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MERGER CONTROL

– EUROPEAN UNION LEVEL –

European Commission conditionally clears AbbVie's acquisition of Allergan

On 10 January 2020, the European Commission approved AbbVie's acquisition of its rival Allergan, subject to the divestment of one of Allergan's pipeline inflammatory bowel disease (IBD) drugs.

Both companies are global pharmaceutical producers with innovative product portfolios covering, among other matters, biologic drugs for the treatment of inflammatory bowel disease (IBD). These biologic medications are used when patients fail to respond to traditional therapies, including corticosteroids and immunosuppressants. Specifically, AbbVie produces Humira, an "anti-TNF" biologic, and is developing risankizumab, an "IL-23 inhibitor". Allergan also has an IL-23 inhibitor, brazikumab, at an advanced stage of its development pipeline. The Commission found that both IL-23 inhibitors would directly compete with one another, and that the merged entity would have an incentive to cease pursuing the development of brakizumab.

To resolve these concerns, the Commission accepted Abb-Vie's commitment to divest the brakizumab pipeline product, including global marketing rights, to a suitable purchaser that would continue developing the drug.

– MEMBER STATE LEVEL –

BELGIUM

Belgian competition authority expands scope of simplified merger review

On 20 January 2020, the Belgian Competition Authority ("BCA") announced the adoption of new rules expanding the scope of the simplified merger review procedure in Belgium.

Under these new rules, the BCA can decide to follow a simplified procedure to review transactions that fulfil two conditions: (i) the cumulative market share of all parties "having horizontal relationships" remains below 50%; and (ii) the Herfindahl-Hirschman index delta (i.e., a method of measuring market concentration) resulting from the transaction is below 150. The BCA can also apply the simplified procedure to horizontal mergers where the parties' combined market share remains below 50% and the transaction results in less than 2% increment in market shares. Finally, the BCA can apply the simplified procedure "when it considers, in view of all relevant circumstances, that there is no doubt on the admissibility of the concentration and that it does not raise any objections", in two cases: (i) in horizontal mergers, when the parties are active on the same (product and geographic) market and their cumulative market shares are above 25% but below 40%; and (ii) in vertical mergers, when the parties operate at different levels of the supply chain and their market shares on vertically related markets are above 25% but below 40%.

GERMANY

German competition authority conducts parallel cartel and merger proceedings for Telekom and EWE joint venture

Telekom and EWE, two of Germany's largest telecommunications companies, sought to form a joint venture (JV) to expand the fire-optic broadband network in north-western Germany. On 21 March 2019, the German Federal Cartel Office (FCO) launched two sets of parallel proceedings: an investigation into whether the JV would constitute a cartel, and a merger control review. The cartel investigation, which concluded on 4 December 2019, resulted in commitments that were then taken into account as conditions in the merger approval decision issued on 9 January 2020.

As Telekom and EWE are the largest providers of internet connections in north-western Germany, and Telekom was found to be virtually the only provider on the wholesale market, the FCO found that their cooperation would have significant effects on competition. The FCO raised compe-tition concerns with regard to three main areas. First, the JV would risk slowing down the deployment of fibre-optic cable connections as it would reduce incentives to expand as a first mover into low-deployment areas.

Second, the JV could negatively affect other telecommunications providers by restricting their ability to expand into the region or by exerting pressure on rival companies by focusing the JV's activities on areas that already had existing cable networks. Finally, the JV would have lowered incentives to grant third companies access to Telekom and EWE's combined networks, which could prevent these competitors from offering internet services to end customers.

To conclude the FCO's cartel investigation and resolve these concerns, the companies committed to: (i) providing 300,000 new fibre-optic connections to end consumers in the coming four years including in rural areas financed by the JV; (ii) competing separately in tenders for publicly funded network expansions; (iii) refraining from engaging in certain defensive measures against other telecommunications companies; and (iv) granting non-discriminatory access to their network and upstream services. The FCO then cleared the JV subject to these commitments.

ABUSE OF DOMINANT POSITION

– MEMBER STATE LEVEL –

FRANCE

French Competition Authority finds that the acquisition of a company does not amount to an abuse of dominant position

On 16 January 2020, the French Competition Authority (the "FCA") handed down a decision in which it found that mergers and acquisitions did not amount to an abuse of a dominant position.

