March 2019

VBB on Competition Law

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MERGER CONTROL

– EUROPEAN UNION LEVEL –

Commission lifts commitments adopted in Air France-KLM merger based on exceptional circumstances review

In a recently published decision of 6 February 2019, the European Commission waived a commitment imposed during its merger review of Air France's acquisition of KLM in 2004.

By way of background, during the 2004 review of its acquisition of KLM, Air France offered commitments to address competition concerns identified by the Commission on five long-haul routes. As regards the Amsterdam-New York route in particular, Air France committed to: (i) make slots available at Amsterdam airport to enable new entry; (ii) limit flight frequencies to 14 per week; (iii) enter into an interlining agreement with a new entrant and (iv) allow a new entrant to join the Air France-KLM frequent flyer programme. However, no new entrant had made such a request to avail itself of these merger commitments. In a separate development, on 12 May 2015, the Commission closed an antitrust investigation under Article 101 of the Treaty on the Functioning of the European Union into a transatlantic joint venture between Air France, KLM, Alitalia and Delta by accepting commitments offered under Article 9 of Regulation 1/2003 on Procedure. These antitrust commitments went beyond those offered during the 2004 merger review and included a more flexible slot commitment, a fare combinability commitment, a special prorate agreement commitment, as well as a frequent flyer commitment. In August 2017, Norwegian Air Shuttle applied for slots on the Amsterdam-New York route under the Article 9 antitrust commitments.

As a result of these developments, in November 2018, Air France-KLM requested the Commission to review the continued effectiveness of the 2004 commitments on the Amsterdam-New York route. Under the Commission's Remedies Notice, a non-divestiture commitment may be waived or modified in exceptional circumstances if its objective to protect competition is better achieved through alternative means.

In its opinion, the Monitoring Trustee did not support a waiver because the 2004 merger commitments were to last for an indefinite duration, while the Article 9 antitrust commitments are set to expire in 2025. However, the Commission reasoned that on expiry of the antitrust commitments in 2025, it could open a new antitrust investigation that could lead to an extension of the antitrust commitments. The Commission also noted that Norwegian Air Shuttle had decided to start operations only under the broader scope of the antitrust commitments, which indicated their effectiveness and restored the competitive situation that existed prior to Air France's acquisition of KLM. Maintaining both the merger commitments and the antitrust commitments risked undermining the proportionality principle, as both sets of commitments pursued the same objective. Finally, the Commission concluded that third parties, such as Norwegian Air Shuttle, would not be adversely affected by the waiver. For these reasons, the Commission agreed to waive the merger commitment on the Amsterdam-New York route.

Commission conditionally approves Spirit's acquisition of Asco

On 20 March 2019, the Commission conditionally approved the acquisition of Asco by Spirit. The Commission was concerned that the deal would reduce competition in the market for aircraft slat systems. These parts allow the wing of an aircraft to operate at a higher 'angle of attack', which improves stability and allows aircraft to fly at lower speeds during take-off and landing.

By acquiring Asco, Spirit would have become a shareholder of Belairbus, an important joint venture for the production of slat systems for Airbus and other aircraft manufacturers. The Commission was concerned that Belairbus might be used as a vehicle for Spirit to share information with its sole competitor for slats, Sonaca, also a parent of Belairbus, and result in an increased likelihood of coordinated behaviour between Spirit and Sonaca.

To address the Commission's concerns, Spirit offered to structurally modify the set-up of Belairbus in order to permanently eliminate its role as a commercial and technical platform for negotiations with Airbus and ensure that future contract negotiations will be carried out bilaterally and independently between each supplier and Airbus. Further, any existing commercially sensitive information of Sonaca held by Asco will be destroyed and such information will not be shared with Spirit in future. Based on these commitments, the Commission decided to conditionally clear the deal.

– MEMBER STATE LEVEL –

UNITED KINGDOM

CMA fines JLA for failure to comply with initial enforcement order

On 8 March 2019, the UK's Competition and Markets Authority ("CMA") fined JLA £120,000 for failure to comply with an initial enforcement order ("IEO"). Under UK competition law, the CMA may impose an IEO on merging parties to prevent them from taking pre-emptive action which might prejudice the outcome of the CMA's merger review. As UK law provides for a voluntary, non-suspensory merger control regime, IEOs are often imposed in mergers which have already been completed.

In this case, JLA and Washstation supplied managed laundry services, and had already completed the transaction prior to the CMA initiating its merger review. In December 2017, the CMA imposed an IEO on JLA and, following an in-depth investigation, later prohibited the deal (see VBB on Competition Law, Volume 2018, No. 10). During its in-depth review of the deal, the Monitoring Trustee appointed under the IEO alerted the CMA to the fact that, three weeks after the IEO had come into force, 145 new and eleven used laundry machines acquired by JLA as part of the deal had been sold to the former owner of Washstation.

In its penalty decision, the CMA found that, by selling these laundry machines, JLA had taken action which reinforced the integration of the two businesses and narrowed the options available to the CMA, if it decided, as a result of its investigation, that remedial action was justified. The CMA, therefore, held that the sale constituted a serious breach of the IEO and imposed a fine of £ 120,000.

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ABUSE OF DOMINANT POSITION

– EUROPEAN UNION LEVEL –

European Commission fines Google € 1.49 billion for abusing its dominant position in online advertising

On 20 March 2019, the European Commission (the "Commission") announced that it had issued a decision imposing a € 1.49 billion fine on Google for breaching Article 102 of the Treaty on the Functioning of the European Union. According to the Commission, Google abused its dominant position in online advertising by imposing a number of restrictive measures in contracts with third-party websites which prevented Google's rivals from placing their search adverts on those websites.

According to its press release, the Commission found that Google enjoyed a dominant position on the market for online search advertising intermediation. The Commission concluded that this followed from high barriers to entry and Google's very high market share, above 70% from 2006 to 2016, and in fact exceeding 85% for most of the period.

The Commission's decision relates to Google's practices in online advertising. More specifically, websites such as newspaper websites, blogs or travel sites aggregators, considered as "publishers", often have a search function embedded. When a consumer uses this search function, the website delivers both search results and search adverts, which appear alongside the search results.

Through AdSense for Search, Google provides these search adverts to "publishers", which appear alongside the search results. In essence, Google is an intermediary, like an advertising broker, between advertisers and website owners that want to profit from the space around their search results. Therefore, AdSense for Search works as an online search advertising intermediation platform.

Google's provision of online search advertising intermediation services to the most commercially important publishers took place via agreements that were individually negotiated. Starting in 2006, Google included exclusivity clauses in its contracts, which prevented publishers from placing any search ads from Google's competitors on their search results pages.

As of March 2009, Google gradually began replacing the exclusivity clauses with so-called 'Premium Placement' clauses. These required publishers to reserve the most profitable space on their search results pages for Google's ads, and also to request a minimum number of Google ads. As a result, Google's competitors were prevented from placing their search ads in the most visible and clicked-on parts of the websites' search results pages.

In addition, as of March 2009, Google began including clauses requiring publishers to seek written approval from Google before making changes to the way in which any rival ads were displayed, meaning that Google could control how attractive, and therefore clicked-on, competing search ads could be.

The Commission also found that it was not possible for competitors in online search advertising, such as Microsoft and Yahoo, to sell advertising space in Google's own search engine results pages. Therefore, third-party websites represent an important entry point for these other suppliers of online search advertising intermediation services to grow their business and try to compete with Google.

While Google ceased the illegal practices a few months after the Commission issued a Statement of Objections in July 2016, the misconduct allegedly lasted over ten years. The Commission imposed a fine of € 1.49 billion which was calculated in accordance with the Commission's 2006 Guidelines on fines taking into account the duration and gravity of the infringement.

In addition, the decision requires Google, at a minimum, to stop its illegal conduct, to the extent it has not already done so, and to refrain from any measure that has the same or equivalent object or effect.

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– MEMBER STATE LEVEL –

GERMANY

Higher Regional Court of Frankfurt dismisses claim that Telekom Deutschland abused its dominant position by charging excessive prices for renting cable conduits

In a recently published judgment issued on 20 December 2018, the Higher Regional Court of Frankfurt finally rejected the claim of a major operator of broadband cable, Kabel Deutschland, that Telekom Deutschland was abusing its dominant position by charging excessive prices when renting cable conduits to Kabel Deutschland.

