VBB on Competition Law

HIGHLIGHTS

MERGER CONTROL:
- Commission conditionally approves Staples’ acquisition of Office Depot
- Commission conditionally approves Liberty Global’s acquisition of BASE

ABUSE OF DOMINANT POSITION: Hungarian Competition Authority fines MasterCard for failure to decrease interchange fees

CARTELS AND HORIZONTAL AGREEMENTS: Price Signalling: Does the Commission’s position in the Liner Shipping case deviate from existing case law?

VERTICAL AGREEMENTS: Higher Regional Court of Frankfurt rules on restrictions on the use of online platforms and price comparison websites in the selective distribution system of Deuter

INTELLECTUAL PROPERTY/LICENSING: Competition and Markets Authority fines pharmaceutical companies £ 45 million over alleged “pay-for-delay” patent settlement agreements and abuse of dominant position

PRIVATE ENFORCEMENT: Düsseldorf Regional Court rejects car insurer’s claim for damages stemming from car glass cartel

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ECJ rejects Odile Jacob challenge to approval of Wendel divestitures in Lagardère/Vivendi case

On 28 January 2016, the Court of Justice of the European Union (“ECJ”) dismissed the appeal of Odile Jacob against the approval of a divestiture purchaser relating to the European Commission’s 2004 conditional approval of the Lagardère/Vivendi Universal asset sale.

In 2004, the Commission conditionally authorised Vivendi Universal’s sale of its European book publishing business to the Lagardère group, subject to the divestiture of significant assets to an approved buyer. When Lagardère obtained Commission approval of Wendel Investissement as the divestiture buyer, Éditions Odile Jacob, another candidate to purchase the assets, sought the annulment of both the underlying conditional merger approval and the blessing of Wendel as the divestiture buyer.

In 2010, the EU General Court (“GC”) held that the underlying authorisation was permitted but that the Commission’s procedure for approving Wendel as the divestiture buyer was flawed (see VBB on Competition Law, Volume 2010, No. 9). In particular, the GC ruled that the trustee whose report the Commission had relied upon was insufficiently independent, because the president of the firm serving as trustee had simultaneously acted as a member of the executive board of the seller, Vivendi. The GC therefore annulled the approval of Wendel as the divestiture buyer, and the ECJ upheld this judgment in 2012 (see VBB on Competition Law, Volume 2012, No. 11).

In 2011, the Commission adopted a new decision, based on the report of a different trustee, again approving Wendel as the divestiture purchaser with retroactive effect dating to the original 2004 approval decision. Odile Jacob’s application to annul this second decision was rejected by the GC in 2014, and Odile Jacob appealed to the ECJ.

The ECJ considered that the GC’s annulment of the 2004 approval decision effectively required that the Commission adopt a new decision approving or rejecting Wendel as the divestiture buyer based on a new report by a new trustee who was sufficiently independent. The ECJ considered that this was precisely what the Commission had done in 2011 in its second approval decision.

Odile Jacob contended that there was no legal basis for this second approval decision to have retroactive effect. However, the ECJ considered that this retroactive effect was necessary to serve the interest of res judicata by remedying the legal void caused by the annulment of the original Wendel approval decision, and it considered that the legitimate expectations of interested parties were duly respected.

Finally, Odile Jacob argued that the presence of the same individual in the management of both Lagardère and Wendel made Wendel insufficiently independent to be a suitable divestiture buyer. The ECJ held that this alone, in the absence of other financial and material links, was not enough to demonstrate Wendel’s dependence on Lagardère and thus annul the decision.

The ECJ therefore upheld the judgment of the GC and the Commission’s retroactive approval of the divestiture to Wendel.

Commission conditionally approves Staples’ acquisition of Office Depot

On 10 February 2016, the European Commission approved the acquisition by Staples of its fellow US-based office supplier Office Depot, subject to the divestiture of the entirety of Office Depot’s EEA activities in particular routes to market.

Both parties are suppliers of office products which sell through a variety of channels including, most notably, so-called contract sales whereby large customers purchase their requirements according to a framework contract awarded by tender. The Commission concluded that such contract sales in a given Member State constituted a separate relevant market and that contract sales to international customers, requiring supply in many countries, constituted yet another relevant market.
On the international contract sales market, the Commission considered that only the parties and Lyreco were capable of supplying large business customers, and that the volume of requirements to be supplied in many countries created a barrier to entry. Moreover, the Commission found that national contracts were not a suitable alternative for such customers due to the higher prices and administrative costs involved, and that competitors selling through online channels such as Amazon did not significantly constrain contract suppliers.

In addition, the Commission considered that the transaction would have raised concerns in the markets for contract sales in Sweden and the Netherlands and for wholesale supply in Sweden where, again, few competitors were capable of supplying large customers.

Staples therefore agreed to divest the entirety of Office Depot’s contract sales business in the EEA and Switzerland and all of Office Depot’s activities in Sweden, subject to the Commission’s approval of a suitable purchaser. The Commission was of the opinion that this remedy would address its concerns, and thus conditionally approved the acquisition after a phase II review.

