February 2019

VBB on Competition Law

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MERGER CONTROL

– EUROPEAN UNION LEVEL –

European Commission stops Siemens' Alstom deal in its tracks

On 6 February 2019, the European Commission ("Commission") prohibited Siemens' proposed acquisition of Alstom under the EU Merger Regulation. The deal would have combined Siemens' and Alstom's transport equipment and service activities in a new company fully controlled by Siemens.

According to the Commission, the merger would have harmed competition for railway signalling systems and very high-speed trains. These types of trains operate at speeds of 300 km per hour or more and are used on routes such as the Eurostar between the UK, France, Belgium and the Netherlands. For signalling, the combined entity would have become the 'undisputed market leader' in several mainline signalling markets. Further, the deal would have reduced the number of large manufacturers of very high-speed trains from two to one in the EEA.

In its press release, the Commission cited previous cases where it had accepted structural divestments as a viable remedy to address competition concerns: *Praxair/Linde* (see VBB on Competition Law, Volume 2018, No. 8), *GE/Alstom* (see VBB on Competition Law, Volume 2015, No. 9) and *Holcim/Lafarge* (see VBB on Competition Law, Volume 2014, No. 12). In those cases, the Commission found that the new purchaser would replicate the previous role in the market and maintain effective competition. According to the Commission, however, Siemens/Alstom proposed a 'complex mix' of asset transfers which would not enable a potential buyer of the divested assets to effectively and independently compete in future. Ultimately, the remedies would not have been sufficient to prevent higher prices and less choice for railway operators and infrastructure managers.

The presence (or otherwise) of strong global competitors played a prominent role in the case. In particular, the Commission found that Chinese suppliers had not participated in any tenders for signalling systems in the EEA, and were highly unlikely to represent a competitive constraint on Siemens/Alstom in the supply of very high-speed trains in the foreseeable future.

Reaction to the merger has been mixed. Certain national authorities already shared the Commission's serious competition concerns. On 20 December 2018, the Belgian, Dutch, Spanish and UK competition authorities published a joint letter which highlighted the shortcomings of the remedies offered by Siemens. On the other hand, soon after the prohibition was announced, a joint French-German paper was published calling for a new European industrial policy to favour the promotion of so-called 'European champions' (see PROCEDURE, page 16 below).

European Commission blocks Wieland's proposed acquisition of Aurubis

On 6 February 2019, the European Commission ("Commission") prohibited Wieland's proposed acquisition of Aurubis. Both companies are producers of rolled copper products, a key input for many industries, including for parts used in electric cars, trains and electronic devices.

The Commission's investigation identified two serious competition concerns. First, on the market for rolled copper products, the Commission found that Wieland would become a dominant player with more than a 50% market share and that the transaction would result in higher prices in the EEA. Only one other large player, KME/MKM, had more than 20% market share in the EEA.

Second, the Commission found that serious harm to competition would result on the upstream market for pre-rolled strip, which is used as an input in the manufacturing of rolled copper products. Prior to the deal, Wieland and Aurubis already manufactured pre-rolled copper strips through a 50/50 joint venture named Schwermetall. This upstream joint venture sold pre-rolled copper strips to both Wieland and Aurubis, as well as to other downstream copper manufacturers. In particular, these smaller com-

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petitors need to source a significant part of their pre-rolled copper strip requirements from Schwermetall, as there are no other suitable alternative suppliers. As Schwermetall was responsible for over 60% of European pre-rolled strip sales, the Commission was concerned that, post-transaction, Wieland would be able to raise input costs for smaller competing copper manufacturers and/or gain access to their confidential information. Significantly, the Commission noted that the merger would eliminate Schwermetall's operational independence from its parents (Wieland and Aurubis).

Ultimately, although Wieland offered remedies on two occasions to allay the Commission's competition concerns, these were found to be insufficient. While Wieland had been prepared to divest two plants that manufactured rolled copper products in Germany and the Netherlands, it was not willing to divest Aurubis' 50% stake in Schwermetall. It is noteworthy that while the proposed remedy appeared to allay the Commission's (horizontal) concern on the market for rolled copper products, the Commission still prohibited the deal due to the (vertical) input foreclosure effect on rivals seeking to purchase pre-rolled copper strips.

This is only the twenty-eighth time that the Commission has prohibited a merger since 1990. It has received well over 7,000 notifications during this time.

European Commission issues first ever charge for breaching merger commitment

On 22 February 2019, the European Commission ("Commission") sent a Statement of Objections to Telefónica Deutschland alleging that it breached a commitment offered in order to secure the Commission's approval of its acquisition of E-Plus (see VBB on Competition Law, Volume 2014, No. 7). In particular, in exchange for the Commission approving its deal, Telefónica Deutschland had committed to offer wholesale 4G services to interested players at 'best prices under benchmark conditions'.

