April 2019

VBB on Competition Law

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MERGER CONTROL

– EUROPEAN UNION LEVEL –

Commission fines General Electric € 52 million for providing incorrect information during merger review of LM Wind acquisition

On 8 April 2019, the European Commission ("Commission") imposed a fine of € 52 million on GE for negligently providing incorrect information to the Commission during the merger review of its acquisition of LM Wind.

On 11 January 2017, GE notified its proposed acquisition of LM Wind to the Commission. According to the Commission, GE stated in its notification form that it did not have any higher output wind turbine for offshore applications in its development pipeline beyond its 6 megawatt turbine. However, the Commission was later informed by a third party that GE was offering a 12 megawatt offshore wind turbine to potential customers. On 2 February 2017, GE withdrew its notification. On 13 February 2017, GE refiled the notification with complete information and the Commission later unconditionally approved the transaction after a Phase I investigation. Subsequently, on 6 July 2017, the Commission issued a Statement of Objections ("SO") alleging that GE had breached its procedural obligations under the EU Merger Regulation.

Under the EU Merger Regulation, the Commission may impose a fine of up to 1% of group-wide turnover on companies which intentionally or negligently provide incorrect or misleading information during a merger review. By its latest decision, the Commission has found that GE's statement in its notification form that it had no higher power output wind turbines for offshore in development was incorrect and that GE should have been aware of the relevance of the information for the assessment. According to the Commission, the € 52 million fine reflects the fact that GE committed a serious procedural infringement as it prevented the Commission from having all relevant information for the assessment of the transaction.

Other procedural cases

In the past five years, the Commission has opened multiple cases for procedural infringements of the EU Merger Regulation. Two previous cases resulted in significant fines. In May 2017, the Commission fined Facebook € 110 million for providing misleading information during its WhatsApp review (see VBB on Competition Law, Volume 2017, No. 5). In April 2018, the Commission imposed a fine of € 124.5 million on Altice for implementing its acquisition of PT Portugal prior to clearance (see VBB on Competition Law, Volume 2018, No. 4).

Three further investigations of procedural infringements are ongoing: in July 2017, the Commission sent an SO to Merck and Sigma-Aldrich alleging a failure to provide correct information, while a separate SO alleged that Canon had implemented its acquisition of Toshiba prior to clearance (see VBB on Competition Law, Volume 2017, No. 7). In February 2019, the Commission issued an SO to Telefónica Deutschland alleging a breach of certain merger commitments offered during its acquisition of E-Plus in 2014 (see VBB on Competition Law, Volume 2019, No. 2).

Commission conditionally approves Nidec's acquisition of Embraco

On 12 April 2019, the Commission conditionally approved the acquisition by Nidec of Embraco, Whirlpool's refrigeration compressor business. Both Nidec and Embraco are leading global producers of refrigeration compressors. These are electro-mechanical devices used to lower the temperature of an enclosed space (such as a freezer or refrigerator) by compressing vaporised refrigerant. They are used for both household and light commercial applications.

During its investigation, the Commission identified that the transaction would reduce competition and result in higher prices. In particular, on the market for variable speed refrigeration compressors for light commercial applications, the Commission found that the transaction would result in a monopoly as Nidec and Embraco are the only two play-

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ers active at both European and worldwide level. On the market for variable speed refrigeration compressors for household applications, the Commission found that the transaction would strengthen Embraco's dominant position in the EEA.

To address the Commission's competition concerns, Nidec committed to divest its refrigeration compressor business for both household and light commercial applications, including selling plants in Austria, Slovakia and China. In addition, Nidec committed to provide funding to the purchaser of the divested plants for future investments in the production lines in Nidec's plants in Austria and Slovakia to ensure their future viability and competitiveness. Nidec committed to provide an amount equal to the capital expenditure that it would have committed to the two plants absent the divestment. As the commitments remove the entire overlap between Nidec and Embraco, and ensure the viability and competiveness of the plants, the Commission approved the deal.

– MEMBER STATE UNION LEVEL –

NORWAY

Norwegian Competition Authority intervenes to limit minority shareholder acquisition

On 28 March 2019, the Norwegian Competition Authority ("NCA") conditionally approved Sector's acquisition of an interest in its rival, Nokas, on the basis that Sector does not acquire more than a 25% interest in Nokas and abandons its plan to acquire its Norwegian division, Nokas Small Systems. Both Sector and Nokas are active in the market for security systems for homes and small businesses in Norway.

