"Van Bael & Bellis is one of the most experienced law firms with regard to European antitrust issues."

Chambers Global 2016

June 2019

VBB on Competition Law

Highlights

Global Competition Review 2017 Law Firm of the Year – Europe

GCR Awards 2017

Jurisdictions covered in this issue

vbb@vbb.com
www.vbb.com

Table of contents

Chaussée de La Hulpe 166
Terhulpsesteenweg
B-1170 Brussels – Belgium

Phone: +32 (0)2 647 73 50
Fax: +32 (0)2 640 64 99

vbb@vbb.com
www.vbb.com

Table of contents

Chaussée de La Hulpe 166
Terhulpsesteenweg
B-1170 Brussels – Belgium

Phone: +32 (0)2 647 73 50
Fax: +32 (0)2 640 64 99

vbb@vbb.com
www.vbb.com

MERGER CONTROL

– EUROPEAN UNION LEVEL –

European Commission blocks Thyssenkrupp and Tata JV

On 11 June 2019, the European Commission ("Commission") prohibited the creation of a joint venture between Thyssenkrupp and Tata Steel under the EU Merger Regulation. The deal would have combined Thyssenkrupp and Tata's flat carbon and electrical steel activities in the EEA.

According to the Commission, the combination of the EEA's second largest (Thyssenkrupp) and third largest (Tata) producers of flat carbon steel would have harmed competition in two already highly concentrated markets. First, in the market for metallic-coated and laminated steel products for packaging (namely tinplate and electrolytic chromium coated and laminated steel), the merger would have created a market leader with the likely ability to raise prices for the most important steel packaging inputs in the EEA. Second, in the market for automotive hot dip galvanised steel products, the merger would have eliminated one of the few competitors able to deliver significant volumes of this key input to the EEA automotive industry.

This prohibition decision differs in several respects from the Commission's conditional clearance of ArcelorMittal's acquisition of Ilva a year ago (see VBB on Competition Law, Volume 2018, No. 5). In that transaction, the Commission also identified a problematic overlap in galvanised flat carbon steel. However, the merging parties resolved this concern by divesting Ilva's entire operations in this market, including assets along the full value chain. Although Thyssenkrupp and Tata offered specific divestments in both problematic markets in this case, the Commission rejected these as insufficient, as they did not include the upstream production assets to manufacture the steel inputs needed to produce these products, nor, in the case of galvanised steel, adequate finishing assets to serve the same geographic range of customers as the merging parties.

In *Tata/Thyssenkrupp*, as in *ArcelorMittal/Ilva*, the Commission examined in detail whether steel imports from outside the EEA could help offset the negative competitive effects of the transaction. This is a significant consideration in light of growing arguments raised by the steel industry, among others, that consolidation is necessary for European companies to remain competitive in the face of growing competition from countries like China. In *ArcelorMittal/Ilva*, the Commission did consider that certain imports of commoditised steel (hot rolled) would increase the competitive pressure on the merged entity in that market. By contrast, in the *Tata/Thyssenkrupp* decision, the Commission concluded that, given the specialised nature of the steel concerned, imported steel would not be sufficient to ensure effective competition post-transaction. Specifically, the market test revealed that insufficient imported steel was available to meet the needs of downstream customers in terms of both quality and timely delivery requirements. In sum, it appears that the Commission remains reluctant to promote the creation of so-called "European champions" – which are perhaps better positioned to compete in the global industry – at the expense of downstream European industries that rely on specialised products and for which imports do not represent a sufficient alternative source of supply to offset any competitive harm.

European Commission fines Canon for gun jumping in "warehousing" transaction

On 27 June 2019, the European Commission ("Commission") announced that it had imposed a € 28 million fine on Canon for partially implementing its acquisition of Toshiba Medical Systems Corporation (TMSC) before notifying the transaction and receiving clearance. Canon produces imaging and optical products, while TMSC manufactures medical equipment, such as x-ray imaging systems. Both parties are Japanese.

Canon purchased TMSC through a two-step "warehousing" transaction involving an interim buyer. As a first step, the interim buyer acquired 95% of TMSC's share capital for a nominal amount of € 800, while Canon purchased the remaining 5% and an option over the interim buyer's stake for € 5.28 billion. Canon then notified the proposed acquisition to the Commission on 12 August 2016, and received an unconditional clearance decision on 19 Sep-

tember 2016. After the Commission approved the merger, Canon implemented the second step of the transaction by exercising its option and purchasing the remaining 95% of TMSC's shares from the interim buyer.

Following a subsequent investigation, the Commission concluded that Canon had violated the notification and standstill provisions of the EU Merger Regulation when implementing the first step of this warehousing transaction. Specifically, the Commission found that both steps of the transaction constituted parts of a single, notifiable merger, as the first step contributed to (and was indeed necessary for) Canon's acquisition of control over TMSC. Therefore, by carrying out the first step before notifying the transaction or receiving clearance, Canon partially implemented the merger by taking a step toward the eventual acquisition of control in step two, in violation of the procedural rules. While the Commission was empowered to impose a fine of up to 10% of Canon's annual turnover for each of the notification and standstill violations, the fine took into consideration as a mitigating factor the fact that the underlying merger was cleared unconditionally.