In 2003, Kabel Deutschland had acquired a subsidiary of Telekom Deutschland, including its broadband cable networks. The cable conduits, through which the broadband cable networks run, however, remained the property of Telekom Deutschland. Together with the company purchase agreement, the parties had entered into a rental contract for the cable conduits at an agreed rental fee. In 2010, the German Federal Network Agency fixed the rental fees for access to cable conduits at a significantly lower level than that agreed in the rental contract between the parties. As a result, Kabel Deutschland filed a complaint against Telekom Deutschland with the Regional Court of Frankfurt, alleging that Telekom Deutschland was abusing its dominant position in the market for access to cable conduits by refusing to reduce the rental fee agreed in the ongoing rental contract. Kabel Deutschland asked the Court to oblige Telekom Deutschland to reduce the rental fee agreed in the rental contract. The Regional Court of Frankfurt rejected the claim in 2013, and so did the Higher Regional Court of Frankfurt on appeal, based essentially on the reasoning that the rental contract, including the level of the rental fee, was closely linked to the agreement on the purchase of the Telekom Deutschland subsidiary, and that the agreed rental fee was part of the consideration that Kabel Deutschland agreed to pay for the entire transaction (see VBB on Competition Law, Volume 2015, No. 2).

The case was further appealed to the German Federal Court of Justice, which decided in January 2017 that the case should be referred back to the Higher Regional Court of Frankfurt (see VBB on Competition Law, Volume 2017, No. 3). The Higher Regional Court of Frankfurt has now finally dismissed Kabel Deutschland's claim that the rental fee of its ongoing rental contract with Telekom Deutschland should be reduced because it constituted an abuse of dominance through excessive pricing.

In its judgment, the Higher Regional Court of Frankfurt confirmed that the rental contract and the level of the rental fee agreed between the parties was closely connected to their company purchase agreement, in that the purchase price for the company was lower than the market price due to the simultaneous signature of the rental contract for the cable conduits. On that basis, the Court reiterated its previous view that the two agreements could not be seen in isolation from one another and that the relevant market on which to assess possible dominance was not the market for the provision of access to cable conduits, but rather the market for company takeovers, on which Telekom Deutschland was not dominant. The Court therefore held that the agreements, including the rental contract, had been negotiated and agreed on competitive terms.

Based on the principle of "*pacta sunt servanda*" (i.e., agreements must be kept) and its finding that Telekom Deutschland was not dominant at the time the agreements, including the rental contract, were entered into, the Court ruled that the interests of Telekom Deutschland in continuing the rental contract on the agreed terms prevailed and that the plaintiff was not entitled to demand that the rental fee agreed under the valid contract be reduced. Whilst the Court conceded that, in the meantime, Telekom Deutschland may well have become dominant on the market for access to cable conduits, it held that, in order to enforce its rights vis-à-vis a dominant company based on competition law, the plaintiff should have made use of its contractual termination right, which allowed it to terminate the rental contract annually. If Telekom Deutschland was dominant on the market for access to cable conduits, the plaintiff would then have been entitled to demand that Telekom Deutschland grant it access to its cable conduits for an appropriate fee, pursuant to the German rules on abuse of dominance (in particular, Section 19(2) Nr. 4 of the Act against Restraints of Competition). In view of the fact that the plaintiff had chosen not to terminate the contract which had been agreed on competitive terms, the Court concluded that Telekom Deutschland's interests in continuing the rental contract on the agreed terms prevailed over the plaintiff's interests in having the Court reduce the rental fee under the ongoing contract.

CARTELS AND HORIZONTAL AGREEMENTS

– EUROPEAN UNION LEVEL –

European Commission imposes fines totalling € 368 million on car safety equipment suppliers in cartel settlement decision

On 5 March 2019, the European Commission (the "Commission") announced that it had imposed total fines of € 368,277,000 on two car safety equipment suppliers, Autoliv and TRW, for their involvement in two cartels concerning the supply of car seatbelts, airbags and steering wheels to European car producers. A third supplier, Takata, was granted immunity from fines for having reported the infringements to the Commission under the Leniency Notice.

According to the Commission, the three suppliers exchanged commercially sensitive information and coordinated their market behaviour for the supply of seatbelts, airbags and steering wheels in two separate cartels relating to the Volkswagen Group and the BMW Group respectively. The cartel coordination took place through meetings at the suppliers' business premises, in hotels, in restaurants, as well as through telephone calls and e-mail exchanges.

The Commission found that the first cartel involving the Volkswagen Group had started on 4 January 2007 and ended on 28 March 2011 (for TRW) and 30 March 2011 (for Autoliv and Takata). TRW was fined € 158,824,000 and Autoliv € 121,211,000. They respectively received fine reductions of 50% and 30% under the Leniency Notice for their cooperation in the investigation.

The second cartel, which related to the BMW Group, started on 28 February 2008 (Autoliv and Takata) and 5 June 2008 (TRW) and ended on 19 September 2010 (Autoliv) and 17 February 2011 (Takata and TRW). The Commission imposed fines of € 30,067,000 on TRW and € 58,175,000 on Autoliv. Fine reductions of 50% and 30% were granted to TRW and Autoliv respectively under the Leniency Notice for their cooperation.

Takata received full immunity from fines for informing the Commission of the existence of the cartels, thereby avoiding aggregate fines of around € 195 million. All of the companies received an additional fine reduction of 10% for agreeing to settle with the Commission under the Settlement Notice.

– MEMBER STATE LEVEL –

GERMANY

German Federal Court of Justice annuls judgments on fine calculation in liquefied gas cartel case

On 9 October 2018, the German Federal Court of Justice annulled four judgments of the Higher Regional Court of Düsseldorf with regard to the amount of fines imposed in the liquefied gas cartel case. The Federal Court of Justice remitted the case to the lower court as regards the calculation of the fine, but confirmed the substance of the decision.

In 2007 and 2009, the Federal Cartel Office (the "FCO") fined nine individuals and eleven undertakings a total of approximately € 250 million for their involvement in a customer allocation cartel in the liquefied gas sector (see VBB on Competition Law, Volume 2008, No.1 and Volume 2009, No.4). The companies had agreed not to poach each other's customers; they had informed each other about customer price requests and had paid compensation in case a customer switched to another supplier.

On appeal, the Higher Regional Court of Düsseldorf increased the fines imposed on the companies involved in the infringement. The Higher Regional Court did so to take account of the additional profits generated by the anticompetitive conduct, i.e., the difference between the actual revenue generated by the cartel and the revenue

that the cartelists would have generated absent the cartel. According to the Higher Regional Court, the additional profit could only be estimated since the hypothetical competitive price was unknown. The cartel profit was estimated by comparing the prices charged by the companies involved in the collusion (the "cartelised prices") and those charged by their competitors active on the same market during the same period which were not involved in the cartel (the "competitive prices")

In its recent judgment on appeal, the Federal Court of Justice considered that the comparative analysis conducted by the Higher Regional Court was flawed in a number of respects. In particular, it noted that the methodology applied by the Higher Regional Court was not included within the catalogue of economically recognised methods (see, e.g., the European Commission Staff Working Document on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, para. 26). Recognized methods would include a comparison with the price development on cartel-free markets or a comparison based on price-determining elements.

The Federal Court of Justice stated that the approach adopted by the Higher Regional Court was not *per se* wrong and might be appropriate in cases where there was no comparable market with effective competition. However, it found that the Higher Regional Court had failed to explain why it preferred this specific method over other, more established, ones. According to the Federal Court of Justice, the trial court must clearly state why it chose one specific method and why that method was appropriate. In particular, the judgment must indicate that the court was aware of the main advantages or disadvantages of the alternatives in question.

The Federal Court of Justice confirmed that, in the case of a customer-allocation cartel, it was generally probable that, without the infringement, the prices of the cartel members would have been similar to the lower prices of the companies not involved in the infringement. However, the Federal Court of Justice found that, in making its analysis, the Higher Regional Court had disregarded the "umbrella effect", i.e., the fact that non-cartel members may increase their prices in view of the higher prices of the cartel. According to the Federal Court of Justice, the Higher Regional Court had failed to provide verifiable evidence to support the key assumptions on which its estimates were based, namely that absent the cartel, the average prices of the cartelists would have been comparable to those of the companies not involved in the infringement.

