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vbb@vbb.com
www.vbb.com

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Chaussée de La Hulpe 166
Terhulpsesteenweg
B-1170 Brussels – Belgium

Phone: +32 (0)2 647 73 50
Fax: +32 (0)2 640 64 99

vbb@vbb.com
www.vbb.com

MERGER CONTROL

– EUROPEAN UNION LEVEL –

Commission conditionally clears Alstom's acquisition of Bombardier's train business

On 31 July 2020, the European Commission (the "Commission") announced its conditional clearance of Alstom's acquisition of Bombardier Transportation. Both the target, a German subsidiary of Canadian Bombardier Inc., and the French acquirer, Alstom, are global companies active in rail transportation and signalling.

During its Phase I investigation, the Commission raised concerns relating to a number of markets. First, the Commission concluded that the merger would give rise to an undisputed leader in the market for very high-speed trains (i.e., trains operating at over 300 km/hr), with a high market share. Second, the merger would have strengthened the parties' high market share for mainline trains in France and Germany. Finally, as the parties had each supplied a significant share of the mainline European Train Control System ("ETCS") signalling on-board units ("OBUs") already installed in European trains, the Commission considered that the merged entity would have the ability and incentive to make it more difficult for other OBU producers to interface with existing systems. The Commission also considered that this would make the merged entity the only supplier of legacy OBUs in the Netherlands.

In order to resolve these concerns, the parties offered the Commission a package of divestments and behavioural remedies. These include the divestment of Bombardier's assets involved in the development of a joint platform for very high-speed trains with Hitachi as well as commitments relating to preserving a joint bid for the production of such trains that Bombardier and Hitachi had offered to the company HS2. The parties also agreed to divest a series of platforms and facilities in France and Germany relating to the construction of mainline trains. Finally, the merged entity committed to supplying legacy OBUs and necessary interfacing information to signalling competitors and to the Dutch infrastructure manager.

The clearance of this merger comes on the heels of the Commission's prohibition of Siemen's proposed acquisition of Alstom following an in-depth investigation in early 2019 (see VBB on Competition Law Volume 2019, No. 2). In that transaction, the Commission had also raised concerns in the markets for signalling and very high-speed trains, as the merger would have combined the number one and number two players. The Commission found that neither the commitments offered by the parties nor potential new entry from China would have been sufficient to overcome the loss of competition the merger would have generated. In *Siemens/Alstom*, the Commission noted that Bombardier had not recently sold high-speed trains on a standalone basis from Hitachi, and held a smaller market share in signalling than either party. It appears that in *Alstom/Bombardier*, the Commission considered the remedy package offered to be adequate in light of the parties' smaller combined shares in the affected markets.

– MEMBER STATE LEVEL –

AUSTRIA

Austrian Cartel Court clarifies calculation method for domestic turnover thresholds

On 4 August 2020, the Austrian Cartel Court published a decision dated 13 February imposing a € 100,000 fine on Castanea Rubra Assets GmbH ("Castanea Rubra") for failing to notify its acquisition of 94% of shares in Neue Halberg Guss GmbH ("Neue Halberg") in 2018. This failure to notify violated the merger notification rules under the Austrian Cartel Law (see VBB on Competition Law Volume 2020, No. 4).

The Cartel Court found that Castanea Rubra had negligently failed to take into account deliveries made by Neue Halberg to an Opel factory in Austria when calculating Neue Halberg's domestic turnover to determine whether the merger met the notification threshold. The delivery had been excluded as the order was made through Opel's headquarters in Germany. According to the Cartel Court, however, if the location of the customer and the place of delivery are not identical, the relevant sales must be allocated to the territory of the place of delivery, and should therefore have been counted towards the Austrian domestic turnover. In its decision, the Cartel Court relied on the demand-side oriented market concept also used by the German Federal Cartel Office and drew on the Commission's Consolidated Jurisdictional Notice.

While conceding that the calculation method was not entirely clear, the Cartel Court nevertheless found that Castanea Rubra had negligently failed to make reasonable inquiries on the question and thus could not be exempted from liability. The fine, however, was set at only 0.02% of the relevant turnover.

UNITED KINGDOM

UK Competition Authority Fines JD Sports £300,000 for breach of merger-freeze order

On 5 August 2020, the UK's Competition and Markets Authority (the "CMA") fined JD Sports and its parent company Pentland Group £300,000 for failing to comply with an initial enforcement order ("IEO") imposed with regard to JD Sports' completed merger with footwear retailer Footasylum. The CMA found JD Sports to be in breach of the IEO when Footasylum served a lease break notice on the landlord of one of its stores.

