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MERGER CONTROL

– MEMBER STATE LEVEL –

AUSTRIA

Austrian Cartel Court imposes € 70,000 fine for gun jumping

On 21 August 2019, the Austrian Cartel Court imposed a € 70,000 fine on WIG Wietersdorfer, a construction materials firm, for failure to notify its acquisition of a 50% interest in Calcit, a Slovenian building company, before implementing the transaction. WIG Wietersdorfer acquired the interest in Calcit in June 2018, yet only notified the transaction to the Austrian Competition Authority in December 2018, and later received unconditional merger approval in January 2019. According to the Austrian Competition Authority, this resulted in a breach of the Austrian merger standstill obligation during the period from 6 June 2018 (when the acquisition took place) to 15 January 2019 (when it was approved). WIG Wietersdorfer has not contested the decision.

GERMANY

German Minister overturns prohibition, conditionally clears Miba/Zollern deal

On 19 August 2019, the German Economy Minister, Peter Altmaier, issued a ministerial order to approve conditionally a joint venture between competitors Miba and Zollern, both active in the production of hydrodynamic slide bearings. The ministerial order effectively overturns an earlier prohibition decision of the German Federal Cartel Office ("FCO") (see VBB on Competition Law, Volume 2019, No. 2).

According to the ministerial order, clearance was granted on the basis that the deal would generate "expertise and innovation potential for energy revolution and sustainability" and meet overriding public interest objectives with regard to climate and environmental protection. In particular, the bearings at issue are an important technology used in renewable energy generation. At the same time, the clearance is subject to specific remedies and a commitment to invest € 50 million into German research and development.

The German Monopolies Commission criticised the ministerial order as not well-founded and the remedies as inappropriate. The decision may be appealed by the FCO to the Higher Regional Court of Düsseldorf.

THE NETHERLANDS

Dutch Competition Authority conditionally clears educational material merger with first ever access-to-data remedy

On 29 August 2019, the Dutch Competition Authority ("ACM") conditionally cleared the acquisition of Iddink Group by Sanoma. Both are active in the publication and distribution of educational material in the Netherlands. Iddink operates an online learning portal called Magister, which is used by more than half of the secondary schools in the Netherlands. Magister makes it possible for publishers to offer schools and students digital access to educational material, with further useful functionality such as enabling progress and grade information to be shared between students, parents and teachers. During its Phase II review, the ACM was concerned that post-transaction Sanoma would hamper innovation in this important emerging digital market as it might limit the ability of competing publishers to offer educational material to users of Magister.

To resolve these concerns, the ACM required Sanoma to grant competing publishers of educational material access to Magister under "equal conditions" as its own service, including access to Magister's data on fair, reasonable and non-discriminatory terms. Additionally, Sanoma must ensure that any commercially sensitive information of competing publishers cannot be shared through Iddink.

– OTHER DEVELOPMENTS –

UNITED KINGDOM: On 14 August 2019, the Competition and Markets Authority ("CMA") imposed a fine of UK£ 27,000 on Rentokil, a pest control company, for failing to comply with a number of formal information requests sent to it between October 2018 and February 2019, during the CMA's review of Rentokil's acquisition of rival Mitie Pest Control. On 22 August 2019, the CMA accepted an undertaking to divest various contracts relating to pest control services in lieu of referring the completed deal to a Phase II investigation.

ABUSE OF DOMINANT POSITION

– MEMBER STATE LEVEL –

GERMANY

Higher Regional Court of Düsseldorf orders suspensive effect of Facebook's appeal against FCO decision

On 26 August 2019, the Higher Regional Court of Düsseldorf (the "Court") granted Facebook's request for an injunction against the immediate application of measures imposed by the German Federal Cartel Office (the "FCO") arising from the FCO's finding in February 2019 that Facebook abused its dominant position. As a result, Facebook is now not obliged to comply with the FCO's requirement that it make amendments to its data processing policy pending its appeal, although the FCO has stated that it intends to appeal the Court's order.

