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MERGER CONTROL

– MEMBER STATE LEVEL –

GERMANY

German Competition Authority prohibits merger in cash handling sector

On 18 December 2019, the German Federal Cartel Office (“FCO”) prohibited Loomis’ proposed acquisition of its competitor, Ziemann Sicherheit Holding (“Ziemann”). Loomis and Ziemann are both cash handling service providers. The proposed concentration would have affected the provision of cash to banks and businesses and, in particular, the transport of coins and banknotes to and from customers, cash processing, and ATM refilling and maintenance. According to the FCO, this market is already highly concentrated. The deal would have resulted in a duopoly in several regional markets where the merging parties and market leader, Prosegur, together would have had an 80% market share post-merger. This would in turn have resulted in higher costs for customers of these services and, ultimately, in higher costs for all consumers.

The merging parties offered commitments to address these concerns, including the sale of customer contracts and related infrastructure in the affected regional markets. However, the FCO did not consider these remedies to be sufficient as market tests showed that customers were generally unwilling to change providers.

NORWAY

Norwegian Competition Authority prohibits merger in market for semi-submersible accommodation vessels

On 28 October 2019, the Norwegian Competition Authority (“NCO”) prohibited Prosafe, the leading global producer of semi-submersible accommodation vessels, from acquiring competitor Floatel. Prosafe is Norwegian, whereas Floatel is based in Bermuda and Sweden. Semi-submersible accommodation vessels provide accommodation for workers on oil rigs and similar installations.

The NCO considered that the two companies, both of which lease accommodation units to oil rig operators in Norwegian waters, face little competition from other providers in the relevant geographical market. The NCO defined this geographical market to include the Norwegian continental shelf as well as units operated in British waters as these could easily be moved into Norwegian waters at little cost. The merger of the two leaders in this market would, in the NCO’s view, reduce competition in terms of prices, quality and innovation.

To address these concerns, the parties offered to lease one of their accommodation units to any market operator at a fixed rate under a framework agreement until 31 December 2022. However, the NCO found that this would be insufficient to address its concerns and prohibited the transaction.
ABUSE OF DOMINANT POSITION
– MEMBER STATE LEVEL –

FRANCE

French Competition Authority fines Google for abusing its dominant position in online search advertising

On 20 December 2019, the French Competition Authority (“FCA”) announced that it had imposed a € 150 million fine on Google for abusing its dominant position in the market for search advertising. This is the fourth antitrust fine imposed on Google by a competition authority of the EU in less than three years, after the sanctions imposed by the European Commission in 2017 (Google shopping case – see VBB on Competition Law, Volume 2017, Issue No. 6), in 2018 (Google Android case – see VBB on Competition Law, Volume 2018, Issue No. 7) and in 2019 (Google AdSense case – see VBB on Competition Law, Volume 2019, Issue No. 3).

In this case, the FCA found that Google’s operating rules for its Google Ads advertising platform (the “Rules”) were opaque and applied in an unfair and random manner, which amounted to discrimination.

Any Google search returns two types of results: (i) “natural” results, based on Google’s algorithm and (ii) “sponsored” results, placed above, below or to the right of the “natural” results on Google’s search page. Sponsored results are commercial ads resulting from auctions during which publishers bid on keywords on the Google Ads platform. According to the press release published by the FCA, “The quality of the service offered by the search engine to users depends both on the relevance of the results through referencing but also on the relevance and the value of the paid advertisements displayed. In a competitive market, a search engine is therefore naturally encouraged to ensure the quality of the sites that carry ads.”

However, the FCA found that “Google had an ambiguous behaviour in several aspects: the Rules […] are themselves opaque and difficult to understand, so they give Google discretion to interpret and modify them. In addition, the application of these Rules does not seem to follow coherent principles: thus, some sites have been suspended by Google while others, with similar content, have been maintained. Finally, the internal application of these Rules by Google is also not consistent, as some sites which did not comply with the Rules were offered personalized Google Ads services to increase their exposure”. According to the FCA, Google “showed, at best negligence, at worst opportunism, by displaying a consumer protection behaviour, while developing commercial offers towards editors of sites considered by Google itself as doubtful, with the objective to increase investments in Google Ads (support services)”.

As a result, the FCA imposed a € 150 million fine on Google and ordered it to: (i) clarify its rules; (ii) clarify its procedures for suspending accounts (to prevent abrupt and unjustified suspensions) and (iii) “set up procedures for alerting, preventing, detecting and treating the breaches of its Rules, so that measures to suspend Google Ads sites or accounts are strictly necessary and proportionate to the objective of consumer protection”. To this end, Google must organise training and report to the FCA on its compliance with the FCA’s decision. Google must also make a summary of the FCA decision accessible to French users for a week via its home pages: Google.com and Google.fr.

The full text of the decision is not yet available but the FCA has announced that it will be published on its website.
CARTELS AND HORIZONTAL AGREEMENTS
– EUROPEAN UNION LEVEL –

Court of Justice largely dismisses four appeals in power cables cartel case

In judgments delivered on 14 and 19 December 2019, the Court of Justice of the European Union (the “Court of Justice”) dismissed in their entirety the appeals brought by LS Cable, Brugg Kabel and VISCAS (together with its parent company Furukawa), three manufacturers of power cables, against the judgment of the General Court which had upheld the Commission's decision in the Power cables cartel case. In a fourth appeal, brought by ABB, the Court of Justice partially set aside the operative part of the General Court's judgment in so far as it upheld the Commission’s finding that ABB was liable for an infringement of Article 101 Treaty on the Functioning of the European Union (TFEU) in respect of a collective refusal to supply accessories for underground power cables with voltages from 110 kV and below 220 kV.