The Commission's fine against Canon is the latest in a wave of procedural infringement cases brought in the context of merger proceedings in recent years. This includes the Commission's record € 124.5 million gun-jumping fine against Altice in 2018 (see VBB on Competition Law, Volume 2018, No. 4), as well as its € 52 million fine against General Electric in 2019 (see VBB on Competition Law, Volume 2019, No. 4), a € 100 fine against Facebook in 2017 (see VBB on Competition Law, Volume 2017, No. 5), and its ongoing investigation of Sigma Aldrich for supplying misleading information during merger investigations. Gun jumping has also been the focus of enforcement at Member State level (see, e.g., decision of Romanian competition authority of 18 January 2019, *Corsar online*).

– MEMBER STATE LEVEL –

AUSTRIA

Austrian Competition Authority conditionally clears Carl Zeiss' acquisition of GOM

On 13 June 2019, the Austrian Federal Competition Authority cleared the acquisition of GOM, a supplier of hardware and software for automated 3D-coordinate metrology, by Carl Zeiss, a technology company in the optical and optoelectronic industry. The clearance is subject to commitments. Among other commitments, Carl Zeiss has guaranteed to provide after-sales support for a period of ten years after serial production ends for GOM systems sold in Austria during the three years following the merger, including providing the complete portfolio of maintenance, repair and spare parts. Carl Zeiss also committed to include the current service partner for GOM systems as a service partner of Carl Zeiss and to grant access to independent service providers by offering training programmes, tools and spare parts. An independent trustee will monitor compliance with the commitments.

IRELAND

Irish competition watchdog announces simplified merger review procedure

On 14 June 2019, the Irish Competition and Consumer Protection Commission ("CCPC") announced that it would be introducing a simplified merger control review procedure. The CCPC is now drafting simplified procedure guidelines, which will be published before the end of 2019 to allow for a period of consultation. The guidelines will include: (i) the criteria that may be used to select notifiable transactions for assessment under the simplified procedure; (ii) examples of situations in which mergers that qualify for assessment under the simplified procedure may be reviewed under a standard procedure; and (iii) an overview of what changes will be made to current merger procedures.

UNITED KINGDOM

Facing competition concerns, Thermo Fisher abandons proposed acquisition

On 10 June 2019, the UK's Competition and Market's Authority ("CMA") cancelled its Phase II investigation into scientific instruments giant Thermo Fisher's anticipated purchase of Gatan, a Roper subsidiary active in the production of specialised electron microscope peripherals, after the parties abandoned the deal. The transaction was valued at $925 million.

In its provisional phase II findings, issued on 17 April 2019, the CMA raised serious horizontal and vertical competition concerns regarding the proposed merger. The CMA found that the deal could substantially lessen competition for the supply of two products produced by both parties, direct detection (DD) cameras and filters, as it would enhance Thermo Fisher's already strong market position and further reduce the small number of competitors in the peripherals market.

The CMA also provisionally concluded that the merger may result in substantial vertical foreclosure concerns. As Thermo Fisher is by far the largest supplier of transmission electron microscopes (TEMs) fitted with filters and DD cameras, and Gatan has market power with respect to these peripherals, the CMA considered that the combined entity would have the ability and incentive to foreclose Gatan's supply of peripherals to other TEM producers. Furthermore, the CMA found that the acquisition would give Thermo Fisher access to its rivals' supply agreements with Gatan, allowing it to put those rivals at a competitive disadvantage.

The parties abandoned the transaction as the CMA was preparing to publish its final report.

ABUSE OF DOMINANT POSITION

– EUROPEAN UNION LEVEL –

European Commission investigates Broadcom for abuse of dominant position and seeks interim measures

On 26 June 2019, the European Commission (the "Commission") announced that it had opened a formal investigation to assess whether integrated circuit ("IC") provider Broadcom may be abusing its dominant position, in breach of Article 102 Treaty on the Functioning of the European Union. In parallel, the Commission informed Broadcom of its intention to impose interim measures in response to a perceived risk of serious and irreparable harm to competition.

According to the Commission's press release, Broadcom is the world's largest designer, developer, and provider of ICs for wired communication devices like televisions, modems, and components that provide high speed data connections. It is a global leader in a number of markets including: (i) systems-on-a-chip; (ii) front-end chips; (iii) WiFi chipsets; and (iv) central office/head end equipment.

Based on the information gathered, the Commission suspects that Broadcom has put in place contractual restrictions to exclude competitors from the market. Alleged exclusionary practices include: (i) setting exclusive purchasing obligations; (ii) granting rebates or other advantages conditioned on exclusivity or minimum purchase requirements; (iii) product bundling; (iv) abusive IP-related strategies; and (v) deliberately degrading interoperability between Broadcom products and other products.