In the case at hand, Towercast (a company active on the market of terrestrial broadcasting in France) complained to the FCA that the non-notifiable acquisition of Itas (another company active on that market) by TDF (the dominant company on the market for terrestrial broadcasting) amounted to an abuse of a dominant position by the latter.

In its complaint before the FCA, Towercast relied in particular on the judgment of the Court of Justice of the European Union (the "Court of Justice") in *Continental Can* which found that an acquisition of a company by an undertaking can amount to an abuse of a dominant position if it is likely to strengthen the existing dominant position of that undertaking "*in such a way that the degree of dominance reached substantially fetters competition*."

However, in its decision of 16 January 2020, the FCA refused to apply the *Continental Can* case law on the ground that that judgment had been handed down at a time when there was no merger control mechanism in place in the European Union.

Since such mechanisms have now been adopted, the FCA found that the *Continental Can* ruling has become obsolete. The FCA relied in particular on the fact that Article 21 of Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the "Merger Control Regulation") makes it explicitly clear that mergers and acquisitions are solely and exclusively reviewed under that Merger Control Regulation, and that Articles 101 (agreements between undertakings) and 102 (abuse of dominance) of the Treaty on the Functioning of the European Union are not applicable to such a situation. The fact that a merger does not meet the notification thresholds is irrelevant in this respect.

The FCA therefore dismissed the complaint submitted by Towercast.

CARTELS AND HORIZONTAL AGREEMENTS

– MEMBER STATE LEVEL –

GERMANY

German Competition Authority imposes fines totalling € 154.6 million on plant protection product suppliers in collusion case

On 13 January 2020, the German Federal Cartel Office (FCO) imposed fines totalling € 154.6 million on seven undertakings for agreeing on price lists, rebates and retail prices for plant protection products between 1998 and 2015. Fines were also imposed on employees implicated in the infringing conduct.

Following a leniency application filed by Beiselen, the FCO carried out dawn raids at the premises of seven undertakings in March 2015 to collect evidence of the suspected infringement. The FCO's probe found that Agravis, Agro Agrargroßhandel, BayWa, BSL Betriebsmittel Service Logistik, Getreide, Raiffeisen Waren and ZG Raiffeisen had agreed on price lists for plant protection products which were sent out twice a year between 1998 and 2015. According to the FCO, the undertakings agreed on a price calculation methodology which resulted in very similar price lists for retailers and consumers. At the beginning of the infringement, the undertakings met multiple times each year, but later the discussions were conducted via email or phone. A "green list" of prices was first agreed upon by a smaller number of undertakings and then distributed to a larger group. Some undertakings also agreed on discount margins and sales prices to retailers for key products until 2011.

BayWa and Agravis announced that they had settled with the FCO and agreed to pay € 68.6 million and € 43.7 million respectively. Four other companies also agreed to settle. All participants cooperated in the investigation. Beiselen, the leniency applicant, was exempt from fines. Investigations into two more companies are on-going and proceedings into five further undertakings have been discontinued. According to reports, the German agricultural association *Arbeitsgemeinschaft bäuerliche Landwirtschaft* (AbL) has encouraged victims of the cartel to initiate private enforcement proceedings.

HUNGARY

Hungarian Competition Authority imposes fines totalling € 4.8 million for bid rigging in diagnostic imaging equipment sector

On 3 January 2020, the Hungarian Competition Authority ("GVH") imposed fines totalling HUF 1.6 billion (approximately € 4.8 million) on seven undertakings producing and distributing diagnostic imaging products (MRI, CT and X-ray equipment) for their involvement in rigging their bids for an EU-funded tender for the public procurement of diagnostic imaging equipment that took place in 2015.

The undertakings that were involved in the infringement and fined are Hungarian subsidiaries of Siemens, GE and Philips as well as several of their distributors. The GVH granted immunity to Mediszer Kft., one of the distributors, which was the first company to apply for leniency. The GVH also granted fine reductions ranging between 30% and 40% to three of Siemens' Hungarian subsidiaries and to the distributor HOGE Kft. under provisions rewarding cooperation, including leniency and settlement cooperation.