The Commission has now formed the preliminary view that Telefónica Deutschland breached the commitment by improperly excluding certain existing wholesale agreements from the benchmark. This meant that third parties did not benefit from better 4G wholesale access conditions and were restricted in their ability to compete against Telefónica Deutschland on the German market for mobile communication services.

The Statement of Objections does not prejudge the final outcome of the investigation.

– MEMBER STATE LEVEL –

GERMANY

German Federal Cartel Office prohibits bearings production joint venture

On 17 January 2019, the German Federal Cartel Office ("FCO") prohibited the creation of a joint venture between Miba and Zollern in the market for the production of hydrodynamic slide bearings. These products are needed for the production of large bore engines used in ships, locomotives and other power generators.

According to the FCO, industrial buyers of hydrodynamic slide bearings would have lost an important alternative supplier if the joint venture had gone ahead. Both Miba and Zollern were major competitors and held strong market positions in an already highly concentrated market. Furthermore, the FCO found that it was complex and costly for industrial buyers to switch suppliers due to the need for intensive and lengthy performance tests before a buyer could switch to a new supplier of hydrodynamic slide bearings. Finally, the FCO considered that market entry by new players was unlikely as such entry would require extensive technological expertise and considerable investments.

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ABUSE OF DOMINANT POSITION

– MEMBER STATE LEVEL –

FRANCE

French Competition Authority orders review and clarification of Google Ads rules

On 31 January 2019, the French Competition Authority (the "FCA") ordered Google to review the rules of its Google Ads service. The FCA's Order follows a complaint by Amadeus, an operator of online enquiry services – such as "a directory that provides call or text numbers for business/ residential listings" – alleging an abuse by Google of a dominant position on the market of online advertisement linked to online searches as well as an abuse of a position of economic dependence.

Amadeus' complaint arose from the suspension by Google of one of Amadeus' accounts in the Google Ads services. When suspending the account Google did not give any prior notice to Amadeus nor did it provide any explanation. It was only three months later that Google explained to Amadeus that the suspension of its account was based on the fact that Amadeus was providing misleading information to customers.

The FCA found that, at this stage of the investigation, it can be concluded that Google is likely to hold a dominant position on the market of online advertisement linked to online searches, in particular because 90% of online searches in France are carried out through its browser. The FCA also found that Google's suspension may amount to an unlawful termination of a commercial relationship based on grounds that were not objective or transparent. Furthermore, according to the FCA, the suspension may amount to abusive discrimination, in particular because some of Amadeus' competitors had published identical advertisements without their Google Ads accounts being suspended. According to the FCA, the suspension may have led to anti-competitive effects given the importance of Google Ads for competition between operators of online enquiry services and the negative effects that the suspension had on Amadeus' turnover and profitability.

In view of the substantial and imminent damage caused to Amadeus by the suspension of its account, the FCA decided to grant interim measures in order to ensure that the application of the Google Ads rules are objective and non-discriminatory.

The FCA therefore ordered Google to:

- clarify the Google Ads rules;
- review the procedure for suspending the accounts of advertisers in the directory enquiry information services sector, providing for a formal warning and sufficient notice to enable advertisers, except in serious situations, to justify, remedy or request explanations for the alleged breach;
- conduct an individual review of the compliance of Amadeus' accounts with the clarified rules, and if this review reveals that these ads are indeed compliant, authorise Amadeus to run its advertising under non-discriminatory conditions; and
- provide training for its sales staff on the content of clarified Google Ads rules so that they can alert advertisers to cases of non-compliance.

GERMANY

German Federal Cartel Office finds Facebook to have abused dominant position and orders amendment of data processing policy

On 6 February 2019, the German Federal Cartel Office ("FCO") concluded administrative proceedings concerning the data gathering practices of Facebook Inc., Facebook Ireland and Facebook Germany (together "Facebook"). The FCO found that Facebook abused its dominant position by making the private use of the Facebook social network ("Facebook.com") by users residing in Germany contingent upon the processing of user and device-related data

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obtained from third-party apps (and those owned by Facebook), and by attributing that information to Facebook.com user accounts without the users' consent.

The FCO found that Facebook used exploitative business terms which both violate the EU General Data Protection Regulation ("GDPR") and constitute an abuse of a dominant position. The FCO prohibited the above practices, which enabled Facebook to build a unique database concerning each individual user that it exploits for advertising purposes, but no fines were imposed. The decision did not assess the processing of data on the use of the Facebook social network itself.