In the summary proceedings, the Court conducted a summary assessment which expressed serious doubts about the legality of the FCO decision. The Court found on a preliminary basis that the data processing by Facebook does not infringe competition law, contrary to the FCO's opinion. In particular, the Court stated that an infringement of data protection law does not necessarily lead to a violation of competition law.

The Court assessed the FCO's findings of both an exploitative and exclusionary abuse.

According to the Court, an exploitative abuse pursuant to section 19(2) No. 2 of the German Act against Restraints on Competition occurs when a dominant undertaking demands fees or other terms and conditions that differ from those that would probably result from effective competition. In the present case, the Court found that the FCO failed to meet this burden because it did not sufficiently investigate which terms and conditions would have been chosen in case of perfect competition, and show that those imposed by Facebook differed.

With regard to the alleged exclusionary abuse pursuant to section 19(1) of the German Act against Restraints on Competition, the Court preliminarily found that the conduct did not have anticompetitive effects. More particularly, the Court concluded that the transmission of user data to Facebook can easily be duplicated, and users are free to make the data available to any third party as often as they wish. In addition, the Court also preliminarily concluded that the FCO's decision did not sufficiently assess the data's nature, origin and volume to demonstrate that Facebook engaged in excessive data processing. In the Court's preliminary view, the FCO did not sufficiently differentiate between different processing activities of various kinds of data. Moreover, the Court also preliminarily concluded that users did not lose control over their data, noting that the users gave free consent for data processing without being under coercion. In this context, the Court rejected the argument that users do not read the terms and conditions, as the Court preliminarily considered that any such failure did not result from Facebook's dominant position, but from the indifference or convenience of the average Facebook user.

The Court did not assess whether Facebook's data processing policies actually comply with data protection rules, as it did not consider this relevant to the question whether the conduct is harmful to competition. In this respect, the Court stated that a dominant position entails a particular responsibility with regard to compliance with competition rules, not for the entire legal order. Moreover, the Court preliminarily concluded that Facebook's dominance did not cause an infringement of data protection law.

According to the Court's preliminary findings, the FCO's finding of an exclusionary abuse should have been supported by an assessment of the extent (if any) to which the processing and linking of data on third party platforms impedes market entry of Facebook's competitors, and the extent to which (if any) the use of such data from third party platforms would allow Facebook to increase its advertising revenues and secure Facebook's market position.

As noted, the FCO has announced that it will appeal against the injunction, which would then be assessed by the German Federal Court of Justice. The main appeal procedure against the decision itself is still pending.

CARTELS AND HORIZONTAL AGREEMENTS

– MEMBER STATE LEVEL –

PORTUGAL

Portuguese competition authority imposes record fine of € 54 million for a cartel in the insurance market

On 1 August 2019, the Portuguese competition authority (Autoridade da Concorrência, "AdC") published a press release in which it announced that it had imposed total fines of € 42 million on two insurance companies (Lusitania and Zürich), two board members and two directors for, inter alia, allocating markets and coordinating the prices of their insurance policies for workplace accidents, health and cars, to the detriment of their corporate customers. These fines come on top of the € 12 million fine imposed on two other undertakings involved in the infringement on 28 December 2018.

On 13 February 2019, the AdC announced in a press release that one of the undertakings involved in the infringement (Seguradores Unidas) received full immunity from fines under the Leniency Programme. Additionally, two other insurance companies (Multicare and Fidelidade) benefited from fine reductions under the Leniency Programme and under the settlement procedure.

This is the first time the AdC has sanctioned a cartel in the financial sector. The total fine of € 54 million is the largest fine to have been imposed for an infringement of competition law in Portugal.

VERTICAL AGREEMENTS

– MEMBER STATE LEVEL –

FRANCE

French court rules that car supplier Hyundai was free to terminate selective car distribution contract with distributor despite meeting selection criteria

On 31 July 2019, the Paris Court of Appeal (the "Court") ruled that Hyundai did not discriminate against retailer Garage Richard Drevet by terminating its car distribution contract. The Court essentially ruled that each car supplier is free to determine whether to grant access to its selective car distribution network. Moreover, the Court determined that, in line with the principle of contractual freedom and the freedom of economic operators to choose their commercial partners independently, a car supplier is not obligated to admit every distributor that meets its selection criteria. Finally, the Court found that Hyundai had not misled the distributor into believing that the distribution contract would be renewed. This decision may be appealed to the French Supreme Court.