Commission conditionally approves Liberty Global’s acquisition of BASE

On 4 February 2016, the European Commission conditionally approved the acquisition of Belgian mobile network operator (“MNO”) BASE by Liberty Global, which controls the Belgian telecommunications operator and mobile virtual network operator (“MVNO”) Telenet. Telenet has a significant position in a range of telecommunications markets, mainly in Flanders.

The Commission focused on the markets involving mobile communications and ignored possible issues associated with other markets in relation to Telenet’s cable network. It considered that in mobile communications BASE, one of only three MNOs in Belgium, has been a particularly aggressive competitor, offering attractive prices. At the same time, Liberty Global’s Telenet has been an exceptionally successful MVNO, i.e., an operator that does not own a network of its own but relies on the network of another operator to offer its mobile services. The Commission therefore considered that the transaction would combine two important competitive forces and further concentrate the Belgian mobile market.

Liberty Global therefore agreed to a multi-part remedies package to establish an upfront buyer with whom BASE has an existing relationship, the Belgian broadcaster Medialaan, as a competing MVNO. First, Liberty Global agreed to sell to Medialaan BASE’s share in Mobile Vikings, a competing MVNO which currently uses BASE’s network. Second, Liberty Global committed to transfer to Medialaan the customers which BASE currently serves under the brand JIM Mobile, a brand already owned by Medialaan. Third, Liberty Global concluded an agreement to give Medialaan access to BASE’s mobile network on terms allowing it to compete effectively as a fully-developed MVNO. On 28 January 2016, the Belgian Competition Authority had already approved the transaction that involved parts 1 and 2 of the above remedies package under the Belgian merger control rules. The Commission considered that these commitments eliminated competition concerns and conditionally approved the acquisition after a Phase II review.

– MEMBER STATE LEVEL –

GERMANY

Higher Regional Court of Düsseldorf rules on interim order regarding implementation of EDEKA/Tengelmann merger

In a recently published judgment issued on 9 December 2015, the Higher Regional Court of Düsseldorf (the "Court") ruled that implementation of a framework supply contract between supermarket chains Tengelmann and EDEKA would amount to implementation of their concentration in breach of the standstill obligation, which prohibits parties from implementing their transaction prior to obtaining merger approval. However, the Court added that the German Federal Cartel Office ("FCO") had not provided sufficient reasons to issue an interim order prohibiting the execution of the contract.

In October 2014, EDEKA notified its proposed acquisition of competing supermarket chain Tengelmann to the FCO. The FCO prohibited the acquisition in March 2015 (see VBB on Competition Law, Volume 2015, No. 4). Together with the merger agreement, Tengelmann and EDEKA had concluded a framework that gave Tengelmann the option to purchase
all products from EDEKA. During the course of its review of the merger, the FCO issued an interim order prohibiting the execution of this framework contract because it would breach the standstill obligation. The FCO considered that it was a preparatory act forming part of the overall plan to implement the merger and would have negative effects on competition that could not be undone if the transaction was ultimately not approved.

In its judgment of 9 December 2015, the Court held that the FCO was right to conclude that the framework contract would be illegal because it would breach the standstill obligation. However, the Court found that the FCO did not have sufficient reasons to issue the interim order because the implementation of the framework agreement could relatively easily be reversed if the merger were prohibited. The Court therefore annulled the FCO’s decision.

THE NETHERLANDS

Highest Dutch appeal court annuls decision blocking bakery merger

On 11 February 2016, the Dutch Industry Appeals Tribunal (the "Tribunal"), the administrative court of last instance in competition law matters, annulled the decision of the Dutch Competition Authority ("DCA") prohibiting the merger between Continental Bakeries and A.A. ter Beek. The Tribunal held that the DCA had incorrectly defined the relevant product market.

In 2011, the DCA prohibited the merger between the two bakeries based on competition concerns in the markets for rusk, a crisp, twice-baked bread product. The DCA had found that there were separate product markets for the retail sale of rusk to consumers and the upstream production and sale to retailers, with the parties having a significant combined share on this upstream market. Although one party sold its own brand of rusk and the other sold private labels, the DCA had concluded that, because branded and private label rusk are substitutable from the perspective of consumers, and because that demand substitution in turn impacted retailers’ procurement decisions on the upstream market, branded rusk and private-label rusk fell within a single upstream product market.

The bakeries appealed the DCA’s decision arguing that the DCA had erred in its definition of the relevant product. Although the court of first instance had dismissed the bakeries’ claims, on further appeal the Tribunal concluded that substitutability on the downstream market for consumers had only a limited effect on the upstream market for retailers. In particular, since the retailers’ pricing strategies used the margins on their sales to consumers to offset their upstream purchase prices, it could not necessarily be inferred that private label rusk and branded rusk belonged to the same upstream product market simply because they belonged to the same downstream product market. According to the Tribunal, the DCA had therefore erroneously defined the relevant market, and the Tribunal annulled the DCA’s prohibition decision.