The FCO analysed various online services commonly referred to as "social media" and defined the relevant product market as social networks financed through targeted advertising. The high degree of product differentiation of social media and the various overlaps of their functionalities were key criteria for the market definition. Networks such as LinkedIn and Xing were considered to be designed to meet professional requirements and were thus found to belong to a separate product market. The FCO also considered messaging services such as *WhatsApp* as belonging to a separate market, similar to the approach of the Commission in its *Facebook/WhatsApp* merger clearance decision. The business models of video platform YouTube, image sharing platforms Instagram, Pinterest and Snapchat, as well as micro-blogging and networking site Twitter, although found to have overlaps with social networks, were not considered sufficiently comparable to Facebook. The relevant geographic market was defined as the German national market.

The FCO considered the number of daily active users ("DAU") as the key indicator for assessing a network's market share, on the grounds that a social network's success is measured by intensity of use. On this basis, Facebook's user-based market share among DAU in Germany exceeded 95%. The finding of dominance was also supported by a finding of strong direct network effects. The FCO noted that competitors such as Google+ had exited the market and that there is a downward trend in the user-based market shares of the remaining competitors, while Facebook's market share was stable and indeed growing. The FCO also identified a market-tipping process and a lock-in effect that it considers will contribute to Facebook.com becoming a monopolist. The FCO also considered the barriers to market entry to be very high.

The FCO concluded that Facebook's comprehensive processing of personal data from other corporate services and Facebook Business Tools violates data protection requirements including those contained in the GDPR. According to Article 6 of the GDPR, the processing of data is only lawful if one of the justifications provided for in Article 6 applies. The FCO found that none of the justifications pursuant to Article 6(1) GDPR were met.

- First of all, the FCO examined the issue of consent, because data processing is lawful if the data subject has given valid consent to the processing of its personal data. The FCO found that the users' consent to Facebook's terms and conditions was not voluntary consent within the meaning of the GDPR because it needed to be given as a prerequisite for the use of Facebook's social platform. In this respect, the FCO noted that consent should not be regarded as freely given if the data subject has no genuine or free choice or is unable to refuse or withdraw consent without detriment.

- Second, the FCO examined the necessity of data processing. Data processing is justified under the GDPR if it is necessary for the performance of a contract. The FCO stated that this justification must be interpreted narrowly and could not be met on grounds of efficiency or by providing the customer advantages of a personalised service, as such arguments would entitle a company to unlimited data processing merely on the grounds of its particular business model.

The FCO ordered Facebook to implement the changes necessary to ensure compliance and, in particular, to amend its data and cookie policies within a period of twelve months and to present an implementation road map within four months.

This is the first time that an abuse of dominant position has been based on the infringement of data protection law, although it should be noted that the approach of basing a competition abuse on the infringement of another set of rules is not novel under German law. For example, the German Federal Court of Justice ("FCJ") has established an abuse by using contract terms prohibited by the German Civil Code.

The decision has not yet been published, but a background paper is available on the FCO's website (in English).

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Facebook has announced that it has appealed the decision to the Higher Regional Court of Düsseldorf and has requested that the suspensive effect of the appeal against the above time limits be ordered.

SWEDEN

Swedish Court finds that refusal to grant access to recycling stations infringes Article 102 TFEU

On 21 January 2019, the Swedish Patent and Market Court (the "Court") upheld a decision of the Swedish Competition Authority ("SCA") that required an operator of recycling stations for household waste to extend an agreement with its competitor.

The Swedish Packaging and Newspapers Collection Services ("FTI") is a Swedish non-profit company that owns and operates a nationwide network of recycling stations for household recycling of metals, paper and plastic waste. According to Swedish law, producers of packaging are responsible for gathering and disposing of the waste resulting from their products. Packaging producers therefore pay FTI to cover this obligation.

In 2012, FTI and TMResponsibility ("TMR") reached an agreement for the latter's use of FTI's infrastructure in order to provide competing services. However, FTI unilaterally terminated the agreement in 2016 without citing any reasons.

The Court found FTI to have a dominant position in recycling stations for household waste, noting that other methods to facilitate recycling, such as deposit systems and collection of recycling products at households, are complements to public recycling stations and not in the same market.

The Court held that the termination of the agreement constituted an abuse of FTI's dominant position. FTI's refusal to allow TMR to make use of its recycling infrastructure would risk eliminating effective competition. The Court found that access to FTI's network of recycling stations was essential, as it would be unreasonably difficult for a competitor to establish a parallel, nationwide network of recycling stations given the lack of usable land and the costs of acquiring the necessary land from a large number of private and public actors. The Court therefore agreed with SCA's view that there were no practicable alternatives to using FTI's existing infrastructure.