Similar to the merger control regime under the EU Merger Regulation, there is no mandatory filing obligation for the acquisition of a non-controlling minority interest in Norway. However, Norwegian rules enable the NCA to order the acquirer of such a stake to file notice of such an acquisition. In August 2018, the NCA requested Sector to file notice of its acquisition of a non-controlling 49.99% interest in Nokas and its proposal to acquire 100% of Nokas Small Systems. During its investigation, the NCA was concerned that Sector could influence Nokas' strategic decisions, in order to make it compete less aggressively and prevent it from destabilising coordination between Sector and other players. The NCA found that Sector and Nokas Small Systems are respectively the first and third largest players in the Norwegian market for security systems. Although Nokas Small Systems is smaller than the second largest player, Verisure, the NCA considered that the merger could allow Sector to profitably increase prices and reduce quality as Nokas Small Systems exerts an important competitive constraint on Sector, and it is difficult for new entrants to enter the market.

To address the NCA's concerns, Sector proposed to limit its post-transaction shareholding in Nokas to 25%. In addition, Sector committed to refrain from proceeding with its related acquisition of 100% of Nokas Small Systems. The case is noteworthy as it is the first time that the NCA has intervened to limit a minority shareholder acquisition since 2004.

– OTHER DEVELOPMENTS –

ITALY: On 25 March 2019, Italy introduced a minor increase in the turnover thresholds above which a mandatory merger notification must be submitted to the Italian Competition Authority. The new thresholds require prior notification of all mergers and acquisitions involving undertakings where (i) the aggregate turnover in Italy exceeds € 498 million (previously € 495 million), and (ii) the aggregate turnover in Italy of each of at least two of the undertakings concerned exceeds € 30 million (unchanged). The Italian merger control thresholds are adjusted annually to take account of changes in the Italian gross national product price deflator index.

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CARTELS AND HORIZONTAL AGREEMENTS

– EUROPEAN UNION LEVEL –

In this section, we provide a factual overview of significant case developments at EU level and a more detailed analysis of the developments addressed.

Summary of Significant Case Development

General Court reduces the fine imposed on Pometon in Steel Abrasives cartel case

On 28 March 2019, the General Court ("GC") delivered a judgment on an appeal lodged by Pometon against the European Commission's ("Commission") decision in the *Steel Abrasives* cartel case (Case T-433/16, *Pometon SA v. Commission*).

In April 2014, the Commission imposed fines totalling over € 30 million on four companies (Ervin, Winoa, Metalltechnik and Eisenwek Würth) for their involvement in the Steel Abrasives cartel case (see VBB on Competition Law, Volume 2014, No. 4). The case was handled under the Commission's cartel settlement procedure. Pometon, an Italian abrasives producer under investigation, decided to discontinue the settlement discussions with the Commission and follow the standard infringement procedure. In May 2016, the Commission imposed a fine of € 6.2 million on Pometon (see VBB on Competition Law, Volume 2016, No. 5).

On appeal, the GC rejected most of the pleas raised by Pometon, including that the Commission had violated the principle of a fair trial, the principle of the presumption of innocence, the principle of impartiality and its rights of the defence because the Commission had referred to specific conduct of Pometon in the settlement decision. The GC, however, upheld the argument raised by Pometon that the Commission had failed to provide an adequate statement of reasons when departing from the standard fining methodology by applying point 37 of the Fining Guidelines in fixing the amount of the fine imposed on Pometon. The GC, in exercising its power of unlimited jurisdiction, reduced the amount of the fine imposed on Pometon from € 6.2 to € 3.8 million.

Analysis of Important Substantive and Procedural Developments

Steel Abrasives cartel case: the principle of fair trial in hybrid cartel settlement cases

Hybrid settlements cases arise when one or more parties withdraw from a settlement procedure and the European Commission ("Commission") decides to continue the case against these parties under the standard infringement procedure. Because both procedures run in parallel, hybrid settlement cases raise questions on impartiality, objectivity, independence, equal treatment and legitimate expectations when the Commission adopts a decision under the standard infringement procedure.

In *Pometon*, the General Court ("GC") was called upon to rule on a hybrid cartel case and the interplay between the standard infringement procedure and the settlement procedure. Amongst the issues examined were the principle of fair trial, the principle of the presumption of innocence and the rights of defence.

In its judgment, the GC held that the Commission did not infringe its duty of impartiality nor the principle of the presumption of innocence in the standard infringement procedure against Pometon when it referred to Pometon (i.e., the non-settling party) in the settlement decision adopted two years prior to the adoption of the standard infringement decision. According to the GC, there was no indication in the settlement decision that the Commission had already decided that Pometon had infringed Article 101 of the Treaty on the Functioning of the European Union.

In this respect, the GC found that the Commission took the necessary editorial precautions when drafting the settlement decision to ensure that the procedural guarantees enjoyed by Pometon in the subsequent standard infringement procedure were not jeopardized. For example, the

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Commission only referred to Pometon in the description of the events and not in the legal assessment of the conduct at issue. In addition, Pometon was not an addressee of the settlement decision. A footnote of that decision even specified that: (i) the settlement decision was based on matters of fact as accepted by the settling parties; (ii) the references involving the non-settling party were exclusively used to establish liability of the settling parties and (iii) the standard procedure against the non-settling party was still pending.