Remitting the cases, the Federal Court of Justice indicated that, in view of the time elapsed since the 2013 judgment of the Higher Regional Court of Düsseldorf, it might be preferable to apply a temporal comparative analysis, comparing the cartel period with a period of time when the market was not subject to the cartel. Furthermore, the Federal Court of Justice recommended engaging an expert to determine the amount of the additional profits generated by the cartel.

SPAIN

Spanish Competition Authority imposes fines totalling € 118 million on railway infrastructure companies

On 14 March 2019, the Spanish competition authority ("CNMC") imposed fines totalling € 118 million on fifteen companies, namely Cobra, Elecnor, Siemens, Semi, Inabensa, Alstom, Cymi, Isolux, Electren, Comsa, Indra, Neopul, Telice, Eym and Citracc, for their involvement in a cartel on the market for the supply of railway infrastructure. The investigation was initiated as a result of a leniency application filed by Alstom S.A.

The CNMC concluded that the companies involved in the infringement had agreed not to compete in tenders organised by ADIF, the Spanish public entity in charge of managing national railway infrastructure. According to the CNMC, the companies carried out three different anticompetitive practices which affected the following markets: (i) public tenders for the maintenance of electrification systems for conventional railway lines; (ii) public tenders for the construction, supply, installation and maintenance of electrification systems for high-speed railway lines; and (iii) public and private tenders for the construction, supply, installation and maintenance of electromechanical systems for high-speed railway lines.

Concerning the first cartel, the CNMC found that ten of the companies concerned had concluded an agreement to illegally share between them at least 239 public tenders. According to the CNMC, as a result of this agree-

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ment, 173 of those tenders were awarded to the colluding companies between 2002 and 2016, representing a value of € 134 million. The companies used a "lottery" system in order to decide which company would be the winner of each tender. This system established a ranking which determined the order in which tenders would be awarded to each of the participants. A compensation mechanism was also put in place, rewarding non-winning companies with 6% of the value of each contract.

In relation to the second cartel, which took place between 2008 and 2016, the CNMC found that thirteen of the companies involved in the infringement had agreed to share among themselves 24 public contracts worth a total of € 837 million. For each tender, the companies had agreed in advance which one would submit the lowest bid. In practice, all of the colluding companies submitted seemingly competing tenders but always at a price higher than that of the agreed winner. The companies also agreed that the winning company would subcontract its services to the other colluding companies in order to share the profit.

The third cartel lasted three years and involved three companies. The cartel aimed at ensuring that the tenders were always awarded to one of them. The winning company would also subcontract its services to the other cartel participants. This cartel affected seven contracts worth a total of € 84 million.

In light of the above findings, the CNMC imposed fines totalling € 118 million on the fifteen cartel participants. The highest fines were imposed on Cobra (part of the ACS Group), Elecnor and Siemens. The CNMC also imposed fines amounting to € 666,000 on fourteen executives of the companies involved in the infringement. Alstom, which revealed the existence of the cartel to the CNMC, was exempted from the payment of a fine. Siemens benefited from a 45% reduction for its cooperation under the leniency programme.

In addition, the CNMC prohibited the companies involved from concluding contracts with the public administration. The duration of such restriction will be determined by the national Administrative Contracts Board. This prohibition will only enter into force once the decision of the CNMC is definitive, a process that might still take several years considering that the decision can be appealed before the Spanish courts.

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VERTICAL AGREEMENTS

– EUROPEAN UNION LEVEL –

European Commission imposes € 12.5 million fine on Nike for restricting cross-border sales of merchandising products

On 25 March 2019, the European Commission ("Commission") announced its decision to fine Nike € 12,555,000 for limiting the ability of licensees to sell licensed merchandising products to other EEA countries. According to the Commission's press release, the restrictions concerned the merchandise products of certain European football clubs and federations (FC Barcelona, Manchester United, Juventus, AS Roma, Inter Milan and the French Football Federation are named by the Commission). Nike acted as a licensor with respect to these products, which feature only the brand of the club or federation; the restrictions did not concern Nike-branded products.

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

- Imposed *direct measures* restricting out-of-territory sales by licensees. Such measures included clauses explicitly prohibiting out-of-territory sales, obligations to refer orders for out-of-territory sales to Nike and clauses imposing double royalties for out-of-territory sales;
- Enforced *indirect measures* designed to implement the out-of-territory restrictions, including by refusing to supply "official product" security holograms, threatening licensees with ending their contract if they sold out-of-territory or carrying out audits;
- Imposed *direct and indirect measures* on master licensees (where Nike used master licensees in order to grant sub-licenses for use of the relevant intellectual property rights to third parties) to ensure that master licensees stayed within their territory and compelled master licensees to enforce restrictions against their respective sub-licensees;
- Included clauses expressly prohibiting licensees from supplying merchandising products to (often retail) customers who could be selling outside their allocated territories. Nike both obliged licensees to *pass on out-of-territory sales prohibitions* in their contracts and intervened to ensure that retailers did not purchase products from licensees in other EEA territories.

The infringement lasted nearly 13 years (between 1 July 2004 and 27 October 2017).

The fine imposed on Nike was substantially reduced based on the extent of its cooperation with the Commission during the investigation, which went beyond what was legally required of Nike. In particular, Nike provided the Commission with information permitting it to extend the scope of the case to include the sports merchandise of a number of additional clubs. Nike also provided evidence of significant added value and expressly acknowledged the facts and infringements in question. As a result, Nike was granted a 40% reduction of the fine.

Nike is the sixth company to have been fined by the Commission for restrictions in vertical agreements since July 2018, and in all of these cases substantial reductions in the fine have been granted under the Commission's informal "cooperation procedure". Three of the six cases have involved, at least in part, restrictions on cross-border sales, although this may be the only case to have concerned restrictions on licensees. The case is further evidence of the priority being given by the Commission to vigorous enforcement in the area of vertical agreements after many years of inactivity.

– MEMBER STATE LEVEL –

SWEDEN

Swedish Competition Authority closes investigation into distribution agreement

On 19 March 2018, the Swedish Competition Authority (the "Authority") closed its investigation into agreements between Kanefusa Europe B.V., a manufacturer of cutting tools for processing wood and metal, and its distributors in Sweden. The agreements in question, dating from 2012 and 2017, concerned the allocation of exclusive rights over the sale of Kanefusa tools in the Swedish and Norwegian markets. Under the agreement, distributors were granted exclusive rights over specific geographic areas and/or customer groups across different product categories.

Both agreements ended in 2017, when Kanefusa introduced a mechanism to prevent distributors competing for one another's' existing customers. This practice was discontinued over the course of the Authority's investigation.

The Authority closed its investigation upon finding that the agreements in question have ceased to apply and that dealers compete outside their previously-defined geographic areas and customer groups. Over the course of the investigation, Kanefusa also sent letters of clarification to the affected dealers, confirming that it had not banned and did not intend to ban passive sales outside.

The decision not to investigate Kanefusa's behaviour further cannot be taken to imply any position on whether the agreements in question violate competition rules.

– OTHER DEVELOPMENTS –

EUROPEAN UNION: The music-streaming company Spotify has announced that it filed an antitrust complaint with the European Commission (the "Commission") on 11 March claiming Apple had engaged in anticompetitive behaviour under both Articles 101 and 102. Spotify has stated that the complaint focuses on Article 101, which does not require a finding of dominance. According to Spotify, the restrictions include the mandatory and exclusive use of Apple's in-app purchase system for digital content. This system obligation is accompanied by a 30% 'tax' levied on competing digital subscription application developers. Further to this, failure to comply with the system obligation results in a restriction on developers' – such as Spotify's – ability to communicate with customers through the application. Commissioner Vestager is reported to have stated that the Commission will take the complaint seriously.

EUROPEAN UNION: See also '<u>European Commission accepts final commitments in cross-border access to pay-TV case</u>' in the Intellectual Property/Licensing section of this Newsletter for a discussion of the Commission's decision to accept commitments relating to film licensing contracts concluded between film studios and broadcasters, restricting broadcasters' ability to accept unsolicited requests for pay-TV services from consumers located outside their licensed territory.

