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VBB on Competition Law

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MERGER CONTROL

– EUROPEAN UNION LEVEL –

Commission conditionally clears the creation of six joint ventures for mobility services by Daimler and BMW

On 7 November 2018, the European Commission conditionally approved the creation of six mobility services joint ventures by Daimler and BMW.

While the joint ventures will combine Daimler and BMW's mobility services in ride hailing services, parking services, charging services and other on-demand mobility services, the Commission's investigation focused on the market for free-floating car sharing services. This emerging form of mobility service allows customers to pick up and drop off a car anywhere within a certain delimited area in a particular city.

The Commission found that because the activities of Daimler (via car2go) and BMW (via DriveNow) overlap significantly on the market for free-floating car sharing services, competition would be reduced in six German and Austrian cities, namely Berlin, Cologne, Düsseldorf, Hamburg, Munich and Vienna.

The Commission also examined the role of mobile applications called "integrator apps" that aggregate several different transport options including free-floating car sharing. Such apps seek to display the car sharing services of DriveNow and car2go. As Daimler offered its own integrator app called "moovel", the Commission had a vertical concern that "upstream" providers of (a) third party platforms which aggregate mobility solutions for users, and (b) integrator apps for car sharing providers, would be foreclosed from the market.

To address the Commission's foreclosure concerns, Daimler and BMW committed to (1) grant application programming interface access to third party aggregator platforms for mobility solutions, so that they can also re-direct users to Daimler and BMW's car sharing services; and (2) grant access to Daimler's integrator app, moovel, to interested car sharing providers. According to the Commission, the commitments will ensure that smaller competitors can enter the market and be visible on the moovel app, and will allow integrator apps to also display DriveNow and car2go for customers seeking a mobility solution.

The case is interesting as the behavioural commitments indicate that the Commission's main competition concern was to preserve competition for car sharing services at a digital level, by imposing two access obligations.

EU reaches political agreement on new foreign investment screening rules

On 20 November 2018, the Council of the EU reached a political agreement with the European Parliament on a proposed EU framework for screening foreign direct investment ("FDI").

According to the Council, there has been a recent surge in FDI relating to critical EU assets, which are not the result of normal market forces. The FDI screening rules aim to establish a common framework for investigating whether FDIs from outside the EU pose a threat to critical infrastructure, key technologies or enable access to sensitive information in the EU. The FDI screening rules were first proposed by the Commission in September 2017 (see VBB on Competition Law, Volume 2017, No. 9). During discussions in the European Parliament, the scope of the proposed rules was extended to cover sectors including media, land usage, water-supply infrastructure, data processing and electoral infrastructure. Under the FDI screening rules, the Commission and EU Member States will monitor FDI flows and, if necessary, oppose or unwind such investments. Such mechanisms will have to meet a number of EU-wide criteria, such as the respect of the non-discrimination principle, the protection of confidential information, the right to judicial redress against national authorities' decisions and clearly defined applicable procedural rules.

Next, the FDI screening rules will be published and must be formally endorsed by the Council and the European Parliament. It is expected that the new FDI screening rules will come into effect 18 months after publication.

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– MEMBER STATE LEVEL –

FINLAND

Finnish Competition and Consumer Authority closes investigation into merger commitment breach without imposing fine

On 24 October 2018, the Finnish Competition and Consumer Authority ("FCCA") closed a six-year investigation finding that a merger commitment imposed in 2008 had been breached, but did not warrant the imposition of a fine.

In 2008, TV4 notified the acquisition of C More to the FCCA. The FCCA identified competition concerns because TV4 (through its subsidiary MTV) and C More were the two largest providers of pay-TV services in Finland and held broadcasting rights for key sports events. The FCCA cleared the transaction subject to certain commitments which sought to keep the pay-TV services of TV4 and C More structurally separate. However, in 2012, TV4 introduced a new pay-as-you-go channel package which combined the pay-TV services of TV4 and C More. This led the FCCA to open an investigation into whether the launch of the combined pay-TV channel package breached the separation commitment given to the FCCA.

In its recent decision, the FCCA closed the case without imposing any sanctions. While it considered that the merger commitment had been breached, the FCCA refrained from imposing a fine because it considered that this would be unreasonable. In particular, the FCCA noted that the commitment itself was potentially imprecise and there was ambiguity in relation to the interpretation of earlier advice given by the FCCA. The FCCA also noted that the commitment had been lifted in 2015, due to significant changes in the Finnish pay-TV market.