The CMA imposed the IEO on JD Sports in May 2019, pending its investigation of the merger, which it later blocked in May 2020 (see VBB on Competition Law Volume 2020, No. 5). The IEO required JD Sports to remain separate from Footasylum and to continue developing individually without introducing substantive organisational changes. This included a prohibition on Footasylum from disposing of any of its assets without the CMA's prior consent. JD Sports was responsible for making sure that Footasylum complied with the IEO.

In its decision, the CMA considered that Footasylum breached the IEO when, in October 2019, it served notice on the landlord of its store in Wolverhampton to break the lease. The CMA said that JD Sports did not obtain permission from the CMA; instead, Footasylum informed the CMA of its plan to close the store in November 2019.

The CMA dismissed the parties' arguments that no prior consent was required from the CMA, because the closure of the store was done in the ordinary course of business and that the decision to close the store was made before the merger. However, the CMA referred the parties to the Electro Rent case, in which the Competition Appeal Tribunal (the "CAT") ruled that the service of a break notice in this context cannot be said to be within the ordinary course of business. The CAT also ruled that, while there might be a good commercial reason to serve the break notice, this does not remove the requirement to receive prior consent from the CMA. The CMA also noted that Footasylum did not provide any evidence showing that it made the decision to close the store before the CMA imposed the order. The CMA therefore concluded that the parties were in breach of the IEO.

The fine is the highest to date for a single breach of an IEO and follows several other recent fines for similar conduct, showing that the CMA is cracking down on this type of conduct. Nonetheless, due to the impact of COVID-19, the CMA has given JD Sports nine months, rather than the usual 28 days, to pay the fine.

JD Sports has said that it is now considering whether to appeal the CMA's decision to the CAT. JD Sports has already appealed the CMA's decision blocking the merger. The first hearing in that case is scheduled to take place before the CAT in September 2020.

VERTICAL AGREEMENTS

– OTHER DEVELOPMENTS –

AUSTRIA: According to a press release issued by the Austrian Federal Competition Authority ("AFCA") on 23 July 2020, the Austrian Cartel Court found that Yamaha Music Europe GmbH ("Yamaha") infringed competition law by entering into agreements with retailers on fixed or minimum resale prices for musical instruments and, in individual cases, for audio and video products. The practices took place between 2004 and 2017. Yamaha nonetheless escaped a fine as it cooperated with the AFCA following a leniency application. The Cartel Court decision is final. A second case before the Cartel Court against another musical instrument maker which applied for leniency is still pending.

AUSTRIA: On 29 July 2020, the AFCA announced that the Cartel Court had fined Zodiac Pool Care Europe ("Zodiac") € 294,000 for resale price maintenance on 26 June 2020. According to the announcement, the Cartel Court found that Zodiac had fixed resale prices with retailers and wholesalers in the market for automatic pool cleaning equipment between March 2016 and September 2019 in violation of Article 101 of the Treaty on the Functioning of the European Union and Section 1(1) of the Austrian Cartel Law. The decision was not appealed and is final.

INTELLECTUAL PROPERTY/LICENSING

– MEMBER STATE LEVEL –

GERMANY

Mannheim Regional Court finds Daimler to have infringed Nokia's patent and issues injunction against Daimler

According to a press release of the Mannheim Regional Court of 18 August 2020 in the matter *Nokia v Daimler*, the Regional Court of Mannheim (the "Court") ruled in favour of Nokia that Daimler had infringed Nokia's patent and could not invoke a FRAND objection. The Court held that Daimler and a number of intervening parties in support of Daimler had failed to demonstrate that they were "*seriously willing or prepared*" to conclude a licence agreement on FRAND terms.

According to Nokia's press release, the Court issued an injunction against Daimler concerning the unauthorised use of Nokia's patent EP 2 981 103, which enables the car or other end user devices to communicate more efficiently with Long-Term Evolution ("LTE") networks.

Interesting questions include: (i) who in a value chain is entitled to take a licence – the manufacturer of the end product or its suppliers that use the technology for input products / components – and more specifically whether the SEP holder can refuse to issue a licence to a component manufacturer willing to take such a licence, and (ii) on what basis will the licence fee be calculated – the value of the component or the value of the end product.