– OTHER DEVELOPMENTS –

EUROPEAN UNION: On 26 February 2016, the European Commission held that the mere acquisition by the UK supermarket joint venture Netto of a recently-closed supermarket property from Morrisons did not fall within the scope of EU merger control rules. Because the object of the transaction, a property that had closed in November 2015, was “limited to the transfer of freehold property” and did not involve the transfer of tangible or intangible assets, goodwill, or employees, it could not be considered a business with a market presence to which turnover could be attributed, and the transaction was not a concentration. The case provides a rare precedent on when the sale of property or assets is not considered an acquisition of the whole or parts of an undertaking and thus falls outside the scope of the EU Merger Regulation.

EUROPEAN UNION: On 16 February 2016, a third-party study commissioned by the European Commission concluded that the Commission’s analytical approach and use of evidence in defining relevant geographic markets are generally correct. Among other findings, the study concluded that the Commission is rightly skeptical of arguments that the relevant geographic market should be broad because of importers’ ability to shift production and supply to regions where they do not currently have significant market shares. However, the study also suggested that, without defining the relevant markets differently, the Commission should be more open to whether an importer’s significant capacity outside the relevant geographic market might indicate that it constrains competitors within that market.
ABUSE OF DOMINANT POSITION

– MEMBER STATE LEVEL –

HUNGARY

Hungarian Competition Authority fines MasterCard for failure to decrease interchange fees

By a decision issued on 11 January 2016 and published on 1 February 2016, the Hungarian Competition Authority (“GVH”) fined MasterCard Europe SA (“MasterCard”) 88 million HUF (approximately € 284,000) for abusing its dominant position from 8 February 2011 to 31 December 2013. The abuse consisted of MasterCard’s failure to decrease the interchange fees of its consumer debit cards issued in Hungary to the level of Visa’s interchange fees.

In its decision, the GVH established that MasterCard was dominant in the Hungarian debit card market during the relevant period, and explained that the abuse of this dominant position consisted of determining interchange fees above those set by Visa. Visa’s interchange fees on domestic transactions made by consumer debit cards have been subject to a cap since 2011 as a result of the commitments which it accepted within the framework of a European Commission investigation into interchange fees. Because card-issuing banks have an interest in choosing a credit card company with a higher interchange fee, the GVH considered that MasterCard’s application of a higher interchange fee amounted to an abusive exclusionary practice. The case exemplifies how the application of EU competition law can influence national competition law in a variety of ways.
In the following sections, we first provide a factual overview of significant developments at EU level and then offer detailed analysis of important substantive or procedural developments addressed in these cases.

### Summary of Significant Case Developments

**Container Liner Shipping Investigation** - Commission seeks feedback on commitments in response to allegations of illegal price signalling

On 16 February 2016, the European Commission announced that it was seeking feedback on commitments offered by 15 container liner shipping companies. The Commission had previously opened proceedings to investigate, inter alia, whether the companies’ practice of regularly announcing on their websites or via specialised press their intentions to apply future price increases on similar routes and on similar implementation dates breached the EU antitrust rules (see VBB on Competition law, Volume 2013, No. 11). The companies concerned are China Shipping, CMA CGM, Evergreen, Hamburg Süd, Hanjin, Hapag Lloyd, HMM, Maersk, MOL, MSC, NYK, OOCL, UASC and ZIM.

**Retail Food Packaging Cartel Case** - General Court suspends obligation to post a bank guarantee for fine repayment

On 15 December 2015, the President of the EU General Court ("GC") issued an interim order in which it suspended the obligation imposed on Consorzio Cooperative di Prodizione e Lavoro SCWefalische Drahindustrie GmbH ("CCPL") to post a bank guarantee for the € 33 million fine imposed on it for its participation in the Retail Food Packaging cartel (Case T-522/15 R, CCPL and Others v Commission), subject to conditions.

**Animal Feed Phosphates Cartel Case** - Court of Justice annuls General Court judgment on bank guarantees

On 28 January 2016, the EU Court of Justice ("ECJ") annulled the judgment of the EU General Court ("GC") in so far as it had found that the European Commission had provided sufficient reasoning enabling Comércio e Indústria Química and Sociedade Gestora de Participações Sociais to understand why they had to post a "AA" rated bank guarantee on the € 2.8 million fine imposed on them for their participation in the Animal Feed Phosphates cartel (Case C-415/14, Quimitécnica.com - Comércio e Indústria Química, SA and José de Mello - Sociedade Gestora de Participações Sociais, SA v European Commission).

### Analysis of Important Substantive and Procedural Developments

**Price Signalling: Does the Commission’s position in the Liner Shipping case deviate from existing case law?**

While public price announcements are common commercial practice in many markets, such announcements may be challenged as illegal price signalling if they have the object or effect of restricting competition among suppliers. The question remains, however, whether such announcements are unilateral actions or concerted practices, as only concerted practices are subject to Article 101 TFEU.

