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# VBB on Competition Law

## Highlights



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# MERGER CONTROL

## – EUROPEAN UNION LEVEL –

**Commission maintains adjustments to merger filing process made in response to COVID-19 crisis**

The European Commission (the "Commission") continues to encourage companies to discuss the timing of any proposed mergers with the relevant case team in light of the COVID-19 pandemic, as it anticipates that it may still face difficulties in collecting the information necessary to conduct its review, in particular from third parties such as customers and competitors. Nevertheless, the Commission notes that it is ready to assist parties that demonstrate a compelling reason why their merger notification should proceed quickly. The Commission is also maintaining its relaxed rules regarding the acceptance of electronic submissions.

**Commission unconditionally clears Aurubis' acquisition of Metallo after Phase II review**

On 4 May 2020, the Commission approved German Aurubis' € 380 million acquisition of Belgian rival Metallo following an in-depth investigation. Aurubis is Europe's largest integrated copper producer, selling copper shapes, semi-finished copper and various copper alloy products. It also processes copper concentrates and scrap to produce copper cathodes. Metallo recycles, processes and trades copper and other non-ferrous metals. Metallo refines copper scrap to produce copper cathodes, anodes and other by-products.

The Commission considered that the merger should be given close scrutiny as it would combine two large EEA purchasers of copper scrap. Both companies obtain copper scrap either as a by-product of other industrial production or by recycling products containing cooper. As such, the refining of copper scrap represents an important component of the circular economy in the EEA. The Commission's Phase I investigation raised concerns that the merger would increase the combined entity's buying power, which could enable it to lower the price of the copper scrap it purchases. This would effectively raise the production costs of industries that sell copper scrap as a by-product – leading to more expensive consumer goods – and could reduce incentives for other market players to collect and supply copper scrap to refiners for recycling.

Despite these initial concerns, upon closer consideration, the Commission concluded that the deal did not risk harming competition. The Commission's investigation focused primarily on the market for copper scrap for smelting and refining ("CSSR"). The Commission concluded that the combined entity's market share would remain moderate post-transaction and that a number of other refiners would constrain its competitive behaviour. Moreover, the Commission considered that Aurubis and Metallo were not especially close competitors in CSSR refining, as their purchases were largely complementary. Perhaps most interestingly, the Commission also appears to have taken note of the synergies that the deal might generate in the refining of CSSR due to the parties' complementary technological focuses. The Commission also found that no concerns arose on a related market for "copper scrap no. 2" as a sufficient number of alternative buyers of this scrap were also active on the market. As a consequence, the Commission cleared the transaction unconditionally.

**Commission clears Mylan/Upjohn merger subject to commitments**

On 22 April 2020, the Commission conditionally cleared Dutch pharmaceutical company Mylan's acquisition of Upjohn, a division of Pfizer. Upjohn, which is based in China, produces and distributes off-patent branded and generic medicines. Mylan is also active in the production and distribution of branded and unbranded generic medicines, as well as in the production of other speciality drugs. Both companies produce medicines that treat cardiovascular, genito-urinary, musculoskeletal, nervous system and sensory organ conditions.

The Commission's Phase I investigation raised concerns that the merged entity would hold a dominant market position with respect to the supply of certain generic molecules to particular Member States. Consistent with previous cases, the Commission considered that the relevant geographic market for the medicines in question was national, and that competition with regard to genericised medicine typically takes place at the molecule level. The Commission consequently identified 36 problematic molecule-country pairs for which there were few to no significant alternative suppliers on the relevant national market.

In order to alleviate these concerns, Mylan offered to divest its current activities with respect to each of the 36 molecule-country pairs at issue. These commitments, which cover twenty countries in total (including the EEA and UK), include the divestment of all applicable marketing authorisations, contracts and brands, and provide for transitional manufacturing and supply arrangements. These commitments removed all problematic horizontal overlaps, allowing the Commission to clear the deal following its Phase I review.

## – MEMBER STATE LEVEL –

AUSTRIA

**Austrian competition authority extends temporary measures relaxing commitments in advertising merger**

On 26 March 2020, the Austrian Federal Competition Authority (the "FCA") granted a request to temporarily suspend the application of certain commitments in the market for free TV and television advertising undertaken as part of a merger between ProSiebenSat.1Puls 4 GmbH, ATV Privat TV GmbH and ATV Privat TV GmbH & Co to permit cooperation in light of the COVID-19 pandemic (see VBB on Competition Law 2020, No. 4). While the suspension was originally set to expire on 30 April 2020, the FCA has announced that it will now run until 30 June 2020.

GERMANY

**German competition authority clears Chinese acquisition of German shunter manufacturer**

On 27 April 2020, the German Federal Cartel Office ("FCO") cleared the acquisition of Vossloh Locomotives ("Vossloh") by Chinese CRRC Zhuzhou Locomotives ("CRRC") after an in-depth review. Vossloh is the leading manufacturer of diesel-powered shunters in the EEA and Switzerland. CRRC is a subsidiary of China Railway Rolling Stock Corporation, which is 51% state-owned and is the world's largest manufacturer of railway vehicles, with activities focused on China. Prior to the FCO's review, the Federal Ministry for Economic Affairs and Energy had granted CRRC's application for a certificate of non-objection under Germany's foreign direct investment rules.

During the FCO's in-depth review, European competitors expressed concerns that the transaction would distort competition. The FCO's assessment of these claims focused on two main issues: (i) the specificities of the market for shunting locomotives; and (ii) the particular circumstances of the merging parties.

