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MERGER CONTROL

– MEMBER STATE LEVEL –

FINLAND

Finnish court upholds first merger prohibition

On 17 February 2020, the Finnish Market Court (the "Court") upheld the request of the Finnish Competition and Consumer Authority (the "KKV") to prohibit Kesko's proposed acquisition of grocery wholesaler Heinon Tukku. The Court's judgment may be appealed before the Finnish Supreme Administrative Court.

The KKV opened an in-depth investigation into the proposed acquisition on 17 June 2019. It established that the merged entity would hold a dominant position with respect to the distribution of groceries to foodservice customers such as hotels and restaurants, with a market share of between 60-70%. The KKV concluded that the transaction would therefore significantly impede effective competition in this market. The KKV, which does not have the power to prohibit a merger, submitted a prohibition request to the Court.

The Court found that, based on a conservative market share estimate, the merged entity would have held a combined market share of 40% to 50%, which would have been substantially higher than the market shares of its largest remaining competitors. As it determined that the behavioural remedies submitted by the parties were insufficient to eliminate these competition concerns, the Court upheld the decision of the KKV and prohibited the merger.

The KKV has previously requested the Court to prohibit four other proposed concentrations. However, this ruling marks the first time that the Court has prohibited a merger in Finland since the country introduced merger control rules in 1998.

LITHUANIA

Lithuanian Supreme Administrative Court upholds fine for gun-jumping

On 17 January 2020, the Lithuanian Competition Council, Konkurencijos taryba, published a decision of the Lithuanian Supreme Administrative Court upholding a € 947,700 gun-jumping fine imposed on Kauno Grūdai, one of Lithuania's largest agricultural processing companies.

Kauno Grūdai acquired 51% of the shares of the poultry farm Vievio Paukštynas in 2011 and entered into fictitious transactions enabling it to conceal its identity as buyer in order to avoid merger control procedures. On 9 June 2017, the Competition Council fined Kauno Grūdai € 947,700 for gun-jumping, citing the company's attempt to conceal the infringement as an aggravating circumstance.

The Vilnius Regional Administrative Court upheld the fine in June 2018. The Supreme Administrative Court confirmed the lower court's ruling at the beginning of this year.

CARTELS AND HORIZONTAL AGREEMENTS

– MEMBER STATE LEVEL –

FRANCE

French Supreme Court overturns Paris Court of Appeal judgment on concept of restriction of competition by object in bank fee cartel case

On 29 January 2019, the French Supreme Court (the "Supreme Court") annulled a judgment of the Paris Court of Appeal (the "Court of Appeal") in the bank interchange fee cartel case on the grounds that the Court of Appeal's interpretation of the concept of "restriction of competition by object" was overly extensive and ran counter to EU case law.

In September 2010, the French Competition Authority (the "FCA") imposed a fine of € 384.9 million on eleven banks for colluding to charge, from 1 January 2002 to 1 July 2007, an interchange fee of € 0.043 per bank cheque paid by the remittent bank to the drawee bank at a time when the country was transitioning to a digital payment processing system. The banks involved in the infringement were Banque de France, BPCE, Banque postale, BNP-Paribas, Confédération nationale du Crédit mutuel, Crédit agricole, Crédit du Nord, Crédit Industriel et Commercial (CIC), LCL, HSBC and Société générale. Higher fines were imposed on certain banks for their active involvement in persuading other banks to participate in the cartel.

On 21 December 2017, the Court of Appeal largely confirmed the FCA's decision but found that several of the cartelists had not in fact played an active role in convincing the other banks to participate in the infringement and reduced their fines accordingly. In addition, the Court of Appeal found that the agreements to charge an interchange fee (i.e., an element of the banks' cost) aimed at maintaining the balance between operators competing in a market were particularly harmful to competition because they decreased the degree of competition between the operators. According to the Court of Appeal, the object of this agreement was to distort competition between the banks by introducing an artificial cost element for all remitting banks, thereby hindering the ability of each bank to set its own prices and eliminating competition among them. The Court of Appeal thus concluded that such agreements were highly likely to have had an impact on the prices of services of the banks concerned and also on the structure of the market.

An appeal was brought before the Supreme Court on the ground that the Court of Appeal had wrongly interpreted the concept of restriction of competition by object.