Although the Court did not need to invoke competition law in its reasoning, the case is another clear expression of the French courts' stance regarding the freedom of car suppliers to choose whether or not to allow distributors meeting their selection criteria into their vehicle selective distribution networks. In another pending case against Hyundai before the Paris Court of Appeal, Garage Richard Drevet and others have appealed the decision of the French Competition Authority to reject their complaint against Hyundai for discriminating in its appointment of repairers to its authorised repair network.

GERMANY

Higher Regional Court of Düsseldorf rejects action by automotive repair shop over right to be admitted to car manufacturer's authorised repair network

On 27 March 2019, the Higher Regional Court of Düsseldorf (the "Court") upheld a judgment of the Regional Court of Cologne rejecting an action of an automotive repair shop over its right to be re-admitted to the authorised repair network of a manufacturer of an unnamed non-luxury car brand.

The claimant, an authorised repair shop for four different car brands, was authorised for the defendant's brand until the defendant terminated the contract in 2016. In support of its action over its right to be re-admitted, the claimant put forth three arguments: (i) the defendant abused its dominant position on a brand-specific upstream market in violation of sections 19(1) and (2) No. 1 of the German Act against Restraints of Competition ("ARC"); (ii) the defendant abused its relative market power in violation of section 20(1) ARC and (iii) the defendant infringed Articles 101 and 102 TFEU.

First claim. The claimant argued that the upstream market on which repairers (on the demand side) source from vehicle manufacturers (on the supply side) products, services and rights that facilitate entry into the downstream markets (on which repairers offer vehicle repair and maintenance) needs to be defined as brand-specific. The claimant argued that the defendant was, consequently, dominant on this upstream market and abused its dominant position by refusing the claimant access to its authorised repair network.

The Court, however, reasoned that the claimant had failed to demonstrate that the market should be defined as brand-specific and that the defendant was, consequently, dominant. In line with the case-law of the Federal Court of Justice (see, e.g., *Jaguar*, VBB on Competition Law, Volume 2018, No.3), the Court decided that the upstream market is only to be defined as brand-specific if it is impossible, or not economically viable, for repairers to carry out repair and maintenance work on a branded vehicle downstream unless they have the status of authorised repairer for that specific brand. Whether the status as an authorised repairer is indispensable for the provision of repair services for vehicles of a particular brand is determined largely by the demands, expectations and habits of the customers of that particular brand and will, therefore, be assessed on a case-by-case basis.

In finding that the claimant had not met the burden of proving that it is not economically viable to operate in the downstream market without being a member of the defendant's authorised repair network, the Court noted the following: (i) a high number of independent repair shops are active in Germany; (ii) there is a correlation between the age of the vehicle and the type of repair shop that customers choose for repairs (in particular, customers use authorised repair shops for new vehicles and independent repair shops for older vehicles); (iii) there is a correlation between the age of the vehicle and frequency of maintenance works (with older vehicles requiring more frequent maintenance, thereby generating business for non-authorised repair shops); and (iv) the claimant had been an authorised repair shop for 20 years for the defendant and therefore possessed all the necessary knowledge to continue carrying out maintenance and repair works for the defendant's particular brand.

The fact the claimant's turnover generated in relation to the defendant's brand decreased by more than 50% after it lost the status of authorised repairer was not found by the Court to be sufficient to prove that the claimant's economic viability on the downstream market depended on having the status of authorised repairer. It therefore seems that claimants face a high burden of proof in establishing this requirement.

Second claim. On the separate issue of alleged abuse of relative market power, the Court found that the defendant did not have relative market power vis-à-vis the claimant since it was authorised by a number of different brands, and did not solely rely on the defendant's brand.