First, the FCO considered that it was appropriate to consider the market over a longer time period than usual because of the irregular nature of the demand for shunting locomotives. Shunting locomotives, which are mostly used by railway and industrial companies to arrange the composition of a train, for loading wagons at large industrial plants or ports, or for traction on the public rail network, are a long-life asset. Only a comparatively small number of units are sold each year, and there is a considerable time lag between the time an order is placed and delivery.

Second, the FCO considered that Vossloh's and CRRC's market positions were likely to undergo considerable change in the foreseeable future due to technological advances in the market. Specifically, the market for railway vehicle technology is evolving towards hybrid traction systems and dual mode locomotives, which can be powered by both diesel engine and electricity from overhead wires. The development of a hybrid or dual-mode shunting locomotive costs millions of euros and requires several years.

In light of these changes, Vossloh's competitiveness had decreased considerably in recent years, and it was expected to occupy a weaker market position in the future than its current market share might indicate. Specifically, Vossloh's parent company had already attempted to divest this business in 2014 and had stopped innovating. Meanwhile, new competitors, such as Alstom, Stadler, and Toshiba have entered the European market and are well-placed to provide innovative solutions to customers. On the other hand, while CRRC has thus far been only a small player on the European market, it is currently in the process of increasing its footprint. The FCO consequently considered the parties' historical market shares to be of limited predictive value and based its assessment on how the merged entity's market position would likely develop.

The FCO also considered the competitive impact of the merged entity benefitting from considerable technical, financial, and strategic advantages due to its vertical integration with Chinese state-owned enterprises, as well as the threat of CRRC's state-subsidised activities leading to price-lowering and dumping strategies. The FCO found that the Chinese state strongly protects CRRC, as it plays a key role in two strategic plans, "Made in China 2025" and the "Belt and Road Initiative". The FCO also found that CRRC had benefitted from € 75 million in state subsidies in 2018 and likely received additional, undisclosed subsides.

Nevertheless, the FCO ultimately cleared the deal. It stated that merger control law is not the right instrument to address all threats of distortion of competition that European manufacturers may raise, as these are instead issues of trade policy or public procurement law. Rather, to the FCO, it was significant that the target had become significantly less competitive in recent years, such that the FCO could not predict with requisite certainty whether the merger would create a dominant position within the next five to ten years. Consequently, the FCO concluded that the concerns expressed by the market were not sufficient to justify a prohibition. This case illustrates that while Chinese state-owned companies may enter European markets backed by substantial economic power, this will not necessarily lead competition authorities to conclude that they pose a threat to effective competition.

UNITED KINGDOM

**UK competition authority blocks JD Sports' acquisition of Footasylum**

On 6 May 2020, the UK's Competition and Markets Authority ("CMA") blocked the sports-fashion retailer JD Sports' already completed purchase of sportswear retailer Footasylum. The CMA concluded that the parties were close competitors and the transaction would lead to a substantial lessening of competition nationally in the sports-inspired casual footwear and clothing market, which would leave shoppers with fewer discounts or receiving a lower level of customer service.

Following the completion of the deal, the CMA referred the merger for an in-depth investigation after JD Sports declined to offer remedies to address the CMA's initial competition concerns.

Having reviewed the transaction, the CMA concluded that a number of key pieces of evidence pointed to close competition between the parties. From an analysis of the companies' internal strategies and decision-making documents, it discovered that the two parties monitor each other's activity closely. The CMA also surveyed over 10,000 of the parties' customers, finding that more than two-thirds of customers surveyed would switch to JD Sports if Footasylum left the market. The CMA also found that Footasylum store openings negatively impacted footwear and clothing sales at nearby JD Sports stores.

With regard to the relevant product market, although the parties are active in selling products both in-store and online, the CMA considered these two sales channels to be one product market given evidence indicating that consumers in the sports-inspired casual footwear and clothing market shop both in-store and online interchangeably.

In assessing whether rival retailers posed a competitive constraint on the parties, the CMA determined that rivals, such as Foot Locker and Sports Direct, which sell multiple brands, as well as Nike and Adidas, which sell only one brand, impose a lower competitive constraint than the parties do on each other. As a result, the CMA found that the level of competition these rivals exert on the parties was not sufficient to stop consumers being worse off after the merger.

While the CMA acknowledged that the COVID-19 crisis has led retailers to face uncertain and challenging trading conditions, the CMA said that it had not found evidence that the impact of coronavirus would remove its competition concerns. Last month, the CMA released guidance indicating that it would consider the impact of COVID-19 during merger reviews under its existing "failing firm" framework (see VBB on Competition Law 2020, No. 4). However, the CMA noted that neither party had claimed that it would exit the market absent the merger.

Nonetheless, JD Sports argued that the CMA should have given the impact of the COVID-19 crisis much more attention and has indicated that it intends to appeal the decision.

Specifically, JD Sports contends that the CMA's decision fails to take account of the dynamic and rapidly evolving competitive landscape and the long-lasting impact that COVID-19 has had on the industry, to the particular detriment of smaller retailers like Footasylum, which it says is in a weak financial position.

As the acquisition was completed before the CMA started its in-depth review, JD Sports will now have to sell Footasylum. Although the CMA has indicated that, in light of the COVID-19 outbreak, it will give JD Sports "sufficient" time to sell Footasylum, this case shows the danger of completing an acquisition in the UK in cases where the CMA may have jurisdiction to investigate.

# ABUSE OF DOMINANT POSITION

**– EUROPEAN UNION LEVEL –**

**Broadcom offers commitments in abuse of dominance investigation**

On 27 April 2020, the European Commission (the "Commission") invited interested parties to submit comments on the commitments offered by Broadcom under Article 9 of Regulation 1/2003 to address competition concerns in relation to certain exclusivity and quasi-exclusivity agreements allegedly imposed by Broadcom in various TV set-top box and modem chipset markets.