– OTHER DEVELOPMENTS –

DENMARK: On 13 November 2018, the Danish Maritime and Commercial Court confirmed that the termination by KPMG Denmark of its cooperation agreement with KPMG International in anticipation of its acquisition by Ernst & Young ("EY") could not be regarded as breaching the Danish merger standstill obligation. The judgment is consistent with the judgment of the Court of Justice of the European Union in May 2018 (see VBB on Competition Law, Volume 2018, No. 5), where the Court ruled that only actions which, in whole or in part, in fact or in law, contribute to a change of control of a business are capable of breaching the standstill obligation. In light of this ruling, the Danish Maritime and Commercial Court ordered the Danish Competition Council to withdraw its 2014 decision and to pay EY's legal costs of around € 200,000.

IRELAND: On 7 November 2018, the Irish Competition and Consumer Protection Commission ("CCPC") opened a consultation on whether to introduce a simplified merger review procedure. Existing Irish rules do not provide for a simplified review procedure, although parties may request a waiver from the CCPC to avoid completing certain sections of the Irish notification form where their activities do not overlap in Ireland. Based on an internal review, the CCPC estimated that if certain simplified criteria were applied to the 219 merger notifications reviewed by the CCPC between 2016 and 2018, 121 of these mergers (approx. 55%) would have qualified for a simplified review procedure. The CCPC proposes to introduce three conditions to allow for a simplified review: (i) none of the parties to the merger are active in the same product or geographic markets, or in any upstream or downstream product market; (ii) two or more of the parties involved in a merger or acquisition are active in the same product or geographic market, but their combined share is less than 15%, or if active on an upstream/downstream market, the market share of each of the parties involved in each market is less than 25%; or (iii) a party already has joint control over a company and is to acquire sole control over that company.

The consultation is open until 6 December 2018 and is available here.

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ABUSE OF DOMINANT POSITION

– MEMBER STATE LEVEL –

ITALY

Italian Competition Authority fines the Italian Authors' and Publishers' Association for abuse of dominant position

On 25 September 2018, the Italian Competition Authority (the "ICA") imposed a symbolic fine of € 1,000 on the Italian Authors' and Publishers' Association (the "SIAE") for abusing its dominant position.

The SIAE is a collective management organisation under Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market. SIAE enjoyed a legal monopoly until 2017 for most of the copyrighted Italian works (i.e., music, films, opera, literary and dramatic works) and the licensing of most forms of use of copyrighted works (such as reproduction, enforcement, performance and broadcasting).

The ICA found that the SIAE held a dominant position in markets related to the management of copyrights, which were not covered by the Italian statutory provision granting the monopoly. These markets include: (i) copyright management services for the authors as well as services related to the protection against unauthorized uses of works; (ii) the issuing of licences to users (such as TV broadcasters, organisers of concerts); (iii) the management of copyright and related rights on behalf of foreign collective associations; and (iv) the granting of multi-territorial licences to certain types of users, such as *Spotify* or *Google*.

According to the ICA, the SIAE carried out a "complex exclusionary strategy" aimed at excluding other undertakings engaged in the management of copyrights, such as *Innovaetica* and *Soundreef*. This strategy was implemented by means of, *inter alia*, exclusivity clauses in management contracts and bundling of certain copyright management services. For example, the ICA alleges that authors had to give full and exclusive rights to the SIAE in respect of all existing and future works. As a result, SIAE enjoyed broad management activities related to the copyrights, including copyright related activities that had not been within the ambit of its (previous) statutory monopoly. SIAE is also alleged to have engaged in unlawful bundling by tying the management of copyrights services with services related to the protection against unauthorized uses of copyrighted works.

In addition, the ICA found that SIAE had engaged in exclusionary conduct when granting licences to TV-broadcasters and concert organizers, as SIAE's licence fees were based on the assumption that all works used by the licensee were part of SIAE's repertoire, without possibility of adjustment if the licensee also used music licensed by a third party such as *Soundreef*.

The ICA obliged SIAE to put an end to its conduct. Taking into account the specificity of SIAE's position, the complexity of the markets involved and the novelty of the case, the ICA chose to impose only a symbolic fine of € 1,000.

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CARTELS AND HORIZONTAL AGREEMENTS

– MEMBER STATE LEVEL –

THE NETHERLANDS

Dutch higher court upholds judgment on ship waste collection cartel

On 30 October 2018, the Dutch Trade and Industry Appeals Tribunal ("Appeals Tribunal") largely confirmed the judgment of the Rotterdam District Court ("District Court"), which had upheld the 2011 cartel decision of the Dutch Competition Authority ("DCA"). The Appeals Tribunal partially annulled the judgment under appeal, insofar as it concerned the duration of the infringement, and re-established the DCA's decision on the level of the fines.

The cartel involved three ship-generated waste collectors active in the Rotterdam port area which were found to have rigged bids and shared markets between August 2005 and July 2007. The undertakings allocated clients and aligned their quotations over the phone. These phone calls were wiretapped by the Intelligence and Tracking Service of the Inspectorate of the Ministry of Housing, Spatial Planning and the Environment. The Public Prosecution Service ("PPS") then passed the information on to the DCA, which opened proceedings and fined the cartelists almost € 3 million in 2011.