In addition, the GC held that the references to Pometon in the settlement decision were useful to appropriately describe the origin of the cartel, as well as to clarify its territorial scope and evolution over time.

Interestingly, the GC stated that, when a company freely decides to follow a so-called hybrid procedure, that company cannot claim on the basis of the principle of innocence that the Commission must completely ignore in the settlement decision some of the facts set forth by the settling companies.

For all the above reasons, the GC concluded that Pometon's rights of defence were not infringed when the Commission adopted the infringement decision.

Steel abrasives cartel case – European Commission must provide adequate statement of reasons when departing from standard fining methodology

Under point 37 of the 2006 Fining Guidelines, the European Commission ("Commission") may depart from its standard fining methodology if it is justified by the particularities of a given case or if there is a need to achieve deterrence in that particular case. In such circumstances, the Commission is required to provide a statement of reasons for this departure, including an explanation of the factors which enabled it to determine the gravity of the infringement and its duration, as well as explaining the weighting and assessment of the factors taken into account. The purpose of the obligation to state reasons is to provide the person concerned by a decision with sufficient information to know whether the decision may be vitiated by an error enabling its validity to be challenged, as well as permitting review by the EU Courts.

In the *Steel abrasives* case, the Commission had in April 2014 fined four companies (Ervin, Eisenwerk Würth, Metalltechnik Schmidt and Winoa) under the settlement procedure for coordination of steel abrasives prices. In May 2016, the Commission then fined the Italian company Pometon under the standard infringement procedure, after it failed to reach a settlement with the Commission (the "Decision"). On appeal, Pometon alleged that the Commission had failed to sufficiently state its reasoning for applying point 37 of the Fining Guidelines, thereby breaching the principles of proportionality and equal treatment.

In fixing the amount of the fines in the 2014 Settlement Decision, the Commission exercised its discretion by applying point 37 of the Fining Guidelines on the following three grounds: (i) the amount of the fines would have exceeded 10% of the total turnover of the companies involved in the infringement; (ii) the values of sales of the cartelised product represented a high proportion of the parties' total turnover and (iii) there were differences between the parties with regard to their individual participation.

In principle, the Commission may not discriminate in fixing the amount of the fine between the companies involved in the same infringement. In applying point 37 of the Fining Guidelines, the General Court ("GC") noted that the Commission did not refer to above point (ii) (i.e., the value of sales represented a significant part of the turnover) amongst the reasons justifying the reduction granted to Pometon. As a result, the GC considered that Pometon was not able to understand the difference between the reduction rate granted to it and the other participants in the cartel.

Due to the above, the GC determined that the statement of reasons in the Decision did not make it possible to identify the method of calculation used by the Commission to determine the level of fine adjustments and whether the reduction granted was granted in accordance with the principles of proportionality and equal treatment. The Decision was annulled on this basis.

The GC, in exercising its power of unlimited jurisdiction, re-calculated the fine and applied an exceptional reduction rate of 75% on the amount of the fine imposed on Pometon (from € 6.2 to € 3.8 million) based on, *inter alia*, its level of involvement in the infringement in comparison to the other settling companies.

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– MEMBER STATE LEVEL –

GERMANY

German Federal Cartel Office fines asphalt producer € 1.43 million for participating in price-fixing and market-sharing agreement

In December 2018, the German Federal Cartel Office ("FCO") fined asphalt producer Gaul € 1.43 million for its participation in a price-fixing and a market-sharing cartel by engaging with its competitors in multilateral and bilateral bidding consortia for bituminous mixtures between 2005 and 2013. The other companies involved in the infringement were Südhessische Asphalt-Mischwerke ("SHM") and Mitteldeutsche Hartstein-Industrie ("MHI").

According to the case report, which was published on 10 April 2019, the three companies, which were close competitors on the asphalt market, took part in numerous bidding and supply consortia without assessing whether they had complied with competition law. The companies identified territories where their supplies overlapped and agreed to bid together only for bigger orders in these markets.

Simultaneously with the conclusion of the proceedings, the FCO assisted the German Asphalt Association in creating guidelines intended to provide assistance for members of the association to self-assess the competition law compliance of bidding consortia. According to the guidelines, bidding or supply consortia comply with competition law provided three cumulative conditions are fulfilled: (i) the company is not able to make an independent bid alone; (ii) the cooperation is economically appropriate and commercially reasonable and (iii) only the combination of resources of the competitors allows them to make a bid.

The guidelines also indicated that the antitrust compliance of forming a bidding consortium needs to be assessed on a case-by-case basis and that companies have to document whether a joint bid was considered before contacting a competitor. This applies in particular to the question of whether the company alone was able to carry out the order. Furthermore, safeguards have to be taken to ensure that companies which team up do not exchange sensitive information that is not indispensable for carrying out the joint bid.