This development follows the Commission's decision in October 2019 imposing interim measures on Broadcom, applicable in the markets for systems-on-a-chip (SoCs) for TV set top boxes, xDSL modems, fibre modems and cable modems (see VBB on Competition Law, Volume 2019, No. 10).

Broadcom's proposed commitments are essentially as follows:

- At worldwide level (excluding China), Broadcom has offered to commit:
    - Not to require or induce an original equipment manufacturer (OEM) to source over 50% of its requirements for SoCs for TV set top boxes, xDSL modems and fibre modems from Broadcom; and
    - Not to condition the supply of or granting advantages for SoCs for TV set top boxes, xDSL modems and fibre modems on an OEM sourcing over 50% of its requirements for any products within the scope of the decision imposing interim measures or the Commission's Statement of Objections from Broadcom.
- At EEA level, Broadcom has offered to commit:
    - Not to require or induce an OEM to source over 50% of its EEA requirements for SoCs for TV set top boxes, xDSL modems and fibre modems from Broadcom; and
    - Not to condition the supply of or granting advantages for SoCs for TV set top boxes, xDSL modems and fibre modems on an OEM sourcing over 50% of its requirements for any products within the scope of the decision imposing interim measures or the Commission's Statement of Objections from Broadcom.

The proposed commitments also include provisions concerning obligations and inducements to bid equipment based on Broadcom products as well as provisions concerning EEA service providers. The proposed commitments would apply for a period of five years. Interested parties have until 11 June 2020 to submit comments.

Subject to market testing, the Commission announced its intention to adopt a decision under Article 9(1) of Regulation 1/2003 declaring binding the commitments summarised above.

# CARTELS AND HORIZONTAL AGREEMENTS

## – EUROPEAN UNION LEVEL –

### Court of Justice reduces fine imposed on NKT in Power Cables cartel case

On 14 May 2020, the Court of Justice of the European Union (the "Court of Justice") partly set aside a judgment of the General Court dismissing the action brought by NKT Verwaltungs GmbH (formerly nkt cables GmbH) and NKT A/S (formerly NKT Holding A/S) (together, "NKT") in the *Power Cables* cartel case. As a result, the Court of Justice reduced the fine imposed on NKT by € 200,000.

By way of background, in 2014, the European Commission (the "Commission") adopted a decision in which it imposed fines totalling € 302 million on a number of producers of underground and submarine high voltage power cables for their involvement in a customer and market allocation cartel. NKT was fined € 3,887,000 for its involvement in the infringement.

In its decision, the Commission found that the infringement comprised two configurations. The first configuration consisted of Japanese and Korean producers who refrained from competing for projects in the European territory, while European producers would stay out of Japan and Korea (the "home territory" agreement). The parties also allocated projects in most of the rest of the world (the "export territory" agreement). The second configuration involved the allocation of territories and customers by or to the European producers for projects inside the European territory (the "EU agreement").

In its recent judgment, the Court of Justice found that the General Court had committed three errors of law in rejecting NKT's challenge to the Commission's decision.

First, the Court of Justice ruled that the General Court had erred in rejecting an argument relating to the breach of NKT's rights of defence. The Court of Justice noted that, while the Commission stated in the Statement of Objections that it would exclude from the scope of the infringement activities relating to certain sales in non-EU or non-EEA countries, these activities were nonetheless included in the Decision. According to the Court of Justice, this breached the provisions of Article 27(1) of Regulation 1/2003 because, in finding in the Decision that the infringement at issue covered conduct related to sales in non-EU or non-EEA countries, the Commission based its Decision on objections on which NKT had not been able to present its arguments. The Court of Justice also specified that Article 27(1) applied, *a fortiori*, to the situation where the Commission had indicated in the Statement of Objections that certain information or conduct would not be considered.

Second, the Court of Justice found that the General Court had erred in finding that the Commission was not required to establish that NKT was aware of, or could reasonably have foreseen, the aspect of the cartel concerning a collective refusal to supply accessories and technical assistance to competitors not participating in the cartel. The General Court had explicitly found that the Commission was not obliged to prove that aspect of the cartel because it constituted a "non-essential" characteristic of the infringement at issue. However, the Court of Justice ruled that case law does not distinguish between practices which are "essential", and those which are not, in order to be held liable for the conduct of other participants in the context of a single and continuous infringement.

Finally, the Court of Justice held that the General Court had erred in finding that NKT had participated in another aspect of the cartel (i.e., the allocation of underground power cable projects in the "home territories" of the EEA) prior to 21 November 2002. According to the Court of Justice, it was clear that the sole piece of evidence on which the Commission relied did not establish that NKT had participated in the infringement prior to 22 November 2002. The Court of Justice was not convinced by the Commission's claim that it would have been difficult to imagine an agreement between the infringing companies concerning the allocation of projects in "export territories" without the corresponding allocation under the "home territory" agreement. The Court of Justice recalled that, in accordance with the presumption of innocence, the benefit of the doubt must be given to the undertaking to which the decision finding an infringement is addressed.

In conclusion, the Court of Justice ruled that the Decision at issue must be annulled in so far as it found NKT liable for an infringement of Article 101 Treaty on the Functioning of the European Union concerning: (i) the conduct relating to sales in countries that are not members of the EU or the EEA; (ii) a collective refusal to supply accessories and technical assistance to competitors not participating in the cartel; and (iii) its involvement in the allocation of underground power cable projects in the EEA in the period prior to 22 November 2002. In the exercise of its unlimited jurisdiction, the Court of Justice considered it was appropriate to reduce the fine imposed on NKT by € 200,000, from € 3,887,000 to € 3,687,000.