In addition to opening an investigation, the Commission also issued a Statement of Objections seeking to impose interim measures against Broadcom. This signals the Commission's preliminary conclusions regarding the investigation and its serious concerns over anti-competitive practices. Interim measures are only imposed on companies in limited circumstances, i.e., if at first sight there is an infringement of competition law rules, as well as an urgent need for protective measures due to the risk of serious and irreparable harm to competition. This is the first time the Commission has sought interim measures since 2001, when it adopted a decision against IMS Health (a decision which was then withdrawn in 2003 following proceedings before the European Courts).

Here, the Commission's initial conclusions set out that Broadcom likely holds a dominant position in various markets for the supply of systems-on-a-chip for TV set-top boxes and modems. Additionally, the Commission noted that certain agreements effectively require seven of Broadcom's main customers to purchase ICs from Broadcom on an exclusive or almost exclusive basis.

The Commission now must formally adopt interim measures, which would remain in place until the Commission concludes its assessment of the substance of the case.

– MEMBER STATE LEVEL –

GERMANY

Higher Regional Court of Düsseldorf rules on admissibility of exclusivity clauses

On 3 April 2019, the Higher Regional Court of Düsseldorf (the "Court") upheld a 2017 decision of the Federal Cartel Office ("FCO") prohibiting exclusivity clauses in the event ticketing market. In a large number of its contracts with event organisers, ticketing service provider CTS Eventim used terms which, in different versions and with different contract periods, required the contracting party to sell tickets exclusively or to a considerable extent on the online platform Eventim.net.

On 4 December 2017, the FCO found that ticketing service provider CTS Eventim abused its dominant position by using exclusivity clauses. Accordingly, the FCO prohibited the practice (see VBB on Competition Law, Volume 2017, No. 12). The FCO also ordered CTS Eventim to alter the contracts to allow contracting parties to sell at least 20% of their annual ticket volume via a different platform of their choice when contracts are concluded for a duration of two years or more.

The Court confirmed the FCO's assessment that CTS Eventim had abused its dominant position. The Court followed the reasoning adopted by the Court of Justice of the European Union in case C-413/14P, *Intel*, holding that exclusivity clauses used by a dominant undertaking do not constitute an abusive behaviour *per se*. Rather, the Court maintained that if the dominant undertaking submits evidence during the administrative procedure that its conduct is not capable of restricting competition, the FCO is required to assess the evidence submitted. Applying this reasoning, the Court stated that an exclusivity clause only constitutes an abusive behaviour if it is capable of restricting competition, in particular by foreclosing competitors that are at least as efficient. However, CTS Eventim failed to demonstrate that there were substantive doubts regarding the anti-competitive effects of the exclusivity clauses at issue.

CARTELS AND HORIZONTAL AGREEMENTS

– MEMBER STATE LEVEL –

BELGIUM

Markets Court dismisses The Great Circle's appeal against Belgian Competition Authority's interim measures decision and explains limits of its jurisdiction

On 8 May 2019, the Markets Court of the Brussels Court of Appeal rejected as inadmissible the appeal lodged by The Great Circle against the decision of the Belgian Competition Authority ("BCA") to reject its request for interim measures against the Royal Meteorological Institute of Belgium ("RMI").

The Great Circle is a company offering meteorological software based on raw meteorological data. It complained before the BCA that RMI had allegedly abused its dominant position on the market for the supply of raw meteorological data and/or entered into an anticompetitive agreement with other national meteorological services and intergovernmental organisation ECMWF. The Great Circle therefore requested the BCA to order RMI to provide it with raw meteorological data from ECMWF. On 15 February 2019, the BCA rejected this request for interim measures as there was no prima facie evidence of an infringement of competition law. The Great Circle appealed this decision before the Markets Court.

The Markets Court took this opportunity to clarify its powers in the context of appeals against decisions of the BCA. The Court explained that its "full jurisdictional review" under Article IV.90(2)(2) of the Code of Economic Law ("CEL") (former Article IV.79(2)(2) CEL) allows it to review all the facts of a case. However, the Court will only examine whether the facts are accurately described and are not assessed manifestly incorrectly. Overall, the Court's role is to verify whether the decision under appeal is illegal or defective and not to give the applicant a "new chance" to make its case. The applicant must prove that the decision under appeal is defective or illegal *sensu lato* as the Court is not concerned with issues of mere policy or suitability.

The Court confirmed that it has the power to substitute its own decision for the decision of the BCA, but stressed that this is only a faculty, not the essence of its jurisdiction, and that it can only do so if it first finds that the decision under appeal is illegal or defective.

In this case, the Markets Court found that The Great Circle had requested the amendment of the BCA decision under appeal without first seeking its annulment. The Great Circle essentially requested the Court to re-examine its request for interim measures rather than criticizing the legality of the contested decision. In this respect, the Court noted that The Great Circle had not submitted any grounds of appeal based on any fault or illegality of the decision under appeal. As a result, the Court found that, even if the applicant's request for the review and amendment of the BCA decision had also, implicitly, included a request for annulment, the Court would not have been able to grant The Great Circle the interim measures that it requested.

Finally, the Markets Court added that, pursuant to Article IV.90(2)(3) CEL (former Article IV.79(2)(3) CEL), the Court can only annul a decision (not amend it) when the Court finds that, contrary to the contested decision, there is an infringement of competition law. Granting The Great Circle the interim measures that it requested would have required the Court to find that there was, prima facie, an infringement of the competition rules. As a result, the Court could only annul the contested decision (which The Great Circle did not ask the Court to do), not amend it as The Great Circle wanted.