In July 2013, the District Court annulled the DCA's cartel decision due to the misuse of telephone tap evidence (see VBB on Competition Law, Volume 2013, No. 7). The District Court acknowledged that evidence obtained in the framework of an investigation can be provided to other authorities for purposes other than the investigation concerned. However, it held that this can only be done for public interest reasons. The PPS had to make an assessment with respect to the necessity of providing such information, taking into account the principles of proportionality and subsidiarity and weighing the individual's right to privacy against the public interest. This assessment had to be undertaken in a way that allows for review in court. Since the PPS had failed to make this assessment and the DCA had – in large part – based its decision on the wiretapped calls, the District Court annulled the DCA's decision.

In July 2015, the Appeals Tribunal overturned the District Court's judgment, ruling that the absence of a prior written assessment does not necessarily lead to the conclusion that the provision of evidence was illegal (see VBB on Competition Law, Volume 2015, No. 7). According to the Appeals Tribunal, the DCA could not have obtained the information on the existence of price-fixing and market-sharing arrangements by less invasive means, as such agreements are, in general, not made in writing. Furthermore, the provision of the evidence by the PPS was sufficiently safeguarded by procedures of judicial and administrative review. The Appeals Tribunal annulled the District Court's judgment and referred the case back to the latter.

In October 2016, the District Court had to rule again on the substance and this time it upheld the cartel decision of the DCA. However, it held that the duration of the infringement was shorter than established in the DCA's decision, since the DCA could not prove to the requisite legal standard that the cartel started on the day that an unshared document, reflecting one party's anticompetitive intent, was created. Consequently, the relevant turnover had to be reassessed, resulting in a lower fine.

In the present judgment of 30 October 2018, the Appeals Tribunal annulled the District Court's judgment insofar as it concerned the start date of the infringement. The Appeals Tribunal held that the DCA had proved the duration of the infringement to the requisite legal standard on the basis of the evidence considered as a whole and reinstated the fine originally imposed by the DCA.

SPAIN

Spanish High Court annuls € 88 million fine imposed on dairy companies due to procedural error

On 24 October 2018, the Spanish High Court (*Audiencia Nacional*) annulled a 2015 decision adopted by the Spanish Competition Authority ("CNMC") imposing fines totalling € 88 million on eleven dairy companies for alleged price fixing and market sharing.

The High Court's judgment follows a ruling delivered by the Spanish Supreme Court on 24 July 2018, which annulled the CNMC's decision insofar as one of the companies implicated, Nestlé, was concerned. Nestlé had challenged the CNMC's decision to reopen the preliminary phase of its investigation in order to "correct a material error", which had resulted in the CNMC extending the duration of the infringement attributed to certain cartel participants, including Nestlé. Nestlé argued that the decision to reopen the case constituted a procedural irregularity leading to a new legal assessment, rather than merely the correction of an error. The Supreme Court agreed with Nestlé and annulled the € 10.6 million fine imposed on it. The Supreme Court also ruled that the procedure before the CNMC should return to its preliminary investigation phase.

Ruling on an appeal brought by another company involved in the infringement, Schreiber Foods España, the High Court concluded that antitrust fining procedures constitute a single procedure which is common to all the parties involved. Accordingly, the Court ruled that any procedural error affecting the CNMC's preliminary investigation equally affects all the companies implicated in the infringement. The High Court thus considered that the Supreme Court's annulment decision in Nestlé's appeal affected all the companies involved in the investigation, even though only Nestlé appealed this particular aspect of the CNMC's investigation and despite the fact that not all of those companies were affected by the CNMC's decision to enlarge the temporal scope of their involvement in the cartel.

The CNMC will now be required to restart its investigation against all the implicated companies from its preliminary phase.

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VERTICAL AGREEMENTS

– EUROPEAN UNION LEVEL –

European Commission invites feedback from stakeholders on its evaluation of the Vertical Agreements Block Exemption Regulation which expires in 2022

The Vertical Agreements Block Exemption Regulation ("VABER") will expire on 31 May 2022. As a result, the European Commission has formally commenced its evaluation of the VABER in order to inform its decision on whether to allow it lapse, prolong its duration or revise it, in particular to take into account the increased importance of online sales and market players such as online platforms. As a first step, the Commission has published a roadmap (i.e., an outline of the scope of the Commission's proposed evaluation) and invited feedback from stakeholders on the proposed evaluation. Feedback must be submitted by 6 December 2018.

According to the roadmap, the Commission's investigation will focus on evaluating the following: (i) the effectiveness of the VABER's current provisions (for example, whether the hardcore and excluded restrictions effectively capture agreements unlikely to satisfy Article 101(3) TFEU); (ii) the efficiency resulting from the VABER, in particular whether it has reduced costs for undertakings and competition authorities in ensuring compliance with Article 101 TFEU; (iii) the relevance of the VABER in light of new market developments; (iv) the coherence of the VABER with the Commission's overall enforcement policy; and (v) the extent to which the VABER has contributed to a consistent application of Article 101 TFEU to vertical agreements in EU Member States.