## – MEMBER STATE LEVEL –

### GERMANY

**German Federal Court of Justice confirms that German banking industry's general terms and conditions infringed competition law**

On 7 April 2020, the German Federal Court of Justice (the "FCJ") issued its judgment on an appeal against a decision of the Federal Cartel Office (the "FCO") which had found that a number of German banking associations had infringed competition law in connection with general terms and conditions of online payments (see VBB on Competition Law, Volume 2016, No. 7).

In 2016, the FCO found that certain provisions of the general terms and conditions jointly agreed upon by the German banking industry restricted the use of non-bank online payment systems in breach of German and EU competition law. These general terms and conditions included special provisions for online banking, according to which online banking customers were not permitted to enter their PIN and TAN codes to access third party payment systems.

On 30 January 2019, the Higher Regional Court of Düsseldorf upheld the FCO's decision on appeal. In the present case, the FCJ dismissed the non-admission complaint, a legal remedy under German law against the non-admission of the appeal by a lower court, thereby making the FCO's 2016 decision final. Notably, the FCJ stated, in relation to the finding of a restriction of competition by object, that the decision of the Higher Regional Court of Düsseldorf was consistent with settled case law as defined by the Court of Justice of the European Union in *Cartes Bancaires* and *Maxima Latvija* and previous case law of the FCJ. In particular, the FCJ stated that the Higher Regional Court of Düsseldorf had conducted an in-depth analysis of the agreement, which revealed a sufficient degree of harm in order for the agreement at issue to be characterised as a restriction by object.

# INTELLECTUAL PROPERTY/LICENSING

**– MEMBER STATE LEVEL –**

GERMANY

**German Federal Court of Justice issues judgment in case involving SEP licensing negotiations on FRAND terms**

On 5 May 2020, the German Federal Court of Justice (*Bundesgerichtshof* - the "FCJ") delivered a judgment in a case pitting Sisvel against Haier which deals with the licensing of Standard Essential Patents ("SEP") on terms that are fair, reasonable and non-discriminatory ("FRAND"). This is the first time the FCJ has addressed this issue following the landmark judgment of the Court of Justice of the European Union (the "Court of Justice of the EU") in *Huawei v. ZTE* (Case C-170/13) (see VBB on Competition Law, Volume 2015, No. 7). The FCJ had to contend with conflicting case law of lower courts.

The judgment has not yet been published. Reportedly, the FCJ overturned the appeal ruling of the Higher Regional Court of Düsseldorf and confirmed the judgment of the Regional Court of Düsseldorf at first instance.

The dispute concerned two SEPs that are part of the GPRS and UMTS telecommunications standards. These patents were considered essential for mobile telecommunications. Sisvel, the patent holder, provided FRAND undertakings to the European Telecommunications Standards Institute (ETSI) and offered to license these patents to all market participants in exchange for an appropriate licence fee.

In 2014, Sisvel, the SEP holder, had brought an action against Haier Germany and Haier Europe Trading, the subsidiaries of the Chinese electronics manufacturer Haier, over the infringement of two of its SEPs, requesting an injunction and damages.

The action was initially granted by the Regional Court of Düsseldorf in a judgment given in November 2015, which appears to be the first judgment in Germany that applied the principles laid down by the Court of Justice of the EU in its *Huawei v. ZTE* case. The Düsseldorf court held that Haier had not submitted a counter licence offer in time and, therefore, considered there was no need to assess whether Sisvel's licence offer had been FRAND-compliant.

On appeal, the Higher Regional Court of Düsseldorf overturned the ruling of the Regional Court of Düsseldorf, reasoning that the licence offer made by Sisvel was evidently not on FRAND terms as Haier had been treated differently from another licensee. According to the appeal court, Sisvel could not argue that Haier was generally not interested in concluding a licensing agreement since, in order to raise this claim, the SEP holder Sisvel should have first made a licence offer that was on FRAND terms.

In the present case, the FCJ reportedly reinstated the ruling of the Regional Court of Düsseldorf in favour of Sisvel. The judgment is understood to have significantly raised the standard for the potential infringer of the SEP to show that a violation has occurred: it not only has to declare its willingness to accept a licence offer but it also has to show that a concrete counter-offer was made.

The judgment is important for policy reasons. Following the *Huawei v. ZTE* judgment, the lower courts in Germany had not followed a uniform approach as to when the steps prescribed by the Court of Justice of the EU had to be taken. For example, the Regional Court of Mannheim required the SEP holder to make its licence offer prior to bringing an action. By contrast, the Higher Regional Courts of Düsseldorf and Karlsruhe accepted that the licence offer of the SEP holder could be made at any time up until the end of the oral hearing (see VBB on Competition Law, Volume 2019, No. 12). A guidance document published by the Regional Court of München supported this latter view (see VBB on Competition Law, Volume 2020, No. 2).

Furthermore, the Higher Regional Court of Düsseldorf interpreted the *Huawei v. ZTE* case in such a way that the court should first examine whether the licence offer of the SEP holder is FRAND-compliant. The Regional Court of Mannheim, on the other hand, took the view that the infringer must react to the licence offer of the patent holder, even if it is convinced that the offer was not FRAND-compliant.

The reasoning of the judgment of the FCJ is expected to be published in a few weeks' time.

# STATE AID

**– EUROPEAN UNION LEVEL –**

**National limitation period and recovery of interest on illegal State aid: The Court of Justice further narrows the scope for exceptions to recovery**

On 30 April 2020, the Court of Justice of the European Union (the "Court of Justice") delivered another important judgment concerning the complex relationship between State aid and national procedural rules (Case C-627/18, *Nelson Antunes da Cunha*). The judgment was delivered in response to a request for a preliminary ruling from the Administrative and Tax Court of Coimbra, Portugal. The request was made in the context of proceedings between Nelson Antunes da Cunha Lda (a Portuguese company) and the Portuguese authorities (specifically, the Institute for the Financing of Agriculture and Fisheries – "IFAP") regarding the recovery of illegal State aid.