The proceedings were initiated by whistle-blower SHM, which received full immunity from fines under the FCO's leniency programme. The legal successor of MHI could not be fined due to a legal loophole known as the "sausage gap" which allowed companies in the past to evade fines through restructuring measures.

In determining the amount of the fine, the FCO took into account that Gaul fully cooperated in the investigation and largely contributed to clarifying the facts. Gaul did not appeal against the decision which has become legally binding.

SPAIN

Spanish competition authority imposes fines totalling € 57.7 million on tobacco manufacturers and their distributor for illegal information exchange

On 10 April 2019, the Spanish competition authority ("CNMC") imposed fines totalling € 57.7 million on three tobacco companies and their distributor for a breach of Article 1 of the Spanish Competition Act and Article 101 of the Treaty on the Functioning of the European Union for exchanging commercially sensitive information.

The CNMC concluded that the tobacco manufacturers, namely, Philip Morris Spain, Altadis, JT International Iberia and British American Tobacco, had exchanged commercially sensitive information through their common Spanish distributor, Logista. According to the CNMC, Logista had informed its suppliers since 2008, on a daily basis, of its sales to tobacco shops in each province of Spain, broken down per tobacco brand. In principle, the tobacco manufacturers had access only to the data concerning their own brands. However, these tobacco companies could give Logista consent to share their information with other tobacco manufacturers, in exchange for reciprocal access to the data of those other companies. As a result, the four tobacco manufacturers had daily access to each other's business data.

According to the CNMC, this system enabled the tobacco makers to know, in real time, the behavioural pattern of the consumers in every province, the consumer reaction to price changes and the timing of the release of new products. This system also allowed Logista to consolidate its position as the main wholesale distributor in the mar-

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ket, with a 99% share since 2008, and contributed to the stability of the market shares of the main tobacco manufacturers in the Spanish market, which accounted for 95% of the market.

The fines imposed by the CNMC were the following: € 21 million on Logista, € 15 million on Philip Morris Spain, € 11 million on Altadis and € 10 million on JT International.

The CNMC found that the participation of British American Tobacco in the anti-competitive practice had ceased in 2012. Given that the investigation was only initiated in 2017 and that a four-year statute of limitations applies to competition law infringements, the CNMC concluded that the investigation against British American Tobacco should be terminated without the imposition of a fine.

All the companies involved in the alleged infringement have already announced that they will appeal against the CNMC's decision.

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VERTICAL AGREEMENTS

– EUROPEAN UNION LEVEL –

European Commission sends statement of objections concerning alleged geo-blocking of PC video games

On 5 April 2019, the European Commission announced via a press release that it had sent Statements of Objections to Valve – the owner of the 'Steam' video game distribution platform – and five video game publishers (Bandai Namco, Capcom, Focus Home, Koch Media and ZeniMax) concerning their alleged geo-blocking of PC video games. Valve both distributes the video games of these publishers on its platform and supplies these publishers with 'activation keys' which are needed by purchasers of certain games from channels other than Steam to activate and use the games. In particular, the Commission is concerned that Valve and the publishers breached Article 101 of the Treaty on the Functioning of the European Union by agreeing to use 'geo-blocked' activation keys to prevent cross-border sales of games, including in response to unsolicited requests by consumers in other Member States. The Commission also took the preliminary view that the five video game publishers included contractual export restrictions in their agreements with distributors other than Valve, restricting distributors' ability to sell the relevant games outside the territories allocated to them, thereby partitioning markets along national borders and restricting passive sales to consumers. The sending of a Statement of Objections does not prejudge the final outcome of the investigation.

These proceedings form part of a series of recent cases in which the Commission has targeted cross-border trade restrictions, in respect of both physical goods (including fashion clothing and merchandising products) and digital content (in particular, pay TV services), in the context both of distribution agreements and licenses of intellectual property rights.

– MEMBER STATE LEVEL –

SPAIN

Spanish Supreme Court upholds annulment of € 25 million fine on Telefónica

On 18 February 2019, the Spanish Supreme Court rejected an appeal brought by the Spanish competition authority ("CNMC") against a 2017 judgment of the Spanish High Court annulling a € 25 million fine imposed by the CNMC on Telefónica for vertical restrictions in its mobile telephony contracts with small and medium-sized enterprises (SMEs) (see VBB on Competition Law, Volume 2017, No. 9).

The conduct in question concerned the retention clauses and cancellation penalties included in certain Telefónica contracts concluded with business customers and SMEs for the provision of mobile services. In return, customers received price reductions. According to the CNMC, this conduct amounted to a restriction of competition by object in a vertical agreement, limiting customers' ability to switch providers and breaching Article 1 of the Spanish Competition Act and Article 101 of the Treaty on the Functioning of the European Union.