According to the press release which the European Commission published in the Liner Shipping case (see above), the Commission considers that these public price announcements may constitute concerted practices allowing the companies to coordinate their behaviour by enabling them to "test" whether they could implement a price increase reasonably without incurring the risk of losing customers. Further, the Commission considers that the public price announcements made by the liner shipping companies had little value for consumers as these price announcements did not indicate the fixed final price for the services concerned, but only the amount of the increase.

The most relevant proposed commitments are the following:

- the parties have offered to stop publishing and communicating price announcements, i.e., changes to prices expressed solely as the amount or percentage of the increase;
in order for customers to be able to understand and rely on price announcements, the price figures that the carriers announce will benefit from further transparency and include at least the five main elements of the total price (i.e., base rate, bunker charges, security charges, terminal handling charges and peak season charges if applicable);

any future announcements will be binding on the carriers as maximum prices for the announced period of validity (but carriers will remain free to offer prices below these ceilings); and

price announcements will not be made more than 31 days before their entry into force, which is usually when customers start booking in significant volumes.

The commitments would apply for a period of three years.

The Commission’s approach is noteworthy mainly because it may deviate from the reasoning espoused by the Court of Justice of the European Union (“ECJ”) in the Wood Pulp judgment (Case C-85/89, Ahlström osakeyhtiö and others v. Commission). In that case, the Commission had levied fines on several wood pulp producers for engaging in concerted practices by announcing prices publicly on a quarterly basis to customers in the European Union. However, on appeal, the ECJ found that the system of quarterly price announcements did not, of itself, breach EU competition rules nor did it constitute evidence of collusion.

Bank Guarantees: Further clarifications from the EU Courts

When a company is fined by the Commission for breaching competition rules, that company usually has three months to pay the fine, after which the Commission is entitled to charge default interest. If the decision is appealed, payment will be suspended pending the appeal against the provision of a bank guarantee, in which case default interest is applied at a rate lower than that applicable for non-payment.

The order of the EU General Court (“GC”) in the Retail Food Packaging cartel case and the judgment of the Court of Justice of the European Union (“ECJ”) in the Animal Feed Phosphates cartel case clarify conditions for the posting of bank guarantees, in particular where a company is in a dire financial condition and where a “AA” rated bank guarantee may not be available.

With respect to the Retail Food Packaging cartel decision, the Commission had indicated that the payment of the fine had to be made within three months from the date of the notification of the decision, after which interest was automatically due at the BCE rate (0.5%), increased by 3.5%. In the event of an appeal, the undertaking had to either pay the amount of the fine, or provide the Commission with a bank guarantee. If a bank guarantee was provided, then the interest rate to be paid by the undertaking on the fine was lower, i.e., the BCE rate (0.5%), increased by 1.5%. However, because CCPL was unable to pay the fine and unable to secure a bank guarantee in view of its dire financial situation, CCPL submitted an application to the GC for interim measures seeking to suspend its obligation to provide a bank guarantee as collateral to paying the fines.

In its order, the GC exceptionally suspended CCPL’s requirement to provide a bank guarantee on the grounds that: (i) it was sufficiently probable that the judge in the main proceedings would grant CCPL a reduction in fines imposed by the Commission; and (ii) it was impossible for CCPL to obtain a bank guarantee in view of its very difficult financial situation. Indeed, the GC noted that, despite requests made to 13 banks, CCPL was not able to secure a bank guarantee. However, the suspension was conditioned on two requirements, namely the payment of € 5 million as soon as practicable and the transmission to the Commission on a quarterly basis of detailed information on the implementation of its restructuring plan.

With respect to the Animal Feed Phosphates cartel decision, the parties involved in the cartel were informed under the terms of the Commission decision that they could pay the € 2.8 million fine in two instalments and benefit from a preferential interest rate if they provided a long-term “AA” bank guarantee. However, the Portuguese parties were unable to secure an “AA” rated bank guarantee because no Portuguese bank at the time could offer that rating, which led to the default payment interest rate (4.5%) being applied, resulting in more than € 36,000 of interest.

In its judgment, the ECJ overturned the judgment of the GC insofar as the GC had not carried out a fact assessment and an analysis of the discussions between the Commission and the parties as to the necessity and the proportionality of a bank guarantee requiring a “AA” rating. Importantly, the ECJ did not overturn the GC’s judgment on the merits of the
case, i.e., whether the “AA” rated bank guarantee was necessary and proportional, but instead overturned the GC’s judgment on procedural grounds, i.e., the GC had not ruled on the parties’ arguments relating to the communication of the justification of the “AA” rating. As a result, the ECJ referred the matter back to the GC.

