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MERGER CONTROL

– EUROPEAN UNION LEVEL –

European Commission conditionally clears Vodafone's acquisition of Liberty Global's businesses in Czechia, Germany, Hungary and Romania

On 18 July 2019, the European Commission ("Commission") conditionally approved Vodafone's acquisition of Liberty Global's cable network business in four countries (Czechia, Germany, Hungary and Romania).

In order to address competition concerns identified mainly in Germany regarding the ability of the merged entity to hinder competition for other television broadcasters, Vodafone committed to a broad remedy package. First, Vodafone will provide its rival, Telefónica, with wholesale access to the merged entity's cable network in Germany. Second, Vodafone will refrain from contractually restricting broadcasters that are carried on the merged entity's television platform from distributing their content via an over-the-top ("OTT") service. An OTT service consists of streaming media content, such as broadcasts, directly over the internet. Third, Vodafone will not increase the feed-in fees paid by free-to-air broadcasters for the transmission of their television channels via Vodafone's cable network in Germany. Finally, Vodafone will carry on its network the Hybrid Broadcast Broadband TV-signals of free-to-air broadcasters. This functionality allows television customers to connect directly to the interactive services of broadcasters.

– MEMBER STATE LEVEL –

GERMANY

German Federal Cartel Office prohibits merger in the waste management sector

On 11 July 2019, the German Federal Cartel Office ("FCO") prohibited the proposed acquisition of Duales System Holding ("DSD") by Remondis. The parties are active in the waste management industry in Germany.

In Germany, the waste management industry is organised around the "Dual System", which requires producers to ensure the recycling of packaging waste. Under the Dual System, waste management services are centrally organised and procured through tenders commissioned by a number of dual system organisers, such as DSD. Waste management services providers, such as Remondis, are responsible for the collection, sorting and reprocessing of packaging waste. The Dual System is funded by licence fee payments by producers to the waste management services providers.

The FCO found that the transaction raised serious competition concerns because Remondis is the largest waste management provider and DSD is the largest dual system organiser. The FCO considered that competition between dual systems for packaging recycling would be significantly impeded as a result of the proposed acquisition as it would lead to higher costs for DSD's competitors, significant market share gains for DSD and, ultimately, higher prices for the disposal of packaging waste. In particular, the FCO held that Remondis would have a post-merger incentive to charge DSD's competitors higher prices for waste management services in order to place them at a disadvantage to its own company, DSD. While the parties offered to divest two glass recycling facilities and certain behavioural commitments, these were deemed insufficient by the FCO. On 24 July 2019, the FCO's prohibition decision was appealed to the Higher Regional Court of Düsseldorf and this appeal is still pending.

Although the FCO did not prohibit any transactions in 2018, this is the third FCO prohibition in 2019, following prohibitions of the creation of a joint venture between Miba and Zollern (see VBB on Competition Law, Volume 2019, No. 2) and the proposed acquisition of MBO by Heidelberger (see VBB on Competition Law, Volume 2019, No. 5).

IRELAND

Irish CCPC conditionally clears laundry merger after longest-ever Phase II review

On 10 July 2019, the Irish Competition and Consumer Protection Commission ("CCPC") conditionally cleared the acquisition of Kings Laundry by Berendsen. Both parties are active in the provision of outsourced laundry services in Ireland.

During its review, the CCPC identified competition concerns as the firms are already two of the three largest providers of outsourced flat linen rental and maintenance services to healthcare customers in Ireland. To address these concerns, Berendsen committed to a "fix-it-first" divestment of three key laundry healthcare contracts, and a further divestment of healthcare contracts of an undisclosed value.

The review, which started after notification on 7 August 2018, is the longest Phase II investigation undertaken by the CCPC.

– OTHER DEVELOPMENTS –

UNITED KINGDOM: On 16 July 2019, the UK's Competition and Markets Authority ("CMA") fined Nicholl Oils, a fuel distributor, for three breaches of an initial enforcement order ("IEO"). An IEO is generally imposed by the CMA when it investigates a completed deal with the purpose of obliging the merging companies to remain independent pending completion of the CMA's review. In this case, the CMA imposed the IEO during its review of Nicholl Oils' completed acquisition of DCC Energy in Northern Ireland. Previously, the CMA cleared the deal in November 2018. After further investigation, however, the CMA found that without the consent required by the IEO, Nicholl Oils had moved staff of DCC Energy into premises used by Nicholl Oils (fine £ 120,000), made fuel deliveries to customers of DCC Energy using the mini-tankers of Nicholl Oil (fine of £ 20,000), and failed to provide timely compliance statements to the CMA (fine of £ 6,000).