Third claim. With regard to a possible infringement of Article 101 TFEU, the Court decided that the refusal to admit the claimant as an authorised repairer neither constituted an "agreement" nor a "concerted practice", but rather constituted purely unilateral business conduct outside the scope of Article 101 TFEU. In addition, the Court dismissed the argument alleging an infringement of Article 102 TFEU as the defendant had not been shown to have a dominant position.

Overall, the case illustrates the obstacles faced by independent car repairers in proving that a refusal to be admitted to authorised networks violates competition law, despite the prior recognition by the Federal Court of Justice that such a refusal may indeed be a violation where access is essential.

German Federal Court of Justice annuls Higher Regional Court of Düsseldorf's sixfold increase of Rossmann's RPM fine for procedural reasons

On 9 July 2019, the German Federal Court of Justice ("FCJ") annulled a judgment of the Higher Regional Court of Düsseldorf (the "Court") which had increased a fine imposed on drugstore Rossmann for engaging in resale price maintenance ("RPM") from € 5.25 million to € 30 million.

In December 2015, the German Federal Cartel Office ("FCO") fined Rossmann € 5.25 million for vertical resale price fixing related to the sale of Melitta roasted coffee. The Court subsequently increased the fine taking into account the fact that the vertical infringement of competition law had horizontal effects in relation to the sale of a major consumer product in Germany (see VBB on Competition Law Volume 2018, No. 5).

On appeal, the FCJ annulled the Court's judgment on procedural grounds and remitted the case to another cartel panel of the Court for reconsideration. The FCJ did not rule on the merits of the case.

The FCJ found that the Court had not provided the reasoning for its ruling within the legal time limit of eleven weeks after giving judgment. As the judgment was rendered on 28 February 2018, the reasoning should have been provided by 16 May 2018, but was only given on 29 May 2018. The FCJ held that, in a collegial judicial body, even the unforeseen absence of the rapporteur (as had occurred in this case) does not automatically extend the deadline, and that the other members of the panel are responsible for observing the deadline.

UNITED KINGDOM

UK Competition authority imposes a record-breaking £ 3.7 million fine on Casio for online RPM

According to a press release issued on 1 August 2019, the Competition and Markets Authority ("CMA") imposed a fine of £ 3.7 million (approximately € 4.1 million) on piano supplier Casio Electronics ("Casio") for online resale price maintenance (RPM). Between the years 2013 and

2018, Casio reportedly implemented a policy designed to restrict retailers' online pricing freedom and obligate them to sell digital pianos and keyboards online above a certain minimum price. Retailers that sold these products online below that price were pressured to raise prices or else risked being sanctioned. This policy was made more effective by Casio's use of a new type of software to monitor the real-time prices of its retailers.

Casio's fine was reduced as a result of its admission of the illegal behaviour and its cooperation with the CMA, which ultimately facilitated the CMA's investigation.

The fine, which is the CMA's highest fine for RPM to date, is a further indicator of the renewed focus on enforcement actions targeting vertical restraints at both EU and national level, particularly in the online context. It also illustrates the emphasis being placed by authorities on the role of online price monitoring software in increasing the effectiveness of RPM (see, for example, VBB on Competition Law, Volume 2018, No. 17, in relation to the European Commission's decision fining four consumer electronics manufacturers).

INTELLECTUAL PROPERTY/LICENSING

– MEMBER STATE LEVEL –

BELGIUM

Antwerp Enterprise Court refers request for preliminary ruling to Court of Justice of European Union in excessive pricing case against SABAM

On 10 May 2019, the Antwerp Enterprise Court (the "Court") referred a request for a preliminary ruling to the Court of Justice of the European Union (the "ECJ") in two separate cases between Belgian festival organisers Weareone. World BVBA (the organisers of *Tomorrowland*) and Wecandance NV (the organisers of *Wecandance* – together the "festival organisers") and the Belgian Association of Authors, Composers and Publishers ("SABAM").

SABAM is a copyright management society that collects and distributes royalties for Belgian artists. This includes the collection of royalties from music festivals for the use of works from Belgian musicians in SABAM's portfolio.