The Court abstained from making a request for a preliminary ruling to the Court of Justice of the European Union ("ECJ") that had been strongly suggested by the German Federal Cartel Office. According to the Court, most questions in this context were no longer pertinent, given its finding that Daimler and the intervening parties were not willing to take a licence. Also, the limited time of the remaining patent protection appeared to have played a role in this assessment.

The ruling can be appealed to the Higher Regional Court in Karlsruhe which in turn could still request a preliminary ruling from the ECJ.

Nokia expressed the hope that Daimler would now take a FRAND licence, as many other car manufacturers already have. Daimler reportedly intends to appeal the judgment. If Nokia wants to enforce the injunction, it will need to provide a security for potential damages should the judgment be overturned on appeal. According to Bloomberg, Nokia would be required to post collateral of € 7 billion to enforce a sales ban on Daimler, which Daimler reportedly does not expect to happen.

The ruling of the Regional Court of Mannheim follows on the heels of a judgment of the German Federal Court of Justice which in May 2020 had applied the conditions of the ECJ's judgment in *Huawei v ZTE*. In its ruling in *Sisvel v Haier* the Federal Court of Justice also ruled in favour of the SEP holder and found that the defendant had not been willing to conclude a licence agreement (see VBB on Competition law, Volume 2020, No. 5 and 7).

Prior to this judgment, Daimler and some of the automotive suppliers had already filed a complaint with the European Commission claiming that Nokia was abusing its dominant position as an SEP holder. That case is still pending.

UNITED KINGDOM

UK Supreme Court delivers judgment in FRAND royalty case

On 26 August 2020, the UK Supreme Court issued a judgment in a licence dispute involving Standard Essential Patents ("SEPs") pitting Unwired Planet, a US based patent assertion entity, against Huawei, a Chinese telecommunications company that produces smartphones.

Unwired Planet brought an action against Huawei for infringement of a number of UK patents, which it had acquired from Ericsson as part of a portfolio comprising about 2,000 patents, and which were considered as essential to the 2G, 3G and 4G wireless telecommunications standards developed under the auspices of the European Telecommunications Standards Institute ("ETSI"). The patents were encumbered by Fair, Reasonable and Non-Discriminatory ("FRAND") commitments to ETSI.

On 5 April 2017, Mr Justice Birss of the English High Court of Justice found that: 1) the imposition by Unwired Planet of a global licence (rather than country by country) on Huawei was not contrary to FRAND terms; 2) Unwired Planet was entitled to seek an injunction under any valid and infringed UK SEPs in the event Huawei did not agree to enter into a worldwide licence to all of the SEPs in the Unwired Planet portfolio; 3) the FRAND rate set by the court was not discriminatory; and 4) Unwired Planet had not abused its dominant position because it had complied with the obligations set out by the judgment of the Court of Justice of the European Union ("ECJ") in Case C-170/13, *Huawei v ZTE*, by undertaking to unconditionally offer a licence on FRAND terms as determined by the court (see VBB on Competition law, Volume 2017, No. 5). On 7 June 2017, the English High Court issued an injunction against Huawei (see VBB on Competition law, Volume 2017, No. 6). These judgments were confirmed on appeal on 23 October 2018 by the English Court of Appeal (VBB on Competition Law, Volume 2018, No. 10).

In the present judgment, the UK Supreme Court confirmed the findings of the lower courts and ruled as follows:

English courts have jurisdiction to impose a global licence on FRAND terms and set a global FRAND rate

Unwired Planet offered Huawei a worldwide licence for the asserted SEPs. Huawei refused to accept that licence, arguing that: 1) a worldwide licence was unreasonable because it had only requested licences covering the UK; 2) the lower English courts were wrong to rule that it had to take a worldwide licence at a royalty rate fixed by the English courts in order to avoid an injunction restraining the infringement of UK SEPs; and 3) once Huawei had disputed the validity or infringement of a foreign patent, English courts had no jurisdiction to require Huawei to take a global licence to avoid an injunction.

The UK Supreme Court dismissed these arguments and held that English courts have jurisdiction to impose on Huawei a global licence on FRAND terms and set a global FRAND rate. In reaching this conclusion, the UK Supreme Court first acknowledged that: 1) questions of validity and infringement of a national patent are within the exclusive jurisdiction of the courts of the state which granted that patent; and 2) in the absence of the FRAND regulatory framework established under ETSI, English courts would not have jurisdiction to determine a FRAND licence of a portfolio which included foreign patents.