The next steps in the evaluation process are public consultations which will be launched in the beginning of 2019 and through which the Commission hopes to receive information from business, consumers and EU competition law enforcers on the key competition issues arising in vertical relationships. In late 2019, an open stakeholder workshop will be held on areas of particular interest for the possible review of the VABER. Finally, the Commission plans to hold discussions with the competition authorities of the EU Member States in the framework of the European Competition Network.

The Commission intends to complete the evaluation in the Spring of 2020.

– MEMBER STATE LEVEL –

FRANCE

French competition authority imposes fine of € 7 million on outdoor power tool manufacturer for de facto online sales restrictions

On 24 October 2018, the French competition authority (the "FCA") fined Stihl, a German manufacturer of outdoor power tools, € 7 million for, in effect, prohibiting online sales of chainsaws, brush cutters, pole saws and electric pruners.

Stihl operated a selective distribution system, under which online sales were in principle permitted, but only where: (i) the products were handed over in-person to the customer (either at the distributor's premises or at the customer's home); and (ii) the sale was not made over a third party platform.

The FCA did not take issue with the use of selective distribution for the products in question, noting that the system (in particular, the advice and services which authorised distributors were required to provide) was needed to preserve the quality and ensure the proper use of the products, taking into account their complexity and the safety considerations associated with their use.

However, the FCA found fault with the requirement that the products be handed over in-person to the customer, as this was considered to be tantamount to a de facto ban on internet sales and, therefore, to constitute an object restriction under Article 101(1) TFEU that was ineligible for exemption under the Vertical Agreements Block Exemption Regulation. Despite the potentially dangerous nature of the products, the FCA found that this requirement was

not justified by safety concerns, since it was not required by relevant safety legislation (which only required a manual to be provided with the product), and was applied by Stihl even to professional buyers (who would already be experienced in using these products).

In rejecting the need for this requirement, the FCA also noted that Stihl's competitors did not impose such restrictive requirements for similar products, and there was furthermore a lack of consistency in Stihl's own policy, since the requirement was not applied consistently in the mass market channel.

In contrast, the FCA found that Stihl's ban of sales over third party platforms was legitimate and would comply with Article 101(1) TFEU. In so doing, it is noteworthy that the FCA applied the Court of Justice of the EU ("ECJ")'s reasoning in Coty (see VBB on Competition Law, Volume 2017, No. 12) to what are non-luxury products. In particular, the need to protect the brand image and quality of Stihl's products was considered one reason why the ban was justified. The ban was also seen as a legitimate means of ensuring that the service requirements that Stihl imposed on its authorised distributors were always respected when its goods were sold. In this respect, the FCA emphasised the fact that Stihl did not have any contractual right against third party platforms to require them to comply with these obligations. The ban was not considered to be disproportionate taking into account that retailers, in general, mainly sell over their own online stores rather than over platforms (as shown in particular by the results of the European Commission's e-commerce sector inquiry report, as well as by the practice of retailers when selling online the products of Stihl's competitors).

The FCA's decision has been appealed to the Paris Court of Appeal.

The case is significant in that the FCA was willing, in upholding the platform ban, to apply the reasoning of Coty to non-luxury products and to endorse the preservation of the brand image of the power tools in question as a key justification. The finding that the in-person hand-over requirement constituted an infringement is controversial, given the potentially dangerous nature of the products, but this is not the first occasion on which apparent inconsistencies in the supplier's own policy, and the less restrictive practices of competitors, have been cited in a negative ruling in respect of restrictions on online sales (see, for example, the UK Competition and Market Authority's decision in a case against Ping, upheld on appeal to the Competition Appeal Tribunal, in VBB on Competition Law, Volume 2018, No. 9).

GERMANY

German Federal Cartel Office publishes paper on competition restraints in online sales

In October 2018, the German Federal Cartel Office ("FCO") published its fourth paper in the series "Competition and Consumer Protection in the Digital Economy". The paper assesses the legal status of online sales restrictions subsequent to the judgment of the ECJ in *Coty* (see VBB on Competition Law, Volume 2017, No. 12) and the judgment of the German Federal Court of Justice in *Asics* (see VBB on Competition Law, Volume 2018, No. 1). Overall, the FCO appears to favour a considerably narrower reading of the *Coty* judgment than the European Commission (as reflected in the Commission's Competition policy brief of April 2018), and leaves open the possibility that market place bans might be considered as hardcore restrictions under the Vertical Agreements Block Exemption Regulation ("VABER") taking into account specific market circumstances in Germany. The paper also expresses concerns over the development of "hybrid platforms", and the risk that this might lead to the exclusion of independent dealers, a concentration of the market and a restriction of consumer choice.