ABUSE OF DOMINANT POSITION

– EUROPEAN UNION LEVEL –

Commission fines Qualcomm € 242 million for engaging in predatory pricing

On 18 July 2019, the Commission announced that it had adopted a decision against Qualcomm for abusing a dominant position in the market for 3G baseband chipsets, and imposed a fine of € 242 million. According to the Commission, Qualcomm's prices to certain key customers were below its costs with the intention of eliminating its competitor Icera.

The Commission's proceedings concerned baseband chipsets complying with the 3G standard that enable smartphones and tablets to connect to cellular networks and are used both for voice and data transmission.

According to the Commission's press release, Qualcomm held a dominant position in this global market between 2009 and 2011, based in particular on: (i) Qualcomm's market shares of approximately 60% (almost three times the market share of its biggest competitor) and (ii) high barriers to entry to this market, including significant initial investments in research and development to design UMTS chipsets, as well as various barriers related to Qualcomm's intellectual property rights.

The Commission's press release further states that the Commission concluded that Qualcomm abused its dominant position between mid-2009 and mid-2011, by engaging in predatory pricing. More specifically, Qualcomm is claimed to have sold certain quantities of three of its UMTS chipsets below cost to Huawei and ZTE, which the Commission regarded as two strategically important customers, with the intention of eliminating Icera, its main rival at the time in the market segment offering advanced data rate performance.

The Commission's press release also contends that Qualcomm's behaviour took place when Icera was becoming a viable supplier of UMTS chipsets providing high data rate performance and thus posing a growing threat to Qualcomm's chipset business.

On the basis of its press release, the Commission's conclusion that Qualcomm engaged in predatory pricing during the period investigated was founded on:

- a price-cost test for the three Qualcomm chipsets concerned;
- a broad range of qualitative evidence demonstrating the anti-competitive rationale behind Qualcomm's conduct, intended to prevent Icera from expanding and building market presence.

The Commission further stated that the results of the price-cost test were consistent with the contemporaneous evidence which it had gathered, and that the targeted nature of the price concessions made by Qualcomm allowed it to maximise the negative impact on Icera's business, while minimising the effect on Qualcomm's own overall revenues from the sale of UMTS chipsets. The Commission also found no evidence that Qualcomm's conduct created any efficiencies that would justify its practice.

– MEMBER STATE LEVEL –

AUSTRIA AND GERMANY

German and Austrian competition authorities close investigations against Amazon for abuse of dominant position after commitments

On 17 July 2019, the Austrian Federal Competition Authority and the German Federal Cartel Office closed their respective abuse of dominance investigations against Amazon, after Amazon committed to changing contract terms.

Throughout the years 2017 and 2018, both competition authorities had received complaints from traders and trade associations about various aspects of Amazon's general terms and conditions (GTCs). These complaints concerned, among other matters, the lack of transparency of the GTCs, Amazon's ranking system, unexpected and unfounded terminations and blocking of accounts, retaining of credit balance of blocked accounts, difficulties in communication between Amazon and the traders on the marketplace, the obligation to pay the costs of unjustified customer returns, and discrimination of traders who do not use Amazon's logistics services.

The German and Austrian competition authorities investigated Amazon's conduct based on theories of it being both an exploitative and exclusionary abuse, and closed their investigations when Amazon committed to changes in the GTCs worldwide. According to the competition authorities, the changes that enter into force on 16 August 2019 will largely eliminate the agencies' competition concerns.

Most notably, Amazon will accept liability for intentional or grossly negligent breaches of major contractual obligations vis-à-vis the traders. Furthermore, the new GTCs will provide for a 30-day notice period for ordinary terminations and an obligation to provide reasons for extraordinary terminations and the blocking of an account. Further changes concern jurisdiction, rights of use of product information, confidentiality and certain rules on returns and reimbursements.

Furthermore, Amazon committed to informing the competition authorities about future changes of its GTCs, which will allow the authorities to monitor compliance and, in the event of a breach of Amazon's commitments, to reopen investigations.

On the same day, the European Commission opened an investigation into Amazon in order to assess whether Amazon's use of sensitive data from independent retailers active on the marketplace could infringe EU competition law, a matter not reviewed by the German or Austrian competition authority.