On 2 April 2014, the Commission imposed fines totalling € 302 million on eleven producers of underground and submarine (extra) high voltage power cables (together with their respective parent companies) for their involvement in a market-sharing cartel. The Commission found an infringement consisting of two cartels among power cable producers: (i) a domestic cartel (referred to in the decision as the “European cartel configuration”), in which EU producers allocated European Economic Area (EEA) projects amongst themselves and (ii) an international “stay-at-home” cartel, in which the EU producers agreed with non-EU producers to refrain from competing for projects in each other’s home territories (that is, the EU, Japan and Korea) (see VBB on Competition Law, Volume 2014, No. 4). On appeal, the General Court upheld the decision of the Commission and dismissed all of the appeals in their entirety (see VBB on Competition Law, Volume 2018, No. 7). The addressess of this 2018 decision brought further appeals before the Court of Justice.

With respect to the appeal filed by LS Cable, the Court of Justice dismissed each of the three grounds of appeal. In particular, the Court of Justice rejected alleged errors committed by the General Court in relation to: (i) proof of LS Cable’s participation in the cartel; (ii) the application of the public distancing test and (iii) alleged distortion of evidence.

With respect to the appeal lodged by Brugg Kabel, the Court of Justice upheld the General Court’s judgment in its entirety and considered that there was no infringement of Brugg Kabel's rights of defence even though: (i) the information requests and the Statement of Objections had been notified to Brugg Kabel in English, rather than in German and (ii) the access to the non-confidential replies of other addressees of the Statement of Objections had been largely refused. Moreover, the Court of Justice found that there was no breach of the principle of the presumption of innocence in connection with, among other things, the determination of the starting date of Brugg Kabel’s involvement in the infringement.

With respect to the appeal lodged by VISCAS and its shareholder company Furukawa, the Court of Justice found that, even though the situation of the Japanese producers was not the same as that of the European producers (since the Japanese producers only participated in one component of the infringement, i.e., the international “stay-at-home” cartel, while the European producers participated in both components, i.e., the European cartel configuration and the international “stay-at-home” cartel), this difference could be taken into account by the Commission at a stage other than that of the calculation of the basic amount of the fine. According to the Court, it was enough for the Commission to have taken this difference
into account in setting the gravity percentage applied in the calculation of the fine, which was 2% higher for the European producers. The fact that the European producers benefited from a large reduction in their fine (44%) as a result of the calculation of the basic amount on the basis of hypothetical rather than actual EEA sales (i.e., under the methodology set out in point 18 of the Fining Guidelines), which was not compensated for by the 2% difference in the gravity percentage, was ignored by the Court.

Finally, with respect to the appeal lodged by ABB, the Court of Justice considered that an adequate statement of reasons was provided as regards the starting date of ABB’s participation in the infringement and that there was no breach of the principles of equal treatment and presumption of innocence in relation to the starting date of ABB’s participation in the infringement. However, the Court of Justice partially set aside the operative part of the General Court’s judgment in so far as it upheld the Commission’s finding that ABB was liable for an infringement of Article 101 TFEU in respect of a collective refusal to supply accessories for underground power cables with voltages from 110 kV and below 220 kV. According to the Court of Justice, the Commission had confined itself to explaining that the projects covered by the infringement were generally global offers comprising the cables themselves and their accessories, but did not adduce any concrete evidence to support the claim that the collective refusal to supply power cable accessories covered accessories for underground power cables with voltages from 110 kV and below 220 kV. The General Court, rather than ascertaining whether the Commission had established, to the requisite legal standard, that the collective refusal to supply the power cable accessories referred to in the decision covered accessories for power cables with voltages from 110 kV and below 220 kV, effectively relied on that unsubstantiated presumption, while leaving it to ABB to rebut that presumption in respect of accessories. In those circumstances, the Court of Justice ruled that the General Court had failed to have regard to the evidential requirements in finding that the collective refusal to supply the power cable accessories referred to in the Commission’s decision covered accessories for underground power cables with voltages from 110 kV and below 220 kV and, accordingly, partially annulled the judgment.

– MEMBER STATE LEVEL –

HUNGARY

Hungarian Competition Authority imposes fines for bid-rigging on market for provision of specialised bins, vehicles and equipment for waste collection

The Hungarian Competition Authority (“GVH”) imposed total fines of over HUF 860 million (over € 2.5 million) on five undertakings for bid rigging in (mainly EU-funded) public procurement procedures for the provision of specialised bins, vehicles and equipment for waste collection. According to the GVH, the evidence collected in dawn raids established that the undertakings had concerted their offers and agreed on the winner in advance. Three of the undertakings obtained a fine reduction of 30% for cooperating during a settlement procedure and for waiving their right to a legal remedy.

GERMANY

German Competition Authority fines steel manufacturers € 646 million for collusion

According to a press release of the German Federal Cartel Office (“FCO”) dated 12 December 2019, the FCO fined steel manufacturers ThyssenKrupp, Ilsenburger Grobblech and Voestalpine Grobblech, as well as three individuals, a total amount of approximately € 646 million for exchanging sensitive business information and for agreeing on price supplements and surcharges for quarto plates over the period from 2002 to 2016.

Quarto steel plates are used in construction applications, bridges, shipbuilding, boilers and pressure vessels, mechanical engineering, wind towers, pipelines and the offshore industry. The prices of quarto plates are based on a base price and various price supplements for certain quality characteristics and for additional services, as well as surcharges such as scrap and alloy surcharges. The supplements and surcharges accounted for 20%-25% of the final product price.
The FCO found that the steel manufacturers agreed to negotiate only the base price with their individual customers, and not the supplements and surcharges. The companies admitted to the conduct, which was taken into account in the fine calculation. Another manufacturer, Dillinger Hüttenwerke, received full immunity from fines for being the first company to cooperate with the FCO. The companies may still appeal against the fining decisions before the Higher Regional Court of Düsseldorf.