On 8 September 2017, the Spanish High Court overturned the fine after concluding that the retention clauses and cancellation penalties at issue did not breach competition law.

First, the High Court held that as the SMEs and other business customers were final consumers, rather than part of the supply or distribution chain, the contracts could not be considered to be vertical agreements within the scope of Article 101 or of the Spanish equivalent (as these provisions only apply to agreements between different undertakings). Second, the High Court rejected the CNMC's view that the retention clauses and cancellation penalties were anti-competitive. Instead, the clauses were found to provide cheaper prices for consumers, who were found to retain the ability to switch operators. Moreover, the High Court concluded that the contracts only affected a small part of the market.

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The Supreme Court disagreed on the first point, ruling that the Telefónica services were contracted in a professional context, such that the SMEs could not be considered as final consumers – i.e., those contracting services in a personal, family or domestic environment – but rather as undertakings within the meaning of Article 101 party to vertical agreements. On the second point, the Supreme Court developed the lower court's reasoning further, recalling that according to the case law of the Court of Justice of the European Union, the concept of object restrictions should be interpreted restrictively. In this respect, the CNMC had not demonstrated why the clauses in question created sufficient harm by their nature so as to render an effects assessment unnecessary. The High Court's claim that the design of Telefónica's contracts, by combining retention clauses and cancellation penalties with price reductions for customers, indicated they were restrictions by object, without carrying out any further analysis as to their effects on competition, could not demonstrate sufficient harm.

As a result, the Supreme Court dismissed the CNMC's appeal, upholding the annulment of the CNMC's decision against Telefónica.

– OTHER DEVELOPMENTS –

FRANCE: In a decision published on 12 April 2019, the French Supreme Court overturned, on procedural grounds, a 2017 ruling by the Versailles Court of Appeal which had found that Mercedes-Benz had infringed the French law equivalent of Article 101 of the Treaty on the Functioning of the European Union in connection with its refusal to allow the transfer of two dealership and repairer businesses to an acquirer, Suma, proposed by the owner of the businesses. According to the Versailles Court of Appeal, Mercedes-Benz had not shown that the alternative candidate favoured by Mercedes-Benz had been appointed on the basis of verifiable criteria within the meaning of the 2002 Motor Vehicle Block Exemption as interpreted in the *Auto 24* ruling of the Court of Justice of the European Union. The Supreme Court has referred the case back to the Paris Court of Appeal for reassessment.

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STATE AID

– EUROPEAN UNION LEVEL –

General Court delivers judgment concerning the Deutsche Post saga

On 10 April 2019, the General Court ("GC") annulled a European Commission ("Commission") decision concerning the extension of a formal investigation into alleged State aid granted to Deutsche Post (Case T-388/11, *Deutsche Post v. Commission*).

The GC first dismissed the arguments raised by the Commission with regard to the alleged inadmissibility of the action. It clarified that the contested decision, insofar as it extended the scope of a pending formal investigation, had binding legal effects vis-à-vis the applicant.

Second, the GC ruled that in view of the circumstances in which the contested decision had been adopted – including the previous annulment of the decision to open a formal investigation with regard to the same State aid – the Commission had to meet a high standard of motivation. The GC held that the contested decision did not meet such standard and breached Article 296(2) of the Treaty on the Functioning of the European Union.

General Court declares inadmissible Lufthansa's action for annulment against a decision concerning State aid to Frankfurt Hahn Airport and Ryanair

On 12 April 2019, the General Court ("GC") dismissed an action for annulment brought by Deutsche Lufthansa against a European Commission ("Commission") decision concerning State aid in favour of Frankfurt Hahn Airport and Ryanair (Case T-492/15, *Deutsche Lufthansa v. Commission*).

Amongst its reasons for rejecting Deutsche Lufthansa's application, the GC referred to the fact that the applicant had not demonstrated that its market position was substantially affected by the State aid measures at stake. The fact that Deutsche Lufthansa had brought a complaint to the Commission and that it participated in the formal investigation was not deemed sufficient to justify its locus standi before the Court.

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LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– EUROPEAN UNION LEVEL –

Commission publishes final report on competition policy for the digital era

On 4 April 2019, the European Commission published a special report commissioned by Commissioner Margrethe Vestager on how competition policy should evolve to continue promoting pro-consumer innovation in the digital age ("Competition Policy for the Digital Era").

The report is grounded in three key characteristics of the digital economy which grant significant competitive advantages to incumbents, frustrating competitors' ability to enter the market. First, the extreme returns to scale in the production and delivery of digital services. Second, the existence of network effects which frustrate potential competitors' efforts to make users move to an alternative platform and, finally, the role of data as a crucial input for the provision of online services. In this context, the report focuses on the application of competition rules to platforms and data and on the role of the EU merger control rules in regulating the digital space.