Belgian Competition Authority fines professional organisation of pharmacists

On 28 May 2019, the Belgian Competition Authority ("BCA") imposed a fine of € 1 million on the professional organi-sation of pharmacists (the "PO") for infringing Article IV.1 of the Belgian Code on Economic Law and Article 101 of the Treaty on the Functioning of the European Union. According to the BCA, the PO had taken a range of exclusionary measures to thwart the development of MediCare-Market, a retailer of both medicines and other, less regulated health products.

The BCA found that the PO had relied on a range of techniques to hamper MediCare-Market's development, including disciplinary proceedings and court proceedings.

Interestingly, the BCA also blamed the PO for limiting price competition, even though the scope for such competition is narrow as far as medicines are concerned in view of the regulatory framework in this sector. However, the BCA took issue first and foremost with attempts made by the PO to stifle competition for health products other than medicines. For example, the PO had initiated court proceedings against MediCare-Market on account of pub-licity in which MediCare-Market promised price reductions on non-phar-maceutical products. In the PO's view, this constituted unethical behaviour unbecoming of a pharmacist. The BCA disagreed and added that, to the contrary, Medi-Care-Market's actions were welcome in that they made pharmacists aware of the legitimacy of price competition for products other than medicines. While the BCA is some-what ambiguous on this, it also seemed to favour price competition for medicines in forms such as end-of-year reductions. This is illustrated by the BCA's reference to an OECD finding of 2017 that the pricing level of medicines in Belgium was high compared to that in neighbouring countries.

Additionally, the BCA made short shrift of the PO's public service remit. Relying in part on a 2014 judgment of the EU General Court which confirmed a European Commission decision which had found the French *Ordre national des pharmaciens* to be in breach of the competition rules (Case T-90/11, *Ordre national des pharmaciens and others v. European Commission*, ECLI:EU:T:2014:1049), the BCA held that legitimate public-service obligations cannot serve as a pretext for anti-competitive behaviour. Similarly, the BCA also rejected the general interest arguments that the PO was supposedly right in pursuing MediCare-Market in order to (i) protect the credibility of the pharmacist's profession; (ii) safeguard public health; and (iii) guard against the excessive consumption of medicines. The BCA went even further by positing that the general approach followed by the PO to foreclose MediCare-Market or at least stunt its development amounted to a restriction of competition by object. While it was therefore not required to show any anticompetitive effects, the BCA still went on to demonstrate the potential and actual adverse effects on competition resulting from the PO's conduct.

THE NETHERLANDS

Dutch District Court annuls fine in battery cartel due to lack of evidence

On 20 June 2019, the Rotterdam District Court ("Court") annulled a fine of € 583,000 imposed by the Dutch Authority for Consumers and Markets ("*Autoriteit Consument & Markt*" or "ACM") on Midac, a manufacturer of batteries for forklift trucks, for its involvement in a cartel. The Court held that ACM had not provided sufficient evidence to establish that Midac had breached competition law.

In 2017, ACM imposed total fines amounting to approximately € 17 million on a trade association and several companies active in the sale of batteries for forklift trucks for their involvement in a price-fixing cartel from 2004 to 2013. ACM found that Midac had participated in the infringement for nine months.

In a simplified settlement procedure, five companies admitted that they had taken part in the cartel and accepted ACM's fine, while Midac appealed. In essence, ACM found that the companies had agreed to pass on to their customers the fluctuations in the purchase prices of lead, which represents the most important raw material used in batteries. According to ACM, the trade association distributed to the companies lists containing information on the lead surcharges. ACM found, *inter alia*, that Midac had participated in the price-fixing agreement, as one of its directors previously held a position in an undertaking that was also involved in the cartel.

The Court disagreed with this finding and ruled that Midac had not endorsed the common goal of the cartel, while pointing out that it had always used its own lists for surcharges. According to the Court, ACM's finding that Midac had received certain of the abovementioned lists from the trade association by email and had taken part in a telephone call to discuss the lead alloys price increases did not change this. The Court finally held that ACM had the burden of providing sufficient evidence to prove that Midac endorsed the common goal of the cartel and that, in this case, ACM had failed to provide such conclusive evidence.

SPAIN

Spanish Supreme Court upholds fines totalling € 42.6 million imposed on REPSOL

On 23 and 27 May 2019, the Spanish Supreme Court reinstated two fines totalling € 42.6 million, which were imposed by the Spanish Competition Authority ("CNMC") on REPSOL S.A., the parent company of the REPSOL group, for the anticompetitive conduct of its subsidiaries on the market for the distribution of automotive fuel.

In doing so, the Supreme Court overturned two earlier judgments delivered by the Spanish High Court which had annulled the fines on the grounds that the CNMC had wrongly considered REPSOL S.A. to be the sole author of anticompetitive practices carried out by its subsidiaries (see VBB on Competition Law, Volume 2017, No 8 and VBB on Competition Law, Volume 2018, No 2). According to the Spanish High Court, this finding violated the constitutional principles of personal responsibility and fault.