SWEDEN

Swedish Appeal Court confirms dismissal of competition authority's abuse of dominance case against Nasdaq

On 28 June 2019, the Swedish Patent and Market Court of Appeal (the "Appeal Court") upheld a ruling of the Swedish Patent and Market Court that rejected an action brought by the Swedish Competition Authority (Konkurrensverket or "KKV") against Nasdaq Stockholm Aktiebolag and several affiliated companies ("Nasdaq") for allegedly abusing their dominant position by pressuring Verizon, Nasdaq's IT service provider, to terminate negotiations with Burgundy, a newly created Nordic trading platform and a potential rival of Nasdaq. The negotiations between Verizon and Burgundy were aimed at enabling Burgundy to place its trading servers in the building that housed Nasdaq's primary trading servers and at allowing Burgundy to offer Nasdaq's co-located trading customers the opportunity to connect directly to Burgundy's trading servers. KKV had alleged that Nasdaq's conduct had forced Burgundy to locate its server at a more remote facility, which had undermined Burgundy's ability to attract more customers and effectively compete with Nasdaq (see also VBB on Competition Law, Volume 2018, Number 1).

Although the Appeal Court upheld the Patent and Market Court's ruling, it did not follow the somewhat curious reasoning of the Patent and Market Court that Nasdaq had acted within its contractual right to control the technical set-up of its customers that were co-located with its primary trading server, and had therefore had the right to prevent co-located customers from creating direct connections to another trading server in the same building.

The Appeal Court emphasised at the outset that Article 102 Treaty on the Functioning of the European Union was not designed to protect less efficient rivals against competition by a dominant firm, and that an as-efficient competitor test should be used to determine whether a dominant firm's conduct had anticompetitive, exclusionary effects. In this context, the Appeal Court pointed to evidence that during the relevant period, Burgundy's trading servers had a much higher, and more volatile latency (the total time required for the execution of an order) than Nasdaq's trading servers, which made Burgundy a much less attractive trading venue, in particular for high frequency traders relying on arbitrage strategies. The Appeal Court concluded that, in contrast, neither the longer distance between Burgundy's and Nasdaq's trading servers, nor the higher costs for customers that might have considered co-locating with both Burgundy's and Nasdaq's trading servers, materially affected Burgundy's ability to compete. The Court referred to the example of the London-based trading platform BATS Chi-X, which was not co-located with the incumbent London Stock Exchange, but was able to successfully compete because of its fast, low latency trading servers. In light of this evidence, the Appeal Court concluded that Nasdaq's conduct was not capable of having the anticompetitive effects that KVV had alleged, and therefore dismissed KKV's action.

CARTELS AND HORIZONTAL AGREEMENTS

– EUROPEAN UNION LEVEL –

In this section, we give a factual overview of significant case developments at EU level and then provide a more detailed analysis of important substantive or procedural developments addressed in these cases.

Summary of Significant Case Developments

European Commission re-adopts decision in reinforcing steel bar cartel case for third time and imposes fines totalling more than € 16 million on steel producers

On 4 July 2019, the European Commission (the "Commission") adopted for the third time a cartel decision in which it imposed total fines of more than € 16 million on five Italian manufacturers of reinforcing steel bars for concrete, namely AlfaAcciai, Feralpi Holding, Ferriere Nord, Partecipazioni Industriali (Riva Fire) and Valsabbia Investimenti / Ferriera Valsabbia. These companies were found to have participated in a price-fixing cartel between December 1989 and July 2000.

This cartel has already been the subject of two previous Commission decisions. In December 2002, the Commission adopted a decision imposing fines on eight steel manufacturers and an Italian steel manufacturers' association. However, this decision was annulled by the General Court (the "GC") in 2007.

In 2009, the Commission re-adopted a decision imposing fines on all eight companies. In 2014, the GC upheld that decision, which became final for the three companies that had not appealed (see VBB on Competition Law, Volume 2014, No. 12). In 2017, the Court of Justice of the European Union (the "ECJ") set aside the GC's judgments and annulled the 2009 Commission decision (see VBB on Competition Law, Volume 2017, No. 9). In its judgment, the ECJ held that the GC had committed an error of law in holding that the Commission was not obliged to invite the competition authorities of the Member States to participate in an oral hearing before the re-adoption of the decision. This failure constituted an infringement of an essential procedural requirement, which justified the annulment of the GC judgment and the Commission decision.

The Commission decided to re-impose fines on the five manufacturers that had escaped fines based on the public interest in pursuing an effective and deterrent enforcement against cartels. The re-adopted decision includes an exceptional 50% fine reduction for all five companies due to the long duration of proceedings which was not attributable to the companies involved.

Court of Justice dismisses appeal brought by Commission in Yen Interest Rate Derivatives cartel case

On 10 July 2019, the Court of Justice of the European Union (the "ECJ") delivered a judgment on an appeal lodged by the European Commission (the "Commission") against the judgment of the General Court (the "GC") that had annulled the fines imposed by the Commission on ICAP in the Yen Interest Rate Derivatives cartel case (Case C-39/18, *Commission v. ICAP and Others*).

