiry.

The consultation paper (in German) is available on the FCO's website. Interested parties have until 4 February 2019 to provide comments on the document.

THE NETHERLANDS

ACM adopts guidelines on simplified settlements

On 21 December 2018, the Dutch Authority for Consumers and Markets ("ACM") adopted guidelines on simplified settlements in cases that are subject to fines. The simplified settlement process seeks to avoid long and costly procedures before courts between the ACM and undertakings that infringe competition law.

The ACM has discretion to launch a simplified settlement procedure, provided that all the undertakings concerned in the investigation: (i) admit the infringement of competition law; (ii) have put an end to said infringement; and (iii) accept the fines to be imposed.

In return, the ACM will lower the fines that would normally be imposed by 10%, since it regards the deeper cooperation that takes place in the settlement process as a mitigating factor. The ACM will apply this 10% reduction after its determination of any aggravating or mitigating factors and after the assessment of the maximum amount of the fine. The simplified settlement may take place in parallel to a leniency programme, where both types of fine reduction shall be accumulated, if relevant.

The settlement process starts with the ACM contacting the relevant undertakings separately. Undertakings can also contact the ACM and request a simplified settlement procedure. The ACM will only commence such procedure if the antitrust infringement is sufficiently clear. The ACM will also assess whether the case is eligible for a simplified settlement. This will be the case if the ACM expects concrete efficiency benefits. It will then orally express its views on the alleged infringement and on the applicable fines. The undertakings can, in their turn, reply orally to the ACM's views. The ACM subsequently informs the undertakings about whether its assessment of the case has changed as a result of the undertakings' replies. If the undertakings admit to the infringement of competition law and accept the fines to be imposed, they shall provide to the ACM a written settlement declaration. The ACM then determines whether the declaration meets the applicable requirements. Finally, the ACM adopts a shortened decision which is final.

As long as the ACM has not accepted their settlement declaration, undertakings may terminate the simplified settlement procedure and resort to the default procedure. If one of the undertakings involved objects to the simplified settlement procedure, while the other undertakings accept it, the ACM may decide to terminate the settlement procedure for all undertakings involved.

The ACM commits not to use any information shared by the undertakings in the context of the simplified settlement process against them, nor will this information be available to third parties in potential cartel damages cases. The shortened decision will be published and will contain, inter alia, a description of the infringement, the procedure, the identity of the undertakings involved and the level of the fines.

– OTHER DEVELOPMENTS –

EUROPEAN UNION: On 14 January 2019, the ECN+ Directive was published in the Official Journal (OJ 2019 L11/3). The ECN+ Directive 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 (see VBB on Competition Law, Volume 2018, No. 11). The text was approved by the European Parliament on 14 November 2018 and by the Council on 4 December 2018. Member States now have until 4 February 2021 to implement the Directive.

PRIVATE ENFORCEMENT

– MEMBER STATE LEVEL –

GERMANY

German Federal Court of Justice rules on *prima facie* evidence in follow-on damages claim regarding rail track cartel

On 11 December 2018, the German Federal Court of Justice ("FCJ") overruled a judgment of the Higher Regional Court of Karlsruhe in a follow-on damages action regarding the rail track cartel case. The FCJ held that for quota and client-allocating cartels, the existence of a cartel is not *prima facie* evidence of harm to a claimant, nor that the cartel affected individual purchases. Instead a rebuttable presumption shall apply.

Compared to previous case law of lower courts applying *prima facie* evidence, this ruling significantly improves the position of cartelists defending themselves in cartel damages claims. It illustrates the importance for each party to economically substantiate its respective claims in individual cases.

The legal reasoning of the FCJ suggests that its ruling is not necessarily limited to quota and client-allocating cartels. However, the scope of the judgment is limited to cases that are governed by the law valid until the entry into force of the 9th amendment of the Act against Restraints of Competition ("ARC"), which implemented the EU Cartel Damages Directive. For damages claims that have arisen after 26 December 2016, Article 33a (2) ARC expressly introduced a rebuttable presumption that a cartel results in harm. Nevertheless, the judgment is of great interest for pending cases that are still subject to the former legal provisions, such as the ongoing cartel damages claims in the trucks cartel case.

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