In the present judgment, the Supreme Court recalled the case law of the Court of Justice of the European Union, in particular Case C-345/14, *SIA Maxima Latvija*, in which it was held that the concept of restriction by object must be applied restrictively and that only for certain types of coordination, which reveal a sufficient degree of harm to competition, the analysis of their effects is unnecessary. Given that the impact of the interbank fee on the final prices of the bank services was disputed by the parties and in the absence of evidence related to the impact of this type of fees, the Supreme Court held that the Court of Appeal had disregarded the requirement of a restrictive interpretation of the concept of restriction of competition by object established by the case law and had thus violated Article 101(1) Treaty on the Functioning of the European Union and its French equivalent in L. 420-1 of the French Commercial Code. The Supreme Court accordingly set aside the Court of Appeal judgment regarding the modification of the fines and remanded the case to the Court of Appeal for a new review.

ITALY

Italian Competition Authority imposes fines totalling €228 million on four phone operators for pricing collusion

On 31 January 2020, the Italian Competition Authority (the "AGCM") imposed fines totalling € 228 million on Italy's four largest phone operators for breaching competition rules by collectively agreeing to raise their prices after Law 172/2017 forced them to transition from a four-week billing period of 28 days to a monthly billing period of 30 days.

In 2018, the AGCM launched an investigation against the main Italian telecommunications companies, namely Vodafone Italia S.p.A., Telecom Italia S.p.A., Swisscom's Fastweb and CK Hutchinson's Wind, on the grounds that those undertakings had coordinated an 8.6% increase of their prices following the 2015 decision of the Authority for Communications ("AGCOM") requiring them to change their billing period from a four-week period (28 days) to a one-month period (30 days). The AGCOM's decision was subsequently enshrined in Law 172/2017.

While the undertakings concerned alleged that the communications between them took place lawfully in the context of the association *Assocomunicazioni*, the AGCM found that the infringement was, in fact, carried out through a secret exchange of calls and emails between the companies and amounted to illicit price fixing.

Italian Council of State confirms annulment of fines imposed by Italian Competition Authority on steel companies

On 21 January 2020, the Italian Council of State annulled fines totalling € 140 million that had been imposed by the Italian Competition Authority (the "AGCM") on eight companies that were alleged to have taken part in the steel rebar cartel between 2010 and 2016.

In 2017, the AGCM found that Alfa Acciaio S.p.A., Feralpi Siderurgica S.p.A., Ferriera Valsabbia S.p.A., Industrie Riunite Odolesi I.R.O. S.p.A., O.R.I. Martin - Acciaieria e Ferriera di Brescia S.p.A., Stefana S.p.A., Riva Acciaio S.p.A., Ferriere Nord S.p.A. and its parent company Fin.Fer. S.p.A. had put in place an agreement with the object of the coordination of reciprocal commercial policies on the national markets of two steel products, namely steel rebar and electrowelded mesh. The companies involved in the proceedings covered more than 80% of the market.

On 29 October 2018, the Regional Administrative Court of Lazio annulled the AGCM decision on the basis of two grounds. First, the Court found that the preparatory phase of the investigation carried out by the AGCM had lasted an excessively long time. Second, the Court identified deficiencies in the AGCM's assessment of the alleged violations. On appeal by the AGCM, the Council of State has now definitively confirmed the Lazio Court's judgment on the same grounds.

VERTICAL AGREEMENTS

– EUROPEAN UNION LEVEL –

European Commission imposes € 6.7 million fine on Spanish hotel group Meliá for restrictions on cross-border sales of hotel accommodation

On 21 February 2020, the European Commission (the "Commission") announced its decision to fine Spanish hotel group Meliá € 6,678,000 for including clauses in its agreements with tour operators that discriminated between consumers based on their country of residence.

According to the Commission's press release, Meliá's standard terms and conditions stipulated that the agreements with tour operators were valid only for reservations of consumers resident in specified Member States, thereby restricting the tour operators' freedom to make active and passive cross-border sales of hotel accommodation to consumers resident in other Member States and partitioning the single market.

The infringement lasted two years, between 2013 and 2015. The Commission granted Meliá a 30%-fine reduction for its cooperation, which went beyond its legal obligation, since Meliá provided evidence and expressly acknowledged both the facts of the case and the infringement.

The investigation against Meliá was opened on 2 February 2017, following complaints received from customers. On the same day, the Commission opened investigations against four of Europe's largest tour operators (Kuoni, REWE, Tui and Thomas Cook) (see VBB on Competition Law, Volume 2017, No. 2). However, the Commission has decided, following its examination of the evidence, not to pursue the investigations further, and the decision to fine Meliá thereby concludes the Commission's three-year investigation against the tour operators into cross-border sales restrictions of hotel accommodation.