In 2015, the Commission found that ICAP, an operator active in brokerage services, had facilitated six cartels involving various banks on the Yen Interest Rate Derivatives market (see VBB on Competition Law, Volume 2015, No. 2). On appeal, the GC annulled the decision on the ground that the Commission had not provided sufficient evidence concerning its methodology for setting the fines (see VBB on Competition Law, Volume 2017, No. 11).

In its judgment, the ECJ dismissed the single plea put forward by the Commission which alleged that the GC had erred in law in holding that the determination of the amount of the fine imposed on ICAP was not sufficiently reasoned in the decision. The ECJ ruled that, when the Commission departs from its standard fining methodology, it is necessary, in view of the rights of defence, for sufficient information to be disclosed to the interested parties so that they may assess whether the decision is vitiated by an error enabling its validity to be challenged, as well as permitting review by EU courts (see section below).

Analysis of Important Substantive and Procedural Developments

Yen Interest Rate Derivatives cartel case – Commission must state reasons for departing from standard fining methodology and may use different methodologies for setting the fine in context of same decision

Under point 37 of the 2006 Fining Guidelines (the "Fining Guidelines"), the European Commission (the "Commission") may depart from the standard fining methodology set out in point 13 of the Guidelines if this is justified by the particularities of a given case or if there is a need to achieve deterrence. In such circumstances, the Commission is required to provide a statement of reasons for this departure, indicating 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 party targeted by the 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 *Yen interest rate derivatives* cartel case, in calculating the fines imposed on ICAP, the Commission departed from its standard fining methodology, instead relying on point 37 of the Fining Guidelines. The Commission justified this departure by the fact that ICAP was not active on the Japanese Yen interest rate derivatives market and that the value of sales, namely ICAP's brokerage fees, would not be an appropriate proxy to reflect the gravity and nature of the infringement at issue.

On appeal, ICAP argued before the General Court (the "GC") that the Commission had not properly justified its departure from the Fining Guidelines. The GC agreed with ICAP and noted that the Commission had limited its justification for relying on point 37 to a general statement that the fines reflected the gravity, duration and nature of ICAP's involvement in the infringements at issue, as well as the need to ensure sufficient deterrence. Accordingly, neither ICAP nor the GC could understand the justification for the methodology favoured by the Commission and, for that reason, the General Court annulled the decision (see VBB on Competition Law, Volume 2017, No. 11).

In its judgment, the Court of Justice of the European Union (the "ECJ") dismissed the single plea put forward by the Commission on appeal, which alleged that the GC had erred in law in holding that the determination of the amount of the fine imposed on ICAP was not sufficiently reasoned in the decision.

The ECJ considered that, although the Commission is not required to provide all of the figures concerning each of the steps relating to the method of calculating the fine, the Commission has a duty to explain the weighting and the assessment of the factors taken into account. Whether the explanation provided by the Commission is sufficient is an issue that must be assessed in light of the circumstances at issue.

The ECJ acknowledged that, in the *Treuhand* case (Case C-194/14)(in which the Commission had set a lump sum as the basic amount of the fine imposed on Treuhand, which had also facilitated the cartel), it had found that it was sufficient that the Commission's reasoning stated that account had been taken of the gravity and the duration of the infringements when determining that amount. The ECJ added, however, that it could not be inferred from that judgment that such reasoning is always sufficient, irrespective of the particularities of the situation in question.

The ECJ noted that the circumstances of the *Treuhand* case differed from those in the present case. Indeed, the Commission determined the basic amount of the fine on ICAP and R.P. Martin (another broker involved in the infringement) on the basis of the same method developed to deal with the particular situation of facilitators. Siding with the GC, the ECJ found that (i) the decision did not enable ICAP to understand the justification for the methodology used by the Commission, nor did it allow the EU courts to verify that justification and (ii) the decision did not provide the minimum information which might have made it possible to understand and ascertain the relevance and the weighting of the factors taken into account by the Commission in the determination of the basic amount of the fines.

The ECJ also took the view that the explanation provided by the Commission at the stage of the proceedings before the GC should not be taken into account for the purpose of assessing whether the obligation to state reasons had been complied with. Accordingly, the ECJ dismissed the appeal lodged by the Commission and confirmed the annulment of the decision.

– MEMBER STATE LEVEL –

FRANCE

French Competition Authority fines cooperative for having partitioned French distribution market of raw materials and equipment to bakers

On 8 July 2019, the French Competition Authority (the "FCA") imposed a fine of € 1.7 million on the cooperative Back Europ for having partitioned the French market for the distribution of raw materials and equipment to bakers for 30 years.