The Court referred the request in two separate legal proceedings in which the festival organisers are disputing invoices for licence fees issued by SABAM, including the applied tariff-rate structure. The festival organisers claim that SABAM abuses its dominant position on the market by charging excessive licence fees.

In order to address the arguments raised by the festival organisers, the Court referred the following two questions to the ECJ:

- Does the application of a remuneration model on organisers of musical events for the right to communicate musical works to the public, based among other things on turnover, which makes use of a flat-rate tariff in tranches, instead of a tariff that takes into account the precise share (making use of advanced technical tools) of the music repertoire protected by the management company played during the event, constitute an abuse of dominant position?
- Does the application of such a remuneration model which makes licence fees dependent on external elements such as, inter alia, the admission price, the price of refreshments, the artistic budget for the performers and the budget for other elements, such as decor, constitute an abuse of dominant position?

The referral by the Court constitutes the latest development in a history of disputes between Weareone. World BVBA and SABAM concerning excessive invoices. In recent years, SABAM itself has frequently been involved in legal disputes in which its collection of royalties is the subject of allegations of abuse of a dominant position.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

AUSTRIA: On 24 July 2019, the Austrian Federal Competition Authority ("FCA") published a new guidance paper on dawn raids. The paper describes the complete dawn raid procedure and sets out the rights and obligations of the FCA as well as the rights and obligations of undertakings under investigation, including legal protection of the undertakings and employees subject to a dawn raid. The paper dedicates a special section to the access to, and collection of, electronic data, including the use of electronic devices and forensic software. An English version of the guidance paper is available on the FCA's website.

AUSTRIA/ GERMANY: According to a press release of the Austrian Federal Competition Authority ("FCA") of 14 August 2019, the Vienna Cartel Court decided not to fine sugar cartelists due to double jeopardy. The underlying anticompetitive territorial agreements by three German sugar manufacturers were sanctioned by the German Federal Cartel Office ("FCO") in 2014, which imposed fines totalling about € 280 million. The companies also retailed industrial sugar in Austria. The FCA asked the Vienna Cartel Court to fine the companies for market allocation in Austria as well. In May 2019, the Vienna Cartel Court ruled that imposing another fine would infringe the ban against double jeopardy. The FCA appealed the ruling in order to clarify the fundamental understanding of cooperation between competition authorities under Regulation 1/2003.

PRIVATE ENFORCEMENT

– EUROPEAN UNION LEVEL –

Court of Justice of EU rules on jurisdiction in private damages actions for infringement of competition law in absence of contractual link between plaintiff and participant to cartel

On 29 July 2019, the Court of Justice of the European Union (the "ECJ") handed down a judgment in which it held that a domestic court in an EU Member State has jurisdiction to rule on a follow-on competition damages claim even when no direct contractual link exists between the participant to a cartel and the victim.

The case concerned a civil action for damages initiated by Tibor-Trans Fuvarosó és Kereskedelmi Kft ("Tibor-Trans"), a freight transport company based in Hungary, against DAF Trucks NV ("DAF"), a trucks manufacturer headquartered in the Netherlands. The case was initiated before Hungarian courts by Tibor-Trans following the 2016 decision of the European Commission which found that, between 1997 and 2011, the international truck manufacturers, including DAF, had colluded on pricing and on the timing and the passing on of costs for the introduction of emission technologies (Case AT.39824 – Trucks).

Tibor-Trans brought its follow-on action for damages against DAF alleging that it had suffered financial harm as a result of the collusive arrangements between truck companies. Tibor-Trans said it had heavily invested in the purchase of new trucks between 2000 and 2008. In order to purchase those trucks, Tibor-Trans had secured financing from leasing companies which retained ownership of the vehicles until the expiry of the leasing agreements. The right of ownership only passed on to Tibor-Trans after performance of its obligations under the leasing agreements. Thus, although Tibor-Trans never purchased any DAF trucks, it claimed to be a direct victim of the anti-competitive infringement, considering that (i) the leasing companies only provided financing and completely passed on the overcharge to Tibor-Trans; and (ii) in Hungary customers were only able to purchase trucks from independent dealers, and not directly from the original equipment manufacturers.