AUSTRIA: On 8 March 2019, the Austrian Cartel Court ("Kartellgerichts") published its decision dating from 18 November 2018 fining the Austrian petrol chain A1 Tankstellenbetrieb ("A1") € 70,000 for concluding contracts fixing the resale prices of 37 franchisees. A1 was able to directly implement the price fixing through its cashier system, which directly transmitted prices to petrol station franchisees' display screens and fuel dispensers. In calculating the fine to be imposed, the Court took into account as mitigating factors the fact that A1's share of the Austrian market is small, that the individual gas stations were not dominant on their respective local markets and, finally, that A1 pursued an aggressive pricing policy as a discounter.

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INTELLECTUAL PROPERTY/LICENSING

– EUROPEAN UNION LEVEL –

European Commission accepts final commitments in Cross-border access to pay-TV case

According to a press release issued on 7 March 2019, the European Commission ("Commission") has formally accepted the commitments offered by Disney, NBC Universal, Sony Pictures, Warner Bros. and Sky in Case 40.023, *Cross-border access to pay-TV*, under Article 9 of Regulation 1/2003. The commitments address the Commission's concerns over clauses in the film licensing contracts for pay-TV concluded by the above four U.S. studios with Sky UK.

According to the Commission's statement of objections issued in July 2015 to the above companies as well as to Paramount Pictures, certain clauses in these film licensing contracts constituted territorial restrictions eliminating cross-border competition between pay-TV broadcasters. Specifically, the clauses in question required: (i) Sky UK to block access by consumers situated outside its licensed territory (UK and Ireland) to the studios' films through its pay-TV services and (ii) some of the studios to ensure that broadcasters outside the UK and Ireland would be prevented from making their pay-TV services available in the UK and Ireland. In so doing, these clauses restricted the ability of broadcasters to accept unsolicited requests for pay-TV services from consumers situated outside their licensed territory.

The Commission had already accepted and made binding commitments offered by Paramount Pictures in July 2016. These commitments were fully upheld by the General Court in *Groupe Canal+* on 12 December 2018 (see VBB on Competition Law, Volume 2018, No. 12). In that case, the General Court also confirmed the Commission's concerns that the contractual obligations contained in Paramount's film licensing contract with Sky UK infringed Article 101 by eliminating cross-border competition between pay-TV broadcasters, regardless of whether the content was covered by copyright.

Following consultation with market participants to assess the commitments offered by Disney, NBCUniversal, Sony Pictures and Warner Bros., the Commission has now made the following obligations legally binding:

1. When licensing films for pay-TV to an EEA-based broadcaster, each studio commits not to apply or (re-) introduce contractual obligations **preventing broadcasters from providing cross-border passive sales** to consumers located in the EEA but outside the broadcasters' licensed territory.

2. When licensing films for pay-TV to an EEA-based broadcaster, each studio commits not to apply or (re-)introduce contractual obligations requiring studios to **prevent other EEA-based broadcasters from providing passive sales** to consumers located in the licensed territory.

Sky has also committed to no longer apply the clauses in question and not to (re-) introduce such contractual obligations in film licensing contracts for pay-TV with Disney, Fox, NBCUniversal, Sony Pictures and Warner Bros.

The commitments are set to apply throughout the EEA for a five-year period, covering both online and satellite pay-TV services. In addition, the commitments are without prejudice to the rights enjoyed by the relevant studios under Regulation 2017/1128 on cross-border portability of online content services in the internal market and under copyright law. All current and future subsidiaries of the committing parties are covered by the commitments (such that Fox will also be bound following its acquisition by Disney).

The Commission emphasises that the concerns identified in the proceedings are specific to the case, and therefore the Commission's assessment cannot be extended to similar clauses forming part of a different legal and economic context.

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– MEMBER STATE LEVEL –

GERMANY

Regional Court of Munich rejects four Qualcomm claims against Apple in relation to patent claims

On 31 January 2019, the Regional Court of Munich (the "Court") rejected four out of the eight claims that Qualcomm Inc. ("Qualcomm") had brought against Apple Inc., Apple Distribution International UCL and Apple Retail Germany B.V. & Co.KG (together "Apple") finding that Apple's embodiments did not infringe Qualcomm's patents.

Qualcomm had brought several claims (namely a claim for injunctive relief, a claim for information, an accounting claim, a claim for call back and a claim for damages) arguing that the search functionalities on Apple's mobile phones (spotlight search and Siri & search) infringed its European patents.

The Court rejected the claims as unfounded and held that the challenged embodiments did not infringe Qualcomm's patents.

When assessing the admissibility of the claim, the Court also dealt with the question of whether bringing the action amounted to an abuse of a dominant position pursuant to Article 102 of the Treaty on the Functioning of the European Union. The Court rejected such a notion. It held that, generally, IP rights imply the right to exclude others. Enforcing such a right by a claim for injunctive relief cannot, therefore, be considered to be an abuse. The patent holder generally has the exclusive right to exercise its patent. According to the Court, the situation could have been different if the patent were standard essential ("SEP") and, based on this, the patent holder were dominant, or if the patent holder exercised its rights resulting from an SEP or a non-avoidable patent in such ways and circumstances that pursue an aim contrary to the objectives of competition law. The Court further referred to the case law of the Court of Justice of the European Union ("ECJ") in *IMS Health* in order to argue that such exceptions have to be interpreted restrictively. A licence would have to be granted if the following (cumulative) conditions were satisfied: (i) a refusal would prevent the emergence of a new product for which there is a potential consumer demand; (ii) a refusal would be unjustified and (iii) a refusal would exclude any competition on a secondary market. According to the Court, the general rule of allowing the enforcement of the intellectual property rights ("IPRs") and its exceptions should be applied in a generalised way which means that if the conditions for the exceptions are fulfilled, claims for injunctive relief, call backs or destruction based on exclusive IPRs should all be denied.

In the present case, the patents were neither standard essential nor non-avoidable. The Court further found that Apple had failed to show that Qualcomm had pursued an anti-competitive objective, namely to expand its position on the market of premium basic chips and/or to drive its competitor out of the market. Apple also did not demonstrate that the injunctive relief prevented the emergence of a new product. In fact, Apple had asserted that it would not use the patented invention of Qualcomm. Consequently, the injunctive relief was not considered abusive and the claim was held to be admissible.

The four judgments rejecting Qualcomm's claims were appealed to the Higher Regional Court of Munich and are now pending.

Four additional patent disputes between the same parties which concern the same search functionalities as described above are still pending before the Regional Court of Munich.

UNITED KINGDOM

UK Court of Appeal confirms jurisdiction over a dispute over standard essential patents

On 30 January 2019, the UK Court of Appeal issued a judgment in the case pitting Conversant Wireless against two telecommunications companies, Huawei and ZTE. In this case, Conversant was seeking injunctive relief and damages against both companies in relation to the alleged breaches of its patents which it considered to be essential to various standards of the European Telecommunications Standards Institute.

Conversant Wireless commenced proceedings before the UK courts in July 2017, claiming that Huawei and ZTE were infringing four of its UK standard essential patents ("SEPs") and sought a determination of FRAND terms for its global SEP portfolio. Conversant Wireless also claimed

that no progress between the parties concerning the possible licensing of these SEPs had been made in the last few years.

Huawei and ZTE disputed that Conversant Wireless had any SEPs which were valid or essential. In addition, Huawei challenged the jurisdiction of the UK courts on the ground that the UK market represents only 1% of its worldwide sales on which the royalties of the patents are claimed. Similarly, ZTE argued that only 0.07% of its turnover is generated in the UK. In contrast, China represents for Huawei and ZTE respectively 56% and 60% of their operating revenues.

The present proceedings dealt only with the issue of jurisdiction. In essence, the UK Court of Appeal had to determine whether it had jurisdiction to grant relief in the form of a global FRAND licence in relation to a claim for infringement of UK patents, where the UK sales account for less than 1% of the companies' worldwide sales on which royalties are claimed. On 16 April 2018, the UK Patents Court ruled that it had jurisdiction over the dispute and this judgment was appealed by Huawei and ZTE.