Back Europ is a cooperative that operates in the market for the wholesale distribution of bakery products (namely fresh or frozen semi-finished products and frozen finished products) and raw materials (namely salt, sugar and specialised flour). Back Europ is comprised of 42 wholesaler-distributors and has a market share of 35%. According to the FCA, Back Europ's articles of association and internal rules of procedure provided that each wholesaler-distributor would benefit from an exclusive geographic distribution area. Members were divided into four geographic areas, with the exception of four cities (Bordeaux, Lyon, Marseille and Paris) which were open to competition. These articles and rules also provided that, in the event that one of the wholesaler-distributors did not comply with the market-partitioning scheme, the matter would be referred to the Board of Directors of Back Europ, which would then summon and hear the members concerned. A breach of the rules could lead to exclusion from the cooperative.

Back Europ did not dispute the facts and agreed to enter into settlement discussions. The FCA imposed on Back Europ a fine of € 1.7 million, an amount that took into account the gravity and the duration of the infringement, as well as the damage caused to the French economy.

GERMANY

Confectionery cartel: German Federal Court of Justice annuls judgment of Higher Regional Court of Düsseldorf and remands case for new trial

On 21 June 2019, the Federal Court of Justice (the "FCJ") annulled a judgment of the Higher Regional Court of Düsseldorf which had confirmed and partially increased fines on four confectionery producers and their managers for an alleged illegal exchange of information. The FCJ found that the Higher Regional Court of Düsseldorf had erred in law in its appraisal of evidence.

The underlying fining decision of the German Federal Cartel Office ("FCO") dates back to January 2013, when the FCO fined ten confectionery companies and an industry association a total of approximately € 20 million for exchanging information about their negotiations with retailers and planned list price increases during working group meetings of the association between 2003 and 2008 (see VBB on Competition Law, Volume 2013, No. 2). On appeal, the Higher Regional Court of Düsseldorf confirmed and partially increased the fines in January 2017 (see VBB on Competition Law, Volume 2017, No. 2).

On further appeal of four companies, the FCJ ruled that there was a fundamental legal error to the detriment of the defendants. The assessment of evidence was found to be incomplete because the judgment did not include the exonerative statements of the managers brought forward by the defendants. The FCJ considered that the Higher Regional Court of Düsseldorf should have reproduced and assessed the exonerative statements of the managers in its reasoning.

According to the FCJ, in order to establish the existence of anti-competitive behaviour, the Higher Regional Court of Düsseldorf should not have relied solely on the incriminating testimony of witnesses, who, like the managers, had participated in the industry association meetings, without assessing the content of the managers' statements in light of the other evidence and testimony. In particular, the Higher Regional Court of Düsseldorf failed to address potential motives behind the witnesses' incriminating testimonies (i.e., achieving settlement and/or termination of the proceedings with regard to the respective participants) and did not question the reliability of these testimonies or consider that they might be false.

This flaw made it impossible for the FCJ to review whether the evidence had been properly assessed and whether such evidence supports the underlying fining decision. Therefore, the FCJ annulled the judgment of the Higher Regional Court of Düsseldorf in its entirety and remanded the case for a new trial to another cartel senate of the Higher Regional Court of Düsseldorf.

VERTICAL AGREEMENTS

– EUROPEAN UNION LEVEL –

European Commission fines Sanrio € 6.2 million for restricting cross-border sales of merchandising products

On 9 July 2019, the Japanese company Sanrio was fined € 6.2 million by the European Commission ("Commission") for infringing Article 101 Treaty on the Functioning of the European Union by restricting cross-border sales by its licensees.

According to the Commission's press release, the case concerned non-exclusive licences granted by Sanrio under intellectual property rights, such as trademarks or copyright, in relation to merchandising products bearing logos or images of Sanrio characters such as Hello Kitty and Chococat. Licensed merchandising products are very varied and include mugs, bags, bedsheets, stationery and toys.

The Commission found that Sanrio breached Article 101 by imposing contractual restrictions on cross-border sales in the EU, including outright prohibitions on cross-border sales, obligations on licensees to refer out-of-territory orders to Sanrio and limitations on the languages which licensees could use on products. In addition, Sanrio enforced indirect measures to ensure compliance with these restrictions, including auditing licensees and not renewing the licences of licensees which did not respect the restrictions.

The infringement lasted nearly eleven years (from January 2008 to December 2018). Benefiting from the Commission's novel (and still informal) 'cooperation procedure', Sanrio received a 40% reduction in the fine as a result of the extent of its cooperation with the Commission during the investigation which exceeded its legal obligations. This cooperation involved submitting information that enabled the Commission to extend the duration of the infringement, as well as providing other evidence that was of significant added value to the Commission's investigation. In addition, Sanrio acknowledged both the Commission's description of the relevant facts and its legal assessment of the infringements.