**German car makers fined € 100 million for steel purchasing cartel**

According to a press release of the German Federal Cartel Office (“FCO”) dated 21 November 2019, car manufacturers BMW, Daimler and Volkswagen were fined a total amount of approximately € 100 million for their involvement in a steel purchasing cartel between 2004 and 2013. The anticompetitive practice concerned the purchase of long steel, which is used as raw material for the production of, among other things, crankshafts, connecting rods, camshafts, gear wheels and steering rods.

Representatives of the companies were found to have met regularly with steel manufacturers, forging companies and large systems suppliers. At these meetings, the car manufacturers were found to have exchanged information on uniform surcharges for the purchase of long steel products, thereby eliminating price competition between them. Scrap and alloy surcharges account for a substantial part of the purchase prices for long steel and such surcharges were no longer negotiated individually with the steel suppliers. During the period of infringement, the surcharges were found to have accounted for, on average, approximately one third of the end price of engineering steel, which is the main type of long steel concerned by the decision.

The car manufacturers acknowledged the facts as established by the FCO and agreed to settle. The fining decisions can, however, still be appealed before the Higher Regional Court of Düsseldorf.
VERTICAL AGREEMENTS

– MEMBER STATE LEVEL –

HUNGARY

Hungarian Competition Authority fines alarm system distributors over € 1.5 million for anticompetitive agreements

The Hungarian Competition Authority (“GVH”) fined a supplier of security alarm systems, Paradox Security Systems (“Paradox”), registered in the Bahamas, and two of its Hungarian distributors, Power Biztonságtechnikai Kereskedelmi Kft (“Power”) and Trióda Biztonságtechnika Zrt (“Trióda”), approximately HUF 540 million (over € 1.5 million) for restricting competition in the market for alarm systems and equipment in Hungary over a period of ten years. The GVH found that the undertakings had: (i) prohibited passive exports; (ii) fixed the minimum prices for the instalment of alarm systems, thereby indirectly fixing resale prices and (iii) restricted the online sale of the products by prohibiting the online publication of end-user prices.

The GVH also found that distributors and installers were able to achieve artificially high margins for their sales of Paradox products through these practices, which resulted in higher consumer prices. Moreover, this incentivised distributors and installers to recommend Paradox products to their customers over other brands, which in this case was considered liable to have an effect on consumer behaviour, because consumers usually choose the brand recommended by installers due to the complexity of such products. Trióda obtained a 30% reduction of its fine for admitting its participation in the infringement and voluntarily introducing a compliance programme.

SPAIN

Spanish Competition Authority imposes fines totalling € 77 million on Spain’s two leading TV channel operators for restricting other channels’ abilities to compete for advertising revenue

On 13 November 2019, the Spanish Competition Authority (“CNMC”) fined Spain’s two leading TV channel operators Mediaset and Atresmedia a total of € 77 million for imposing single-branding obligations in their agreements with television advertisers.

The CNMC concluded that the two TV channel operators, which collectively held over 85% of the market share for the sale of television advertising, infringed Article 1 of the Spanish Competition Act and Article 101 Treaty on the Functioning of the European Union by: (i) bundling the advertising spots in their channels which held the highest audience shares with all their other channels; (ii) establishing a minimum advertising quota requiring advertisers to devote a significant percentage of their advertising funds to the TV channel operators and (iii) paying incentives (referred to as “additional premiums”) to intermediate media agencies in the form of retroactive and conditional rebates to increase advertising through their channels. The CNMC considered that these illegal activities enticed advertisers and agencies to consolidate much of their television advertising budget in Mediaset and Atresmedia, limiting other TV channel operators’ abilities to compete on equal terms.

Mediaset and Atresmedia were fined € 38.9 million and € 38.2 million respectively. The CNMC further required both companies to cease their behaviour and adapt their contracts within three months or face further penalties. Both companies have reported that they intend to challenge the decision before the national courts.
Vaillant Group fined € 859,763 for imposing anticompetitive restrictions on authorised repairers of its gas boilers

On 26 November 2019, the Spanish Competition Authority (“CNMC”) imposed total fines of € 859,763 on several companies in the Vaillant Group, suppliers and repairers of gas boilers, for a breach of Article 1 of the Spanish Competition Act for anticompetitive restrictions in contracts concluded with authorised repairers of gas boilers.

The investigation was initiated by the CNMC following a tip reporting the illegal practices through the CNMC’s whistle-blower mechanism. The CNMC concluded that, between May 2004 and June 2018, Vaillant Group companies restricted the activities of those authorised repairers of its gas boilers which were not part of the Vaillant Group. According to the CNMC, the illegal activities consisted of preventing them from rendering their services outside a given territory, fixing their fees charged to end consumers and requiring them to exclusively use spare parts provided or authorised by the Vaillant Group.

The CNMC reduced the fines imposed on the companies due to their active cooperation with the CNMC, as well as for their voluntary termination of the infringement by amending the contracts for the provision of repair services. The final fines were the following: € 819,763 on Red Ofisat, € 20,000 on Saunier Duval Dicosa, € 15,000 on Vaillant and € 5,000 on Vaillant Saunier Duval Ibérica. The companies can challenge the fines within two months following the notification of the CNMC’s decision.