In the present proceedings, Huawei and ZTE argued that Chinese courts were the "natural forum" and were competent, whereas Conversant claimed that UK Courts had jurisdiction. In its judgment, the UK Court of Appeal considered that, in light of the circumstances of the case, it was the proper forum to hear the case for the following reasons: (i) according to Article 4 of the Brussels Recast Regulation, the "*persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State*". ZTE and Huawei were found to be domiciled in the UK. The applicability of this provision had been confirmed by the Court of Justice in the *Owusu v. Jackson* case (C-281/02) and (ii) the UK Court of Appeal considered that the Chinese courts did not have jurisdiction to determine the essentiality or the potential infringement of non-Chinese patents, nor did they have jurisdiction to determine FRAND rates without an agreement from all the parties involved. Indeed, the UK Court of Appeal noted that Conversant Wireless had not agreed to accept the jurisdiction of the Chinese courts and this refusal was considered by the UK Court to be reasonable.

Based on the above, the UK Court of Appeal ruled that it had jurisdiction over the case as China was not an alternative available forum. A judgment on the substance of the case is expected in the near future.

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STATE AID

– EUROPEAN UNION LEVEL –

Court of Justice (Grand Chamber) provides guidance on the duty of recovery in case of non-compliance with Block Exemption Regulation

On 5 March 2019, the Court of Justice of the European Union (the "ECJ") delivered a judgment on a request for preliminary ruling by the Court of Appeal of Tallinn, Estonia, concerning a dispute on certain State aid granted by the Estonian authorities to Eesti Pagar, an Estonian bakery founded in 1914.

The judgment sheds light on several important aspects: (i) the interpretation of Article 8(2) of Regulation 800/2008 (the "General Block Exemption Regulation")(the "incentive effect" requirement); (ii) the obligation to recover unlawful State aid; (iii) the general principle of legitimate expectations; (iv) the limitation period applicable to the recovery of unlawful State aid by a Member State; and (v) the obligation to claim interest when recovering unlawful aid.

First, with regard to Article 8(2) of the General Block Exemption Regulation, the ECJ noted that State aid is to be considered as having an "incentive effect", if, before the work on the project or activity has started, the beneficiary has submitted an application for the aid to the Member State concerned. To assess compliance with this requirement, national authorities must check whether the application is submitted before the start of work on the project or activity in question. In this respect, national authorities must consider that such work or activity has started when a first order of equipment – necessary for that project or activity – is made on the basis of an unconditional and legally binding commitment. Interestingly, they do not have to verify whether or not the aid has a "genuine incentive effect".

Second, the ECJ made clear that if aid is granted based on the General Block Exemption Regulation, and the conditions laid down to qualify for an exemption under that regulation were not satisfied, the granting of that aid is in breach of the notification requirement and must be considered to be unlawful. Therefore, in case a national authority finds that aid which it has granted pursuant to the General Block Exemption Regulation does not satisfy the conditions to qualify for the exemption, that authority must *inter alia* order the recovery of the aid. This means that beneficiaries of aid themselves should carefully check that all conditions are satisfied, so as to avoid having to reimburse the aid (with interest) after the beneficiary has implemented the investment project or activity.

Third, the ECJ ruled that undertakings to which aid has been granted may not entertain a legitimate expectation that the aid is lawful, unless it has been granted in compliance with the procedure laid down in Article 108 of the Treaty on the Functioning of the European Union. An economic operator exercising due care should in fact be able to determine whether that procedure has been followed. By the same reasoning, the recipient of State aid which was not granted in compliance with the conditions for exemption set out in the General Block Exemption Regulation cannot hold a legitimate expectation that such aid was lawful.

Fourth, with regard to the time limit applicable to recovery orders, the ECJ noted that the 10 year limit provided in Article 15 of Regulation 659/1999 is not applicable to recovery orders by national authorities. Instead, the limitation period applicable to the recovery of unlawful aid from a structural fund – such as the one under examination in the context of the proceedings before the national court – is, if the conditions for the application of Regulation 2988/95 are satisfied, four years, in accordance with Article 3(1) of that regulation or, if not, the period laid down by the applicable national law.

Finally, the ECJ reaffirmed that insofar as national authorities are required to order the recovery of unlawful aid, they must also claim interest from the beneficiary. This is to be carried out in accordance with the applicable national rules, provided that they comply with the principles of equivalence and effectiveness.

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General Court annuls Commission decision concerning State aid granted to Italian banks and approved by the Italian central bank (Banca d'Italia)

On 19 March 2019, the General Court annulled European Commission Decision 2016/1208 on State aid granted by Italy to the Tercas bank (Case SA.39451). The General Court ruled that the European Commission ("Commission") had failed to demonstrate that the measures concerned constituted State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union. Indeed, the Commission erred in finding that those measures entailed the use of State resources and that they were imputable to the State. In fact, the measures were attributable to a private entity and there was no evidence to conclude that they had been taken under the influence or control of the Italian public authorities. Moreover, there was no evidence that the funds granted to the recipient were controlled by those public authorities.

Commission initiates investigations concerning tax treatment of Huhtamäki in Luxembourg

On 7 March 2019, the European Commission ("Commission") opened a formal investigation to examine whether alleged tax rulings granted by Luxembourg to Finnish food and drink packaging company Huhtamäki may constitute State aid.

The Commission considers that the Luxembourgish legislation allows the Huhtamäki Group subsidiary in Luxembourg (Huhtalux) to deduct from its taxable base fictitious interest payments for the interest-free loans it receives. These deductions reduce Huhtalux's taxable base. As a result, the company is taxed on a substantially smaller profit. According to the Commission, the Huhtamäki Group thus pays less tax than other stand-alone or group companies whose transactions are priced in accordance with market terms.

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LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– EUROPEAN UNION LEVEL –

European Commission publishes notice on competition law in case of no deal Brexit

On 25 March 2019, the European Commission ("Commission") published a notice concerning the main implications on EU competition law of the withdrawal of the United Kingdom from the EU ("Brexit") in a no-deal scenario. Following the extension decided upon by the European Council, the withdrawal date is 13 April if the House of Commons does not approve the Withdrawal Agreement by 29 March 2019. Otherwise, the withdrawal will be extended to 22 May 2019.

As of the withdrawal date, the United Kingdom will become a third country as regards the application of EU competition rules.

Enforcement of EU antitrust rules

The fact that the United Kingdom will become a third country will not have as such an impact on the applicability of EU antitrust rules to UK companies. Indeed, as any company registered or headquartered in a third country, UK companies will remain subject to EU antitrust rules if their anti-competitive conduct is implemented or produces effects in the EU.

However, the Commission will no longer be able to carry out inspections under Article 20 of Regulation 1/2003 in the United Kingdom. On the other hand, the Commission will still be able to obtain information under Article 18 of Regulation 1/2003.

EU merger control

A no-deal Brexit will not have an impact on the applicability of the EU Merger Regulation ("EUMR") to UK companies when the jurisdictional criteria of the EUMR are fulfilled. It is however possible that both the Commission and the UK national competition authority will be competent to review in parallel a planned concentration under their respective substantive and jurisdictional rules on merger control. Hence, companies will no longer benefit from the one-stop-shop principle.

As to the jurisdiction of the Commission, the relevant date for establishing EU jurisdiction over a concentration is the date of the conclusion of the binding legal agreement, the announcement of a public bid or the acquisition of a controlling interest or the date of the first merger notification, whichever date is earlier. These rules are not altered by a no-deal Brexit. Importantly though, if the relevant date for establishing EU jurisdiction takes place after Brexit, the Commission will no longer take into account the turnover that the parties to the concentration realize in the United Kingdom, when establishing the relevant EU-wide turnover and the relevant turnover realized in individual Member States.

As regards the Commission's jurisdiction following a referral of a concentration without EU dimension, a distinction needs to be drawn between pre-notification referrals pursuant to Article 4(5) EUMR, and post-notification referrals pursuant to Article 22 EUMR:

- Under Article 4(5) EUMR, the notifying party or parties may make a reasoned submission that a concentration without an EU dimension be reviewed by the Commission, provided that the concentration is capable of being reviewed under the national competition laws of at least three Member States. Any competent Member State may object within fifteen working days. In instances where an Article 4(5) submission has been made prior to the withdrawal date and where a concentration without EU dimension is capable of being reviewed in three Member States, amongst which the United Kingdom, the Commission will acquire jurisdiction under Article 4(5) EUMR if, prior to Brexit day, the period of fifteen working days has elapsed without any competent Member State expressing its disagreement. The fact that a concentration is capable of being reviewed in the United Kingdom will no longer be relevant for the application of Article 4(5) EUMR for submissions made after Brexit day.