– MEMBER STATE LEVEL –

BELGIUM

Belgian Competition Authority adopts second settlement decision in industrial battery cartel case

On 23 February 2016, the College of Competition Prosecutors (the “Competition College”) of the Belgian Competition Authority adopted its second settlement decision involving six battery manufacturers (Battery Supplies, Celectic, Emrol, Enersys, Exide Technologies and Hoppecke) on account of these parties’ involvement in a price fixing cartel between 2004 and 2014. The total fines imposed amount to € 3,857,000.

The infringement concerned the motive power battery segment of the Belgian industrial batteries’ market, as well as maintenance contracts related to such batteries. Motive power batteries are mainly used as an energy source in forklifts, locomotives and floor cleaning devices. In its decision, the Competition College found that the battery manufacturers had agreed to apply a lead surcharge to the selling prices of motive power batteries, in breach of Article 101 of the Treaty on the Functioning of the European Union and its Belgian equivalent, Article IV.1 of the Code of Economic Law. A lead surcharge is a fee charged on top of the net price of a motive power battery. The battery manufacturers had added the surcharge to adjust their prices to the sudden price increase of lead in 2003, an important component in the production cost of batteries.

The Competition College considered that the cartel could be divided into two periods. During the first period, i.e., 2004 to 2007, the companies involved held meetings during which they discussed the amount of the lead surcharge to be charged per battery type for each quarter. During the second period, i.e., after 2007, Enersys, in discussions with Hoppecke, calculated the lead surcharge for each quarter based on a fixed formula, i.e., on the capacity (ampère-hour) of a battery, and then communicated it to the other cartel participants. The investigation did not reveal the existence of a penalty mechanism to ensure compliance.

The Competition College considered that this conduct constituted a single and continuous infringement, given that all companies involved were aware, or should reasonably have been aware, that their behaviour contributed to the common objective of lessening competitive constraints between them. In addition, the Competition College found that competition in Belgium and trade between Member States were affected by these practices given that the participants represented around 70% of the Belgian market. Finally, the Competition College also considered that there was no element in this case suggesting that the practices contributed to any efficiency.

The Competition College’s investigation was triggered by a leniency application submitted by Exide Technologies which obtained full immunity from fines in return. Battery Supplies, Enersys and Hoppecke also applied for leniency and obtained reductions of their fines of respectively 20%, 30% and 40%.

All the undertakings involved agreed to settle and thus benefited from an additional 10% fine reduction. The settlement procedure is a new mechanism provided for by the Belgian Code of Economic Law, intended to simplify and accelerate the procedure leading to the adoption of an infringement decision. This is the second settlement decision adopted by the Belgian Competition Authority after its decision of 22 June 2015 in the Supermarkets cartel case.

GERMANY

Higher Regional Court of Nürnberg rules on Articles of Association of taxi cooperative

In a judgment issued on 22 January 2016, the Higher Regional Court of Nürnberg ruled on two provisions of the Articles of Association of a taxi cooperative, which operates the only taxi network in Nürnberg.

Pursuant to the first provision, members of the cooperative are prohibited from sending geolocation data to competitors during a driving job provided by the cooperative. Geolocation data enables users to identify the real-world geographic
location of objects, such as cars. According to the second provision, members of the cooperative are not allowed to advertise on their taxis for a competitor of the cooperative. The claimant, who is a developer and operator of a mobile application that sends orders to taxi drivers and taxi companies booked by customers online, argued that both provisions constituted an abuse of dominance.

In its judgment, the Court found that the provisions prevented and restricted competition and therefore violated Article 1 of the Act against Restraints of Competition ("GWB"). According to the Court, the prohibition to send geolocation data to competitors during a driving job that was provided by the taxi cooperative made it too time-consuming and laborious for a taxi driver to use both the service of the cooperative and that of the claimant. Since the cooperative is dominant in the relevant market and the majority of taxi companies are dependent on the cooperative, the provision appreciably limited the chances of the claimant to compete on the Nürnberg taxi market. Moreover, the Court also found that the prohibition imposed on taxis to advertise on their cars the services of a competitor constituted a restriction of competition.

OTHER DEVELOPMENTS

CROATIA: On 25 January 2016, the Croatian Competition Authority imposed fines amounting to 9.7 million kuna (approximately € 1.27 million) on betting shops Bolus, Favorit sportska kladionica, Germania Sport, Prva sportska kladionica and Super Sport for fixing bookmakers’ commission fees between March 2014 and November 2015.

ROMANIA: On 25 January 2016, the Romanian Competition Authority ("RCA") imposed fines totalling € 3.7 million on three fuel wholesalers, namely Planoil, Planoil Industries and Tinmar, for their involvement in a cartel in the wholesale market for the distribution of petrol and diesel. The RCA found that the three companies entered into price-fixing and customer allocation agreements on the Romanian market for gasoline and diesel wholesale distribution. All three companies admitted their participation in the cartel and benefited from a 20% reduction in fine.