Meliá is the ninth company to be fined by the Commission for infringements in relation to vertical agreements since 2018 (and the fifth in respect of restrictions of cross-border sales), evidencing the priority being given by the Commission to the enforcement of the competition rules with respect to vertical agreements. In all nine 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 –

FRANCE

Paris Court of Appeal dismisses Canna France's appeal against resale price maintenance fine

On 16 February 2019, the Paris Court of Appeal (the "Court of Appeal") rejected an appeal brought by Canna France for the annulment of the decision of the French Competition Authority ("FCA") imposing a fine for anticompetitive vertical agreements in the liquid fertilizer market.

On 20 December 2018, the FCA fined four liquid fertilizer manufacturers (Bertels, Biobizz, Canna France and GHE) and two wholesale distributors (CIS and Hydro Factory/Hydro Logistique) a total of € 355,000 for engaging in resale price maintenance during different periods between 2010 and 2013 (see VBB on Competition Law, Volume 2019, No. 1). The highest fine of € 152,000 was imposed on Canna France, which was held to be jointly and severally liable with its parent company.

Canna France challenged the decision before the Court of Appeal claiming that, inter alia, the FCA had wrongly defined the market affected by the practice. In its judgment, the Court of Appeal held that Canna France had failed to explain how the market definition justified the annulment of the decision and that, regardless of that ground, a precise definition of the market is in any event not necessary for the purpose of establishing the existence of anticompetitive agreements.

Canna France also argued that there was no real evidence of its participation in the alleged anticompetitive conduct. The Court of Appeal confirmed that the findings made by the FCA resulted from documentary evidence explicitly demonstrating a meeting of minds between the manufacturers, on one hand, and their wholesale distributors, on the other, and there was no requirement of the FCA to establish the actual application by the distributors of the prices communicated by the manufacturer, or the effective implementation by Canna France of the policing measures contained in its general conditions of sale.

The Court also confirmed that Canna France's arguments that no damage was caused to the economy cannot justify the annulment of a decision. Rather, such an element can only be considered for the purposes of the proportionality of the fine to be imposed.

POLAND

Polish competition authority imposes € 325,000 fine on Brother for online retail price maintenance

On 7 February 2020, the Polish Office of Competition and Consumer Protection (the "UOKIK") imposed a fine of PLN 1.4 million (approximately € 325,000) on office equipment maker Brother for online retail price maintenance ("RPM"). The UOKIK's decision explains that, between the years 2010 and 2017, Brother implemented a policy designed to restrict retailers' online pricing freedom and requiring them to sell standard A3/A4 format printers online above a certain minimum price. The policy affected at least 42 retailers. Retailers that did not respect Brother's recommended retail price were pressured to raise prices or else risked losing discounts and being refused the allocation of products. The policy was implemented through price monitoring by Brother and the retailers among themselves.

In calculating the fine, the UOKIK took into account the gravity of the infringement, its extended duration and the active role played by Brother. The initial fine was reduced by 30% as a result of the company's participation in the leniency programme and by another 10% due to its voluntary submission to the fine.

UNITED KINGDOM

Fender fined record-breaking £ 4.5 million for online retail price maintenance

On 22 January 2020, the UK's Competition and Markets Authority (the "CMA") fined guitar maker Fender Musical Instruments Europe Limited and its US parent company, Fender Musical Instruments Corporation, ("Fender") £ 4.5 million (approximately € 5.4 million) for infringing Article 101 Treaty on the Functioning of the European Union and the UK equivalent by preventing online discounting of its guitars. According to the CMA's press release, by requiring resellers to sell guitars online above a minimum price, Fender engaged in online retail price maintenance ("RPM") between 2013 and 2018. This record-breaking fine for RPM follows the CMA's provisional findings in the case from October 2019 (see VBB on Competition Law, Volume 2019, No. 10).

The CMA found that Fender had on occasion received tip-offs regarding retailers selling below the minimum price and subsequently pressured them to raise their online prices. While some Fender employees attempted to cover up their actions by recording as little as possible in writing, the CMA discovered incriminating emails and texts from Fender's IT servers and mobile phones.

The CMA noted that RPM prevents customers from shopping around for the best deal, which can have particularly negative consequences for consumers when the goods are expensive and popular, such as in the case of guitars.

Fender admitted to the illegal conduct under the CMA's leniency programme, which led to a 60% discount on the fine, along with a 20% discount under the CMA's settlement procedure. The fine is the fifth and highest online RPM fine issued by the CMA to date, and the second within the past year concerning online sales of musical instruments. The CMA's scrutiny of illegal practices in the musical instrument industry is further demonstrated by its four ongoing investigations in this sector.