In its judgments, the Supreme Court disagreed with the High Court's findings and concluded that a parent company can be sanctioned as the sole author of an anticompetitive practice exclusively carried out by a wholly-owned or quasi wholly-owned subsidiary (99.8% in the case at hand) when the parent company has a decisive influence over the subsidiary's decision-making process.

REPSOL S.A. has already announced that it will appeal against the Supreme Court's judgments before the Constitutional Court.

Spanish textbook publishers fined € 34 million for anticompetitive collusion

On 30 May 2019, the Spanish Competition Authority ("CNMC") imposed total fines of € 34 million on 33 Spanish textbook publishers and on the National Association of Book Publishers and Education Materials ("ANELE") for infringing Articles 1 of the Spanish Competition Act and 101 Treaty on the Functioning of the European Union. The CNMC considered that, through their membership of ANELE, the companies involved had engaged in two sets of anticompetitive practices, namely: (i) coordinating their commercial policies and conditions through a Code of Conduct issued by ANELE; and (ii) fixing prices and commercial conditions for the sale of a new product consisting of a digital textbook. The implicated entities have already announced their intention to challenge the fine.

VERTICAL AGREEMENTS

– MEMBER STATE LEVEL –

GERMANY

Higher Regional Court of Düsseldorf overturns Federal Cartel Office's prohibition of Booking.com's narrow best price clauses

On 4 June 2019, the Higher Regional Court of Düsseldorf (the "Court") ruled that narrow best price clauses are not anticompetitive and overturned the decision of the Federal Cartel Office ("FCO") prohibiting Booking.com from using such clauses in contracts with hotel operators. 'Narrow' best price clauses prohibit hotel operators from offering hotel rooms on their own website at lower prices than on the hotel booking platform imposing the obligation, without restricting the hotel's right to do so on a different hotel booking platform.

Narrow best price clauses need to be distinguished from 'wide' best price clauses. 'Wide' clauses prevent hotel operators from offering the lowest available room prices, not only on their own websites, but also through other platforms. These wide clauses were prohibited by the FCO in 2013 in a case involving Booking.com's competitor HRS, while the Court upheld the decision in 2015.

Following that decision, Booking.com started using modified, narrow best price clauses, which the FCO then prohibited in December 2015 (see VBB on Competition Law, Volume 2016, No. 1), ordering the removal of all best price clauses from its contracts and general terms and conditions. In so doing, the FCO adopted a more restrictive approach than most national competition authorities. In fact, a 2017 report of the European Competition Network, monitoring competition in the online hotel booking industry, found no evidence that narrow best price clauses are anticompetitive (see VBB on Competition Law, Volume 2017, No. 4).

The Court has now overturned the December 2015 decision of the FCO. According to the Court's press release of 4 June 2019, the Court conducted a survey with hotel operators and customers that showed that narrow best price clauses do not restrict competition, as they are necessary to ensure a "fair and balanced contractual exchange of services between the platform and hotel operators". It seems that the Court concluded that a booking platform may use such clauses to prevent a "disloyal re-direction of customers". At least in terms of result, this judgment therefore aligns Germany with those EU Member States where narrow best price clauses have been found to be compatible with Article 101 Treaty on the Functioning of the European Union. See, for example, the recent decision of the Swedish Appeals Court (see VBB on Competition Law, Volume 2019, No. 5). The detailed reasoning of the Court under Article 101 will not be clear until the judgment is published.

The FCO has appealed the judgment.

INTELLECTUAL PROPERTY/LICENSING

– MEMBER STATE LEVEL –

FRANCE

Protection of confidentiality in standard essential patent litigation in France

On 16 April 2019, the Paris Court of Appeal delivered a judgment in *Conversant v. LG*, a case dealing with the concept of licensing under fair, reasonable and non-discriminatory ("FRAND") terms. While the court did not set a much-anticipated FRAND royalty rate, the case is noteworthy because of its application of the new French Trade Secrets Act of 30 July 2018, the French legislation that implements Directive (EU) 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (the "Trade Secrets Directive").

Article L 153-1 of the French Commercial Code provides that a court should take procedural steps to protect trade secrets referred to and disclosed during litigation. Accordingly, before the Court of Appeal, access to specific documents (including licence agreements) was limited to the parties' outside counsel and to designated persons (in particular, interpreters and economists) who had signed a confidentiality agreement. Court submissions were filed in both confidential and non-confidential versions. In this case, full written briefs were filed, together with redacted versions which omitted any reference to confidential information with regard to the pertinent licence agreements.

The hearing, which took place over three days, also addressed confidentiality issues. During the first day, access to the courtroom was restricted to the parties' counsel and other representatives of the parties. This session was devoted to the most sensitive parts (notably a Nokia-Qualcomm agreement). On the second day, the assessment of the FRAND rate was discussed. Again, access to the courtroom was limited to the above individuals, although a number of designated experts were also permitted access during discussions regarding comparable licence agreements. On the third day, no access restrictions were imposed while the validity, essentiality and infringement of the patents were discussed in court.