SPAIN: In a recently published decision issued on 17 December 2015, the Spanish Competition Authority imposed a fine of € 234,738 on the national association of dentistry and stomatology, Consejo General de Colegios Oficiales de Odontólogos y Medicos Estomatólogos de España, for restricting the patients’ ability to choose freely their own dental technician, as well as for price-fixing, in breach of Article 1.1(a) of the Spanish Competition law.

SPAIN: On 25 January 2016, the Spanish Supreme Court upheld the decision of the Spanish Competition Authority which had imposed fines on a number of cement producers for their involvement in a price-fixing and market-sharing cartel. In particular, the Supreme Court rejected the argument that recordings could not be considered as reliable evidence, given that they had been corroborated by other sources of evidence.

SPAIN: On 25 January 2016, the Audiencia National Court annulled a 2013 decision of the Spanish Competition Authority, which had imposed fines totalling € 43.4 million on ten companies and associations in the container transport industry for their involvement in a price-fixing and market-sharing agreement within the Port of Valencia between 1998 and 2011. The Audiencia National Court found that the Spanish Competition Authority had failed to inform the alleged participants of its infringement decision within the allocated deadline.
Higher Regional Court of Frankfurt rules on restrictions on the use of online platforms and price comparison websites in the selective distribution system of Deuter

On 22 December 2015, the Higher Regional Court of Frankfurt (the "Court") issued a ruling on appeal concerning the selective distribution system of Deuter, a producer of quality backpacks (see VBB on Competition Law, Volume 2016, No. 1). The Court assessed two restrictions imposed by Deuter on the resellers belonging to its selective distribution system: (i) the prohibition to sell Deuter products via the sales platform Amazon.de; and (ii) the obligation to obtain Deuter’s authorisation before advertising Deuter products on specific price comparison websites. The appeal was brought by a retailer belonging to the selective distribution system (the "Claimant").

The Court found that, since the Claimant is economically dependent on the product range of Deuter, Deuter has superior market power in the sense of Article 20 of the Act against Restraints of Competition ("GWB") vis-à-vis the Claimant. However, according to the Court, Deuter’s prohibition to sell via Amazon does not constitute an abuse of its superior market power pursuant to Article 19 GWB because this prohibition does not discriminate against, or unfairly impede, the Claimant.

First, the Court found that Deuter had applied its prohibition to sell its products via Amazon uniformly and did not discriminate against the Claimant. Second, the Court considered that the prohibition to sell via Amazon did not unfairly impede the Claimant as it reflects a necessary and therefore legitimate element of the selective distribution policy chosen by Deuter.

In support of this second finding, the Court emphasised that Deuter had decided to sell its products only to authorised retailers in the framework of a selective distribution system to which Amazon does not belong. If authorised retailers were allowed to sell through Amazon, the average consumer would assume that Amazon is one of Deuter’s authorised retailers, even though Deuter does not have a contractual relationship with Amazon and cannot influence its business practices. This is because, when purchasing through Amazon, consumers have the impression that they are purchasing from Amazon even if the product is sold by an authorised retailer.

The Court further found that the prohibition to use Amazon is needed to ensure that customers are provided with necessary advice and to signal high product quality. Advice is necessary in order to allow the customer to choose the most appropriate model, given the range of designs, sizes and technical features of the backpacks. The Court found that the need to provide such advice cannot be ensured on Amazon (even though Amazon offers advice to select the right size of the backpack on its website). While customers could theoretically visit the website of Deuter to source appropriate information, this requires action on the part of the customer to carry out research and the customer may not know that additional information can be found on the Deuter website. Further, according to the Court, the product image established by Deuter signals high quality. Producers of high quality products have an interest in communicating to consumers that their products are of better than average quality, as purchasing decisions based on insufficient information are often taken only on the basis of price. According to the Court, signalling high product quality is not possible on Amazon, because the uniform presentation of all products, irrespective of their type and quality, does not leave room for differentiation based on brand image.

By contrast, unlike its conclusion concerning the first restriction on the use of Amazon, the Court found that the second restriction concerning the contract clause requiring authorised retailers to obtain Deuter’s authorisation to advertise Deuter products on price comparison websites is in violation of Article 19 GWB.

According to the Court, the contract clause comes close to a total prohibition on the use of price comparison websites because Deuter has been very restrictive in granting permission to use price comparison websites and because it is not clear under which conditions permission will be granted.
The Court held that the prohibition of the use of price comparison websites strongly restricts the online advertising opportunities of the Claimant, whose competitive position is thereby negatively impacted. The Court considered this to be unfair because price comparison websites do not make any sales but merely allow customers to find retailers that offer a specific product and lead them to the websites of those retailers. According to the Court, this general prohibition cannot be justified by the need to ensure sufficient customer service and to secure the appropriate portrayal of the brand’s image, because Deuter could achieve these goals by laying down requirements concerning the website of the retailer.