SWEDEN

Swedish Competition Authority issues preliminary injunction against the use of exclusivity provisions in vertical agreements

On 5 December 2019, the Swedish Competition Authority (“SCA”) issued a preliminary injunction against IM WITH BRUCE (“Bruce”), the owner of a so-called “training aggregator” app which offers subscribers access to a variety of fitness studios, prohibiting Bruce from using exclusivity provisions in its agreements with fitness studios in the Stockholm and Gothenburg metropolitan areas, and requiring Bruce to notify fitness studios that existing exclusivity provisions would no longer be enforced.

The SCA concluded that the exclusivity provisions likely infringed Section 2(1) of the Swedish Competition Act, the Swedish equivalent of Article 101 Treaty on the Functioning of the European Union, and that there was a serious risk of lasting harm to competition if the exclusivity provisions continued to be in force until the conclusion of the SCA’s investigation.

A training aggregator app provides app subscribers with access to a wide variety of fitness studios against the payment of a fixed fee. The aggregator does not operate any fitness studios, but instead enters into agreements with the fitness studio operators whereby the app subscribers are allowed to train in the fitness studios without the need to sign a membership agreement. The fitness studios are paid a share of the app’s revenue or a fee depending on the number of app subscribers using the fitness studio. Training aggregator apps are popular in Sweden because they provide their subscribers with the opportunity to train at a wider variety of fitness studios and participate in workout sessions that are not offered in the fitness studio where they are regular members. Over 400 of the approximately 800 fitness studios in Stockholm and Gothenburg have entered into agreements with training aggregator apps.

Three training aggregator apps compete in Sweden, providing their subscribers with access to fitness studios in the Stockholm and Gothenburg metropolitan areas. Bruce has the largest subscriber base, and a share of more than 30% in the market for training aggregator apps in each metropolitan area.

Following a complaint by a competing training aggregator app, the SCA found that Bruce had entered into exclusivity agreements with a significant number of fitness studios, including several particularly popular fitness studios, which prevented these studios from entering into agreements with other training aggregator apps. The SCA determined that the exclusivity agreements were likely to restrict competition and therefore to infringe Section 2(1) of the Swedish Competition Act. It reasoned that the market was characterized by strong network effects as the attractiveness of a training aggregator app for subscrib-
ers depended on its ability to offer a wide variety of training opportunities. Considering Bruce's significant market share, the exclusivity provisions likely would appreciably foreclose competing training aggregator apps since it limited their ability to enter into agreements with fitness studios and to compete for subscribers with an attractive and varied offer of fitness studios. The SCA also found that the exclusivity provisions could not be justified on efficiency grounds, as they were not necessary to protect agreement-specific investments.

The SCA noted that the case concerned a dynamically developing market with newly established market participants. This created a significant risk that the first mover could reinforce and protect its market-leading position through the use of anticompetitive exclusivity provisions in its agreements and would no longer be subject to effective competition even if it terminated its exclusivity provisions at a later point in time. It was therefore justified to issue a preliminary injunction against the use of exclusivity provisions pending the conclusion of the SCA's full investigation.
INTELLECTUAL PROPERTY/LICENSING

– EUROPEAN UNION LEVEL –

European Commission rejects complaint lodged by the Polish Association of Lighting Industry against Philips’ Patent Licensing Program

On 25 October 2019, the European Commission published a non-confidential version of its decision to reject a complaint lodged by the Polish Association of Lighting Industry (the “Complainant”) against Philips and Osram, which are manufacturers and distributors of LED light fixtures as well as components for LED light fixtures. The Complainant had alleged that, on the markets for LED light fixtures and LED components, Philips had (i) breached Article 102 Treaty on the Functioning of the European Union (the TFEU) by abusing its dominant position in connection with its Patent Licensing Program (“PLP”), under which Philips licensed a portfolio of its patents of LED technology; and (ii) restricted competition in violation of Article 101 TFEU by concluding a cross-licensing agreement with Osram.

According to the Complainant, Philips held a dominant position on: (1) the product market for the manufacturing and marketing of all lighting products, irrespective of the manufacturing technology and/or (2) the technology market which was covered by the patents for lighting products. The Complainant considered that the relevant geographic market should have at least a European scope, although it did not rule out that the market could be national.

In its decision, the Commission considered that the definition of the relevant product and technology markets, as well as the geographic market, could be left open since the assessment of the alleged infringements would remain the same under any of the potential market definitions. The Commission also found that it was unlikely that Philips held a dominant position on any of the proposed relevant markets, as its share on the overall market for lighting products was below 20% and its share of products incorporating the licensed technology under the PLP was unlikely to exceed 40%. The Commission also noted that Philips did not hold any patents that could be considered as essential that might confer upon it a position of market power.

The Commission observed that there was a low likelihood of finding that Philips had infringed Article 102 TFEU by abusing its dominant position on any of the relevant markets. In particular, the Commission noted that: (1) Philips had not unlawfully intimidated, threatened or otherwise engaged in an aggressive market policy against lighting product manufacturers to force them to join the PLP; (2) the reporting obligation imposed by Philips on the manufacturers, under which the manufacturers were contractually obliged to provide Philips with information regarding the value and volume of sales, was not unnecessary or excessive for the purpose of assessing the royalties payable by the licensee and enabled Philips to prevent the unlawful use of its intellectual property rights; (3) Philips had not used the information reported to it under the PLP to claim the licensees’ inventions as its own and (4) Philips was entitled to impose royalties on the basis of the value of the entire lighting product although the patent only covered a part or component of that product (see paragraph 184 of the Guidelines to technology transfer agreements).