Although the details of the case are limited as the decision has not yet been made available, the case nonetheless appears to be similar to the *Nike* case decided by the Commission in March 2019, in which Nike was fined € 12.5 million for restricting its non-exclusive licensees from making cross-border sales of football merchandising products (see VBB on Competition Law, Volume 2019, No. 3). A third investigation into alleged restrictions of cross-border sales in licensing agreements, involving Universal Studios, is on-going.

Sanrio is the seventh company to be fined by the Commission for infringements in relation to vertical agreements in the past year (and the third in respect of restrictions of cross-border sales), further evidencing the priority being given by the Commission to the enforcement of the competition rules with respect to vertical agreements. In all seven cases, fine reductions of between 40% and 50% have been granted under the cooperation procedure, which has enabled the Commission to achieve major administrative efficiencies.

– MEMBER STATE LEVEL –

FRANCE

French Competition Authority fines Bikeurope € 250,000 for online sales restrictions

On 1 July 2019, the French Competition Authority ("FCA") imposed a fine of € 250,000 on Trek Bicycle Corporation and its subsidiary Bikeurope B.V. (together "Bikeurope") for having prohibited its authorised retailers from selling its bicycles online from 2007 to 2014, a restriction by object that breached Article L.420-1 of the French Commercial Code and Article 101 Treaty on the Functioning of the European Union.

Bikeurope assembles, distributes and sells high-end bicycles through a network of authorised resellers. According to the FCA, Bikeurope's general terms and conditions of sale initially required that any bicycles sold online had to be delivered to the "authorised place of sales", that is, the retailer's brick and mortar shop. Bikeurope subsequently imposed an absolute prohibition of online sales. Bikeurope monitored the conduct of its retailers and, in the event of non-compliance, sent warning letters, as well as threats to terminate commercial relations. As a result of Bikeurope's conduct, retailers either did not sell bicycles online or ceased doing so.

The FCA considered that the online sales restriction imposed by Bikeurope on its retailers went beyond what was necessary to protect the safety of consumers. It further considered that the restriction was not justified by the technical characteristics of the bicycles, or by the need to preserve the image of the brand or the quality of the services provided to customers.

In determining the amount of the fine, the FCA did not count as a mitigating circumstance the fact that, in 2014, Bikeurope voluntarily removed the restrictions at issue following the *Pierre Fabre* judgment delivered by the Paris Court of Appeal in the previous year (see VBB on Competition Law, Volume 2013, No. 2). That judgment, applying the preliminary ruling of the Court of Justice of the EU in the same case (Case C-439/09, *Pierre Fabre*; see VBB on Competition Law, Volume 2011, No. 10) had found that the prohibition of online sales by Pierre Fabre constituted a restriction by object.

PORTUGAL

Portuguese competition authority imposes fine of € 24 million for resale price maintenance in relation to beverages

On 25 July 2019, the Portuguese competition authority (Autoridade da Concorrência, "AdC") published a press release in which it announced that it has fined beverage producer Super Bock and two individuals € 24 million for, *inter alia*, fixing the minimum resale prices of beverages in hotels, restaurants and cafes between 2006 and 2017. The AdC initiated the investigation in 2016 following two complaints from former distributors of Super Bock, which claimed that their contracts contained vertical price-fixing clauses.

The fine is reportedly the largest fine to have been imposed for resale price maintenance in Portugal.

SWITZERLAND

Swiss Competition Commission fines tractor importer Bucher Landtechnik € 135,000 for restricting spare parts imports

On 17 July 2019, the Swiss Competition Commission announced that, in a settlement, it has fined Bucher Landtechnik, the country's main importer of New Holland tractors, CHF 150,000 (€ 135,000) for restricting the import of tractor spare parts into Switzerland between July 2016 and April 2017, by prohibiting distributors from purchasing spare parts from suppliers other than Bucher Landtechnik. In addition, Bucher Landtechnik used an incentive system which linked the purchase quantity of spare parts to discount conditions for New Holland tractors. Both the purchase obligation and the incentive system were found to have excluded sales from foreign suppliers to Bucher Landtechnik dealers, thereby restricting competition. Under the terms of the settlement, Bucher Landtechnik agreed to permit dealers to purchase spare parts for New Holland tractors from the supplier of their choice. The case is a further example of the strict approach taken by the Swiss Competition Commission in relation to restrictions that impede imports into Switzerland.

STATE AID

– EUROPEAN UNION LEVEL –

General Court further clarifies conditions for challenging State aid decisions: Air France's action against State aid in favour of Marseille Airport is dismissed

On 11 July 2019, the General Court ("GC") rejected an action for annulment brought by Air France against the European Commission ("Commission") decision concerning State aid in favour of Marseille Provence Airport as inadmissible (Case T-894/16, *Société Air France v. Commission*).