INTELLECTUAL PROPERTY/LICENSING

– EUROPEAN UNION LEVEL –

Court of Justice rules that pay-for-delay patent settlements may restrict competition 'by object'

On 30 January 2020, the Court of Justice of the European Union (the "ECJ") handed down its judgment in Case C-307/18, *Generics (UK) and Others*. This case marks the first time the ECJ has ruled on patent settlement agreements between originator pharmaceutical companies and generic producers. Depending on the circumstances, such agreements may prevent generic versions of a patented medicine from entering the market or may delay such entry. The ECJ held that pay-for-delay agreements may be infringements of competition by their very object.

The case was referred to the ECJ by the UK Competition Appeal Tribunal (the "Tribunal"), which had to rule on whether the UK Competition and Markets Authority (the "CMA") had lawfully fined manufacturers of generic medicines and the pharmaceutical company GlaxoSmithKline ("GSK") 45 million pounds for settling a patent dispute involving the payment by GSK to generic manufacturers of a total amount of around 50 million pounds in exchange for a commitment by the generic manufacturers not to enter the market with their own generic products. In essence, this agreement was intended to delay the potential entry of generic competitors into the UK market after GSK's patent for the active substance of the anti-depressant medicine paroxetine, and secondary patents, protecting some processes for the manufacture of the active substance, expired in 1999.

The Tribunal sought guidance on how to interpret EU rules that ban arrangements which have as their object or effect the restriction of competition (Article 101 Treaty on the Functioning of the European Union ("TFEU")) with respect to the pay-for-delay agreements. The Tribunal also wanted to know whether GSK abused its dominant position on the relevant market (Article 102 TFEU).

Article 101 TFEU – Restrictive agreements

The ECJ found that an agreement is subject to the prohibition of Article 101 TFEU only if it has a negative and appreciable effect on competition within the internal market. In order for that to happen, the parties to the agreement should at least be in a relationship of potential competition. This implies showing that there are real and concrete possibilities to access the market. With respect to the generic manufacturers, which at the time of the agreement had not entered the market, the ECJ ruled that "[i]t is necessary to assess, for each manufacturer of generic medicines concerned, whether the manufacturer of generic medicines concerned has a firm intention and an inherent ability to enter the market, having regard to the preparatory steps it has taken, and that there are no insurmountable barriers to entry". It added that since the validity of patent rights can be contested, patent rights, in themselves, do not constitute such barriers.

The ECJ added that if such agreements were to be categorised as a restriction of competition "by object", which was indeed how the CMA had reasoned, then such a categorisation would depend on the degree of harm. It rationalised that the way to identify the degree of harm is by the transfers of value provided for in the agreement, which cannot "because of their scale, have any explanation other than the commercial interest of the parties to the agreement not to engage in competition on the merits and, accordingly, act as an incentive to the manufacturers of generic medicines to refrain from entering the market concerned". The ECJ thus gave the regulator leeway in finding an infringement of the competition rules by object and not having to prove the actual effects of anticompetitive conduct on the market. This approach is in line with the opinion of Advocate General Kokott of 22 January 2020.

If, however, the agreement were to be categorised as restrictive "by effect", the ECJ specified that it would then be necessary for the regulator to establish how the market would probably operate and be structured in the absence of the patent settlement agreement. Significantly, the ECJ did not consider it necessary to assess whether manufacturers of the generic medicine would have been successful in patent proceedings or whether the parties would have concluded dispute settlements that are less restrictive to competition.

Article 102 TFEU – Abuse of dominance

In answering the question as to whether GSK had been able to abuse its dominant position on the market, the ECJ confirmed that a dominant company can also abuse its dominant position under Article 102 TFEU when concluding an agreement that violates Article 101 TFEU. The ECJ ruled that in objectively assessing whether there has been an abuse of a dominant position, the regulator has to evaluate the cumulative restrictive effects on competition, in particular exclusionary effects, resulting from GSK's various agreements with different generics manufacturers. Such an objective assessment should weigh the favourable effects for consumers against those that are unfavourable, the ECJ held. For this purpose, it is open to GSK to provide justification for its anticompetitive behaviour.

It would appear that this ruling has set a strong bar for pharmaceutical companies to justify pay-for-delay agreements. This ruling was welcomed by European commissioner responsible for competition Margrethe Vestager, who announced that "[t]he court ruling looks very promising on first reading, and in that of course we feel very much encouraged because we find these cases important". She added that while she found it justified to have patents, once they expire and generic versions can start to be placed on the market "patients should get the full benefit of that". Similarly, the CMA expressed appreciation for the ruling stating that "[t]his case shows our ongoing determination to take action against illegal behaviour by drug companies designed to stifle competition at the expense of the NHS".