The Court also rejected FTI's argument that the contract termination was objectively justified. FTI argued that its incentive to invest in the recycling infrastructure would diminish if it had to share it with its main competitor. FTI also maintained that TMR's use of the FTI facilities meant that FTI could not guarantee high environmental treatment standards and that this undermined trust in FTI's brand. While the Court agreed that FTI's incentive to invest may be negatively affected, it pointed out that FTI had not referred to any specific investments which had failed to materialise due to the TMR agreement. Furthermore, although FTI "to a certain extent" had a legitimate interest in being able to exercise greater control over how the recycling is conducted within its system, FTI had not shown that this objective could not be achieved through less restrictive means, such as specific contractual provisions in the TMR agreement.

FTI has since lodged an appeal against the decision before the Patent and Market Court of Appeal.

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CARTELS AND HORIZONTAL AGREEMENTS

– EUROPEAN UNION LEVEL –

European Commission fines Mastercard € 570 million for limiting retailers' access to cross-border card payment services

On 22 January 2019, the European Commission ("Commission") announced that it had imposed a fine of € 570,566,000 on Mastercard for preventing banks from offering lower interchange fees to retailers located in another EEA Member State, in breach of EU competition rules.

Mastercard is the second largest card network in the EEA in terms of the number of consumer cards issued and value of transactions. Mastercard acts as a platform on which the bank of the cardholder (the "issuing bank"): (i) provides cardholders with payment cards; (ii) ensures the completion of the card payment transaction and (iii) transfers funds to the bank of the retailer (the "acquiring bank").

This means that, in practice, when a consumer uses a debit or a credit card in a shop or online, the bank of the retailer pays an interchange fee to the bank of the cardholder. The bank of the retailer then passes this fee onto the retailer, who may add it to the final prices charged to consumers.

According to the Commission, Mastercard obliged the bank of the retailer to apply the interchange fees of the country where the retailer was located. Prior to the introduction of interchange fee caps by the Interchange Fee Regulation in December 2015, the amount of the interchange fees differed significantly from one EEA country to another. As a result, retailers located in countries in which high interchange fees applied could not benefit from the lower interchange fees offered by an acquiring bank located in another Member State. The Commission considered that this conduct led to higher prices for retailers and consumers, limited cross-border competition and artificially segmented the Single Market.

The Commission opened formal proceedings against Mastercard in April 2013 and sent it a Statement of Objections in 2015. In setting the amount of the fine, the Commission took into account several factors, including the value of sales relating to the infringement, the gravity of the infringement and its duration (which ended when Mastercard amended its rules following the entry into force of the Interchange Fee Regulation on 9 December 2015). The Commission also took account of Mastercard's cooperation in the investigation, which led to a 10% fine reduction.

VERTICAL AGREEMENTS

– EUROPEAN UNION LEVEL –

European Commission publishes stakeholder questionnaire as part of evaluation of Vertical Agreements Block Exemption Regulation

As reported in VBB on Competition Law, Volume 2018, No. 11, the European Commission ("Commission") has initiated its evaluation of the Vertical Agreements Block Exemption Regulation ("VABER"), which will expire on 31 May 2022. The Commission's evaluation will inform its decision on whether to allow the VABER to lapse, to prolong its duration or to revise it.

The Commission has now launched a public consultation with a view to receiving comments from stakeholders (such as businesses, industry associations, consumer organizations, academics and law firms) on this issue. Interested parties can contribute to the evaluation by completing an online questionnaire, available at https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-5068981/public-consultation_en%20%before%2027%20May%202019 before 27 May 2019.

– MEMBER STATE LEVEL –

BELGIUM

Belgian Competition Authority fines infrared cabins distributor for resale price maintenance

On 24 January 2019, the Investigation and Prosecution Service of the Belgian Competition Authority (the "BCA") imposed a € 98,000 fine on HM Products Benelux ("HM") for engaging in resale price maintenance ("RPM").

HM imports and distributes infrared cabins of the HealthMate brand in the Benelux. The BCA found that HM had determined the maximum level of discounts which its distributors were allowed to grant to their own customers. Only distributors complying with this cap were allowed to join HM's distribution network. HM also monitored the prices charged by its distributors and threatened to sanction distributors that did not follow the cap. In at least one case, a dealer was warned that its distribution agreement would be terminated if it did not comply with the maximum discount level imposed by HM.

The BCA considered these practices to be a "hardcore restriction" of competition, such that, consequently, there was no need to demonstrate the effects of the relevant practices on the market. The BCA found that the infringement had lasted for 8 years and 6 months.

However, for several reasons, the BCA only imposed a modest fine. First, the BCA decreased the initial (undisclosed) amount of the fine as it exceeded the legal maximum of 10% of HM's turnover in the preceding year (as defined in Article IV.74 of the Code of Economic Law). Second, the BCA further reduced the fine (by an undisclosed percentage) on proportionality grounds, noting that HM is "*a small independent market player which does not belong to a large international group*". Finally, the resulting amount of the fine was again reduced by 10%, since HM agreed to settle the case.