The judgment offers guidance on the conditions for bringing a direct action against a decision authorising State aid in favour of a competitor.

First, the GC noted that part of the State aid entailed a subsidy for the development of Marseille Airport, which was granted to the Chamber of Commerce and Industry of Marseille Provence ("CCIMP"). In this regard, the GC noted that the recipients of the State aid were the CCIMP and Marseille Airport, neither of which competes with Air France.

In addition, contrary to what Air France argued, Ryanair was not a recipient of this part of the State aid. The GC noted that Ryanair did not have any preferential access to the terminal that was built thanks to the aid. Not only was the use of that terminal not reserved to a particular airline, but its usage had been assigned on the basis of an open procedure, in which the applicant had taken part. Air France could have had access to that terminal in the same way as Ryanair had access, provided that the negotiations between the applicant and the operator of the airport had been successful. Therefore, Air France could not have standing to challenge the subsidy for the development of Marseille Airport on the basis of the case law concerning annulment actions by competitors.

Second, the GC observed that the remaining part of the State aid consisted, essentially, in more favourable passenger charges for the new terminal. The GC emphasised that Air France is active on this market. However, it noted, *inter alia*, that Air France had not demonstrated that the measure would substantially affect its market position.

In particular, even supposing that Air France and Ryanair were the main users of Marseille Airport, it had not been demonstrated that Air France's competitive position would be substantially affected as a result of the State aid.

In this regard, the GC drew a distinction between those situations where a competitor's position is directly affected, rather than substantially affected. Only the latter hypothesis would open the way for the competitor to bring a direct action against the State aid granted to the recipient. If the competitor's market position is only directly but not substantially affected, such an undertaking cannot meet the direct and individual concern criteria.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– EUROPEAN UNION LEVEL –

French, German and Polish Ministries for Economic Affairs publish joint paper on modernisation of EU competition policy

In their call for changes to EU merger control and State aid rules (see VBB on Competition Law, Volume 2019, No. 2), the French and German Ministries for Economic Affairs have been joined by their Polish counterpart. On 4 July 2019, they published a joint paper (available here) containing a number of suggestions for a reform of competition law, with a particular focus on merger control. The proposals are aimed at protecting EU companies from non-EU competition. The proposed amendments include:

- taking account of third countries' state control and subsidies for undertakings in merger investigations;
- strengthening merger enforcement in the tech sector focusing on potentially predatory acquisitions and enabling ex-post reviews, as well as the introduction of a transaction-based threshold similar to the system in place in Austria and Germany;
- strengthening European joint ventures and cooperation (allowing the creation of "European champions").

The possibility of a veto by the European Council against Commission merger decisions in well-defined cases, as suggested by France and Germany in their previous manifesto, does not feature in the present proposal.

G7 competition authorities publish common understanding on competition in the digital economy

On 18 July 2019, the competition authorities of the G7 countries published a Common Understanding (available here) of the issues raised by the enforcement of competition law in the digital economy. The competition authorities presented their Common Understanding at the meeting of the G7 finance ministers held in France under the aegis of the French presidency.

The communication is available on the websites of the French, German, and Italian Competition Authorities, along with the text of the Common Understanding in English. The document focuses on four key aspects:

- the importance of competitive markets for well-functioning economies and the potential of the digital economy for innovation and growth;
- the flexibility of existing antitrust rules which allows adapting them to challenges posed by the digital economy without abandoning their guiding principles and goals;
- the relevance of advocacy and of competition impact assessment of policies, showing a consensus on the necessity of assessing whether proposed and existing laws and regulations unnecessarily hinder competition in digital markets; and
- the need for greater international cooperation and convergent competition law enforcement.

– MEMBER STATE LEVEL –

GERMANY

German competition authority publishes annual report 2018 and biannual activity report 2017/2018

On 27 June 2019, the German Federal Cartel Office ("FCO") published its annual report 2018 and biannual activity report 2017/2018. The reports include statistics on the total amounts of fines, leniency applications and merger pro-ceedings, describe the FCO's policies and the key cases which the authority concluded during the reporting period.

Key topics in 2018 were the digital economy and consumer protection. The FCO thus concluded the abuse investigation into Facebook's data collection practices, published a series of papers on "Competition and Consumer Protection in the Digital Economy" and conducted sector inquiries on online advertising, online comparison websites, smart TVs and user reviews on digital platforms which uncovered possible infringements of the German Act against Unfair Competition ("UWG"). In the accompanying press release, the FCO states that it would be in the interests of consumers if the FCO was granted additional enforcement powers on the basis of the UWG in order to remedy deficiencies.