The issues of confidentiality concerned comparable licensing rates in licence agreements that had been concluded on the basis of individual negotiations.

This approach appears to be in contrast with the German situation. Under existing case law in Germany, the protection of confidential documents in German standard essential patent ("SEP") proceedings is not guaranteed. For example, in *Sisvel v. Haier,* the Higher Regional Court of Düsseldorf held in 2017 that an SEP holder is under an obligation to name its licensees and to describe the concrete conditions of the licence in the relevant market.

On 26 April 2019, Germany finally implemented the Trade Secrets Directive. The implementing act now introduces into German law a definition of what is to be regarded as a business secret. The implementing act also provides for the possibility that a court could restrict the use of business secrets which were revealed in court proceedings. However, it remains to be seen how German courts will apply the provisions of the implementing act and whether they will be prepared to abandon their previously hostile position towards the protection of trade secrets. The approach of the Paris Court of Appeal certainly offers an interesting precedent.

THE NETHERLANDS

Standard essential patent developments involving Philips in the Netherlands

On 7 May 2019, the Court of Appeal of the Hague delivered its judgment in a case pitting Philips against ASUS regarding the alleged infringement of Philips' European patent EP 1 623 511, which was considered essential to the High Speed Uplink Packet Access ("HSUPA") protocol of the Universal Mobile Telecommunications System ("UMTS") standard. The judgment is the first Dutch court case to address a FRAND-defence in infringement proceedings following the judgment of the Court of Justice of the European Union (the "Court of Justice") in *Huawei v ZTE* (see VBB on Competition Law, Volume 2015, No. 7) .

The Court of Appeal turned to the *Huawei v. ZTE* case law for guidance to determine the circumstances in which the proprietor of a standard essential patent ("SEP") in a dominant position within the meaning of Article 102 Treaty on the Functioning of the European Union (TFEU) abuses that position by bringing an action seeking an injunction prohibiting the alleged infringement. According to that case, as a first step, the SEP proprietor must, prior to bringing an action for infringement, alert the alleged infringer of the infringement complained about by designating that patent and specifying the way in which that patent has been infringed. As a second step, if the alleged infringer shows willingness to conclude a licensing agreement on FRAND terms, the SEP proprietor must present to that infringer a specific and written offer for a licence on FRAND terms. That offer must specify the amount of the royalty and the way in which it is to be calculated. The alleged infringer has a duty to respond diligently to that offer, in accordance with recognised commercial practices in the field and in good faith. If the alleged infringer does not accept the SEP holder's offer, the alleged infringer must submit, promptly and in writing, a specific counter-offer that corresponds to FRAND terms. It is only where the notified alleged infringer does not accept the offer made to it (that corresponds to FRAND terms), and does not submit a counter-offer, that the SEP holder will be entitled to seek injunctive relief without breaching the provisions of Article 102 TFEU.

In the present case, Philips informed in mid-2013 ASUS of its UMTS / LTE patent portfolio and met with ASUS a number of times to introduce its SEP portfolio, to explain its licensing programme and the royalty rates. ASUS appeared unwilling to negotiate a FRAND licence, or even discuss the proposed licensing terms, despite the consistent indication that Philips was willing to enter into a FRAND licence. In September 2015, Philips provided ASUS with a draft licence agreement. In a meeting of November 2015, ASUS did not substantially discuss the licence and did not make a counter-proposal. On 15 December 2015, Philips decided to enforce its rights and initiate infringement proceedings against ASUS.

In its judgment, the Court of Appeal considered that ASUS had not taken a constructive position in the discussions with Philips and had engaged in a 'hold-out' and used 'delaying tactics' (the latter terms were used by the Court of Justice in the *Huawei v. ZTE* case). The fact that ASUS made a counteroffer during the proceedings did not change the outcome of the case.

The ruling shows that implementers can rely on a FRAND defence in the Netherlands, provided they negotiate constructively and in good faith with the genuine aim of reaching an agreement. ASUS was found not to have met this test.

STATE AID

– EUROPEAN UNION LEVEL –

General Court of European Union annuls *Micula* state aid decision of European Commission

On 18 June 2019, the General Court of the European Union (the "General Court") handed down its long-awaited judgment in the *Micula* case (Cases T-624/15, T-694/15 and T-704/15, *European Food and Others v Commission*, EU:T:2019:423).

The case finds its origins in the investment made by the Miculas, two investors of Swedish nationality, in the food production sector in Romania in the 1990s. At the time of investment, they made use of numerous tax incentives which Romania had put in place in order to attract foreign investment.

In 2005, as Romania prepared to accede to the European Union, the tax incentives were revoked in an effort to conform to EU law on state aid.

The Miculas then instituted ICSID proceedings against Romania based on the Romania-Sweden Bilateral Investment Treaty, arguing that the revocation of the tax incentives constituted a breach of their rights under that treaty. The arbitral tribunal issued its award in 2013, holding that by revoking the incentives, Romania had indeed failed to award the claimants fair and equitable treatment. The arbitral tribunal awarded the Miculas EUR 180 million in damages.