FRANCE

Paris Court of Appeal orders suspension of obligations imposed on STIHL by French Competition Authority

On 23 January 2019, the Paris Court of Appeal ordered the suspension of the obligations imposed by the French Competition Authority on STIHL in its decision of 24 October 2018 (the "Decision"). This order requiring the suspension (the "Order") is to remain in effect until the Court rules on the merits of the appeal filed by STIHL against the finding of an infringement in the Decision.

By its Decision, the French Competition Authority ("FCA") fined STIHL, a German manufacturer of outdoor power tools, € 7 million for imposing what the FCA considered to be a *de facto* prohibition of internet sales on its authorized dealers (see VBB on Competition Law, Volume 2018, No. 11). This *de facto* prohibition resulted from the contractual obligation on authorized dealers to hand over the products in person to the customer at the dealer's premises or at the customer's address. In addition to the fine, the FCA imposed the following specific obligations on STIHL (the

"Obligations") to be implemented within three months: (i) to modify all existing distribution contracts to remove the in-person hand-over requirement; (ii) to send a letter to all distributors informing them of the changes made to their contracts and (iii) to publish extracts of the FCA's decision in French newspapers.

In parallel to STIHL's appeal on the merits of the case to the Paris Court of Appeal, STIHL requested the Court to suspend the Obligations. In the course of the suspension proceedings, STIHL argued that the Obligations were manifestly excessive pursuant to Article L. 464-8 of the French Code of Commerce and developed several pleas to that effect. It also emphasised that there were important uncertainties as to whether the clause requiring products to be handed over in person to customers infringed the competition rules. Notably, it referred to the position taken by other competition authorities (i.e., in Germany, Sweden, and Switzerland) which did not object to the clause.

Interestingly, the representative of the French Ministry of Justice argued in favour of STIHL's position in these proceedings and opposed the FCA's arguments. The President of the Paris Court of Appeal agreed that enforcement of the Obligations would be manifestly excessive and ordered their suspension until a final decision is reached on the merits of the case. In doing so, he relied on the following factors:

- First, STIHL's distribution system would need to be substantially modified to reflect the removal of the hand-over obligation and comply with the Obligations. This would lead to substantial non-recoverable costs.
- Second, although the Obligations applied only to French contracts, it could not be excluded that STIHL would need to modify its contracts across the EU to remove the distortion of competition that could result from French dealers providing different services than dealers elsewhere.
- Third, it could not be excluded that a reduction in the quality of the service provided by dealers (resulting from the removal of the hand-over obligation) could risk triggering the legal liability of STIHL, as well as reputational damage.
- Fourth, suspending the Obligations would not negatively impact public economic policy.

Lastly, there was no urgent need for the Obligations to be implemented within the deadline of three months provided for in the FCA's Decision, and before a decision is reached on merits of the appeal.

GERMANY

German Federal Cartel Office fines bicycle purchasing cooperative ZEG € 13.4 million for retail price maintenance

According to a press release dated 29 January 2019, the German Federal Cartel Office ("FCO") has fined bicycle cooperative Zweirad-Einkaufs-Genossenschaft ("ZEG") and its representatives a total of € 13.4 million for retail price maintenance. ZEG sells bicycles to its members under its own brands, e.g., Pegasus, Bulls und ZEMO, as well as exclusive models of other brands.

The FCO found that ZEG had concluded agreements with 47 bicycle retailers between February 2007 and February 2015, under which ZEG set a minimum retail price for the newest models of the season. ZEG representatives and other retailers monitored compliance with the minimum price. None of the retailers were fined, as the FCO considered their role to have been secondary.

ZEG cooperated with the FCO and reached a settlement. The fining decisions are final.

– OTHER DEVELOPMENTS –

EUROPEAN UNION: The Motor Vehicle Block Exemption Regulation ("MVBER"), which (together with the Vertical Agreements Block Exemption) exempts under Article 101(3) various vertical agreements in the automotive sector, will expire on 31 May 2023. In preparation for this, the European Commission has formally started its evaluation of the MVBER in order to verify the extent to which its objectives are being fulfilled. As a first step, the Commission published a roadmap (i.e., an outline of the scope of the proposed evaluation) on 19 February 2019. The next and more important step in the evaluation process is a public consultation of 12 weeks to be launched in the second quarter of 2020, which will be open to stakeholder groups interested in the evaluation process.

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DENMARK: On 15 February 2019, the Danish court of Næstved imposed a fine of DK 1,000,000 (approximately € 135,000) on hair-product wholesaler Icon Hairspa for imposing minimum retail prices for Kevin Murphy-branded products on its dealers. An Icon Hairspa manager was also fined DK 100,000 for participating in the conduct (approximately € 13,500).