The ECJ will have to rule on two further cases that deal with patent settlement agreements. The first case involves Denmark's Lundbeck (Case C-591/16 P) and the second case involves France's Servier (Cases C-201/19 P and C-176/19 P).

– MEMBER STATE LEVEL –

GERMANY

Regional Court of Munich provides guidance concerning its application of the landmark Court of Justice ruling in Huawei v. ZTE

In February 2020, the Regional Court of Munich published a guidance document that sets out how that court intends to apply the landmark ruling of the Court of Justice of the European Union (the "ECJ") in *Huawei v. ZTE* (Case C-170/13). The ECJ's ruling provided the practical steps which Standard Essential Patent ("SEP") holders are supposed to take before seeking injunctive relief (see VBB on Competition Law, Volume 2015, No. 7).

The guidance document applies to actions for injunctive relief based on SEPs to the extent that they give the holder a dominant position in the market and the holder made a fair, reasonable and non-discriminatory ("FRAND") commitment to a standard-setting organisation. The guidance document does not discuss the question, which was also left open by the ECJ, whether the ownership of a SEP necessarily confers dominance and whether the same principles also apply to non-SEPs or *de facto* standards.

The guidance offers an overview of the pre-litigation contract negotiation procedure to be followed and of the procedure that will apply in court.

The steps to be taken by both parties during the pre-litigation contract negotiation correspond to those set out in the ECJ's judgment in Huawei v. ZTE

In the pre-litigation contract negotiations, the parties should go through a number of steps prior to bringing an injunctive claim. These include: 1) Infringement alert by the patent holder to the patent user, comprising at least the patent at issue; 2) Transmission of the licensing request from the patent user to the patent holder, including at least the patent at issue; 3) Transmission of a draft FRAND licence agreement from the patent holder to the patent user, including at least the patent at issue; 4) If the user does not accept the draft licence agreement, it must submit an alternative draft FRAND licence agreement to the patent holder, involving at least the patent at issue; 5) If the patent user does not accept the draft licence agreement, then it must produce accounts and provide security.

Interestingly, the Regional Court of Munich specifies that the moment at which to assess whether these steps were taken is at the time of conclusion of the oral proceedings. This means that it is still possible to comply with some of these requirements after the initiation of court proceedings. On this point, the guidance document specifies that the time between the first hearing and the main oral hearing can still be used to remedy shortcomings, provided the party announces during the first hearing which steps it will carry out. This is in line with a judgment of the Higher Regional Court of Karlsruhe that had held that the date on which a court action is brought is not a cut-off date for complying with information obligations under the *Huawei* framework (see VBB on Competition Law, Volume 2019, No. 12)

Procedure in court

During the court proceedings, a number of conditions should be satisfied before discussions can take place on the antitrust objections against the imposition of a compulsory licence. These are: 1) The patent user may set forth its objections on competition grounds against the imposition of a compulsory licence; 2) If the patent holder makes an offer that covers at least the patent at issue and that offer is not accepted, the defendant has to make at least one counter-offer. If the patent holder rejects that counter-offer, the defendant then has to produce accounts and provide security; 3) If the defendant was already a licensee of the patent at issue but has terminated the licence agreement or has otherwise contributed to its termination, for example by failing to pay the licence fees, then objecting against a compulsory licence is no longer possible; 4) If the defendant was offered a licence for the patent at issue, but did not include it in its counteroffer, objecting against the compulsory licence is no longer possible.

The court also offers guidance seeking to make sure that objections against the imposition of a compulsory licence are raised as early in the proceedings as possible. The guidance also discusses the burden of proof of both parties in the proceedings.

While the guidance document is not binding, it still offers valuable insight for future patent litigation.

THE NETHERLANDS

Dutch Court of Appeal rules on FRAND licensing case

On 24 December 2019, the Court of Appeal of The Hague (the "Court") handed down two judgments on the nature and extent of fair, reasonable and non-discriminatory ("FRAND") licensing principles as set out by the Court of Justice of the European Union (the "ECJ") in *Huawei v. ZTE* (see VBB on Competition Law, Volume 2015, No. 7).

Philips started proceedings against both ASUS and WIKO on account of the alleged infringement of its European patent EP 1 440 525, which is considered essential to the High Speed Uplink Packet Access ("HSUPA") protocol of the Universal Mobile Telecommunications System ("UMTS") standard. Both defendants alleged that Philips abused its dominant position within the meaning of Article 102 TFEU – resulting from its ownership of a standard essential patent ("SEP") – for having brought infringement actions against them and for having failed to offer them a licence under FRAND terms.