However, according to the UK Supreme Court, it is the contractual arrangement that ETSI created in its intellectual property right ("IPR") policy that gave English courts jurisdiction in this particular case to determine a global FRAND licence.

The UK Supreme Court also noted that parties may hold portfolios with thousands of patents which may be relevant to a standard and that, in this context, it was "*common practice in the telecommunications industry for operators to agree global licences of a portfolio of patents, without knowing precisely how many of the licensed patents are valid and infringed*". By taking out an international portfolio of patents, the implementer buys "*access to the new standard*" and "*purchases certainty*".

With this being said, the UK Supreme Court acknowledged that parties must have the right to resolve their disputes about the validity or infringement of particularly significant patents or groups of patents in the relevant national courts or by arbitration.

On this basis, the UK Supreme Court ruled that English courts have jurisdiction: 1) to grant an injunction restraining the infringement of UK SEPs, unless the defendant entered into a global licence on FRAND terms of a multinational patent portfolio as a result of which the jurisdiction of English courts extends over the entire range of patents; and 2) to determine the royalty rates for a settled global licence.

The non-discriminatory limb of the FRAND undertakings is part of a single, unitary obligation

The UK Supreme Court dismissed Huawei's argument that the non-discriminatory limb of the FRAND undertakings must be given its ordinary meaning, which is that SEP holders have to grant the same or similar terms to all similarly situated licensees, unless it can be shown that there are objective grounds for treating them differently (this was referred to as the "*hard-edged*" non-discriminatory interpretation of the FRAND undertakings).

Instead, the UK Supreme Court ruled that the non-discriminatory limb of the FRAND undertakings was "*general*" and must be read as a "*single unitary obligation*". The FRAND undertakings are not two distinct obligations (that the licence terms should be fair and reasonable and also, separately, that they should be non-discriminatory) and even less three distinct obligations (that the licence should be fair and, separately, reasonable and, separately, non-discriminatory).

This unitary approach was found to reflect commercial reality and sense, as there may be circumstances in which the SEP holder may choose to license its portfolio at a rate that does not reflect its true FRAND royalty rate value. Such circumstances include those in which the SEP holder may decide: 1) to offer a lower rate to the first licensee because it provides the SEP holder with initial income on its portfolio and may serve to validate the portfolio in the eyes of the market; or 2) to conclude a licensing deal at low royalties rates for a particular licensee because the SEP holder is facing financial difficulties. According to the UK Supreme Court, Huawei's "*hard-edged*" approach would prevent the SEP holder from enjoying the flexibility of these situations.

Finally, the UK Supreme Court found it relevant that ETSI had considered, before rejecting, the imposition of a "most-favourable licence" clause in the FRAND undertakings. Interpreting the FRAND undertakings as incorporating a "hard-edged" non-discriminatory obligation for which Huawei advocated would have the effect of re-introducing a "most-favourable licence" term by the back door.

The UK Supreme Court interprets Huawei v ZTE as not setting out a series of mandatory steps to be complied with by the SEP holder to obtain injunctive relief

Huawei argued that Unwired Planet had failed to comply with the series of prescriptive steps set out by the ECJ in *Huawei v ZTE* and, as a result, Unwired Planet's claim for an injunctive relief had to be regarded as an abuse of dominant position, in breach of Article 102 Treaty on the Functioning of the European Union.

The UK Supreme Court disagreed with Huawei's position and ruled that the ECJ was not "*laying down a set of prescriptive rules, intending that failure to comply precisely with any of them would necessarily, and in all circumstances, render the commencement of the proceedings for an injunction abusive*". Instead, the UK Supreme Court confirmed Mr Justice Birss's view that "*the ECJ's scheme* [set out] *a standard of behaviour against which both parties' behaviour can be measured to decide in all the circumstances if an abuse has taken place*".

In the present case, the English courts had found that Huawei was given sufficient notice by Unwired Planet before the injunction application was made and that Unwired Planet had shown itself willing to license Huawei on whatever terms the court determined were FRAND, whereas Huawei, in contrast, had only been prepared to take a licence with a scope determined by it as limited to the UK.

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VAN BAEL & BELLIS

Chaussée de La Hulpe 166
Terhulpsesteenweg
B-1170 Brussels
Belgium

Phone: +32 (0)2 647 73 50
Fax: +32 (0)2 640 64 99

vbb@vbb.com
www.vbb.com