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STATE AID

– EUROPEAN UNION LEVEL –

General Court annuls Commission Decision classifying Belgian "excess profit" tax system as illegal tax scheme

On 14 February 2019, the General Court ("GC") issued a judgment annulling the decision of the European Commission (the "Commission") concerning the Belgian "excess profit" tax rulings (Joined Cases T-131/16 and T-263/16, *Belgium and Magnetrol International v. Commission*).

Under Belgian law, Belgian entities of multinational corporate groups could obtain an advance ruling from the Belgian tax authorities exempting those entities from paying taxes on so-called "excess profits", i.e., the difference between the actual recorded profit of a multinational compared with the hypothetical average profit of a stand-alone company in a comparable situation. On 11 January 2016, the European Commission decided that the excess profit exemption system constituted a state aid scheme that was incompatible with the internal market and unlawful. Hence, it ordered the recovery of the aid from 55 beneficiaries (see VBB on Competition Law, Volume 2016, No. 1).

The GC annulled the decision of the Commission as it found that the Commission erroneously considered that the excess profit exemption system constituted an aid scheme. According to the GC, the acts identified by the Commission as the basis of the alleged aid scheme did not set out all the essential elements of the scheme, nor did they define in a general and abstract manner the beneficiaries of the alleged scheme. Rather, the Belgian tax authorities enjoyed a genuine margin of discretion over all the essential elements of the exemption system, which could therefore not be considered to be an aid scheme.

– OTHER DEVELOPMENTS –

EUROPEAN UNION: On 24 January 2019, the European Commission published its 2018 State Aid Scoreboard. The Scoreboard provides detailed information on the Member States' aid expenditures in 2017. It is based on expenditure reports by Member States and covers all existing aid measures to industries, services, agriculture and fisheries. One of the conclusions of the analysis is that Member States spent € 116.2 billion (i.e., 0.76% of EU GDP) on State aid in 2017, compared with € 106.6 billion (i.e., 0.72% of EU GDP) in 2016. Total spending on measures covered by the General Block Exemption Regulation in the EU amounted to about € 41.7 billion in 2017, a substantial increase of about € 7.8 billion as compared to 2016. Since 2016, more than 96% of new aid measures have fallen under the Gen-eral Block Exemption Regulation. Notified measures that are still subject to more careful scrutiny by the European Commission tend to cover larger budgets and spending than in the past.

EUROPEAN UNION: On 4 February 2019, the European Commission launched a public consultation on a Draft Notice on the recovery of unlawful and incompatible State aid. The Draft Notice is intended to replace the 2007 recovery notice, reflecting changes in the Commission's practice and case law developments since the 2007 notice was adopted. The Draft Notice explains the rules and procedures governing the recovery of State aid and sets out how the European Commission works with Member States to ensure compliance with their obligations. The Draft Notice explains: (i) the general principles of recovery; (ii) the respective roles of the Commission and the Member States; (iii) issues relating to the implementation of recovery decisions; (iv) the implication of litigation before national courts; and (v) the consequences of a failure to implement a European Commission recovery decision. Stakeholders are invited to submit their views by 29 April 2019.

EUROPEAN UNION: On 13 February 2019, the European Commission launched two public consultations on the revision of the Guidelines on certain State aid measures in the context of the greenhouse gas emission allowance trading scheme post-2012, as amended. The Guidelines date from 2012 and will expire on 31 December 2020. The first consultation aims at identifying the sectors exposed to carbon leakage risk due to indirect emission costs and at determining the level of compensation that should be

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granted to such sectors. Stakeholders must submit their views by 9 April 2019 at the latest. The aim of the second consultation is to collect the views of stakeholders on the implementation of the Guidelines and the design of any future guidelines on the issue. In particular, the European Commission intends to gather respondents' opinions on the eligibility criteria and the variables to be included in the formula used to calculate the aid amount. The consultation period ends on 19 May 2019.

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LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– EUROPEAN UNION LEVEL –

General Court finds European Commission liable for failure to pay default interest when repaying annulled fine

On 12 February 2019, the EU General Court ("GC") awarded € 184,592.95 in damages to envelopes producer Printeos in view of the European Commission's failure to pay default interest when repaying a cartel fine which had previously been annulled by the GC.

In 2014, following a settlement procedure, the European Commission ("Commission") imposed a € 4.729 million fine on Printeos for participating in a price coordination and customer allocation cartel (see VBB on Competition Law, Volume 2014, No. 12). On appeal, the GC annulled the Commission's decision for failure to state adequate reasons regarding the factors taken into account in determining the amount of the fines (see VBB on Competition Law, Volume 2016, No. 12).