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- As far as Article 22 EUMR is concerned, after its withdrawal, the United Kingdom will no longer be empowered to refer cases to the Commission or to join referral requests by other Member States. If the United Kingdom has requested the referral or joined a referral request by another Member State prior to Brexit and the Commission has decided to examine the concentration in accordance with Article 22(3) EUMR before the Brexit date, the case will be considered to be referred also with respect to the United Kingdom. If not, the case will not be considered to be referred in relation to the United Kingdom.

The Commission also explains in its Notice that after Brexit day in a no-deal scenario, it will have to take account of the fact that the UK will no longer be part of the internal market. This implies that the Commission will no longer be competent to find that a planned concentration would or would not significantly impede effective competition in UK national or subnational markets. Moreover, trade between the EU and the UK may become subject to new tariffs and non-tariff barriers. This may have a bearing on the Commission's competitive assessment including the suitability and viability of remedies where a concentration leads to competition concerns. The respective consequences will be assessed on a case-by-case basis.

As regards investigatory tools within the context of merger control, the Commission explains that inspections pursuant to Article 13 EUMR will no longer be possible in the United Kingdom. However, the Commission will still be able to obtain information under Article 11 EUMR.

The Commission further states that all its decisions under the EUMR (including decisions imposing conditions and obligations) will remain valid after Brexit. In this regard, it indicates that no distinction should be drawn between decisions that relate to the effect of a concentration on competition at the level of the EEA or within any of the remaining 27 EU Member States, and its decisions that relate to the effect of a concentration in UK national or sub-national markets. These decisions will in principle remain valid also in instances where commitments address a competition issue only affecting a UK national or sub-national market. This being said, following Brexit, parties may consider requesting the Commission to waive, modify or substitute certain commitments under the standard review clause that is typically contained in commitments. Requests may be considered founded in instances where the commitments in question address competition issues in UK markets only.

A full copy of the Commission's Notice is available here.

Commission launches new online tool for leniency, settlements and non-cartel cooperation submissions

On 19 March 2019, the Commission announced the launch of a new online tool – eLeniency – through which companies and their legal counsel can submit statements and documents as part of leniency and settlement proceedings, as well as for cooperation in infringement proceedings other than cartels.

For leniency applications, the tool allows companies and their lawyers to submit corporate statements and upload supporting documents. It also makes it possible to provide replies to requests for information made by the Commission under the Leniency Notice. According to the press release issued by the Commission, the servers are secured and restricted, and the data cannot be copied or printed but will be securely transferred to the Commission. In addition, just as for oral submissions, the online corporate statements made as part of a leniency application are protected against discovery in civil litigation.

Companies and their lawyers may also use the eLeniency tool in the context of cartel settlements. Using the new tool, it is possible to submit documents, provide comments and make formal settlement submissions to the Commission.

In addition, the new tool may also be used in non-cartel proceedings, where a company wishes to cooperate by acknowledging an infringement of Articles 101 or 102 of the Treaty on the Functioning of the European Union ("TFEU").

The Commission makes it clear that the use of the eLeniency tool is voluntary. Companies retain the possibility of making their submissions orally at the Commission's premises.

In practice, the tool is accessed by creating an EU login account or using an existing one. Since only authorized users can access the tool, users must also send an email to the Commission at comp-leniency@ec.europa.eu indicating the email address that should be linked to their EU login account and asking to be registered in the eLeniency

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system. The registration of user requests will be carried out between 09:00 and 17:00 on weekdays. The Commission advises companies and their lawyers to register in advance of using eLeniency since the registration process may require some time.

Draft statements or submissions cannot be saved; thus, they must be typed in one go. Once started, the session remains open for 24 hours. For lengthy submissions, abbreviated statements with proper referencing are also accepted.

Documents and statements can be previewed and corrected before their formal submission. After the submission, users will receive a timestamp confirming the date and time of the submission, which is of particular importance in the context of leniency applications.

The tool, which is available 24 hours a day and seven days a week, can be accessed here. The Commission's Guidance Notice provides further details on how to attach supporting documents to an online statement or submission.

European Parliament and Member States agree on better protection for whistleblowers

On 12 March 2019, the European Parliament and the Member States reached a provisional agreement on new rules that will guarantee a high level of protection for individuals who report breaches of EU law.

The European Commission ("Commission") proposed setting EU-wide standards of protection for whistleblowers in April 2018 in the wake of the Panama Papers and Cambridge Analytica revelations. It believes that the protection of persons reporting on breaches of EU law will help tackle fraud, corruption, money laundering, corporate tax avoidance and damage to people's health and privacy and the environment.

The proposal also applies to breaches of EU competition rules. In this case, whistleblower protection will add to the EU leniency policy. This policy was recently strengthened through the adoption of the ECN+ Directive in January 2019 which seeks to ensure that individual sanctions do not interfere with the effectiveness of leniency programmes, among others, by granting full protection to employees of immunity applicants subject to certain conditions. It was further reinforced by the eLeniency tool launched by the Commission on 19 March 2019 (see above).

The Commission also believes that whistleblowers will play a significant role in reporting unlawfully granted State aid and informing when aid is misused, at national, regional and local levels.

The aim of the proposed Directive is to encourage Member States to establish a comprehensive framework for whistleblower protection based on the following principles:

- Introduction of clear reporting channels available to report both internally (within an organization) and externally (to an outside authority);
- Obligation of competent authorities to follow-up diligently on reports received and give feedback to whistleblowers;
- Allowing whistleblowers to make public disclosure where no appropriate action was taken after reporting to the authorities, in case of imminent or manifest danger to the public interest, or where reporting to the authorities would not work, for instance because the authorities are in collusion with the perpetrator of the breach;
- Prevention of retaliation and effective remedies in case of retaliation;
- Appropriate sanctions to dissuade malicious or abusive reports or disclosures.

This provisional agreement now has to be formally approved by both the European Parliament and the Council.

– MEMBER STATE LEVEL –

BELGIUM

Abuse of economic dependence will soon be actionable in Belgium

On 21 March 2019, the Belgian Parliament adopted a law modifying the Code of Economic Law to, inter alia, introduce as an actionable offence the abuse of a position involving economic dependence (the "Law").

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The original bill that gave rise to the Law was introduced more than three years ago (in November 2015) and sought to establish an additional competition law infringement. This bill was then subject to important changes and its scope was significantly extended. The Law now contains the following novel provisions:

- *Abuse of a situation of economic dependence* – The Law creates a new competition law infringement referred to as an abuse of a situation of economic dependence of a business that affects, or could possibly affect, competition on the Belgian market or a significant part thereof. This infringement will be added to the existing abuse of a dominant position (Article IV.2 CEL).

- *A situation of economic dependence* – Means a position in which a business is subject to one or more businesses capable of imposing obligations or conditions on the former that would not prevail in normal circumstances, due to the absence of a reasonable and equivalent alternative, within a reasonable time period and under reasonable conditions and costs.

  Such a situation of economic dependence may result from various factors such as: (i) the market power of the company; (ii) the significant share of the company in the turnover of the allegedly dependent company; (iii) the technology or know-how controlled by the company; (iv) the reputation of the brand, the scarcity or perishable nature of the product, or a loyal consumer buying behaviour; (v) access to essential resources or facilities; (vi) the fear of serious economic harm, retaliation or termination of contractual relationship; (vii) the regular application of exceptional conditions (which are not granted to similar undertakings) and (viii) the deliberate or constrained choice to opt for such a situation of economic dependence.

- *Abusive conduct* – The Law provides a non-exhaustive list of practices that could constitute abuses:

  - refusing to sell, buy or apply other transactional conditions;

  - directly or indirectly imposing unreasonable purchase or sales prices or other unreasonable contractual conditions;

  - limiting production, distribution or technical development;

  - applying different conditions to equivalent services affecting the competitive position of the other party;

  - tying certain performances to the conclusion of agreements which are not connected thereto according to their nature or market practices.