The Court rejected Deuter’s argument that the accumulation of similar product images and prices on price comparison websites suggests the mass availability of the product, which damages the high quality image of the product. The Court found that this would only be a valid argument if the brand had a certain luxury image carrying a notion of exclusivity. In the case of Deuter, the Court found that the brand image stands for high product quality and not luxury, and it is not evident that the image of the product is impacted simply because the potential buyer can see that different models of the product are offered by numerous retailers.

The Court further found that the limitation of competition through the prohibition of the use of price comparison websites could not be justified by the Vertical Agreements Block Exemption Regulation as Deuter had failed to demonstrate that its market share on the German market of quality backpacks sold to retailers does not exceed 30%. An exemption could also not be based on Section 2(1) GWB as the agreement does not allow consumers to have a fair share of the resulting benefit of the agreement. Finally, the fact that some operators of price comparison websites infringe intellectual property rights could not justify a general prohibition of the use of price comparison websites.

Although currently on further appeal, the judgment is a significant contribution to the, thus far, conflicting judicial and administrative case law concerning online sales and advertising in Germany. Concerning restrictions on the use of online platforms by authorised retailers, the judgment adopts a more liberal, and brand-friendly stance than the Bundeskartellamt applied in the Asics and Adidas cases (see VBB on Competition Law, Volume 2015, No. 9 and Volume 2014, No. 7). In contrast, the hostile approach of the Court towards restrictions on the use of price comparison websites is more consistent with the findings of the Bundeskartellamt in the Asics decision.

German Federal Court of Justice finds tuning company has right to be supplied with Porsche products and system

On 6 October 2015, the German Federal Court of Justice (the “Court”) found that a provider of tuning services for Porsche cars (the “Claimant”), who is not named in the judgment, has a right to be supplied with Porsche vehicles and parts. As a result, according to the Court, Porsche and its distribution company (the “Defendants”) are not permitted to refuse to supply the Claimant or to require the Porsche distribution network not to supply the Claimant. The Court further held that the Defendants have to grant the Claimant access to Porsche’s diagnostic and information system.

The Court found the Defendants to have infringed the prohibitions against both abuse of economic dependence and abuse of dominance. According to the Court, the refusal to supply the Claimant could not be exempted by Article 101(3) TFEU since such refusal is not based on an agreement between the parties. Rather, the question in this case was whether the unilateral conduct of the Defendants constitutes an abuse.

The Claimant had acquired vehicles and parts for use in its tuning services business until Porsche terminated the supply contract without notice, requested its distribution company to reject any order placed by the Claimant and denied the Claimant access to its diagnostic and information systems.

In relation to cars and car parts, the Court found that the Claimant is economically dependent on Porsche because the Claimant’s entire business model is based on the customisation and upgrade of Porsche cars exclusively.

Pursuant to Section 20(1) of the Act against Restraints of Competition (“GWB”), an abuse of economic dependence occurs when a supplier, directly or indirectly, unfairly impedes the activities of a small or medium-sized company that is economically dependent on the supplier to the extent that no sufficient or reasonable alternative source of supply is available.
In applying this standard, the Court found that the Defendants had unfairly impeded the activities of the Claimant by not supplying it with vehicles and thereby rendered the Claimant unable to showcase its services to potential customers. The Court considered that, by ordering the Defendants to supply the Claimant with new vehicles, it was not substantially interfering with Porsche’s freedom to organise its distribution system, because the Claimant neither competed with Porsche vehicle dealers nor wished to join Porsche’s selective distribution system.

For the same reasons, the Court found that the refusal to supply the Claimant with parts which are only available from the Defendants constituted an unfair impediment to the Claimant’s ability to compete. The Court also found that the Defendant’s refusal to supply parts that can be substituted by equivalent parts that are sold by other suppliers also constituted an unfair impediment to the Claimant’s ability to compete because it is unreasonable to expect it to obtain these parts from a third party (as this would require the Claimant to pay a higher price, accept longer delivery times, undertake disproportionate research efforts and rely on fragmented sources of supply, which is not economically viable.)

By contrast, the Court found that the Defendants’ refusal to supply the Claimant with parts which are exclusively used in Porsche’s own tuning program, Tequipment, was justified by reference to Article 4(b)(iv) of the Vertical Agreements Block Exemption Regulation (which allows a supplier to prevent the resale by a buyer of components supplied for incorporation to a competitor). This is because these tuning parts are supplied to Porsche centres, which use them to carry out finishing and customisation work for customers (and which, unlike the other types of car parts discussed above, are not supplied to Porsche centres for resale as unmodified parts). Pursuant to Article 4(b)(iv) of Regulation 330/2010, the Defendants may therefore prohibit Porsche centres to supply these car parts to the Claimant, insofar as the Claimant uses them for its own tuning activities which compete with the Porsche tuning programme.