The Commission also took the view that there was a low likelihood that the cross-licence agreement between Philips and Osram had an anti-competitive object or effect in breach of Article 101 TFEU. In particular, the Commission did not agree with the Complainant that the cross-licence agreement had the objective to exchange patent and sensitive information about the companies’ technological solutions, which allegedly reduced the level of competition between the two companies. The Commission also found that: (1) the cross-licence agreement was a legitimate way of ensuring the non-assertion of patents between the undertakings; and (2) the terms of the cross-licence agreement did not appear to be anti-competitive and discriminatory, nor did it give rise to the unlawful exchange of sensitive information.
On this basis, the Commission rejected the Complaint as it concluded that, in its discretion to set enforcement priorities, there were insufficient grounds for conducting a further investigation into the alleged infringements.

– MEMBER STATE LEVEL –

FRANCE

French court rules it has jurisdiction over an anti-anti-suit injunction claim in the context of a FRAND dispute

On 8 November 2019, the Paris Court of First Instance (Tribunal de Grande Instance) (the “French Court”) issued a judgment for a preliminary injunction in a case pitting IPCOM GmbH & Co. KG (“IPCom”), an intellectual property rights licensing and technology R&D company, against Lenovo/Motorola (“Lenovo”), a telecommunications company. The French Court held that it had jurisdiction over the case with regard to a patent infringement claim and ordered Lenovo to withdraw the motion for an anti-suit injunction which that company had brought before the US District Court of the Northern District of California (the “US Court”) in so far as it concerns the French part of the patent.

In 2007, IPCom acquired a number of patents related to the 2G, 3G and 4G mobile telecommunications technology and, in particular, EU patent EP 1 841 268 B2 (the “Patent”) which concerned “access of a mobile station to a random access channel in dependence of its user class”. The Patent was declared essential by English Courts. IPCom had provided a fair, reasonable and non-discriminatory (“FRAND”) undertaking on the Patent to the European Telecommunications Standards Institute (ETSI) and offered a licence to Lenovo, which manufactured and sold products using the Patent. IPCom requested Lenovo to clarify its intentions as regards the proposed offer by 15 March 2019.

In response, on 14 March 2019, Lenovo brought suit against IPCom before the US Court in order to obtain a global FRAND rate. On 18 September 2019, Lenovo requested the US Court to issue an injunction against IPCom aimed at prohibiting IPCom from filing proceedings in jurisdictions other than the United States based, inter alia, on the Patent (that is, an anti-suit injunction), such as the one initiated in France.

On 28 October 2019, IPCom then filed the above-mentioned request for a preliminary injunction with the Paris Court of First Instance requesting the French Court to order a withdrawal of the motion for anti-suit injunction which Lenovo had brought before the US Court (that is, an anti-anti-suit injunction).

In its judgment, the French Court rejected Lenovo’s claim that it did not have jurisdiction because proceedings on the same subject matter had been initiated in parallel before a US Court (that is, there is no situation of international lis pendens). According to the French Court, the case pending before the US Court concerned an action in chief, whereas the request in France concerned a preliminary injunction. In addition, the French Court found that the subject matter in the US case (i.e., a motion for an anti-suit injunction in a dispute over the conditions of a FRAND licence) differed from the one in the French case (i.e., maintaining the freedom of action and the exercise of the exclusive rights of the patent holder).

According to the French Court, the international French public order does not recognise the validity of an anti-suit injunction, except where its purpose is to enforce a contractual jurisdiction clause or an arbitral clause. Under all other circumstances, anti-suit injunction proceedings have the effect of indirectly disregarding the exclusive power of each sovereign state to freely determine the international jurisdictional competence of their courts.

In light of the above, the French Court concluded that IPCom should be granted the anti-anti-suit injunction but only insofar as it concerns the French part of the Patent. The French Court also ordered Lenovo to withdraw the pending request before the US Court for an anti-suit injunction, under a daily penalty of EUR 200,000 per violation and to abstain from filing a similar anti-suit injunction in the future.

GERMANY

German court rules on scope of negotiation obligations for FRAND licensing

On 30 October 2019, the Higher Regional Court of Karlsruhe (the “Court”) ruled on the nature and extent of fair, reasonable and non-discriminatory (“FRAND”) licensing
principles as set out by the Court of Justice of the European Union (“CJEU”) in *Huawei v. ZTE* (see VBB on Competition Law, Volume 2015, No. 7). The case involved mobile phone producer Wiko and patent holder Philips. The patent at issue related to a method for priority-based queuing and assembling of data into packets (so-called “multiplexing”) used in mobile communications, which had been designated as a Standard Essential Patent (“SEP”).

In the present appeal, the Court partially overturned a Regional Court judgment from November 2016 that had granted Philips’ request for injunctive relief and a recall and removal from the market of Wiko’s products. At the same time, the Court confirmed that Philips was entitled to damages and, accordingly, ordered Wiko to supply data concerning its commercial partners and its turnover.

The Regional Court had held that, by failing to reply to Philips’ written infringement alert in a timely manner, Wiko showed that it had no interest in negotiating a licensing agreement. Philips had sent an infringement alert to Wiko on 28 July 2015, including a licence offer. Wiko replied on 21 October 2015, two days after Philips had filed for an injunction. Wiko later sent a counter licence offer and argued that Philips’ action constituted an abuse of a dominant position. The Regional Court dismissed the abuse of dominant position argument.

At the outset, the Court confirmed that holders of SEPs must observe specific information obligations vis-à-vis willing licensees in order to avoid infringing Article 102 TFEU. Furthermore, the Court held that the date on which a court action is brought is not a cut-off date for complying with information obligations under the *Huawei* framework.