ASUS

In the case pitting Philips against ASUS, the Court first addressed ASUS' plea that Philips infringed the disclosure obligation laid down in the Policy on Intellectual Property Rights (the "ETSI IPR Policy") issued by the European Telecommunications Standards Institute ("ETSI").

Article 4.1 of the ETSI IPR Policy provides that "each Member shall use its reasonable endeavours, in particular during the development of a standard or technical specification where it participates, to inform ETSI of essential IPRs in a timely fashion. In particular, a Member submitting a technical proposal for a standard or technical specification shall, on a bona fide basis, draw the attention of ETSI to any of that Member's IPR which might be essential if that proposal is adopted". In the present case, Philips waited for the standard to be adopted before notifying ETSI of the IPRs which it held that were essential to that standard.

The Court stated that, contrary to ASUS' contentions, the objective of Article 4.1 of the ETSI IPR Policy is to develop standards based on solutions which best meet the technical objectives of the European telecommunications sec-

tor, rather than creating standards that are free of any IPRs (and royalties). To that end, the ETSI IPR Policy strives to make that technology available on FRAND terms. As a consequence, it is not indispensable for all IPRs essential to a standard to be notified before the adoption of the standard, provided that the IPRs will be available on FRAND terms. Since Philips provided ETSI with a general IPR licensing declaration pledging to license on FRAND terms any and all IPRs essential to any standard, all of its IPRs are deemed available on FRAND terms. Hence, the Court found that it is not necessary that a detailed declaration of the exact IPRs concerned should be issued before the standard is adopted.

Second, the Court applied the principles set out in *Huawei v. ZTE*. 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 the relevant 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 reflects FRAND terms. It is only if the notified alleged infringer does not accept the offer made to it, 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 ASUS in mid-2013 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 to 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 reiterated the findings that it made in an earlier case between the same parties (see VBB on Competition Law, Volume 2019, No. 6). It considered that the steps laid down by the ECJ in *Huawei v. ZTE* were not mandatory but mere guidelines. On this basis, it found 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 Court thus concluded that Philips was justified to seek injunctive relief without first offering a licence. In any event, the Court noted that Philips had made a licence offer to ASUS and had done so on FRAND terms. Finally, the Court found that the fact that ASUS made a counteroffer during the proceedings did not change the outcome of the case.

WIKO

In the case between Philips and WIKO, the Court mainly applied the principles set out in *Huawei v. ZTE* in a similar manner.

The Court added that, contrary to what WIKO had asserted, the burden of proof is not on the SEP proprietor to explain why the offer it made was on FRAND terms but, rather, the burden was on the alleged infringer to show that it was not.

Furthermore, the Court clarified that merely attending licensing negotiations is not adequate to show sufficient willingness. It is necessary that the alleged infringer proactively engages in such negotiations (e.g., regarding the scope and duration of the licensing agreement) and even inquires about relevant licensing terms that it considers to be unclear.

Finally, the Court found that the non-discriminatory part under FRAND licensing terms does not entail that the same structure and the same conditions are applied to all licensees in a similar manner. Specific facts and circumstances can lead to other conditions and terms being agreed upon by different licensees, without there being any undue distortion of competition. According to the Court, WIKO did not show that a competitive disadvantage would arise from applying different conditions under alleged similar circumstances.

Accordingly, the Court ordered both ASUS and WIKO to cease all infringements of Philips' patent, and granted Philips' requests for damages.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– EUROPEAN UNION LEVEL –

ECJ issues new practice directions to parties

On 14 February 2020, new practice directions to parties concerning cases brought before the Court of Justice of the European Union (the "ECJ") were published in the Official Journal (the "Practice Directions"). They detail the conduct of proceedings before the ECJ and aim at complementing the ECJ's Statute and Rules of Procedure, with a particular emphasis on the constraints associated with the processing and translation of written submissions as well as the simultaneous translation of oral hearings.

The new Practice Directions repeal and replace those of 2014, to take account of a number of technical and legislative developments. First, the increasing use of electronic means of communication for the submission of procedural documents requires steps to facilitate the processing and translation of these documents and to preserve their confidentiality. Second, the 2014 Practice Directions were adapted to the ECJ's Rules of Procedure, which have been amended on multiple occasions since then, in areas such as the protection of personal data and the handling of certain types of appeals.

The new Practice Directions entered into force on 1 March 2020.

– MEMBER STATE LEVEL –

FRANCE

French Competition Authority publishes new study on behavioural remedies

On 17 January 2019, the French Competition Authority ("FCA") published a new study on behavioural remedies in competition law. The study is available on the FCA's website in both French and English.