- *Fines and penalty payments* – The Law specifies that businesses which abuse a situation of economic dependence can be subject to fines of up to 2% of their yearly Belgian turnover and penalty payments up to 2% of their daily Belgian turnover.

- *Protection against unfair practices in a business to business* ("B2B") relationship – The latest amendments considerably extended the scope of the Law. In addition to introducing the abuse of a situation of economic dependence into Belgian competition law, the Law includes the following protection mechanisms for businesses against unfair practices in a B2B context:

  - *Significantly unbalanced contract terms* – Contractual provisions that, solely or together with other provisions in the contract, create a significant imbalance in the rights and obligations of the parties will be unlawful and void. In this respect, the Law introduces black lists and grey lists of contractual provisions that are, respectively, always unlawful or presumed to be unlawful in B2B contracts.

  - *Unfair, misleading and aggressive practices* – The Law extends the scope of unfair practices in a B2B context to misleading practices which go beyond the current notion of misleading comparative advertising. Practices are considered misleading if they are based on incorrect information, falsehoods, or if they in actual fact mislead the other party, while being correct.

    In addition, the Law extends the scope of unfair practices in a B2B context to aggressive practices. Practices are considered aggressive if they significantly limit businesses' freedom of action in relation to a product using intimidation, force, violence or inappropriate manipulation.

- Mandatory law and criminal sanctions – Businesses which engage in unfair practices in a B2B context can be subject to injunctions and criminal fines of up to € 80,000. These protection mechanisms are expressly identified as overriding mandatory provisions within the meaning of the Rome I Regulation, which implies that the parties cannot depart from them in their contract.

The Law should be published in the Belgian Official Journal during the course of April. It will then enter into force in various steps: the prohibition of unfair, misleading and aggressive practices will enter into force four months after publication, the prohibition of abuse of economic dependence thirteen months after publication and the prohibition of unbalanced contract terms nineteen months after publication.

Draft bill on reform of Belgian competition law moves forward

On 16 November 2018, the Belgian Council of Ministers adopted a draft Bill (the "Draft Bill") bringing about a wholesale change of the competition law provisions of the Code of Economic Law ("CEL"). When the Belgian government became a caretaker government a few weeks later, the Draft Bill seemed moribund. However, members of parliament recently converted it into a private members' bill which was introduced in the Federal Chamber of Representatives at the end of February 2019.

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. Still, a new text will replace in full Book IV of the CEL entitled "Protection of Competition". New definitions will also be added to Book I of the CEL. Finally, the Draft Bill will modify Book XV of the CEL which governs the enforcement of laws.

Despite its ostensibly modest objective, the Draft Bill thus constitutes another major change of the Belgian competition rules and the question arises whether the legislative zeal at its basis is really justified by the practical problems which the Draft Bill is said to address. Time will tell.

The following novelties are noteworthy:

- *Increased cap on fines* – The maximum amount of fines that the BCA can impose will be increased from 10% of the Belgian turnover of the firm concerned to 10% of its worldwide turnover. This is in line with a requirement imposed by the recently adopted "ECN+ Directive" at the EU level. The new ceiling for fines will only apply to competition law infringements committed after the entry into force of the law. Additionally, a specific transitional regime will be provided for.

- *Competition infringements by individuals* – Unless he/she should be regarded as an undertaking, an individual will only be found in breach of the competition rules if there is also a finding of infringement against the undertaking in which he/she is active. An exception applies if that undertaking no longer exists. Additionally, the competition rules applying to individuals only extend to cartel-like conduct and also expressly cover negotiations, including aborted discussions.

- *Commitments in behavioural cases* – The competition prosecutor will have the power to formally terminate proceedings in response to commitments offered by the party under investigation (this is currently the exclusive right 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. The new rules also address lacunae in the existing rules, such as a ban on the plaintiff to submit further arguments and exhibits except if expressly authorized to do so in order to respond to specific arguments in support of the defence.

- *Dawn Raids* – The investigating magistrate for Brussels (Dutch- or French-language Court of First Instance) will be exclusively competent to authorize on-site inspections on the entire Belgian territory.

- *New rules governing confidentiality before the Brussels Court of Appeal (Market Court)* – The Market Court will be given the express task of protecting confidential information. It will have a number of instruments to achieve this goal, including the power to require the parties to produce non-confidential versions of exhibits and summaries of expert reports and the ability to hold non-public hearings and create access to documents on a need-to-know basis.

- *Detailed new language rules.*

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The Draft Bill was reviewed by the committee for economic affairs of the Chamber of Representatives on 26 March 2019. The aim is to adopt it before the Belgian Parliament is dissolved in view of the coming general election on 26 May 2019. This is however a very tight timeframe which may prove difficult to meet.

LITHUANIA

Amendments to Lithuanian competition law

On 14 March 2019, the Lithuanian Parliament adopted amendments to Lithuanian competition law. According to the press release published on the Lithuanian Competition Council's website (available in English), the most notable change appears to be the introduction of a money incentive for whistle-blowers. In exchange for disclosing breaches of competition law or for providing information relevant thereto, individuals will receive an amount equal to 1% of the fines imposed on the infringers.

Other changes include the introduction of fines and periodic penalties for different procedural breaches, as well as the right for the Lithuanian Competition Council to oblige infringers to change the structure of their companies in order to ensure the termination of competition infringements (e.g., divestiture).

According to the Lithuanian Competition Council, the new amendments will come into force on 1 July 2019.

THE NETHERLANDS

The Hague Court of Appeal rules on lawfulness of dawn raids

On 12 February 2019, the Court of Appeal of The Hague ("Court of Appeal") ruled that a dawn raid carried out by the Dutch Authority for Consumers and Markets ("ACM") at the premises of the claimant was lawful, and that the search was conducted in accordance with the 2014 ACM Procedure for the inspection of digital data ("Procedure"). It upheld the ruling by the District Court of The Hague of 10 October 2018. The claimant essentially raised issues with respect to the reason for the dawn raid, its purpose and the subject of that raid, and the way in which digital data was selected and used.

The claimant argued that Dutch law and the Procedure do not offer sufficient safeguards against abuse and arbitrariness and that for this reason alone the dawn raid carried out by the ACM was unlawful. More specifically, the claimant criticized the lack of a prior judicial authorization and the absence of an independent party during a dawn raid conducted by the ACM.

The Court of Appeal rejected these arguments and held that the absence of such forms of control does not constitute a violation of fundamental rights, because Dutch law offers other adequate and effective safeguards against abuse and arbitrariness, including the possibility of an *ex post* judicial control.

Within this context, the claimant also unsuccessfully argued that Dutch law should require that a description of the objective and subject of the inspection be presented during such a dawn raid, and that the Dutch rules governing the investigatory powers of the ACM are not sufficiently precise.

The Court of Appeal held that the general rules of the Dutch General Administrative Law Act must be read in conjunction with the Procedure, which explains how the ACM deals with digital data collected during its investigations and what safeguards it observes when inspecting digital data. According to the Court, case law further specifies the rules governing the ACM's investigatory powers within the framework of the Procedure and the general rules.

The Procedure, which also set out a number of verification tools that allow parties involved to make sure that the relevant safeguards have been observed, constitutes a policy to which the ACM is bound within the framework of Dutch administrative law. The Procedure obliges the supervisory officers of the ACM to provide a description of the purpose and subject matter of the investigation before it uses its investigatory powers. Hence, Dutch law provides for sufficient safeguards against abuse and arbitrariness, according to the Court. In this regard, it pointed out that compliance with the policy rules can, if necessary, also be enforced in court.

In addition, the Court of Appeal held that the ACM had sufficient *prima facie* evidence to justify an inspection at the claimant's premises, and that, contrary to the claimant's argument that a request for information would have

been sufficient, a dawn raid was proportionate in such circumstances.

The Court of Appeal further ruled that the description of the objective and subject of the dawn raid was sufficiently clear since the ACM specified the type of practices which were subject to its investigation. In this context, it took into account the fact that such a description has to be handed over at an early stage. In light of this, it was not unacceptable that the ACM required "other competitively relevant information" from the claimant, taking into account other terms used in the dawn raid's description.

The Court of Appeal further held that the ACM did not err in selecting the digital information necessary for its investigation. Finally, it ruled that the processing of data by the ACM is in conformity with the GDPR.