The Court confirmed that the sale of Wiko’s products infringed Philips’ patent. However, according to the Court, Philips’ claims for injunctive relief were not enforceable on the ground that its conduct may constitute an abuse of a dominant position under Article 102 TFEU. The Court found that Philips was dominant in the relevant market as the owner of SEPs since compliance with the standard is a mandatory requirement to have access to the market for LTE-enabled mobile communications devices. As such, Wiko could raise the abuse of dominance argument in defence of Philips’ action for injunctive relief.

In order for an action for injunctive relief not to be considered as abusive, the holder of an SEP must comply with specific conditions which seek to ensure a fair balance between the interests concerned as set out by the CJEU in its *Huawei* judgment. The exercise by the SEP holder of its intellectual property rights through the filing of an injunction may be characterised as abusive if those proceedings may prevent products manufactured by competitors, and which comply with the standard in question, from appearing or remaining on the market. This is the case if the SEP holder either refuses to grant licences on FRAND terms or does not comply with the obligations which ensure a fair balance between the interests concerned. Importantly, the Court did not assess whether Philip’s licence offer was, in fact, FRAND-compliant.

In order for an action not to be regarded as abusive, the following conditions must be fulfilled:

1. the SEP holder must alert the alleged infringer of the infringement prior to such proceedings, by designating the SEP and specifying the way in which it has been infringed (i.e., infringement alert);

2. after the alleged infringer has expressed its willingness to conclude a licensing agreement on FRAND terms (i.e., licensing request), the SEP holder must present to the alleged infringer a specific written offer for a licence on FRAND terms, specifying, in particular, the amount of the royalty and the way in which that royalty is calculated;

3. if the alleged infringer does not accept the offer, it may rely on the abusive nature of an action only if it has submitted to the SEP holder a specific counter-offer that corresponds to FRAND terms promptly and in writing;

4. if the alleged infringer used the SEP before the conclusion of a licensing agreement, the alleged infringer must provide appropriate security and offer information on how the SEP was used.

According to the Court, although Philips did not categorically refuse to grant a licence on FRAND terms, Philips had not fully complied with its negotiation obligations.
The Court specified that the period between the ‘infringe-
ment alert’ and the ‘licencing request’ is relatively short
and, in general, should not exceed two months. In the
present case, although the time between Philips’ ‘infringe-
ment alert’ and Wiko’s ‘licencing request’ exceeded two
months, the Court ruled that Wiko’s negligence could be
remedied during the course of litigation and that the fil-
ing of an injunction does not constitute a cut-off date for
complying with information obligations under the *Huawei*
framework. Wiko was found to have demonstrated its will-
ingness to conclude a licensing agreement both before
the Regional Court and before the Higher Regional Court
of Karlsruhe. Moreover, Philips was found not to have ful-
filled its obligations to provide the relevant information
regarding the licence offer.

According to the Court, under the principles set out in
*Huawei*, the SEP holder is required, as part of its nego-
tiation obligations, to provide information enabling the
implementer to determine whether the licence offer is
indeed on FRAND terms. While this obligation does not
generally involve the disclosure of the full content of all
licence agreements concluded with third parties, it does
require the implementer to be in a position to assess if,
and why, it is being treated differently.

Insofar as the SEP holder has already granted licences
to third parties, the SEP holder must provide information
with regard to the ‘non-discriminatory’ criterion. If there is
a standard licensing undertaking, it will be sufficient to lay
out the conditions of that undertaking and to demonstrate
the compliance of the offer with that undertaking. If, on the
other hand, the SEP holder has third-party licence agree-
ments with different licensing conditions, it is required to
explain the essential licensing terms of those agreements
in such a way that the potential licensee can understand
to what extent, and for which reasons, it is being treated
differently.

Philips was found not to have complied with this informa-
tion obligation as it had not provided any adequate expla-
nation of the essential terms and conditions of the licence
agreements concluded with third parties. The Court found
that Philips had granted a licence agreement to a third
party in exchange for a one-time lump sum payment.

Accordingly, the Court overturned the lower court’s
judgment and only granted the request for damages. It
also ordered Wiko to supply information on the turnover
achieved with the various devices using the patent at issue
to allow the calculation of damages.
LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– EUROPEAN UNION LEVEL –

Vestager plans review of EU’s market definition rules

On 9 December 2019, Commissioner and Executive Vice-President Vestager announced that the time has come for the Commission to review its approach to market definition. The principles governing market definition are currently set out in the Notice on Market Definition adopted in 1997. Since then, the past few decades have seen important changes in the way markets work, brought about by globalisation and digitisation.

Following the advice of independent competition economists, the Commission will look, for example, at the impact of digitisation on product markets – with the proliferation of free services and multi-product ecosystems – on long-standing market definition concepts, including the “SSNIP test” and product substitution. These issues were already raised in the Commission’s report on competition policy in the digital era, published early 2019 (see VBB on Competition Law, Vol 2019, No 4). In terms of geographic markets, the review will take into account the effect of globalisation, considering competition from outside the EEA, in assessing competitive constraints.

Speaking at a conference on 10 December 2019, Deputy Coordinator of Mergers at DG Competition, Hans Zenger, noted that the review would serve to codify existing updates to the case law and incorporate empirical findings reflecting developments in markets since 1997. In this sense, Zenger made it clear that “one should not expect a revolution out of such a process”.

– MEMBER STATE LEVEL –

FRANCE

French Competition Authority will have access to data from electronic communication operators in order to investigate anticompetitive practices

On 2 December 2019, the French Competition Authority (“Autorité de la concurrence” or “ADLC”) published Decree 2019-1247 (“the Decree”) implementing the Law of 22 May 2019 relating to the growth and transformation of companies (the so-called “PACTE Law”). The PACTE Law inserted a new provision in the French Commercial Code (Article L. 450-3-3) granting the ADLC new powers to investigate anticompetitive practices by accessing data from electronic communication operators.