The FCO starts by welcoming the recent enforcement activity of the European Commission in vertical price fixing cases involving internet sales.

Moving on to the two major platform cases, it considers that the judgment of the German Federal Court of Justice in *Asics* (which considered the prohibition of the use of price comparison sites in a selective distribution system to be a hardcore restriction that could not be block exempted under the VABER) can be distinguished from, and does not contradict, the judgment of the ECJ in *Coty*. In this regard, the FCO refers to the fact that Asics running shoes, in contrast to the Coty products, were not considered as luxury goods. Furthermore, it notes that Asics retailers were prohibited from using both price comparison sites and third party platforms with the consequence

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that, in contrast to the finding in *Coty*, consumers did not in practice have adequate access to the authorized dealers' own online offer.

The FCO observes that the *Coty* judgment did not provide a definition of luxury goods. It takes the restrictive view that the ECJ's legal assessment of the application of Article 101(1) TFEU cannot simply be assumed to apply to other (high-quality) branded goods.

The FCO advocates that brand image can be protected in a manner consistent with Article 101(1) TFEU by requiring distributors to have their own online shop on third party market places, instead of by prohibiting the use of third party market places altogether.

The FCO also revisits the ECJ's finding that market place bans are not hardcore passive sales restrictions pursuant to Article 4(c) of the VABER. It expresses the view that, in *Coty*, the ECJ had mainly based its finding on the results of the European Commission's E-commerce Sector Inquiry which indicated that, on average in the EU, distributors' own online shops – rather than platforms – are, in practice, by far the main online distribution channel used by distributors.

The FCO points out that the situation in Germany is different and that the use of market places and price comparison sites is clearly more significant in Germany than on average in the EU. It goes on to suggest that it is unclear at what point general platform restrictions and other restrictions on online sales activities reduce the online visibility of dealers to such a degree as to constitute hardcore passive sales restrictions. The FCO also suggests it is unclear whether an overall assessment of the different restrictions is needed in order (presumably) to conclude on whether passive sales are restricted (the FCO seems to be pointing to the fact that, unlike in *Asics*, the only restriction imposed by *Coty* was a market place ban).

In emphasising what it sees as the important open questions after *Coty*, the FCO appears to be advocating that market place bans may in certain circumstances be hardcore restrictions under the VABER, and that different conclusions may be justified by different market circumstances. This approach is difficult to square with the purpose of block exemptions, which is to provide a predictable and uniform safe harbour applicable across the EU, without the need to carry out the type of market analysis appropriate in the context of an individual assessment under Article 101 TFEU.

It is interesting to note that, in applying the criteria set out by the ECJ in *Coty*, earlier this year the Higher Regional Court of Frankfurt (see VBB on Competition Law, Volume 2018, No. 8) already highlighted that the ECJ did not appear to have taken into consideration that, particularly in Germany, distribution via platforms plays a far more important role than in other EU Member States. It nonetheless found that the market place ban did not constitute a hardcore passive sales restriction and was exempted by the VABER.

Looking to the future, the FCO considers the question how to deal with hybrid platforms, i.e., platforms that act as an authorized dealer for manufacturers, on one hand, and as an intermediary for online dealers, on the other hand. The FCO highlights the strong market position of platforms based on increased network effects which can result in dealers being dependent on these platforms. It points to the risk that, with platforms cooperating with manufacturers, dealers might become subject to discrimination and squeezed out of the market. The FCO notes that its aim is to prevent e-commerce being concentrated in the hands of a few players, i.e., the manufacturers, some large dealers and even fewer leading platforms. In this respect, it is noteworthy that the European Commission is currently gathering information from market participants in relation to the dual nature of the Amazon sales platform.

Higher Regional Court of Frankfurt rules that Opel's ban preventing service partners from selling new Opel vehicles is block exempted

On 21 August 2018, the Higher Regional Court of Frankfurt (the "Court") ruled on the lawfulness of a contractual provision prohibiting sales of new Opel vehicles by Opel service partners. By way of background, Opel operated two distinct selective distribution systems: one for the sale of new vehicles and another for servicing and original spare parts. The clause at issue was contained in the service partner agreement.

The claimant, an Opel service partner, sought an order requiring Opel to cease using the clause, arguing that it restricted competition on the market for services and orig-

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inal spare parts (on which, according to the claimant, Opel had a share of more than 30%, which would have precluded the application of the Vertical Agreements Block Exemption Regulation ("VABER")). The Court held instead that the restriction of competition concerned the market for new cars (on which authorised dealers of new Opel cars operated) and not the service market. Ultimately, the Court ruled that the clause was therefore exempted under the VABER, since Opel's share of the market for new vehicles amounted to only 7.3% and the clause did not constitute a hard-core restriction.