VERTICAL AGREEMENTS

– EUROPEAN UNION LEVEL –

European Commission imposes € 14.3 million fine on NBCUniversal for territorial, customer and online sales restrictions of merchandising products

On 30 January 2020, the European Commission ("Commission") announced its decision to fine several companies belonging to Comcast Corporation, including NBCUniversal, € 14,327,000 for limiting the ability of licensees to sell licensed merchandising products to other EEA countries and non-allocated customer groups. According to the Commission's press release, the restrictions concerned merchandise products featuring characters from NBCUniversal's films, including Minions and Jurassic World.

According to the Commission's press release, the Commission found that NBCUniversal's non-exclusive licensing agreements contained a number of restrictions which led to the partitioning of European markets. Specifically, NBCUniversal was found to have:

- Imposed *direct measures* restricting out-of-territory sales by licensees. Such measures included clauses explicitly prohibiting out-of-territory sales, obligations to notify NBCUniversal of out-of-territory sales, limitations to the languages used on merchandise products and obligations to pay revenues of out-of-territory sales to NBCUniversal;

- Imposed *direct measures* restricting sales by licensees beyond their allocated customers or customer groups. Such measures included clauses explicitly prohibiting sales to non-allocated customer groups and obligations to pay revenues of sales to non-allocated customer groups to NBCUniversal;

- Imposed *direct measures* restricting online sales. Such measures included clauses prohibiting all online sales, prohibiting out-of-territory online sales and allowing online sales only on the websites of specific retailers;

- Imposed obligations on licensees to pass on the sales restrictions to their own customers to prevent them from selling beyond the licensees' allocated territories or customer groups;

- Imposed measures to encourage compliance with the imposed sales restrictions. Such measures included audits and terminating or refusing to renew contracts of those licensees that did not comply with the restrictions.

The infringement lasted over six years (between 1 January 2013 and 25 September 2019).

The fine imposed on NBCUniversal was substantially reduced based on the extent of its cooperation with the Commission during the investigation, which went beyond what was legally required of NBCUniversal. In particular, NBCUniversal acknowledged the infringement, provided the Commission with additional evidence permitting it to strengthen its case, and waived certain procedural rights. As a result, NBCUniversal was granted a 30% reduction of the fine.

NBCUniversal is the eighth company to be fined by the Commission for infringements in relation to vertical agreements since 2018 (and the fourth in respect of restrictions of cross-border sales), further evidencing the priority being given by the Commission to the enforcement of the competition rules with respect to vertical agreements. In all eight cases, fine reductions of between 30% and 50% have been granted under the cooperation procedure, which has enabled the Commission to achieve major administrative efficiencies.

– MEMBER STATE LEVEL –

UNITED KINGDOM

Ping loses second appeal against UK fine for anticompetitive online sales ban

On 21 January 2020, the UK Court of Appeal rejected an appeal brought by the golf club manufacturer Ping Europe Limited ("Ping") against the 2018 judgment of the Competition Appeal Tribunal ("CAT"), which upheld the Competition and Markets Authority's ("CMA") 2017 decision finding Ping's online sales ban of its custom-fitted golf clubs to be an unjustified restriction. The CMA originally fined Ping £1.45 million for infringing both Chapter I of the Competition Act 1998 and Article 101 Treaty on the Functioning of the European Union, but the CAT reduced the fine to £1.25 million (see VBB on Competition Law, Volume 2017, No. 8 and Volume 2018, No. 9).

Ping argued that it was justified in preventing retailers from selling its golf clubs online because its products are designed to be custom-fitted in store. However, the Court of Appeal judgment stated that Ping's objective to custom-fit clubs does not require a complete ban on internet sales and there are many other ways in which Ping's objective can be substantially fulfilled without imposing a blanket ban on internet sales.

The Court of Appeal agreed with the CAT's conclusions that the online ban revealed a sufficient degree of harm to be considered a restriction of competition by object. In this respect, the Court of Appeal was satisfied with the CAT's conclusions that the impact on consumers and retailers was real and material since the ban significantly restricts consumers from accessing Ping golf club retailers outside their local area, limits the comparison of prices and significantly reduces the ability of, and incentives for, retailers to compete for business using the internet.