The facts of the case go back to the early 1990s, when Nelson Antunes da Cunha received a credit line for the recovery of agricultural and breeding livestock activities from the Portuguese authorities. Between 1994 and 1996, Nelson Antunes da Cunha received a total of € 7,526.90 by way of interest rate subsidies. This individual aid was granted on the basis of an aid scheme adopted in 1994.

In 1999, the European Commission (the "Commission") found that this Portuguese aid scheme was incompatible with the internal market (the "1999 Commission decision") and ordered the recovery of aid granted on the basis of that scheme. To comply with this order, the Portuguese authorities requested in 2002 and 2009 that Nelson Antunes da Cunha pay the aid back.

Since both requests were left unanswered, in 2013 the IFAP started proceedings before the Coimbra Administrative and Tax Court against the aid recipient in order to recover the aid together with interest (€ 7,526.90 for the illegal aid plus € 7,426.66 EUR for the interest). Nelson Antunes da Cunha argued before that court that the request was contrary to Portuguese procedural rules, according to which the recovery of the aid and interest would be time-barred. In such circumstances, the Coimbra Administrative and Tax Court asked the Court of Justice to clarify several aspects concerning the relationship between the national procedural rules and the State aid rules of procedure set out in Regulation 2015/1589.

First, the national court asked whether the ten-year limitation period set out in Article 17(1) of Regulation 2015/1989 applies to the recovery of State aid by national authorities. The answer of the Court of Justice was straightforward. In light of the case law (*Eesti Pagar,* Case C-349/17), the ten-year limitation period only applies to the Commission. The Court of Justice reiterated that Regulation 2015/1989 concerns the Commission's powers to review State aid and *does not* contain any provision relating to the powers and obligations of national authorities. Hence, Article 17(1) cannot prevent Member States from requesting the pay-back of illegal aid from a recipient even if more than ten years have passed since the aid had been granted.

The second issue raised by the Coimbra Administrative and Tax Court was, from a legalstandpoint, more interesting.

The Coimbra Court asked whether the Portuguese procedural rules are compatible with Article 16(2) of Regulation 2015/1589 – which provides that the aid to be recovered must include interest from the date on which the aid was at the disposal of the beneficiary and until the date of its recovery – and the principle of effectiveness of EU law. The national court noted that the limitation period applicable to the interest on the aid granted to Nelson Antunes da Cunha was five years, which would have started running on the date on which the interest became payable. The application of this limitation period to the interest on the aid granted to Nelson Antunes da Cunha would prevent its full recovery by the Portuguese authorities. In fact, for at least part of that interest, the national court considered that the limitation period took effect even *before* the 1999 Commission decision was adopted.

The Court of Justice found that the national procedural rules, as interpreted by the referring jurisdiction, are incompatible with EU law and must be set aside. In this regard, the analysis of the Court of Justice distinguished between interest accrued before the 1999 Commission decision and after this decision.

As to the interest that accrued before the adoption of the 1999 Commission decision, the Court of Justice noted that the application of the Portuguese five-year limitation period would make full recovery of the illegal aid impossible. In fact, since this limitation period would start running as of the day on which the aid had been granted, such limitation period could have expired even before the Commission had ordered the Member State to recover the illegal aid. This would be contrary to Article 16(1) of Regulation 2015/1589 and the effectiveness of EU law.

Moreover, as to the interest that accrued after the adoption of the 1999 Commission decision, the Court of Justice recalled that, in accordance with Article 16(3) of Regulation 2015/1589, the recovery of illegal aid by the Member State must be immediate. In the present case, the application of the five-year limitation period provided for by the relevant Portuguese legislation would imply that the interest that accrued before 2008 would not be recovered, since the limitation period would have been interrupted only in 2013 when the IFAP started proceedings against the recipient. The expiry of this limitation period would thus be the result of the conduct of the Portuguese authorities, which belatedly adopted the necessary measures to implement the 1999 Commission decision. In fact, almost fourteen years have passed between the adoption of this decision and the interruption of the limitation period as a result of the IFAP's action against the recipient. The State aid rules would be deprived of their *effet utile* if Member States could prevent the recovery of interest by delaying the implementation of a Commission decision and then invoking the expiry of a national limitation period.

In this context, it is also interesting to note that the Court of Justice dismissed any concerns with regard to the protection of the legitimate expectations of Nelson Antunes da Cunha and the principle of legal certainty. It should be recalled that under Article 16(1) of Regulation 2015/1589, the Commission shall not require recovery of the aid if this would be contrary to a general principle of Union law. In the present case, the Court recalled, first, that the aid recipient cannot – in principle – invoke any legitimate expectation with regard to the legality of an aid measure. Nelson Antunes da Cunha should have checked whether the aid was granted in compliance with the notification and authorisation procedure set out in Article 108 Treaty on the Functioning of the European Union, prior to accepting it. Second, after the 1999 Commission decision Nelson Antunes da Cunha was aware that the Portuguese authorities would eventually request it to pay back the aid. Thus, the aid recipient was not in a situation of uncertainty with regard to the recovery of the illegal aid.