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STATE AID

– EUROPEAN UNION LEVEL –

General Court confirms selectivity of Spanish tax scheme for the amortisation of financial goodwill

On 15 November 2018, the General court ("GC") issued several judgments in cases relating to a European Commission decision classifying a Spanish tax scheme for the amortisation of financial goodwill as incompatible state aid (Cases T-207/10, T-227/10, T-239/11, T-405/11, T-406/11, T-219/10 and T-399/11).

The cases concern a rule under Spanish law allowing undertakings which are liable for corporation tax in Spain and which acquire a shareholding of at least 5% in a foreign company to deduct, through amortisation, the goodwill resulting from that shareholding from the basis of assessment for the corporation tax for which said undertakings are liable. By contrast, undertakings liable for corporation tax in Spain acquiring a shareholding of at least 5% in undertakings taxable in Spain could not obtain that advantage.

By decisions of 28 October 2009 and 12 January 2011, the European Commission found that the scheme of deduction applicable to the acquisition of shareholdings in foreign companies constituted state aid, which was incompatible with the internal market. The Commission decisions were however annulled by the GC in its judgments of 7 November 2014. According to the GC, the tax scheme at issue could not be considered as a state aid measure, since it did not meet the criterion of selectivity. In particular, the GC found that the tax advantage was, a priori, accessible to any undertaking.

Subsequently, in a landmark judgment, the Court of Justice of the European Union ("ECJ") set aside the GC judgments finding that the GC had misapplied the criterion of selectivity (see VBB on Competition Law, Volume 2016, No. 12). The ECJ ruled that the case law of the courts does not require the Commission to always identify a particular category of undertakings that exclusively benefit from the measure. Rather, the only relevant criterion in order to establish the selectivity of a national tax measure consists in determining whether that measure is such as to favour certain undertakings over other undertakings which, in the light of the objective pursued by the general tax system concerned, are in a comparable factual and legal situation and which accordingly suffer different treatment that can, in essence, be classified as discriminatory. This interpretation of the criterion of selectivity was reiterated by the ECJ in a recent judgment in another case concerning another Spanish tax measure (see VBB on Competition Law, Volume 2018, No. 8).

Consequently, the GC had to reassess the selectivity of the Spanish tax scheme for the amortisation of financial goodwill. In its judgments of 15 November 2018, the GC followed the - now established - ECJ case law and found that the measure is selective even though the advantage is accessible to all undertakings liable for corporation tax in Spain.

As rephrased by the GC, a measure may be selective even where the resulting difference in treatment is based on the distinction between undertakings which choose to perform certain transactions and other undertakings which choose not to perform them, and not on the distinction between undertakings from the perspective of their specific characteristics.

– OTHER DEVELOPMENTS –

EUROPEAN UNION: On 6 November 2018, the Court of Justice of the European Union ("ECJ") annulled, on appeal, a European Commission decision declaring that aid granted under an Italian scheme was unlawful but did not have to be recovered (Joined Cases C-622/16P to C-624/16P). The ECJ ruled that the recovery of unlawful aid may be regarded as objectively and absolutely impossible only where the Commission finds, following a scrupulous examination, that the following two conditions are satisfied: (i) the difficulties relied on by the Member State concerned genuinely exist; and (ii) there are no alternative methods of recovery. The Commission, however, only

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observed that recovery would be impossible because the necessary information for recovery of the aid could not be derived from the Italian land register and tax databases. According to the ECJ, the Commission should also have considered whether there were alternative methods that would allow recovery, even if only partial, of the aid.

EUROPEAN UNION: On 22 November 2018, the Communication from the European Commission amending the Guidelines for the examination of State aid to the fishery and aquaculture sector was published in the Official Journal. The Communication clarifies that the use of state aid can only be justified if it is in line with the objectives of the Common Fisheries Policy and adds a section to the Guidelines on aid for the renewal of the fishing fleet in outermost regions.

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LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– EUROPEAN UNION LEVEL –

European Parliament adopts proposal for ECN+ Directive

On 14 November 2018, following plenary debates, the European Parliament adopted a resolution in favour of the proposal for a Directive to empower the competition authorities of the EU Member States to be more effective enforcers of competition rules and to ensure the proper functioning of the internal market (known as the "ECN+ Directive"). Adopted at first reading, the draft Directive aims at granting national competition authorities ("NCAs") more effective investigation, decision-making and sanctioning tools so that they can better detect and tackle competition law infringements.

For about 15 years, the European Commission and the NCAs have been working hand in hand in enforcing EU competition rules under the auspices of the European Competition Network ("ECN") which was created in 2004 under Regulation 1/2003. The draft ECN+ Directive, as proposed by the Commission in March 2017, is based on the Commission's enforcement experience under the ECN. Regulation 1/2003 transformed the competition enforcement landscape, especially through empowering NCAs to apply EU competition law alongside the Commission. However, while the Regulation went a long way in bringing about a coherent system with a high level of convergence in the application of the substantive rules, it did not harmonise the procedures used by NCAs for the enforcement of Articles 101 and 102 TFEU. Divergence still subsists in some important areas, such as investigative and sanctioning powers as well as financial and human resources.