The assessment was carried out by comparing behavioural commitments to structural commitments according to three criteria: (i) the speed of implementation; (ii) their irreversible or temporary nature and (iii) the difficulties associated with monitoring their execution.

A retrospective analysis of the FCA's decision-making practice revealed that the FCA has made significant use of behavioural remedies, both to put an end to anticompetitive practices, and in the course of merger review. The study indicated that the effectiveness of behavioural commitments depends on their being monitored, as this ensures that the commitments achieve the desired objective and are implemented successfully. It also found that their effectiveness could be further strengthened if they could be revised in light of new circumstances likely to affect the competition data on which they were originally based. The FCA concluded that the flexible and adaptable nature of behavioural remedies renders them a particularly useful intervention tool for competition authorities.

The FCA nevertheless considered that behavioural commitments should be limited, favouring the use of quasi-structural commitments in antitrust enforcement and structural commitments in merger control. In particular, the FCA notes that the introduction of certain complex remedies, notably in the telecommunications and audio-visual sectors, risks transforming the FCA's role into that of a sector-specific regulator. In addition, the FCA warned against the use of behavioural remedies where these commitments risk providing a "crutch" that might prevent the market from functioning autonomously.

GERMANY

Update on the reform of German competition law

On 24 January 2020, the German Federal Ministry for Economic Affairs and Energy published an update of its draft 10th amendment to the Act against Restraints of Competition (the "ARC"), officially called the "ARC Digitization Act". Compared to the initial draft (see VBB on Competition Law, Volume 2019, No. 11), the update introduces a new provision that empowers the Federal Cartel Office (the "FCO") to require companies to notify all future concentrations that relate to one or more specific economic sectors if they meet thresholds well below those that are currently applicable.

Specifically, pursuant to the new Section 39a ARC, the FCO may require a company to notify for the duration of three years any concentration with other companies in one or more specific economic sectors if: (i) the worldwide turnover of the undertaking concerned exceeded € 250 million in the last business year; (ii) there are indications that future concentrations may restrict domestic competition in these sectors; (iii) the turnover of the target exceeded € 2 million in the last business year and (iv) the target generated more than two-thirds of its turnover in Germany.

The provision aims to prevent a situation whereby companies, by means of successive acquisitions of different targets, acquire a dominant position without being subject to the FCO's merger control review. While the current Section 38(5) sentence 3 ARC subjects to merger control subsequent acquisitions within a period of two years between the same parties which meet the merger control thresholds, it does not apply if different targets are acquired. Therefore, subsequent acquisitions of different targets which each have a turnover of below € 5 million are currently not subject to merger control, even if the targets are all active in the same product and geographic markets and all transactions are carried out within a short period of time.

By contrast, the new Section 39a ARC would give the FCO the ability to intervene before companies acquire a dominant position through the acquisition of relatively small targets. As the worldwide turnover threshold of the acquirer (not both companies) is set at € 250 million, it is expected that the FCO's review will not be limited to global players. Nevertheless, acquisitions of target companies that are very small or that generate more than one-third of their turnover outside Germany will continue to fall outside German merger control.

The extended obligation to notify will apply to economic sectors that will be specified by the FCO. The choice of companies obliged to comply with the extended obligation to notify will also be left to the FCO's discretion, although any FCO decision can be challenged. The FCO may obtain indications that future concentrations are likely to restrict domestic competition in particular sectors through, for example, the results of a sector inquiry, the observed practice of a dominant company gradually taking over small competitors or acquiring market entrants that could potentially endanger its market position, or through complaints to the FCO. While the FCO's decision is limited to three years, it can be renewed if the conditions of Section 39a ARC continue to apply. It is expected that the application of the new provision will be limited and that the FCO will subject only one to three companies per year to the extended notification obligation.

The update of the draft 10th amendment of the ARC also codifies current practice in the field of leniency. Among other matters, it specifies that leniency applications to the FCO can be submitted in writing in German or in English or, upon request, in another EU language. In the latter case, a German translation can be requested after submission.

The draft was discussed in a hearing with stakeholders on 18 February 2020. Next steps in the legislative process include the government's deliberation in the cabinet and the transfer of the draft to the Parliament (first the *Bundesrat*, the representation of the *Länder*, and then to the Bundestag). It is reported that the parliamentary procedure is scheduled to take place in the second half of 2020.