In terms of platforms, the report puts forward two goals. First, to facilitate competition "for" the market – i.e., among competing platforms – in order to allow users to multi-home between platforms and to switch platforms with ease. Second, the report suggests that dominant platforms should be responsible for ensuring that their actions as regulators (in the sense that platforms determine the rules according to which their users interact) are pro-competitive. In order to achieve these goals, the report argues, first, for dominant platforms to be subject to a duty to ensure interoperability with suppliers of complementary services and, second, for dominant platforms to assume responsibility to ensure that their rules do not impede free, undistorted and vigorous competition without objective justification.

As for data, the report considers the importance of operators' access to data, concluding that the significance of such access from a competition and market power perspective must be assessed on a case-by-case basis and will depend on the specifics of a market, type of data and nature of its usage. In this sense, the report suggests that Article 102 of the Treaty on the Functioning of the European Union ("TFEU") should only be invoked where access to the data in question is truly indispensable. Where a refusal to grant access concerns data necessary for uses outside the market served by a dominant firm, the report considers the use of sector-specific regulation or imposition of conditions of access more appropriate. However, according to the report, Article 102 TFEU remains important in guiding dominant companies and platforms as to the circumstances and conditions under which they are required to grant access to their data.

With regard to data sharing, the report suggests that competition law can be useful by providing guidance to operators on the conditions under which data pools and data sharing mechanisms might be considered pro-competitive, particularly in respect of aggregated data. Elaborating on this point, the report envisages the potential for a block exemption regulation on data sharing and pooling.

Finally, in the context of the European merger control rules, the report notes that the current turnover-based merger thresholds preclude competition authorities from reviewing significant transactions where companies have minimal turnover but important market positions or the potential for rapid growth. According to the report, a revised threshold test would allow for closer regulation of "killer acquisitions", in which dominant firms acquire small start-ups with growing user bases that might otherwise have developed into important competitors. In this respect, the report recommends adapting the substantive assessment of such transactions, arguing that where an acquisition may form part of a strategy to prevent users from leaving the 'ecosystem' of a dominant platform, the notifying parties should bear the burden of demonstrating that the adverse effects on competition of a merger are offset by pro-competitive efficiencies. However, the report states that it is too early to change the current thresholds and instead suggests closely mon-

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itoring the performance of the transaction value-based thresholds recently introduced in certain Member States and the functioning of the Member State referral system.

The report concludes that, at the moment, the existing framework of EU competition law provides a sound and sufficiently flexible basis for protecting competition in the digital era. Indeed, the report considers that competition law can and should continue to accompany and guide the evolution of the platform economy. However, it should be noted that this report "*certainly cannot be, and is not intended to be, the final word on how competition policy should adapt to the digital era*". The Commission has stated it will take some time to process the Report before presenting its own conclusions.

General Court dismisses Qualcomm's appeal against Commission's request for information

On 9 April 2019, the General Court ("GC") dismissed the appeal lodged by Qualcomm against the Commission's decision of 31 March 2017 requesting information in the context of an investigation against Qualcomm for alleged predatory pricing contrary to Article 102 of the Treaty on the Functioning of the European Union.

The particularity of this case is that the request for information, adopted under Article 18 of Regulation 1/2003 on Procedure, was sent to Qualcomm many months after the statement of objections and the observations lodged by Qualcomm, thus at a very late stage of the administrative procedure.

Qualcomm challenged the Commission's decision. In particular, it argued that the Commission had infringed its obligation to state reasons, especially given that the contested decision was issued almost seven years after the beginning of the investigation and a year and a half after the statement of objections was adopted. The GC relied on its traditional case-law and recalled that the Commission has an obligation to state the purpose of the request for information, which includes an obligation to indicate the subject matter of the investigation and identify the alleged infringement of competition law. The GC found that the Commission had clearly and unequivocally mentioned the products and the customers to which the investigation related, as well as the alleged infringements justifying the decision.

Qualcomm also argued that the Commission infringed the principle of necessity by requiring information which was not necessary. The GC recalled that for information to be necessary, there must be a correlation between the request for information and the alleged infringement. In particular, the GC found that the mere fact that the Commission continues its investigation after the adoption of the statement of objections through additional requests for information does not, in itself, call into question the necessity of the information requested. For the GC, the Commission is entitled to continue its fact-finding process after the statement of objections, in particular in order to take into consideration the observations of the undertakings. The GC then noted that the information requested by the Commission would help the Commission to determine whether the alleged infringement took place. Therefore, it dismissed Qualcomm's plea.