The discrepancies in the application of competition law across Member States coupled with the gaps and limitations in NCAs' tools result in a situation where companies engaging in anti-competitive practices can face very different outcomes of proceedings depending on the Member States in which they are active. A public consultation conducted by the Commission in 2014 brought to light the fact that a number of NCAs struggle with insufficient human resources, thereby hindering, for instance, their ability to simultaneously carry out inspections of all members of a suspected cartel. Many NCAs also lack the essential digital tools for effective collection of e-evidence from mobile phones, laptops and tablets. When it comes to fines, in some Member States, companies can escape paying them by restructuring. In spite of the ECN Model Leniency Programme, endorsed in 2006 and revised in 2012, leniency programmes differ substantially across the Member States. Such diverging approaches may discourage companies from coming forward with information and evidence denouncing cartelized behaviour.

The Commission considers that such uneven enforcement of the EU competition rules distorts competition in the internal market and it undermines the system of decentralised enforcement that was put in place by Regulation 1/2003. The draft Directive therefore seeks to remedy these shortcomings and give substance to the requirement in Article 35 of Regulation 1/2003 that Member States should designate NCAs in such a way that the provisions of the Regulation are effectively complied with.

In particular, the proposed ECN+ Directive introduces guarantees aiming to protect the staff and management of NCAs from external influence when enforcing the EU competition rules by ensuring that they can perform their duties and exercise their powers independently from political and other external influences as well as by refraining from any action which is incompatible with the performance of their duties and exercise of their powers.

Furthermore, the ECN+ Directive will also grant NCAs extensive enforcement tools, in order to put an end to the current patchwork of investigation powers and decision-making procedures found across the Member States. Pursuant to the draft Directive, all NCAs must have the power to inspect business premises (Article 6), along with other premises including the homes of directors, managers, and other members of staff of undertakings and associations of undertakings (Article 7). NCAs must also have the power to adopt prohibition decisions, including

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the power to impose structural and behavioural remedies, accept commitments, and impose interim measures (Articles 9-12). The Directive will also ensure effective sanctions for non-compliance with the investigatory tools. Finally, it will render more coherent the varying nature and degree of fines and leniency programmes existing under the current national competition regimes.

In light of the fact that, on 30 May 2018, the European Parliament and the Council reached a provisional political agreement on the Commission's proposal and given the Parliament's recent adoption of the draft Directive, it is only a matter of time before the Council will adopt the ECN+ Directive. Member States will then have to transpose the Directive into their national legal frameworks within 2 years of its entry into force.

– MEMBER STATE LEVEL –

AUSTRIA

Austrian Competition Authority publishes Code of Conduct for businesses

On 22 October 2018, the Austrian Federal Competition Authority ("FCA") published a Code of Conduct for businesses addressing unfair trading practices.

The Code of Conduct is meant to serve as guidance for the creation of compliance programmes and to clarify how to assess entrepreneurial behaviour. The document provides general principles relevant for the evaluation of business behaviour in practice. It contains a catalogue of business practices which, regardless of their legal assessment by the courts in each individual case, are at least incompatible with best practices.

The Code of Conduct provides an overview of the Austrian Cartel Act, alongside other relevant legal provisions, such as the Federal Act against Unfair Competition and the Austrian Commercial Code. Interestingly, it gives practical examples and recommendations for companies affected by anti-competitive practices.

The Code of Conduct is accessible on the FCA's website (in German only).

BELGIUM

Draft bill on reform of Belgian competition law

On 16 November 2018, the Belgian Council of Ministers adopted a draft Bill (the "Draft Bill") amending numerous competition law provisions of the Belgian Code of Economic Law ("CEL"). While the Draft Bill will not bring about major substantive or procedural changes to the current competition rules and will also maintain the prevailing institutional architecture, a new text will replace in full Book IV of the CEL on the "Protection of Competition".

The Draft Bill aims to improve compliance with competition law and the functioning of the Belgian Competition Authority ("BCA") in order to enhance the efficiency of its procedures. In this respect, the Draft Bill will simplify and unify existing procedures, cure difficulties of application, resolve issues of interpretation, remedy shortcomings and include amendments to reflect practical experience.