The annual report 2018 shows that the number of leniency applications is decreasing, and, in the framework of the upcoming reform of the German Act against Restraints of Competition, anticipates a decrease in the number of merger reviews (approx. 1300 in 2018) and a stronger focus on mergers which might really affect consumers.

ITALY

Three Italian Authorities issue joint guidelines and policy recommendations on Big Data

On 10 July 2019, the Italian Competition Authority ("AGCM"), the Italian Communications Authority ("AGCOM") and the Italian Data Protection Authority, adopted a joint document laying down guidelines and policy recommendations concerning Big Data. The document addresses some of the concerns raised by the digital economy with regard to privacy, competition and consumer protection.

The document is the result of a joint survey conducted by the three Authorities in cooperation with the main economic operators in the telecommunications, publishing and financial sectors. Experts and academics were also asked to contribute to the survey.

The guidelines and policy recommendations cover four main areas.

1. *Cooperation between the competent authorities, both at the national and the EU levels*: the guidelines suggest the adoption of a common EU policy with regard to data treatment and processing by public authorities. The document also suggests setting up a permanent body coordinating the activities of the national authorities. Cooperation will also have to be accompanied by a strengthening of national authorities' data collection and sanctioning powers.

2. *Relationship between competition rules and data*: the document suggests pursuing consumer welfare objectives through competition law such as, for instance, assessing quality, innovation and equity of services offered on the web. Moreover, it points out the necessity of reforming merger control rules in order to increase the effectiveness of national authorities' intervention. Authorities should be given the power to review concentrations below the thresholds for notification, in view of the restrictions of competition that such concentrations may entail (e.g., through the acquisition of under-valued start-ups). In addition, the guidelines advocate the introduction of an assessment tool more appropriate to the digital economy and based on the "SIEC" merger control test of the European Commission (i.e., substantive impediment to effective competition).

3. *National legislation and digital economy*: the guidelines recommend a national legislative framework aimed at ensuring a transparent development of the digital economy. The legislator is called upon to introduce new tools promoting on-line pluralism (e.g. a requirement for online platforms to promote completeness, accuracy and verifiability of online information) and rules facilitating data mobility among different online platforms.

4. *Protection of consumer data*: the document stresses the necessity of reducing the information gap between consumers and operators as well as between smaller and bigger online platforms in relation to data collection, in order to ensure that weaker parties are informed about the purposes and terms of data treatment. Similarly, digital economic operators will have to make sure that the nature and characteristics of data are assessed prior to their treatment, so as to identify the applicable rules preliminarily.

The final document encompassing the definitive reports of the three Authorities will be published soon.

OTHER DEVELOPMENTS:

AUSTRIA: The Austrian Federal Competition Authority published its annual report 2018 which includes statistics on fines and merger reviews. It also covers the first results yielded by the new anonymous whistleblowing system launched in February 2018.

LITHUANIA: On 1 July 2019, the amendments to Lithuanian competition law, adopted by the Lithuanian Parliament on 14 March 2019, entered into force. They include, among other matters, the introduction of a financial incentive for whistle-blowers (see VBB on Competition Law, Volume 2019, No. 3).

PRIVATE ENFORCEMENT

– EUROPEAN UNION LEVEL –

European Commission seeks feedback on measures to protect confidential information in damages actions

On 29 July 2019, the European Commission ("Commission") published a draft communication which is designed to provide guidance to national courts when dealing with requests for disclosure of confidential information in competition-based actions for damages. The Commission is seeking feedback on the draft communication from interested stakeholders.

As a result of Directive 2014/104/EU 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, which has now been transposed into the national law of each Member State, there has been a general rise in follow-on actions for damages in Europe. In such cases, national courts have the power to order the disclosure of relevant evidence, subject to adopting measures to protect confidential information. However, the scope of the protection afforded to confidential information differs between Member States. The draft communication is intended to provide national courts with non-mandatory practical guidance on selecting effective protective measures for such information, while not jeopardising the interests of victims of competition infringements in substantiating their claims.

The draft communication indicates that information may be confidential if, by analogy, it meets the strict criteria set out in the Trade Secrets Directive. In addition, national courts may refer to EU case law which holds that evidence is confidential if (i) it is known to a limited number of people, (ii) it is liable to cause serious harm when disclosed, and (iii) the interests liable to be harmed are worthy of protection.

As regards practical measures for the protection of confidential information, the draft communication details a number of common measures used by national courts, such as the imposition of confidentiality rings where information is only disclosed to named individuals; the use of redacted documents to remove confidential information; the appointment of third party experts to prepare non-confidential versions of specific documents; and, conducting specific parts of an action for damages *in camera* (i.e., attendance is limited to the parties).

The consultation on the draft communication is open until 18 October 2019 and is available here.

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