In addition, Qualcomm argued that the preparation of the response to the request for information entailed a disproportionate burden in breach of the proportionality principle. In particular, Qualcomm considered that the Commission sought a particularly large amount of information in a specific format, which was disproportionately costly and time-consuming. The GC, however, sided with the Commission and found that the request was largely aimed at re-constructing the price-cost structure of Qualcomm's products under investigation, which requires a complex analysis of data which can be provided only by Qualcomm. The GC therefore concluded that the workload required from Qualcomm was not disproportionate having regard to the needs of the investigation, particularly taking account of Qualcomm's replies to the statement of objections.

The GC dismissed all the pleas put forward by Qualcomm and therefore confirmed the lawfulness of the request for information, even if it had been adopted at a very late stage of the administrative procedure.

Presumption of innocence and duty of impartiality in hybrid cartel settlement cases

In his Final Report of 5 December 2016 on the Euro Interest Rate Derivatives ("EIRD") cartel case (which was only published last month in the Official Journal), Hearing Officer Joos Stragier was called upon to examine whether non-settling parties had been deprived of their right to a fair trial in a staggered hybrid settlement case (i.e., a case where a set-

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tlement decision is adopted before the standard infringement decision against non-settling parties).

The non-settling parties alleged that certain public statements made following the discontinued settlement by the then Competition Commissioner, Joaquín Almunia, indicated that the Commission was not acting impartially and objectively. They believed that these statements implied that the Commission had already made up its mind about the existence of the alleged cartel and their liability for this cartel.

One of the non-settling parties, Crédit Agricole, brought a complaint to the European Ombudsman. In its final decision of 11 November 2015, the Ombudsman concluded that maladministration had occurred. She found that because of these statements, the Commission was perceived to have already reached a conclusion regarding the non-settling parties' participation in the EIRD cartel before the investigation was complete. She added, however, that, because Joaquín Almunia left office before the Commission adopted its final decision, the possible irregularity of the statements at issue did not affect the regularity of the resumed standard infringement procedure.

In his Final Report, the Hearing Officer reached the same conclusion as regards the public statements made by Joaquín Almunia.

The Hearing Officer added that the references made to the non-settling parties in the settlement decision did not infringe their right to a fair trial. The Hearing Officer is of the opinion that, although the resumed standard infringement procedure is a situation of 'tabula rasa' in which possible liabilities are yet to be determined, it would be difficult for the Commission to avoid any mention of the non-settling parties in the settlement decision. The Hearing Officer found that the presumption of innocence of the non-settling parties was even less harmed since the settlement decision clearly indicated that it "*does not establish any liability of* [the non-settling parties] *for any participation in an infringement of EU competition law in this case*".

The EU General Court followed a similar approach in its recent judgment on the appeal lodged by Pometon against the European Commission's decision in the *Steel Abrasives* cartel case (Case T-433/16, *Pometon SA v. Commission* - see above the section of this newsletter on cartels and horizontal agreements).

– MEMBER STATE LEVEL –

THE NETHERLANDS

Dutch competition authority publishes market study into app stores and launches formal investigation against Apple

On 11 April 2019, the Dutch Authority for Consumers and Markets ("ACM") published the results of its market study into app stores for mobile phones (available in English here), which it conducted in order to gain more insight into the accessibility of app stores for app providers and the influence that app stores have on the selection and availability of apps.

The ACM found that app providers depend on the app store in order to reach users on their mobile phones and that no realistic alternatives to Apple's App Store and Google's Play Store exist. The ACM indicates that this could give Apple and Google the possibility to set unfair terms. The ACM notes that since Apple's and Google's own apps compete with those of other developers, competition issues may arise.

The market study reveals that providers of digital products and services are required to use Apple's and Google's payment systems for in-app purchases, and that they have to pay a 30% commission in the first year. Furthermore, app providers are not always able to use all functionalities of iPhones, and face difficulties when communicating with Apple and Google about the application of their conditions.

On the basis of its market study, the ACM found sufficient reason to open an investigation into whether Apple abuses its position with respect to its App Store.

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PRIVATE ENFORCEMENT

– EUROPEAN UNION LEVEL –

Court of Justice rules on scope of national limitation period in light of Damages Directive

On 28 March 2019, the Court of Justice of the European Union ("ECJ") ruled on a preliminary reference from a Portuguese court on the scope of the Portuguese limitation period in light of Directive 2014/104 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (the "Damages Directive").

By way of background, in June 2013, the Portuguese Competition Authority ("PCA") held that Sport TV had abused its dominant position within the meaning of both Article 102 of the Treaty on the Functioning of the European Union ("TFEU") and the corresponding Portuguese provision, and imposed a fine of € 3.7 million. On appeal, the finding that Sport TV infringed Article 102 TFEU was overturned and the fine was reduced to € 2.7 million. In February 2015, Cogeco Communications brought an action against Sport TV seeking compensation for the harm caused by the anti-competitive practices established by the PCA.