In this regard, it should be noted that while the approach followed by the Court of Justice is consistent with earlier case law, the *mantra* that a "prudent operator must know that the aid is illegal" is applied, in the present case, to aid granted on the basis of an aid scheme. This reasoning had up to now been applied to individual aid. Clearly, an undertaking that received individual aid in the form, for instance, of a grant can be expected to check whether the *ad hoc* public measure is compatible with the State aid rules. This is normally feasible for most companies. It is an entirely different matter to require a company to assess whether the aid scheme – which, as in this case, was adopted in the form of a decree – on the basis of which the individual aid was granted is itself legal under the State aid rules. The potential aid recipient would be required to trace back the often not entirely transparent legislative process that led to the adoption of the aid scheme and assess whether it was notified to and authorised by the Commission. This seems to go beyond what many small and medium-sized undertakings can be realistically expected to do.

**COVID-19 Temporary Framework: The Commission clarifies the conditions to adopt targeted aid in the form of recapitalisation of non-financial companies**

On 19 March 2020, the European Commission (the "Commission") adopted the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (the "Temporary Framework"), which was first amended on 3 April 2020.

On 8 May 2020, the Commission adopted another amendment to the Temporary Framework, which is aimed at enabling Member States to adopt targeted aid in the form of recapitalisation of non-financial companies. This second amendment sets forth several principles to guide the assessment of State aid granted for that purpose: (i) conditions with regard to the necessity, appropriateness and size of intervention; (ii) conditions on the State's entry in the capital of companies and remuneration; (iii) conditions regarding the exit of the State from the capital of the companies concerned; (iv) conditions regarding governance; (v) prohibition of cross-subsidisation and acquisition ban. Additionally, it provides for reporting and transparency obligations with regard to the recapitalisation aid granted in the form of aid schemes. The amended Temporary Framework also specifies that Member States can notify recapitalisation schemes or individual aid measures. When approving a scheme, the Commission will request the separate notification of aid to a company above the threshold of € 250 million for individual assessment.

**General Court provides further guidance on the assessment of State aid granted by public authorities through intermediary private entities**

On 13 May 2020, the General Court delivered three judgments in Cases T-607/17,T-716/17,T-8/18, concerning *Volotea, Germanwings* and *easyJet*, respectively (the "Applicants"). These judgments follow actions for annulment brought by the Applicants against a decision of the Commission finding that Italy had granted State aid to airlines serving airports located in the Autonomous Region of Sardinia (the "Region"). The Commission found the aid to be illegal and incompatible with the internal market, and ordered Italy to recover the aid from the recipient airlines.

The aid scheme and the implementing individual aid were granted by the Region to Sardinian airport operators, with a view to promoting the local economy, tourism and culture. The aid scheme provided for compensation for the costs incurred by airport operators with regard to activities directed at increasing air traffic in the Region, promoting Sardinia as a tourist destination and other promotional activities. In order to be eligible for compensation, airport operators had to submit a plan of activities for the approval of the Sardinia Region, identifying the activities that the airport operator intended to implement in order to attain the objectives of the aid. The plan had to be executed through specific agreements between the airport operator and airlines. To this end, airport operators invited airlines to submit business plans for air routes and other activities (such as marketing to promote the Region). The operators then entered into agreements with the selected airlines, including the Applicants.

In view of the characteristics of this aid scheme, the Applicants claimed before the General Court, *inter alia*, that the Commission had wrongly applied the "State resources" and "selective advantage" requirements set out in Article 107(1) Treaty on the Functioning of the European Union ("TFEU"). The General Court's response to the Applicants' arguments with regard to these issues provide interesting guidance on the notion of State aid under EU law. Four aspects of the General Court's reasoning are particularly noteworthy:

- First, the "State origin" of the money used by the airport operators to remunerate the airlines under the agreements.

The General Court held that the funds transferred by the Region to the airport operators corresponded to those used by the operators to remunerate the airlines. In this regard, the Court emphasised that the aid scheme did not allow airport operators to obtain reimbursement of amounts other than those effectively incurred to remunerate the airlines. Moreover, the operators had to prove that the airlines had received the public contributions in full in order to be eligible for the compensation. In essence, the airport operators acted as intermediaries, which passed the Regional funds, in their entirety, on to the airlines.

In addition, the General Court noted that the fact that the public funds were disbursed by the airport operators for commercial purposes (i.e. increasing their profit) is irrelevant. According to the Court, as long as it can be determined that the advantage originating from public resources is transferred by the immediate recipient (i.e. the airport operators) to the final beneficiary (i.e. the airlines), it is irrelevant that the transfer was made by the immediate recipient in accordance with commercial principles or, on the contrary, that that transfer met an objective of general interest.

- Second, the analysis of the "imputability to the State" requirement.

The General Court held that the degree of control exerted by the Region over the grant of the funds to the airlines demonstrates that they are "imputable" to the State. First, airport operators had to submit their plans to the Region for approval. Those plans had to be drafted in accordance with, *inter alia*, the guidelines adopted by the Region. Second, the mechanism for reimbursement of the costs paid by the airport operators was designed in such a way as to enable the Region to monitor the execution of the plans. Therefore, the airport operators acted as mere intermediaries between the Region and the airlines and in accordance with the instructions received from the Region.

- Third, the applicability of the market economy operator principle ("MEOP") to assess whether the aid granted an "advantage" to the airlines.

The General Court ruled that the MEOP cannot be applied to assess the transfer of funds *from the airport operators to the airlines*. Since these operators used the money made available to them by the Region and acted in accordance with the latter's instructions, they did not act as market operators. Moreover, since these operators are not State-owned, the transactions between them and the airlines cannot be examined in the light of the MEOP. In fact, even though they were funded by State resources, these transactions were between two private undertakings (and not the State and a private undertaking). In such circumstances the MEOP cannot be applied.