– OTHER DEVELOPMENTS–:

THE NETHERLANDS: On 26 February 2019, the Dutch Authority for Consumers and Markets ("ACM") published two competition law guides in order to assist businesses in assessing: (i) cooperation between competitors and (ii) agreements between suppliers and customers (available in Dutch only).

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PRIVATE ENFORCEMENT

– EUROPEAN UNION LEVEL –

ECJ rules on scope of successor liability in damages actions

On 14 March 2019, the Court of Justice of the European Union ("ECJ") ruled that where a company acquires another business that previously participated in a cartel, it may be held liable in an action for damages caused by the cartel if it continues the commercial activities of that business even if the corporate legal entity of the acquired business no longer exists (Case C-724/17, *Skanska Industrial Solutions and Others*).

By way of background, the Finnish Competition Authority imposed fines on seven companies for participation in a cartel in the asphalt market in Finland. Even though three of those companies had been acquired, and later dissolved, by other firms which continued to exist at the time of the infringement decision, in 2009 the Finnish Supreme Court upheld that it was permissible to fine the successor companies based on the economic continuity test recognized in EU law. Under this rule, responsibility for payment of a fine for an infringement of EU competition law may apply to the person who continues to operate the underlying business assets, even if the legal person has ceased to exist.

It remained an open question whether a similar economic continuity test applied in the context of the private enforcement of Article 101 Treaty on the Functioning of the European Union ("TFEU"). This question was addressed in the follow-on damages action later brought by the Finnish City of Vantaa against three companies that had acquired legal entities that ceased to exist. The claimant argued that the successors were jointly and severally liable for the overpriced asphalt works resulting from the cartel. However, under Finnish law, only the legal entity that caused damage may be held liable, as it is only possible to lift the corporate veil if business owners use the corporate structure in a reprehensible or artificial manner. Thus, a preliminary question was referred to the ECJ as to whether liability for damages must be determined directly as a matter of EU law under Article 101 TFEU, or under national law.

In his Opinion of 6 February 2019, Advocate General Wahl noted that the determination of the persons liable to pay damages for anticompetitive conduct is a constitutive condition of the right to compensation which ought to be governed by EU law. The recent judgment of the ECJ is consistent with this approach. Referring to the *Kone* judgment (Case C-577/12, *Kone and Others*), the ECJ held that while national law lays down rules for the exercise of the right to compensation, the determination of the *entity* which is required to provide compensation for damage caused by an infringement of Article 101 TFEU is directly governed by EU law. As the concept of an 'undertaking' designates the perpetrator of an infringement, the undertaking which infringes the competition rules must answer for the damage caused by the infringement. Further, the ECJ reasoned that if an entity which committed a competition law infringement is subject to a legal or organizational change, this change does not necessarily create a new undertaking free of liability for the conduct of its predecessor that infringed the competition rules, when, from an economic point of view, the two are identical. As a result, where a purchaser takes over the business assets and liabilities of a target company, the purchaser may be held liable for a competition law infringement *both* for the purpose of imposing a fine under the Regulation on Procedure, and significantly, in an action for damages. In effect, the ECJ has aligned the notion of liability under Article 101 TFEU for both public and private enforcement of EU competition law.

– MEMBER STATE LEVEL –

FRANCE

Paris Court of Appeal sanctions abusive damages action

In a judgment rendered on 13 March 2019, the Paris Court of Appeal (the "Court") ruled that a stand-alone damages action was abusive and condemned the claimant to a civil fine of € 3,000 and € 40,000 in damages.

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The claimant, desserts producer Avi Charente, alleged that two of its competitors (Lactalis Group and Lactalis Nestlé Ultra-Frais) abused their dominant position on the French desserts market by implementing predatory pricing and denigration practices aimed at excluding Avi Charente from supermarket chains. It sought more than € 30 million in damages.

In its judgment, the Court highlighted that Avi Charente, did not bring forward any evidence in support of its claims, and only relied on mere allegations of anti-competitive practices that were investigated by the French Ministry of Economy ("DGCCRF") following a complaint lodged by Avi Charente. The DGCCRF's investigation was yet inconclusive. The defendants also underlined that the complaint had been lodged at a critical moment of negotiations with distributors. Finally, the Court used strong language regarding the bad faith of Avi Charente and thus ruled that the action was abusive.

The amounts of the fine and damages imposed by the Court are significant in view of existing case law and the fact that punitive damages cannot be awarded in France.

GERMANY

Regional Court of Stuttgart rules in favour of damages claims against truck manufacturer

On 28 February 2019, in a series of six judgments, the Regional Court of Stuttgart ruled in favour of damages claims based on the infringement decision of the European Commission establishing the participation of MAN, Volvo/Renault, Daimler, Iveco, DAF and Scania in a fourteen-year price-fixing cartel in the truck sector (see VBB on Competition Law, Volume 2016, No. 7 and Volume 2017, No. 9).

The Regional Court of Stuttgart ruled that the damages claims, covering the purchase of nearly 100 vehicles in total, were mostly well founded, but rejected certain claims where the causal link between the infringement and the injury could not be established due to the action of an intermediary or the timing of the purchase.

All the judgments address the issue of *prima facie* evidence and the applicability of the (rebuttable) factual presumption previously raised by a judgment of the Federal Court of Justice of 11 December 2018 (see VBB on Competition Law, Volume 2019, No. 1). The Federal Court of Justice had held that for quota and client allocating cartels, the existence of a cartel is not *prima facie* evidence for the harm, or for the fact that the cartel affected individual purchases. Instead, a rebuttable presumption applies.

The Federal Court of Justice clarified that the applicability of *prima facie* evidence requires a typical chain of events which, according to general experience, leads to the fact that needs to be proven. When *prima facie* evidence applies, it is sufficient for the claimant to bring evidence for the facts which trigger the general experience and it is not necessary to demonstrate the course of events in the specific case. In order to challenge *prima facie* evidence, the defendant needs to demonstrate and prove that, in the case at hand, exceptionally special circumstances led to an atypical chain of events.

In its ruling, the Federal Court of Justice had held that, due to the varying unique aspects of cartels, market conditions and the conduct of participating companies must be examined on a case-by-case basis. In particular, quota and client allocating cartels do not so typically lead to harm that there would be a general experience that could be used for *prima facie* evidence to apply. Instead, a factual presumption applies. A factual presumption requires circumstantial evidence which points to the fact that needs to be proven. In order to challenge a factual presumption, the defendant needs to demonstrate and prove that the presumption is not accurate. This can for example be done by showing that a certain result could be caused by a different reason. This is generally easier than challenging *prima facie* evidence, where it would need to be proven that in the actual case the result was indeed caused by a different reason.

The wording of the decision of the Federal Court of Justice raised controversy as to whether its reasoning could also be applied to cartels other than quota and client allocation, such as price-fixing cartels.

In its recent judgment, the Regional Court of Stuttgart held that it could leave this question undecided. It found that the claimant had brought sufficient circumstantial evidence to substantiate the factual presumption that the harm was caused by the cartel and that the cartel affected individual purchases, and the defendant had not rebutted such presumption. In addition, the Regional Court of Stuttgart stated that, should *prima facie* evidence apply in the case

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of price-fixing cartels, then the defendant did not convincingly challenge such *prima facie* evidence.

The Regional Court of Stuttgart thus accepted most of the damages claims based on the purchase of trucks at cartelized prices. It however rejected damages claims in two scenarios: (i) indirect purchases from an independent intermediary and (ii) purchases outside of the duration of the cartel or in its very early stage.

The Regional Court of Stuttgart ruled that neither *prima facie* evidence nor a factual presumption apply if the trucks were not purchased directly from one of the manufacturers involved in the cartel but instead were leased from an independent intermediary. This is because there was no evidence to suggest that higher cartel prices also led to higher leasing rates.

Relying on a similar reasoning, the Regional Court of Stuttgart also excluded damages for purchases outside the duration of the cartel or for purchases made within the first year of the cartel. While the Court takes the widespread view that cartels have effects up to one year after the cartel has ceased to exist, it held that claims relating to purchases made within one year of the initiation of the cartel should be excluded given that the implementation of an anticompetitive agreement usually takes a certain amount of time to affect prices.

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