The judgment went on to note that internet sales are an important channel of competition between retailers and that companies should look to adopt measures that are less restrictive than an outright ban when looking for ways of meeting quality concerns. This judgment further confirms that it will be extremely difficult, if not impossible, for businesses to justify a general online sales ban as necessary to protect a brand.

INTELLECTUAL PROPERTY/LICENSING

– MEMBER STATE LEVEL –

GERMANY

Munich Court of Appeals issues anti-anti-suit injunction in FRAND case

On 12 December 2019, the Munich Court of Appeals (*Oberlandesgericht München*) (the "Court") upheld the judgment of the Munich District Court (*Landgericht München I*) of 2 October 2019 which had granted a preliminary injunction in a case pitting Continental, an automobile supplier, against Nokia, a telecommunications company. The Munich Court of Appeals ordered Continental to withdraw the action for anti-suit injunction which that company had brought against Nokia before the US District Court of the Northern District of California (the "US Court") in a patent dispute.

Daimler wished to obtain licences for Nokia's European portfolio of standard essential patents ("SEPs") regarding 4G, 5G and WiFi mobile connectivity technology relevant to the connectivity of cars. On 7 January 2019, Daimler filed a competition law complaint with the European Commission against Nokia alleging that Nokia had not offered the requested technology on fair, reasonable and non-discriminatory ("FRAND") terms. On 21 March 2019, while the proceedings before the European Commission were still pending, Nokia commenced ten patent infringement cases against Daimler before Düsseldorf, Mannheim and Munich courts. Two Daimler suppliers, both part of the Continental group ("Continental"), joined these suits as third-party interveners in support of Daimler.

On 10 May 2019, Continental brought suit against several defendants, including Nokia, before the US Court for refusing to grant licences on FRAND terms. In this context, on 12 June 2019, Continental applied for, and subsequently obtained, a motion from the US Court to stop Nokia's infringement actions in Germany (that is, an anti-suit injunction).

In response, on 9 July 2019, Nokia filed a motion for an interim injunction in Germany (that is, an anti-anti-suit injunction). On 11 July 2019, the court granted an interim anti-anti-suit injunction which was subsequently confirmed by the Munich District Court on 2 October 2019.

On appeal, in assessing whether to grant the anti-anti-suit injunction, the Munich Appeals Court balanced the parties' rights, namely: (i) Nokia's property rights relating to the SEPs and (ii) Continental's general freedom to bring legal action. In balancing these two interests, the Munich Appeals Court concluded that the anti-suit injunction brought by Continental before the US Court would be damaging to Nokia's property rights and that the anti-anti-suit injunction brought before German courts by Nokia would not infringe Continental's general freedom to act (and bring an action). The Munich Appeals Court also considered that an anti-anti-suit injunction was the only way for Nokia to protect its exclusive property rights conferred by the patents against the anti-suit injunction motion brought before the US Court.

Furthermore, according to the Munich Appeals Court, the action brought by Continental to obtain a judgment ruling on the issue of whether the licensing terms offered by Nokia were FRAND compliant could in any case be raised in the patent infringement case in Germany. Continental was not able to establish that Nokia's rights to pursue the main proceedings in Germany would be sufficiently protected in the US to justify denying an anti-anti-suit injunction. The Munich Appeals Court also found that Nokia would be subject to high fines if it acted contrary to the US anti-suit injunction, which justified an urgent response by the German court in the form of an anti-anti-suit injunction.

Finally, the Munich Appeals Court rejected a challenge based on public international law and held that any potential extraterritorial effect which would breach US sovereignty was justified by the need to protect the patent

rights in Germany. Moreover, the protection of Nokia's exclusive property rights conferred by the patents was justified on constitutional grounds which in the German legal order rank higher than public international law.

Accordingly, the Munich Appeals Court ordered Continental to withdraw the motion for an anti-suit injunction which it had brought before the US Court under a € 250,000 penalty, as well as detention for up to six months, for each breach of its court order.

This ruling was issued in the wake of the judgment of the Paris Court of First Instance (*Tribunal de Grande Instance*) of 8 November 2019 which had ordered Lenovo, a telecommunications company, to withdraw the pending request before the same US Court for an anti-suit injunction, under a daily penalty of € 200,000 per violation and to abstain from filing a similar anti-suit injunction in the future (see VBB on Competition Law, Volume 2019, No. 12).