Furthermore, the General Court ruled that the MEOP cannot be applied to assess the transfer of funds *from the Region to the airport operators*. The Court noted that the Region did not act as a private investor, since it had put in place the aid scheme at issue solely with a view to improve the island's economic development. The Region acted as a public authority and could not expect to receive dividends, capital gains or any other form of profit from the investment. The expected effects on tourism (estimated at € 47 million or, combined with other indirect and induced effects, € 139 million) is a "macroeconomic benefit" which does not fall within the MEOP.

In this regard, the General Court added that, insofar as the marketing services offered by the airlines are concerned, the Region acted as a "service acquirer" through the intermediary of the airport operators. To exclude the existence of a "selective advantage" in this context, it would have been necessary to organise open and transparent tender procedures. In the case at hand, however, the calls for expressions of interest published prior to the conclusion of agreements with the airlines were not regarded by the Court as equivalent to tender procedures.

- Fourth, the assessment of whether the airport operators received an "advantage" within the meaning of Article 107(1) TFEU.

The Applicants argued that the Commission wrongly concluded that the airport operators had not benefitted from any advantage, even of an indirect nature, on the ground that they were mere intermediaries transferring aid from the Region to the airlines.

In this regard, the General Court recalled that the airport operators passed on to the airlines the entirety of the funds they received from the Region. Thus, they did not receive an advantage within the meaning of Article 107(1) TFEU. In addition, the fact that the performance of the services of the airlines – funded by the Region – had the effect of increasing air traffic and the volume of passengers to and from the airports concerned, entailing an increase in the airport and non-airport resources of their operators, is irrelevant. According to the General Court, this is a "secondary effect" of the aid scheme, from which the entire Sardinian tourism sector benefitted, including the Applicants (e.g., increase in sales of the services offered on board the aircraft). However, the immediate advantage forming the subject matter of the aid scheme at issue and which was not obtained under normal market conditions still consisted of the payments made to the airlines.

# LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

## – EUROPEAN UNION LEVEL –

**Agricultural sectors benefit from temporary derogation from competition law rules amidst COVID-19 crisis**

On 30 April 2020, the European Commission (the "Commission") issued three implementing regulations temporarily relaxing the scope of competition law rules in three agricultural sectors severely affected by the COVID-19 pandemic.

By way of context, Regulation (EU) No 1308/2013 of 17 December 2013 establishing a common organisation of the markets in agricultural (the "CMO Regulation") encourages cooperation between agricultural producers, but at the same time makes clear that EU competition law rules remain applicable to production and trade in agricultural products. However, under Article 222 of the CMO Regulation, the Commission may apply temporary derogations from Article 101(1) Treaty on the Functioning of the European Union (the "TFEU") to specific categories of agreements to address severe imbalances on the market. While hardcore infringements (e.g., price-fixing between competitors) may not be exempted, seven categories of arrangements (e.g., market withdrawal or free distribution of products, transformation and processing) may be exempted, provided that they aim to stabilise the sector concerned and do not undermine the proper functioning of the internal market.

As a result of the COVID-19 crisis, the Commission has noted severe issues in certain agricultural sectors. For example, extensive movement restrictions on people and limited availability of labour has led to significant disruptions and cash-flow issues for farmers. In addition, the cancellation of festivities (e.g., annual garden shows, cultural and open-air festivals, sports tournaments) and the closure of markets, specialised retail shops and fast foods have led to significant economic disruptions on the markets for processed potatoes, live plants and cut flowers, and milk and dairy products.

According to the Commission, these disruptions qualify as severe market imbalances which, under Article 222 of the CMO Regulation, justify the adoption of temporary derogations from Article 101(1) TFEU. Consequently, farmers and producers, as well as recognised organisations thereof, are temporarily authorised to:

- conclude agreements and take common decisions on planning the volume of raw milk to be produced (based on Commission Implementing Regulation (EU) 2020/599);

- conclude agreements and take common decisions on market withdrawal and free distribution, joint promotion and temporary planning of production of live plants and flowers (based on Commission Implementing Regulation (EU) 2020/594); and

- conclude agreements concerning potatoes for processing and take common decisions concerning potatoes for processing on market withdrawals and free distribution, transformation and processing, storage, joint promotion and temporary planning of production (based on Commission Implementing Regulation (EU) 2020/593).

Each Implementing Regulation covers the territory of the EU and entered into force on 5 May 2020 for a period of six months.

## – MEMBER STATE LEVEL –

BELGIUM

**Belgian competition authority adopts new Leniency Guidelines**

On 22 May 2020, new Leniency Guidelines (the "2020 Guidelines") adopted by the Belgian Competition Authority (the "BCA") were published in the Belgian Official Journal. The 2020 Guidelines replace the 2016 Leniency Guidelines and lay down the conditions to obtain total or partial immunity from fines for undertakings (or associations of undertakings) as well as immunity from prosecution for natural persons involved in a cartel. The 2020 Guidelines are largely identical to the 2016 Guidelines and adapt the wording and references to the new nomenclature of Book IV of the Code of Economic Law, which contains Belgian competition law rules, as substantially amended in 2019 (see VBB on Competition Law, Volume 2019, No. 5, p. 14). The conditions to obtain total or partial immunity from fines, the amount of the reduction in fine that can be granted to leniency applicants and the procedural aspects of the leniency regime have remained unchanged in the 2020 Guidelines. However, the 2020 Guidelines bring about a few clarifications, some of which are described below.

First, the BCA may prosecute and impose fines of up to € 10,000 on natural persons who have been involved in a cartel. However, natural persons can only be prosecuted in parallel with an undertaking (or association of undertakings). While the 2016 Guidelines also provided that a natural person could only be prosecuted if an undertaking (or association of undertakings) was also prosecuted and found guilty of the same offence, the 2020 Guidelines now add that this undertaking (or association of undertakings) must have been the company for which the natural person acted. The 2020 Guidelines also clarify that, if the undertaking (or association of undertakings) ceased to exist and has no legal successor, the proceedings can continue in relation to the natural person only.