In 2015, the European Commission (the "Commission") handed down a decision (the "2015 EU decision") declaring that the ICSID award in favour of the Miculas amounted to state aid. The 2015 EU decision required Romania to refrain from paying the amount due under the award. The Commission also ordered Romania to recover any compensation already awarded to the Miculas.

The Miculas sought to challenge the 2015 EU decision before the General Court.

In its judgment handed down on 18 June 2019, the General Court annulled the 2015 EU decision. It found that (i) the European Commission did not have the competence to adopt the 2015 EU decision since EU law does not apply to international breaches of law committed by Romania prior to its accession to the European Union; and (ii) the arbitral award did not constitute state aid within the meaning of Article 107 of the Treaty on the Functioning of the European Union ("TFEU").

Lack of competence to adopt 2015 EU Decision and inapplicability of EU law

The Miculas argued, first, that the Commission lacked competence to issue the 2015 EU decision since EU law did not apply in 2005 when Romania revoked its favorable tax incentives regime. That Romania joined the EU in 2007 and that the arbitral tribunal only delivered its award in 2013 were irrelevant.

The Miculas also argued that the 2015 EU decision was based on the incorrect premise that the tax incentives regime in place in Romania until 2005 constituted state aid prohibited by EU law.

The Commission contested the allegation that the 2015 EU decision was aimed to challenge the tax incentives regime in place prior to 2005. It argued that the aid at issue was granted after Romania's accession to the EU "*either through the conversion of the arbitral award, by means of its recognition, into a valid legal right under national law, or through Romania's implementation of the arbitral award*" (para. 64).

The General Court dismissed the Commission's arguments and agreed with the Miculas. It found that the Miculas' right to receive compensation arose at the time when Romania repealed the tax incentives regime (para. 75).

Since this event took place before Romania's accession to the EU, EU law did not apply to that situation. According to the General Court, although the decision awarding the compensation to the Miculas was delivered in 2013, this arbitral award was "*merely an ancillary element of the compensation at issue and is not, as such, severable from the earlier tax incentives*". Consequently, "*it cannot be classified as new aid and serve as a basis for the competence of the Commission and the applicability of EU law for all events occurring in the past* […]" (para. 77).

Importantly, the General Court also noted that the amounts granted to the Miculas as compensation for the damage resulting from Romania's revocation of the tax incentives regime were calculated by the arbitral tribunal from the moment that this regime was repealed (on 22 February 2005) until its scheduled expiry (on 1 April 2009). The General Court then noted that:

- with respect to the amounts granted as compensation for the period predating Romania's accession to the European Union (i.e., 22 February 2005 – 31 December 2006), those amounts could not constitute state aid within the meaning of EU law since EU law did not apply during that period; and

- with respect to the amounts granted as compensation for the period subsequent to Romania's accession to the European Union (i.e., 1 January 2007 – 1 April 2009), "*even assuming that the payment of compensation relating to that period could be classified as incompatible aid, given that the Commission did not draw a distinction between the periods of compensation for the damage suffered by the applicants before or after accession, the Commission has, in any event, exceeded its powers in the area of state aid review*" (para. 91).

Micula's arbitral award does not constitute state aid

The Miculas also contended that the arbitral award did not confer an advantage on them (which is an essential element of state aid pursuant to Article 107 TFEU). The Miculas argued that the arbitral award was intended solely to compensate them for the damage which they suffered. They added that the award did not reinstate the tax incentives regime, but rather granted them compensation for Romania's breach of its obligations under the Romania-Sweden Bilateral Investment Treaty.

The General Court made the following findings in response to this argument:

- Regarding the compensation corresponding to the period predating Romania's accession to the European Union (i.e., 22 February 2005 – 31 December 2006), the General Court recalled the holding in Asteris (joined cases C-106/87 to 120/87), that "*compensation for damage suffered cannot be regarded as aid unless it has the effect of compensating for the withdrawal of unlawful or incompatible aid*".

  On the basis of this case law and since EU law did not apply during the 2005 – 2006 period, those amounts could not be regarded as "*compensating for the withdrawal of unlawful or incompatible aid*". Consequently, in so far as the arbitral award offered compensation during that period, it did not confer an advantage to the Miculas.

- Regarding the compensation corresponding to the period subsequent to Romania's accession to the European Union (i.e., 1 January 2007 – 1 April 2009), the General Court found that since "t*he compensation at issue covered, at least in part, a period predating accession (from 22 February 2005 to 1 January 2007) and as the Commission did not draw a distinction, among the amounts to be recovered, between those falling within the period predating accession and those falling within the period subsequent to accession, the decision by which it classified the entirety of the compensation as aid is necessarily unlawful*".

The General Court concluded that the 2015 EU decision was unlawful "*in so far as it classified as an advantage and aid within the meaning of Article 107 TFEU the award, by the arbitral tribunal, of compensation intended to compensate for the damage resulting from the withdrawal of the tax incentives, at least in respect of the period predating the entry into force of EU law in Romania*".