ITALY

Italian authorities for competition, data protection and communications regulation publish joint report on big data

On 10 February 2020, the Italian Competition Authority, the Authority for Communications Guarantees and the Authority for the Protection of Personal Data (together the "Authorities") published a joint investigative report on big data (the "Report"). The Report is based on a one-year survey carried out between November 2017 and November 2018 and in the course of which several operators and experts were interviewed.

The Report incorporates the Authorities' considerations on the impact of big data on their respective areas of competence and activities. As regards the impact on competition, the Competition Authority analysed big data from three different perspectives:

- First, big data may constitute a barrier to entry, notably on two-sided markets where access to a large amount of user data can fuel network externalities and constitute a significant competitive advantage. Combining big data and network externalities, first movers enjoy significant competitive advantages that may discourage newcomers from entering the market.

- Second, big data may be viewed as a non-monetary price that customers are willing to pay for a service or a good, which means that customers should be aware of the economic value of their data.

- Third, big data may possibly either be the object of an anti-competitive agreement under Article 101 TFEU or the tool for an exploitative abuse under Article 102 TFEU.

In the last section of the Report, the Authorities give their recommendations to the Italian Government and Parliament. In this context, they call for the adoption of a legal framework that promotes transparency in the use of personal data and advocate for permanent cooperation between them in the enforcement of rules relevant to big data.

Italian and Brazilian competition authorities sign memorandum of understanding

On 11 February 2020, the Italian and Brazilian competition authorities signed a bilateral Memorandum of Understanding (the "Memorandum") aimed at strengthening cooperation between the two authorities and at increasing their capacity to deal with market failures, anticompetitive practices and cross-border mergers. The cooperation mandated by the Memorandum should take the form of exchanges of experiences and bilateral communication on best practices in competition law and policy.

UNITED KINGDOM

CMA publishes guidance on its role during the Brexit transition period

On 28 January 2020, the UK's Competition and Markets Authority (the "CMA") published guidance to explain how it will conduct its work during the transition period as a result of the UK's exit from the EU (the "Guidance"). The Withdrawal Agreement ratified between the UK and the EU details the terms of the exit and provides for a transition period (lasting at least until 31 December 2020) during which EU law will continue to apply to the UK (see VBB on Competition Law, Volume 2020, No. 1). For merger control, the Guidance states that transactions notified to the European Commission (the "Commission") during the transition period will continue to fall under the exclusive jurisdiction of the Commission, with the CMA unable to investigate such transactions. For antitrust enforcement, the Guidance also states that the Commission's jurisdiction remains until the end of the transition period.

Merger Control

The EU imposes the "one-stop shop" principle with regard to merger control. This effectively means that the Commission has sole jurisdiction over mergers that meet the EU thresholds and precludes Member states from applying their own merger control laws to these transactions. The Guidance states that the "one-stop shop" principle will continue until the transition period ends.

Therefore, if the parties to a transaction which meets the EU thresholds notify the transaction to the Commission before the transition period ends, the CMA cannot investigate the transaction in parallel to the Commission. The Commission will retain exclusive jurisdiction and therefore, until the end of the transition period, parties should continue counting UK turnover when assessing if the transaction meets EU thresholds.

After the transition period, the Commission will retain jurisdiction over ongoing transactions that have been notified to it before the end of the transition period. However, for those transactions that are notified to the Commission after the transition period, UK turnover will no longer be relevant for determining whether the EU thresholds are met and parallel merger investigations will take place where the EU and UK thresholds are both met.

For mergers where the Commission has accepted commitments from the parties, the Commission will continue to be responsible for monitoring and enforcing the UK aspects of these commitments, even after the transition period. However, the Withdrawal Agreement allows for the Commission and the CMA to consider agreeing to transfer responsibility for any UK aspects of such commitments to the CMA.

Antitrust Enforcement

As with merger control, the Guidance states that EU antitrust law will continue to apply in the UK until the end of the transition period. Therefore, where the Commission launches an antitrust investigation before the end of the transition period, the CMA cannot launch a parallel investigation into the same conduct.

The Commission will retain jurisdiction over cases where it has initiated proceedings before the end of the transition period. However, the CMA may obtain jurisdiction if the conduct under investigation affects trade within the UK, even if the Commission initiated proceedings before the end of the transition period. Nonetheless, the CMA will be restricted to investigating facts that postdate the transition period.

After the transition period, the CMA will only investigate suspected infringements of UK competition law. The CMA will also be free to diverge from EU decisions and judicial precedent. As is the case for merger control, the Commission will continue to have responsibility for monitoring and enforcing any UK aspects of commitments imposed in connection with Commission proceedings. However, the Commission and CMA may agree to transfer this responsibility to the CMA.

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