As provided for in the then-applicable delegated financial Regulation 1268/2012 (Article 90), which was the legal basis under which the Commission repaid annulled fines until the recent adoption of Regulation 2018/1046, the Commission invests in a fund the amount of fines provisionally paid pending on-going annulment proceedings before the European Courts. If the fine is wholly or partially annulled by the European Courts, the Commission will then repay the amount unduly collected together with the interest yielded by the fund. In the present case, since Printeos' provisional payment invested in the fund yielded a negative return, the Commission only repaid the principal amount of the fine and rejected Printeos' request for payment of default interest.

Printeos brought an action under Article 340 Treaty on the Functioning of the European Union ("TFEU") on the basis of the EU's non-contractual liability and sought damages for the Commission's wrongful application of the GC's judgment, alleging that the Commission should have included default interest when repaying the annulled fine.

In its judgment, the GC recalled that, under Article 266 TFEU, the Commission is under an absolute and unconditional obligation to take the necessary measures to comply with a judgment that has declared a decision void. This obligation entails, *inter alia*, the payment of sums due, the recovery of amounts paid but not owed and the payment of default interest.

The Commission argued that the delegated financial Regulation 1268/2012 prevented it from granting default interest because the only interest to be repaid under Article 90 of that Regulation related to the interest yielded by the fund. The Commission acknowledged that default interest may be due but only if it were to repay the principal amount of an annulled fine late, which was not the case here since it had repaid the fine to Printeos immediately after the GC's judgment annulling its decision.

The GC however dismissed the Commission's argument. It recalled that its first judgment had annulled the Commission decision with retroactive effect. It therefore found that the Commission was actually in default of repayment of the annulled fine as from the day it was unduly paid by Printeos. The Commission was thus in a situation of late repayment and therefore had to pay default interest in accordance with the first paragraph of Article 266 TFEU in order to compensate the applicant and satisfy the principle of full repayment ('*restitutio in integrum*').

It follows that the Commission committed a serious breach of EU law. According to the GC, the breach directly caused harm to Printeos, i.e., the loss of the default interest that it ought to have received from the Commission together with the repayment of the principal amount of the fine.

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The GC dismissed the Commission's argument that there was no direct causal link between the breach of Article 266 TFEU and the loss because it was Printeos' decision to provisionally pay the amount of the fine instead of providing a bank guarantee. The GC found that Printeos' decision to provisionally pay the penalty was the logical consequence of the Commission's decision and could not break the causal link between the breach identified and the harm suffered.

Since the GC found a serious breach of EU law by the Commission and a sufficiently direct causal link between the breach and the harm suffered by Printeos, the conditions for applying Article 340 TFEU were met. The GC therefore granted € 184,592.95 in damages to Printeos, which corresponds to the default interest due from the date of the payment of the fine in March 2015 to its reimbursement by the Commission in February 2017. The default interest applied by the GC is the interest rate of the European Central Bank (ECB) for its refinancing operations, increased by 2 percentage points, as originally requested by Printeos.

It is worth noting that, at the hearing, Printeos amended its claim and asked the GC to increase the ECB rate by 3.5 percentage points, which is the increase provided for in the financial Regulation. The GC however dismissed the request, finding that it was bound by the original claim made by Printeos in its application.

It follows from the GC judgment that companies that have successfully obtained the full or partial annulment of a fine before the EU Courts must be granted, in addition to the repayment of the fine by the Commission, default interest for the period between the provisional payment of the fine and its reimbursement by the Commission. The applicable rate is the ECB's interest rate for its refinancing operations, increased by 3.5 percentage points.

Interestingly, since the limitation period for actions based on Article 340 TFEU is five years, companies that have successfully obtained the full or partial annulment of an antitrust fine in the course of the last five years and were not granted default interest could theoretically still benefit from the recent GC judgment and claim damages for the injury suffered.

– MEMBER STATE LEVEL –

FRANCE AND GERMANY

France and Germany publish joint industrial policy manifesto calling for changes to EU merger control and State aid rules

On 19 February 2019, the French Minister of Economy, Mr Bruno Le Marie, and the German Minister of Economy, Mr Peter Altmaier, published a joint manifesto which calls for the development of a European industrial policy to ensure the global competitiveness of European manufacturing industries. The joint manifesto appears to have been published partly in reaction to the Commission's prohibition of the *Siemens/Alstom* merger (see MERGER CONTROL, page 4 above). The aim of the joint manifesto is to foster "European champions". According to Mr Le Marie, "we will not succeed without a European champion that's capable of investing, innovating and keeping value-added at home. We should change European competition rules to defend our interests".

The joint manifesto is structured around three pillars.

First, it calls for heavy investment in innovation. This pillar involves a European strategy for technology financing, support for "disruptive innovation", promotion of artificial intelligence, the development of breakthrough technologies and better financial support for innovation.