Conclusion and Implications

Irrespective of any appeal to the Court of Justice of the European Union ("ECJ"), the judgment of the General Court will have immediate and direct consequences on the Micula enforcement cases currently pending in other jurisdictions, particularly in the UK and in Belgium. In the lat-

ter proceedings, the Brussels Court of Appeal recently sought a preliminary ruling from the ECJ asking whether the 2015 EU decision superseded the enforcement proceedings of an ICSID award. The judgment handed down today may cause this request for a preliminary ruling to become moot.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– MEMBER STATE LEVEL –

BELGIUM

Belgian Competition Authority publishes 2018 annual report

On 17 June 2019, the Belgian Competition Authority ("BCA") published its annual report for the year 2018 (the "Report"). The Report describes the activities of the BCA in 2018 and contains statistics on its resources and results in 2018 compared to 2017.

The statistics reveal a slight decrease in the number of ongoing competition investigations from twelve in 2017 to eleven in 2018. Over the last year, the Competition College of the BCA adopted in total four decisions regarding the imposition of interim measures, compared to two in 2017. These interim measures concerned the supply of electricity meter boxes as well as the international horse-jumping sector, an investigation that was eventually terminated after the *Fédération équestre internationale* offered commitments. As in 2017, the Competition College of the BCA did not adopt any decision on the merits in competition cases in 2018. The Report further shows that the average duration of competition procedures decreased from five years per procedure in 2017 to three years and five months in 2018.

As regards merger control, the Report reveals an increase in the number of notifications from thirty in 2017 to thirty-five in 2018, including a significant increase in simplified notifications (from nineteen in 2017 to twenty-eight in 2018). Notable merger decisions adopted in 2018 include the clearance of the acquisition of Mediafin by Roularta and Rossel, the lifting of certain merger commitments imposed on Kinepolis and the acquisition of VNG Bouwmarkten by Intergamma Holding BV.

The BCA notes in the Report that whilst it has continued to hire extra personnel, it is still unable to dedicate the necessary resources to the various cases. The Report further mentions that the BCA is in the process of updating its 2012 study on price differences in the retail sector in Belgium and in neighbouring countries following the publication by the Belgian Pricing Observatory of its yearly analysis on the prices of goods in Belgium in March 2018.

Finally, the Report includes the BCA's enforcement priorities for 2019, as already published on 1 March 2019.

The Report is available in Dutch and in French.

PRIVATE ENFORCEMENT

– MEMBER STATE LEVEL –

SWEDEN

Swedish Appeal Court dismisses Bong's action for declaratory judgment against foreign Office Depot subsidiaries for lack of jurisdiction

On 9 May 2019, the Swedish Patent and Market Court of Appeal (the "Appeal Court") upheld the ruling of the Swedish Patent and Market Court which had found that Swedish courts did not have jurisdiction to rule in an action brought by Bong, an envelope producer fined for its participation in a cartel in the stationery sector, seeking a declaratory judgment that Bong was not liable to pay damages to the non-Swedish subsidiaries of one of its customers, Office Depot.

After the 2014 European Commission's decision in the envelope cartel, which had found that Bong and other envelope producers had participated in a cartel for approximately five years, Bong's customer Office Depot threatened to sue Bong for damages before the English courts. In response, Bong sued Office Depot's Swedish subsidiary and a number of Office Depot subsidiaries in other EU Member States before the Swedish Patent and Market Court, seeking a declaratory judgment against all defendants that Bong was not liable for damages. While the Patent and Market Court admitted (and later upheld) Bong's action against the Swedish subsidiary, it dismissed the remainder of the actions as it did not have jurisdiction to rule against the non-Swedish defendants.

The Patent and Market Court based its judgment on Article 4 of EU Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the "Brussels I Regulation"), according to which a defendant in principle has to be sued in the courts of the Member State in which it is domiciled. It dismissed Bong's argument that Swedish courts had jurisdiction under Article 8 of the Brussels I Regulation, which provides that in case of multiple defendants, an action can be brought in any Member State in which one of the defendants is domiciled, if the claims are so closely connected that it is expedient to determine them together to avoid the risk of irreconcilable judgments. The Patent and Market Court reasoned that the potential grounds to deny Bong's liability for damages varied among the Office Depot subsidiaries, as in some cases there could be a question whether damages claims were time barred, whereas in other cases the subsidiary may not have suffered damage.

The Appeal Court fully confirmed the ruling and reasoning of the Patent and Market Court. It emphasised that Bong had raised several arguments to dispute its liability for damages vis-à-vis Office Deport subsidiaries, and the factual circumstances to evaluate these arguments would be specific to each Office Depot subsidiary. As Bong's claims against the various subsidiaries were not closely connected, Article 8 of the Brussels I Regulation did not provide a sufficient basis to establish jurisdiction over the non-Swedish defendants.

The judgment is not yet final as the Appeal Court granted leave to further appeal to the Swedish Supreme Court.

In the centre of Europe with a global reach

VAN BAEL & BELLIS

Chaussée de La Hulpe 166
Terhulpsesteenweg
B-1170 Brussels
Belgium

Phone: +32 (0)2 647 73 50
Fax: +32 (0)2 640 64 99

vbb@vbb.com
www.vbb.com