Second, the 2020 Guidelines clarify the relationship between leniency applications filed by undertakings and requests for immunity from prosecution lodged by natural persons. The 2016 Guidelines also provided that natural persons could lodge a request for immunity either jointly with the leniency application of an undertaking or separately, of their own initiative. However, in contrast to the 2016 Guidelines, the new Guidelines explicitly enable the President of the BCA to grant immunity from prosecution to a natural person following a decision on leniency issued to an undertaking. According to the 2020 Guidelines, this means that undertakings and natural persons may file leniency applications together and be granted immunity in the context of the same procedure.

Third, the 2020 Guidelines formally create the possibility for the leniency applicant to request to be heard by the President of the BCA after receiving the draft leniency decision. Where such a request is made, the President must hear the applicant. No such hearing was formally organised under the 2016 Guidelines.

Fourth, the 2020 Guidelines bring about some procedural changes. For instance, while the 2016 Guidelines explicitly provided that the BCA would never communicate leniency statements to courts in the context of private damages actions and that it would not use any evidence produced in good faith by leniency applicants against them if their leniency application was rejected (unless the applicant consented to their use), the 2020 Guidelines no longer provide for such assurances. The new Guidelines even suggest that the BCA can use information included in a rejected leniency application if the applicant has not formally withdrawn its application and, if the applicant does withdraw it, the BCA can still obtain this information by using its investigatory powers. Finally, leniency applications can no longer be filed in English.

The 2020 Guidelines entered into force on 22 May 2020.

**Belgian competition authority adopts notice on President's informal opinions**

The President of the Belgian Competition Authority (the "BCA") may issue informal opinions on the application of competition rules to proposed practices or agreements which do not fall within the scope of merger control rules. A Notice published in the Belgian Official Journal on 25 May 2020 sets out the criteria to be satisfied and the procedure to be followed in order to obtain these informal opinions (the "Notice"). Although it does not expressly mention it, the Notice replaces a 2015 notice on the same topic. The Notice did not substantially amend the existing rules, but adapts the wording and references to the new nomenclature of Book IV of the Code of Economic Law, as substantially amended in 2019.

A request for an informal opinion shall be taken into consideration only if the contemplated practice or agreement has not yet been implemented. A similar question cannot be the object of a case before the European Commission, the BCA or before a Belgian or European court. The issue presented must be a novel question of law that the President of the BCA must be able to answer based on the information received from the applicant. In addition, the question must present a sufficiently important economic or societal interest.

When the above-mentioned criteria are met, the President may provide his/her informal opinion in a letter to the applicant. In principle, informal opinions are published on the website of the BCA. However, in order to protect the interests of the undertakings concerned, the President may also decide to publish only some parts of the informal opinion, to postpone the publication, or decide not to publish the opinion. The issuance of an informal opinion by the President does not prevent the BCA from opening proceedings at a later stage if the assumptions made by the President in the letter to the undertaking are unfounded.

The Notice entered into force on 25 May 2020.

**Belgian competition authority adopts new guidelines on the calculation of fines**

New guidelines of the Belgian Competition Authority (the "BCA") on the calculation of fines (the "Fining Guidelines") were published on 25 May 2020 in the Belgian Official Journal. The Fining Guidelines replace the Guidelines on the calculation of fines adopted in 2014 by the BCA.

The new Fining Guidelines essentially reproduce the content of the 2014 Guidelines, but bring about some minor drafting improvements and adapt the wording and references to the new nomenclature of Book IV of the Code of Economic Law, as substantially amended in 2019. The methodology followed to calculate the amounts of fines remains unchanged. Further, as already stated in the 2014 Guidelines, the BCA will, in principle, use the European Commission's Guidelines on the calculation of fines as a reference.

The Fining Guidelines entered into force on 25 May 2020. They apply to all pending cases unless a draft reasoned decision has already been submitted to the Competition College. As far as settlement proceedings are concerned, they apply to all pending cases unless the Competition Prosecutor has already communicated the amount of the possible fine to the settling parties.

GERMANY

**Germany adopts amendment to Act against Restraints of Competition to mitigate the consequences of COVID-19 pandemic on competition law enforcement**

On 28 May 2020, an amendment to the Act against Restraints of Competition which aims at mitigating the consequences of the COVID-19 pandemic on competition law enforcement was published in the Federal Gazette. The amendment adjusts the law with regard to two specific provisions where companies may face issues as a result of the COVID-19 pandemic: (i) the payment of fines for infringements of competition law; and (ii) merger control review periods.

According to the amended law, the payment of interest on fines for infringements of competition law will be deferred until 30 June 2021. Under the existing law, it was possible for the German Federal Cartel Office (the "FCO") to grant payment facilities such as a deferral or payment in fixed instalments if the undertaking concerned was unable to pay the fine immediately due to financial circumstances. However, the interest on fines imposed on legal persons and associations still remained due. Under the amended rules, the interest on fines will also be deferred if payment facilities are granted for the fine. The measure is planned to ease the burden on companies that have suffered liquidity problems during the COVID-19 pandemic.

Further, the amendments temporarily extend the review periods for concentrations notified between 1 March and 31 May 2020. Under the amended rules, the Phase I review period will be two months instead of one month. The length of an in-depth analysis under a Phase II review will be extended from four to six months. The extensions will not apply if the deadlines have already expired or if the concentration has already been cleared at the time of the entry into force of the amended rules. The rationale behind the extended deadlines is that many companies currently have limited capacities to respond to enquiries from the FCO in a timely manner.

The amendment will enter into force on 29 May 2020.

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