Despite this ostensibly modest objective, it is understood that the Draft Bill – the text of which is not yet public – will contain, inter alia, the following novelties:

- *Increased cap on fine* – The maximum amount of fines that the BCA can impose will be increased from 10% of the Belgian turnover of the undertaking concerned to 10% of its worldwide turnover.
- *Competition infringements by individuals* – Unless the individual should be regarded as an undertaking, an infringement by an individual will be ancillary to the infringement committed by the legal person on whose behalf the individual acted.
- *Commitments in behavioural cases* – The competition prosecutor will have the power to formally terminate proceedings in view of the commitments offered by the party under investigation (this is currently the exclusive prerogative of the Competition College).
- *New rules governing request for interim measures* – The Competition College will be expressly required to balance all interests at stake when assessing the merits of a request for interim measures.

- *Dawn Raids* – The investigating magistrate for Brussels will be competent to authorise on-site inspections on the entire Belgian territory.

- *New rules governing use of languages*.

- *New rules governing confidentiality before the Brussels Court of Appeal (Market Court).*

The Draft Bill is now being reviewed by the Belgian Council of State before being approved a second and final time by the Council of Ministers which will then submit the text to the Belgian Parliament. The government will have to rush the Draft Bill through Parliament before that body's dissolution in view of the coming elections currently scheduled to take place on 26 May 2019 in Belgium.

HUNGARY

Hungarian Competition Authority issues fines for obstruction of investigation

According to two decisions dating back to 2015 and 2016 but only published recently, the Hungarian Competition Authority ("GVH") issued fines for the obstruction of investigations. Both cases concerned the conduct of dawn raids regarding alleged infringements of competition rules in the framework of public tenders (bid rigging).

On 4 November 2014, the GVH initiated an investigation into submissions for the public procurement of road salt and other de-icing materials and conducted a dawn raid at the premises of Magyar Plastiroute. During the search, the GVH asked a company representative to bring his desktop computer and storage media to the authority's premises the following day for screening and, if necessary, copying. However, the representative only provided the authority with one of the storage media, stating that, to the best of his knowledge, the other was not in use. The GVH imposed a fine of HUF 7.5 million (approx. € 24,000 at the time of the decision) for not fully complying with its request.

On 24 November 2015, the GVH initiated proceedings concerning public tenders for the drilling and maintenance of wells and conducted a dawn raid at the premises of Geo-Sivo. The authority did not find anyone at the premises of the company, but received a call on the following day from the managing director of the company, who affirmed that he was willing to cooperate. At the request of the officials, he provided the GVH with a PC for inspection on which, as it later turned out, he had installed a new operations system and overwritten all the information it contained on the evening of the dawn raid in full awareness of the proceedings. The GVH imposed a fine of HUF 542,340 (approx. € 1,700 at the time), which was the maximum fine it could impose based on the revenue in that specific case.

Although the facts date back several years, the GVH decided recently to publish these two decisions for deterrence purposes.

SPAIN

Spanish Competition Authority publishes long-awaited guidelines on calculation of fines

On 7 November 2018, the Spanish Competition authority ("CNMC") published a set of provisional guidelines on the calculation of fines for infringements of competition law.

These guidelines are aimed at clarifying the method applied by the CNMC for the calculation of fines after the Spanish Supreme Court declared partially illegal the fining methodology previously followed by the authority. In particular, the Supreme Court ruled, back in 2015, that the imposition of fines amounting to 10% of the company's total turnover must not be imposed as a general rule but that it shall be reserved for the most serious infringements. The Supreme Court added that for less serious infringements, fines should be set at a lower level and should be proportionate to the gravity of the infringement.

The newly adopted guidelines describe the two-step methodology now applied by the CNMC:

- The authority first establishes a base amount applicable to all companies involved in the infringement. Such amount will not exceed 60% of the total amount of the fine and will be calculated on the basis of: (i) the nature of the anti-competitive conduct; (ii) the characteristics of the affected markets; (iii) the market share of the undertakings involved; (iv) the geographical scope of the infringement; (v) the effects on consumers and other market players; (vi) the amount of illegal profit gained; and (vii) the existence of compliance measures or programmes (if applicable to all companies involved).

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- The remaining part of the fine is individually calculated for each of the companies involved in the infringement in view of: (i) the duration of the participation of each company in the infringement; (ii) the share of each company within the total turnover affected by the infringement (except for abuses of dominant position); and (iii) the applicability of aggravating or mitigating circumstances.

In addition, in order to ensure that the fines are proportionate, the CNMC subsequently calculates a proportionality limit over which no fine can be imposed. For such purpose, the CNMC estimates the amount of profit gained by each of the undertakings concerned during the infringement and, as a deterrent factor, multiplies such amount by a figure ranging between 1 and 4, depending on the duration of the infringement and the size of the infringing company.

In its guidelines, the CNMC recalls that the above-described methodology has been upheld by the Spanish High Court (*Audiencia Nacional*) in several recent judgments.

Finally, the CNMC points out that, although these provisional guidelines will generally be applied, the CNMC may depart from them when their application appears impossible or unreasonable in light of the circumstances of the case or when the leniency programme applies.

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