Tibor-Trans argued that Hungarian courts had jurisdiction to rule in that case. Tibor-Trans relied more particularly on Article 7(2) of Regulation 1215/2012 of the European Parliament and of the Council of 12 December 2012 on the jurisdiction and enforcement of judgments in civil and commercial matters (the "Brussels I*bis* Regulation") which provides that "[a] *person domiciled in a Member State may be sued in another Member State*: […] *in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur*".

Tibor-Trans also relied on the ECJ's case-law in which the ECJ interpreted Article 7(2) of the Brussels I*bis* Regulation to mean that, in the case of an action for damages brought against defendants domiciled in different Member States as a result of a violation of competition rules, the victims of those competition law infringements were entitled to bring follow-on actions before the courts of the place where its own registered office was located (see Case C-352/13, *CDC Hydrogen Peroxide* (see VBB on Competition Law, Volume 2015, No. 5)).

DAF, on the other hand, disputed the jurisdiction of the Hungarian court, arguing that the German courts should have jurisdiction because (i) the collusive meetings took place in Germany; and (ii) neither DAF nor any other participants in the cartel had ever entered into a direct contractual relationship with Tibor-Trans, therefore DAF could not reasonably expect to face litigation in Hungary.

Uncertain as to the answer called for by this issue, the Hungarian court stayed the proceedings and referred the matter to the ECJ for a preliminary ruling.

In its judgment, the ECJ noted that the damages that can be recovered in follow-on competition law damages actions is not limited to the financial consequences suffered by

the direct purchasers. Those damages also cover actions for reparation of harm caused by "*additional costs incurred because of artificially high prices*". According to the ECJ, such damage appears "*to be the immediate consequence of an infringement pursuant to Article 101 TFEU and thus constitutes direct damage which, in principle, provides a basis for the jurisdiction of the courts of the Member State in which it occurred*".

Relying on its previous case-law in Case C-27/71, FlyLAL (see VBB on Competition Law, Volume 2018, No. 7) the ECJ then noted that, for the purpose of applying Article 7(2) of the Brussels I*bis* Regulation to competition law infringements, the place where the damage occurred consists of the EU Member State on whose territory the alleged damage is purported to have occurred.

The ECJ therefore concluded that Article 7(2) of the Brussels I*bis* Regulation must be interpreted, in the case at hand, "*as meaning that, in an action for compensation for damage caused by* [infringements of competition law] '*the place where the harmful event occurred' covers* [...] *the place where the market which is affected by that infringement is located, that is to say, the place where the market prices were distorted and in which the victim claims to have suffered that damage, even where the action is directed against a participant in the cartel at issue with whom that victim had not established contractual relations*".

– MEMBER STATE LEVEL –

GERMANY

CDC and HeidelbergCement settle action for damages in cement cartel case

According to CDC (Cartel Damage Claims), an action for € 138 million in damages has recently been settled. The exact date was not specified. The claim was originally brought before the Regional Court of Mannheim. In a judgment of 24 January 2017, that court ruled that the claims for damages were time-barred. CDC filed an appeal to the Higher Regional Court of Karlsruhe against the judgment of the Mannheim Court.

The issue concerned a statutory provision, newly introduced in 2005, suspending the limitation period in antitrust damages cases if a competition authority conducts investigations into a potential infringement. According to the judgment, such a provision would not apply to claims which arose prior to its entry into force (see, VBB on Competition Law, Volume 2017, No. 2). This question was highly contested between German courts. The reasoning of the Regional Court of Mannheim was in line with that of the Higher Regional Court of Karlsruhe.

In the meantime, the German Federal Court of Justice clarified in a highly anticipated judgment in another cement cartel damages claim on 12 June 2018 that the suspension of the limitation period for cartel damages claims also applies to claims that arose prior to the entry into force of the new provision setting out the suspension, provided that they were not yet time-barred at that moment. After this clarification in favour of CDC's position, the appeal was settled.

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