As a matter of Portuguese law, prior to the implementation of the Damages Directive, claimants in Portugal faced a three-year limitation period which commenced from the date on which the injured party was aware of its right to compensation, even if unaware of the identity of the infringer and the full extent of the damage. On 26 November 2014, the Damages Directive was adopted. It provides for a longer five-year limitation period which may be suspended during an investigation by a national competition authority. However, the Damages Directive provides that its *substantive* provisions only apply to actions brought after the deadline for its transposition on 27 December 2016. At the same time, Member States had a measure of discretion to decide whether or not to apply the *procedural* provisions of the Damages Directive to actions brought after its adoption. Further, the Portuguese legislation that transposed the Damages Directive entered into force on 4 August 2018, and its procedural provisions only apply to actions brought after that date. As the Portuguese court had doubts about the application of the limitation period, it referred the case to the ECJ to determine whether (i) the Damages Directive applied and (ii) the Portuguese limitation period was compatible with the EU principle of effectiveness.

In its judgment, the ECJ held that the Damages Directive did not apply to the case as it was permissible for Portugal to apply the procedural rules in the Damages Directive only to actions brought after the entry into force of the transposing national rules. Importantly, however, the ECJ concluded that the short three-year limitation rules in Portugal which did not allow for a suspension period were not compatible with the principle of effectiveness enshrined in EU law. The ECJ considered that the practical effect of Article 102 TFEU would be put at risk if it were not open to an individual to claim damages for loss caused by abusive conduct within the limitation period set down in Portuguese law. The ECJ undertook a broader assessment of the Portuguese rules on limitation periods in competition-based actions for damages. Drawing on its previous judgment in Kone (Case C-577/12, *Kone and Others*), the ECJ held that Article 102 TFEU and the principle of effectiveness prohibit short limitation periods that start to run before the person injured by the infringement is able to ascertain the identity of the infringer, or which cannot be suspended during an investigation, as it may render the exercise of the right to claim compensation practically impossible or excessively difficult.

The case is noteworthy as it is the first time that the ECJ has substantively interpreted a provision of the Damages Directive, even though it was held not to apply to the facts of the case. More broadly, the judgment confirms that claimants may rely on the principle of effectiveness in cases where formal national rules make it practically impossible for claimants to vindicate their legal rights.

– MEMBER STATE LEVEL –

UNITED KINGDOM

Court of Appeal overturns CAT in landmark collective action against Mastercard

On 16 April 2019, the UK Court of Appeal ruled that the Competition Appeal Tribunal ("CAT") had incorrectly refused to certify a major collective action brought against Mastercard. The collective action seeks approximately GBP 14 billion in damages on behalf of an estimated 46.2 million customers following the European Commission's 2007 decision that the multilateral interchange fees set by Mastercard infringed Article 101 Treaty on the Functioning of the European Union.

In 2015, the UK legislator introduced 'opt-out' collective actions in the Consumer Rights Act. In order to bring a valid collective action, a certified representative is required to apply for a collective proceedings order ("CPO") from the CAT. In July 2017, in the second ever application, the CAT refused to issue a CPO in the case against Mastercard on the grounds that, *inter alia*, the claimants had not advanced a workable methodology to determine the level of pass-on of the overcharge to consumers and the difficulty of devising an appropriate method to distribute any aggregate award of damages.

In relation to pass-on, the UK Court of Appeal agreed that the CAT had set too high an evidential hurdle for the appellant at the certification stage. Citing Canadian case law with approval, the UK Court of Appeal agreed upon 'the importance of certification as a meaningful screening device' which does not require a 'determination of the merits of the proceedings'. The UK Court of Appeal considered that it would run counter to the provisions of the Consumer Rights Act to require each individual claimant to establish loss in relation to his or her own spending. Thus, pass-on to consumers generally satisfies the test of commonality of issue necessary for certification. As a result, it had not been appropriate for the CAT at certification stage to require the representative and his experts to specify in detail what data would be available for each of the relevant retail sectors, as the experts had already identified other potential data sources.

In relation to distribution, the UK Court of Appeal found that it is not necessary for the CAT to engage in a detailed assessment of how any potential award would be distributed at the stage of assessing whether to issue a CPO. Rather, distribution is a matter for the trial judge to consider following the making of an aggregate award. Overall, the UK Court of Appeal considered that the changes introduced by the collective action regime in the Consumer Rights Act permitted a court to award aggregate damages by reference to the loss suffered by the represented class as a whole, even if this resulted in certain individuals being over- or under-compensated. In this way, the vindication of the rights of individual claimants is achieved by the aggregate award.

By its latest judgment, the UK Court of Appeal has now set aside the order of the CAT and remitted the case to the CAT for re-hearing. The case is interesting as, to date, no collective action has yet been certified by the CAT. For this reason, the case will be watched closely as guidance for future collective actions.

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