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– MEMBER STATE LEVEL –

GERMANY

Cartel fines in Germany double while number of dawn raids drops

On 27 December 2019, the German Federal Cartel Office (the "FCO") reported in its annual review that 2019 had seen the total fines imposed on undertakings for cartel infringements increase from € 376 million in 2018 to € 848 million in 2019. This trend continues on from 2018 when fines were five times higher than in 2017. In 2019, the FCO fined a total of 23 companies and trade associations and twelve individuals active in a broad range of industries, including bicycle wholesalers, building service providers and steel purchasers for the automotive industry. Andreas Mundt, head of the FCO, explained that the rise in fines is the consequence of the closing of the so-called "sausage gap", which previously allowed companies to avoid paying penalties by restructuring. While fines rose, the FCO only carried out dawn raids at 32 companies as compared to 51 in 2018. Furthermore, the FCO assessed around 1,400 mergers, including fourteen Phase II investigations, and it eventually prohibited four mergers. The FCO's report also highlights inquiries involving internet giants Facebook and Amazon as well as its work to protect consumers against unfair practices of comparison websites. Mundt indicated that the digital economy had been at the centre of the FCO's work in the past year and emphasised that the FCO will keep up with developments of digitalisation.

UNITED KINGDOM

Brexit triggers transitional period where the EU maintains jurisdiction in UK competition and state aid cases until at least the end of 2020

On 31 January 2020 at midnight CET (11pm GMT), the UK officially left the EU. However, under the Brexit Withdrawal Agreement, which was signed on 24 January 2020 and ratified by the EU and the UK on 30 January 2020, essentially nothing will change regarding the EU's jurisdiction involving competition and state aid cases in relation to the UK during the transition period. The Commission will still have the power to investigate infringements of EU competition law affecting the UK territory and it will remain exclusively competent to review the impact on competition in the UK of mergers with an EU dimension (UK turnover will be taken into account for the calculation of the EU merger thresholds). For its part, the Court of Justice of the European Union will also continue to have jurisdiction over any proceedings brought against or by the UK up until the end of the transition period. The transition period agreed between the UK and the EU will last at least until the 31 December 2020, with the option of an extension until 31 December 2022.

As for what will happen after the transition period, all administrative procedures initiated by the Commission before the end of the transition period, including merger reviews and antitrust investigations, will be allowed to run their course until after the transition period. The European Courts will also retain jurisdiction to rule on appeals against any resulting Commission decisions. The UK has also agreed that the Commission will be able to launch investigations into possible UK state aid measures or schemes granted while the UK was still in the EU for up to four years after the transition period has ended.

The UK government led by Boris Johnson is now set to review UK competition policy in preparation for the end of the transition period. The government has already discussed changing existing competition regulation to tackle unfair practices, including "loyalty penalties" by utilities and telecom providers, as well as creating a more "permissive" state aid regime, allowing the UK government to "protect jobs when an industry is in trouble".

UK Competition and Markets Authority publishes report backing regulation that supports innovative market entrants

On 10 January 2020, the Competition and Markets Authority (the "CMA") published a report on the UK's current regulatory environment and its effect on competition (the "Report"). The Report indicates that existing regulation poses potentially large risks to competition and may well be skewed towards larger incumbents in the market, which has the potential to lead to higher prices and can prevent the emergence of new business models. The Report seems to support the UK government's ideas surrounding Brexit, in that Brexit will lead to growth by enabling the removal of certain regulation which supports big players in the market and hinders smaller firms.

According to the Report, policymakers should back new entrants in markets that have "disruptive" business models, which the CMA says are a positive force for competition. The Report provides the example of the UK television market and notes how pressure on the existing market from streaming services, such as Amazon Prime and Netflix, has compelled the existing players, such as the BBC and ITV, to respond with rival streaming platforms.

As a result of the Report's recommendations to ignore the lobbying power of big business and instead listen more closely to smaller firms, the CMA has said that it may update its competition impact assessment guidelines, which are used by policymakers when drafting new regulation, in order to better reflect these recommendations.

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