Second, the joint manifesto urges Europe to adapt the regulatory framework to allow European companies to compete on the world stage. This pillar proposes amending the existing EU Merger Regulation and State aid rules to allow greater flexibility for European authorities to take account of competition on a global scale. Of particular relevance to merger control procedure, the joint manifesto proposes that the European Council would hold a "right of appeal" to set aside Commission decisions in well-defined cases.

Third, the joint manifesto calls for more effective legal protections to defend European technology, business and markets. This pillar encourages robust use of the forthcoming EU screening mechanism for foreign direct investment which recently received political approval (see VBB on Competition Law, Volume 2018, No. 11). This pillar also calls for more effective measures of reciprocity in public

procurement, the use of multilateralism, the opening of markets, and the adaptation of EU trade policy to defend strategic interests.

It remains to be seen whether the joint manifesto's proposals will generate sufficient support among EU Member States to pass into legislation.

GERMANY

German Federal Cartel Office publishes paper on online comparison websites

On 4 February 2019, the German Federal Cartel Office ("FCO") published a fifth paper in its series "Competition and Consumer Protection in the Digital Economy". The paper summarizes the sector inquiry into online comparison websites in the travel, energy, insurance, telecommunications and financial services sectors and its results, including a preliminary legal assessment of the issues under investigation (see VBB on Competition Law, Volume 2019, No. 1). The sector inquiry has identified a number of practices that may constitute violations of the German Act against Unfair Competition ("UWG") by misleading consumers as to the independence or market coverage of the comparison websites. Based on these findings, the FCO suggests that it be granted enforcement rights for these types of infringements.

An English language version of the paper is available on the FCO's website.

– OTHER DEVELOPMENT –

EUROPEAN UNION: On 28 January 2019, the European Commission adopted a report on competition enforcement in the pharmaceutical sector between 2009 and 2017. The report provides an overview on the enforcement of antitrust and merger rules in the pharmaceutical sector and describes how competition law enforcement has contributed to improving European patients' access to affordable and innovative essential medicines. The executive summary and the report are available in all official EU languages on the Commission's competition website.

PRIVATE ENFORCEMENT

– MEMBER STATE LEVEL –

GERMANY

Regional Court of Stuttgart rules in favour of damages claim against truck manufacturer

On 11 February 2019, the Regional Court of Stuttgart ruled in favour of a freight forwarding company that brought a damages claim against a truck manufacturer involved in the truck cartel. The amount of damages is to be determined in a subsequent judgment.

The freight forwarder filed a claim for a total of € 1.83 million (plus interest) as a follow-on action to the infringement decision of the European Commission establishing the participation of MAN, Volvo/Renault, Daimler, Iveco, DAF and Scania in a fourteen-year price-fixing cartel in the truck sector (see VBB on Competition Law, Volume 2016, No. 7 and Volume 2017, No. 9). The claim was based on the acquisition, at an allegedly inflated price, of 127 vehicles. The Regional Court of Stuttgart ruled that the claim was well founded concerning 74 purchases but dismissed the remainder of the action which related to leased and second-hand purchased vehicles.

The Regional Court of Stuttgart considered that all new truck purchases were affected by the cartel, since they took place during the period of the cartel established by the Commission. The Regional Court of Stuttgart ruled that it can be factually presumed that the cartel caused harm.

In a recent judgment concerning a quota and client allocation cartel, which predated the entry into force of the German provisions implementing the EU Cartel Damages Directive, the German Federal Court of Justice ("FCJ") had clarified that the existence of a cartel does not constitute *prima facie* evidence that the harm was caused by the cartel and that individual purchases were affected by the cartel. Indeed, according to the FCJ, the application of such *prima facie* evidence would require a typical chain of events leading to a common experience. Cartels were, however, found to lack such typical characteristics in view of the diversity and complexity of anticompetitive agreements, their implementation and their effects. The FCJ nevertheless held that a rebuttable presumption applies. Indeed, it can be presumed that cartels usually create benefits for the cartelists and, therefore, the prices obtained due to a cartel are higher than they would have been absent the anti-competitive agreement (see VBB on Competition Law, Volume 2019, No.1).

Relying on the FCJ judgment, the Regional Court of Stuttgart applied a rebuttable presumption. In its defence, the truck manufacturer was not able to rebut the presumption of harm. In particular, the Regional Court of Stuttgart rejected the defendant's argument that an exchange of information can also lead to lower prices, since the defendant did not set out which purpose the collusion could have had, other than increasing profit. The defendant's passing-on defence was also dismissed because the vehicles were not resold but rather were used by the claimant in its economic activity.

This judgment shows that, in practice, it may be difficult to rebut the presumption that a cartel caused harm.

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