In practice, the ADLC may submit a request for access to connection data of telephone operators to a new authority, the “Connection Data Request Supervisor” (the “Supervisor”), and would then be able to access information, such as the telephone numbers called by a specific person, the date and time of the call, and its duration, in order to determine whether anticompetitive practices have been implemented.

To ensure due process, the Supervisor will be a member of the French Administrative Supreme Court (“Conseil d’État”) or a judge of the French Supreme Court (“Cour de cassation”). Additionally, in order to receive access to connection data, the ADLC must show: (i) indications of an infringement or breach of competition law and (ii) a need to access such connection data for the purposes of the investigation. The Decree implementing the PACTE Law also specifies the procedure for communicating the connection data and, in particular, sets out the documents that must be provided by the ADLC in support of a connection request, as well as the arrangements for storing and subsequently destroying the data in question.

The procedure for accessing connection data will become operational as soon as the Supervisor is appointed.
GERMANY

**German Federal Court of Justice confirms FCO’s practice of mentioning companies by name in publications relating to competition law infringements**

On 8 October 2019, the German Federal Court of Justice ("FCJ") rejected an appeal against the refusal of leave to appeal on points of law lodged by an unnamed asphalt company, thus confirming the practice of the German Federal Cartel Office ("FCO") of mentioning companies by name in its decisions.

In December 2018, the FCO fined asphalt producer Gaul around € 1.4 million for collusion, while another company received immunity from fines due to leniency. A former subsidiary of Mitteldeutsche Hartstein-Industrie ("MHI"), the applicant’s legal predecessor, was also under investigation, but was not fined.

In a press release issued on 10 December 2018, the FCO mentioned that the applicant, a subsidiary of MHI, had participated in the anticompetitive conduct, noting however that the proceedings were discontinued due to the lack of effective legal succession. A revised version of the press release dated 14 December 2018 no longer mentioned the participation of the MHI subsidiary in the conduct. Instead, it only stated that proceedings were conducted against the subsidiary but that they were discontinued due to the (then existing) legal loophole known as the "sausage gap", which allowed companies to escape fines by restructuring. As a consequence, the scope of the MHI subsidiary’s participation in the infringement would not be subject to further clarification. Yet, following the adoption of its decision, the FCO published a case summary in which the participation of the MHI subsidiary in the conduct was reported among the facts in support of the infringement decision.

The MHI subsidiary requested that the FCO be ordered to: (i) remove from the infringement decision any findings concerning its participation (or that of its legal predecessors) in the conduct; (ii) refrain from publishing a case summary mentioning it (or its legal predecessors) in connection with the conduct and (iii) replace the press release of 14 December 2018 with a statement according to which it (or its legal predecessors) had not been involved in the conduct at all.

The Higher Regional Court of Düsseldorf had rejected the action. The FCJ upheld the Higher Regional Court’s decision and confirmed that naming the companies involved in the infringement does not violate the presumption of innocence and fosters follow-on damages claims by customers against those companies.

**German Federal Ministry for Economic Affairs and Energy publishes industrial strategy paper**

On 29 November 2019, the German Federal Ministry for Economic Affairs and Energy published an industrial strategy paper detailing the preferred strategy to increase the competitiveness of German and European industries. The paper reiterates the call for modernising EU competition rules jointly expressed with France and Poland in July 2019 (see VBB on Competition Law, Volume 2019, No. 7). This is of particular interest in view of the upcoming German presidency of the Council of the EU starting in July 2020.

The first pillar of the strategy is aimed at: (i) reducing burdens on companies with regard to taxation and production costs; (ii) improving infrastructure and the circular economy and (iii) reforming competition law. The 10th amendment of German competition law is upcoming, but still remains at an early stage of the legislative process. It contains, among other things, plans to regulate powerful digital companies (see VBB on Competition Law, Volume 2019, No. 11).

The second pillar of the strategy focuses on strengthening new technologies and innovation, while the third pillar aims to protect technological sovereignty. With regard to technological investment, the paper suggests funding game-changing technologies and supports a review of EU state aid rules. Concerning foreign direct investment, the paper recommends increased scrutiny for critical industries. The strategy paper advocates for EU merger review to include an analysis of global competition faced by merging companies.
### THE NETHERLANDS

**Dutch Competition Authority imposes a fine of € 1.84 million for obstruction of dawn raid**

On 11 December 2019, the Dutch Authority for Consumers and Markets (“ACM”) imposed a fine of € 1.84 million on an unidentified undertaking for obstructing the ACM’s dawn raid which was carried out in 2018.

In its decision, the ACM describes how, in the morning of the dawn raid at issue, an ACM official first demanded the cooperation of two employees of the undertaking involved. Upon their arrival, and at the request of the ACM official, the employees handed over their business mobile phones to the ACM official. The ACM found that one of these employees had left several (internal) WhatsApp groups just before handing over his mobile phone. Shortly after this event, other employees also deleted WhatsApp chats and left related WhatsApp groups.

Dutch administrative law requires the full cooperation of an undertaking with the ACM, as can reasonably be demanded by it, and within the period established by the ACM.

In its decision, the ACM states that it was still unable to access a number of WhatsApp groups or chats. The ACM further explains that due to the undertaking’s failure to fully cooperate, it could not assess whether these sources contained any relevant information for its investigation, nor whether evidence had been destroyed. Although the undertaking involved argued that the ACM could access the information in another way, the ACM states that this is of no relevance for its assessment of an undertaking’s duty to cooperate under Dutch administrative law.

The ACM found that the undertaking breached Dutch administrative law by obstructing the ACM’s investigation, and it consequently imposed a basic fine of € 2.3 million. Given the undertaking’s cooperation in the aftermath of the events, the fine was reduced by 20%.

The ACM will only reveal the identity of the undertaking once the underlying investigation is completed.

### Dutch court revokes € zero fine and rules that no administrative fine should have been imposed

On 17 February 2017, the Dutch Authority for Consumers & Markets (“ACM”) imposed a fine of € zero on a *de facto* manager of an undertaking which had infringed competition law since the manager, together with the company, had successfully applied for leniency. The ACM had initially established a € 170,000 fine before applying a 100% leniency discount. The *de facto* manager lodged an administrative appeal against the decision. On 20 June 2017, the ACM rejected the appeal.

The *de facto* manager subsequently lodged a judicial appeal against the ACM’s decision. On 3 May 2018, the Rotterdam District Court (“District Court”) held that the *de facto* manager had no interest in the appeal proceedings and, as a result, ruled that the appeal was inadmissible. The *de facto* manager subsequently appealed the District Court’s judgment.

On 30 July 2019, the Dutch Trade and Industry Appeals Tribunal (“Appeals Tribunal”) set aside the District Court’s judgment. The Appeals Tribunal held that the ACM does not have the authority under Dutch law to impose a fine of € zero. The Appeals Tribunal further ruled that the imposition of a zero € fine on the *de facto* manager had rendered the *de facto* manager an interested party, since he was the direct addressee of the decision. The Appeal Tribunal also ruled that the *de facto* manager could have an interest in bringing an action, at least insofar as it concerned the ACM’s finding of the existence of an infringement and the identification of the infringers. The Appeals Tribunal thus annulled the 2018 judgment and referred the matter back to the District Court.

On 12 December 2019, the District Court held that the *de facto* manager had infringed competition law, and ruled that the ACM correctly calculated the fine of € 170,000 before applying the leniency discount. In following the decision of the Appeals Tribunal, it nonetheless revoked the fine of € zero, and held that the ACM should not have imposed an administrative fine on the *de facto* manager.
EUROPEAN UNION: On 11 December 2019, the European Commission appointed Mr Olivier Guersent as Director General of DG Competition. Mr Guersent was formerly Director General of DG Financial Stability, Financial Services and Capital Markets Union (FISMA). He has held various positions within the European institutions since 1992, including within the cabinets of various European commissioners and the services of DG Competition.
PRIVATE ENFORCEMENT

– EUROPEAN UNION LEVEL –

ECJ rules that a public body indirectly affected by a cartel may claim compensation for losses resulting from an antitrust infringement

On 12 December 2019, the Court of Justice of the European Union (“ECJ”) delivered a judgment on a request for a preliminary ruling from the Austrian Supreme Court (C-435/18, Otis and Others v. Land Oberösterreich and Others). The request was made in the context of a compensation claim brought by the Province of Upper Austria (Land Oberösterreich) against five companies active on the market for the installation and maintenance of lifts and escalators. The participation of those companies in a price-fixing cartel had been established in 2007, when the European Commission imposed fines on various undertakings for having participated in cartels for the installation and maintenance of lifts and escalators in Belgium, Germany, Luxembourg and the Netherlands.

The Province of Upper Austria had not been harmed by the cartel as a supplier or as a customer. Rather, it provided subsidies in the form of low interest rate loans for the purpose of financing residential construction projects. Because the amounts of the loans were calculated as a percentage of the construction costs, the applicant contended that increased construction costs led it to grant higher subsidies than if the cartel had not occurred. Therefore, the Province of Upper Austria had been deprived of part of its budget which it could have used to more profitable ends.

However, under Austrian law, rules governing compensation for material losses exclude compensation for losses suffered by persons who do not operate as suppliers or as customers on the market affected by the cartel. As a result, the Supreme Court of Austria interrogated the ECJ as to whether compensation for losses should also be available under national law to persons who are not active as suppliers or customers on the market affected by a cartel.

In its ruling, the ECJ first recalled that Article 101 Treaty on the Functioning of the European Union (TFEU) produces direct effects in relations between individuals and confers the right to request compensation on any person who has suffered loss caused by an infringement of competition law, where there is a causal link between the loss and the competition law infringement.

Second, the ECJ considered that national rules applicable to procedures for exercising that right to compensation must not undermine the effective application of Article 101 TFEU. It further found that the effective application of EU competition rules would be seriously undermined if the right to compensation for losses caused by a cartel was restricted to suppliers and customers on the market affected by the cartel. Furthermore, participants in a cartel would be able to avoid compensating all the losses they have caused.

In the case at hand, the restriction provided for by Austrian law relating to compensatory loss resulted precisely in excluding compensation for the loss alleged by the Province of Upper Austria, since the latter was neither a supplier nor a customer on the market affected by the cartel.

The ECJ concluded that persons not acting as suppliers or customers on the market affected by the cartel must also be able to claim compensation for loss resulting from the fact that, as a result of said cartel, they granted higher subsidies than if the cartel had not existed and were deprived of the possibility of putting that difference to better use.

– OTHER DEVELOPMENT –

EUROPEAN UNION: On 28 November 2019, EU national ministers approved a proposed directive on collective consumer actions (the “Proposal”). The Proposal was published by the European Commission on 11 April 2018 as part of its New Deal for Consumers. It aims at allowing groups of consumers harmed by mass illegal practices – such as competition law infringements – to initiate collective proceedings and seek compensation. Simultaneously, the Pro-
Proposal seeks to avoid issues often associated with US class actions, by establishing a ‘loser-pays principle’ and only allows claims to be initiated by eligible representative entities, such as consumer organisations. The Proposal is now set for the final stages of negotiations with the European Commission and the European Parliament.
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