Finally, the Court found that the Defendants are dominant in the market for the provision of access to the diagnostic and information systems for Porsche cars. Accordingly, the Defendants’ refusal to grant access to these systems constitutes an abuse of a dominant market position as it forecloses the Claimant from the market for the provision of tuning services and thereby benefits the Defendant’s own tuning programs.
Competition and Markets Authority fines pharmaceutical companies £ 45 million over alleged “pay-for-delay” patent settlement agreements and abuse of dominant position

In a press release issued on 12 February 2016, the UK Competition and Markets Authority (“CMA”) announced that it had fined GlaxoSmithKline plc (“GSK”) £ 37.6 million for allegedly concluding anti-competitive “pay-for-delay” patent settlement agreements between 2001 and 2004 with three generic companies in order to exclude them from the paroxetine market, in breach of UK and EU competition law. The CMA also found that GSK had abused its dominant position. The three generic producers, Alpharma, Generic (UK) Limited and Norton Healthcare Limited, were also fined a total of £ 5.8 million for their involvement.

Seroxat®, GSK’s branded version of paroxetine, is an antidepressant medicine, the sales of which exceeded £ 90 million in 2001. As the generic companies were taking steps to enter the UK market for paroxetine, GSK initiated proceedings against them alleging that their generic products would infringe its patents. However, before the litigation went to trial, the generic companies entered into a settlement agreement with GSK, which included terms allegedly prohibiting their independent entry into the UK paroxetine market in exchange for payments and other value transfers totalling a reported £ 50 million. The CMA took the view that these payments were aimed at delaying the entry of the generic competitors into the UK market for paroxetine, in breach of UK and EU competition law.

Patent settlement agreements are generally not considered anti-competitive in and of themselves. In fact, the European Commission found in its 2015 monitoring report on patent settlement agreements that only 12% of such agreements were potentially problematic (see VBB on Competition Law, Volume 2015, No. 12). However, agreements that include a transfer of value from an innovative firm to a generic firm and provide for a form of regulated market entry by the generic firm, as is the case in “pay-for-delay” provisions in patent settlement agreements, are of particular interest to competition authorities. The CMA’s decision follows a number of high profile pay-for-delay fines imposed by the Commission in recent years: Servier and five other generic producers were fined a total of € 427 million in 2014 (see VBB on Competition Law, Volume 2014, No. 7); and Lundbeck and three generic companies were fined a total of € 145 million in 2013 (see VBB on Competition Law, Volume 2013, No. 6). All of these cases are under appeal before the EU General Court.
EUROPEAN UNION: Fiat and Luxembourg have appealed the European Commission decision declaring Luxembourg’s tax ruling in favour of Fiat illegal, while Starbucks has appealed the European Commission decision relating to the Dutch Starbucks tax ruling (see VBB on Competition Law, Volume 2015, No. 10, p. 15). Notices of the applications for annulment were published in the Official Journal on 29 January 2016. As is apparent from these notices, the applicants contest, inter alia, the application of the selectivity criterion as well as the arm’s length principle.

EUROPEAN UNION: On 4 February 2016, the EU General Court rejected two actions for annulment against the same European Commission decision declaring a German aid scheme, consisting of tax advantages to undertakings in difficulties, to be incompatible with the internal market (case T-620/11, GFKL Financial Services AG v European Commission, and case T-287/11, Heitkamp BauHolding GmbH v European Commission). While the judgments do not tackle any new legal issues, they are interesting in that they offer a detailed analysis of the application of the state aid rules to tax advantages, which is currently a much debated topic.
BELGIUM

Belgian Competition Authority Adopts New Leniency Guidelines

On 1 March 2016, the board of the Belgian Competition Authority (“BCA”) adopted new guidelines concerning the leniency regime under Belgian competition law. These new leniency guidelines reflect a number of developments that have taken place since the adoption of the 2007 guidelines.

The BCA had first launched a public consultation, prior to the adoption of new guidelines, in order to receive comments from interested parties (see VBB on Competition Law, Volume 2015, No. 11).

The main changes brought about by the new guidelines concern three points.

First, practical rules for leniency applications by individuals have been set out. The possibility for individuals to submit leniency applications had been introduced by the legislator in 2013, in conjunction with the possibility for the BCA to prosecute individuals for their participation in cartels. However, the practicalities of leniency applications by individuals, as well as their relation to leniency applications submitted by undertakings, required further clarification.

Second, the changes made to the European Model Leniency Programme (“EMLP”) at the end of 2012 have been incorporated into the new guidelines. The goal of the EMLP is to avoid discrepancies between the leniency programmes of the different EU Member States, which might be counterproductive in the fight against cartels. The new Belgian guidelines are intended to align leniency applications to the BCA with the harmonized rules of the EMLP.

An important change resulting from the alignment with the EMLP is the fact that, in cases involving more than three Member States, all leniency applicants applying to the European Commission will be given the possibility to submit a summary leniency application to the BCA. Under the 2007 guidelines, such summary applications were reserved for the immunity applicant.

Finally, the practical and procedural terms of leniency applications are further clarified in the new guidelines. These changes are based on the experience which the BCA has gained since the adoption of the 2007 guidelines. In particular, the obligations of undertakings applying for leniency are outlined more elaborately. In addition, the rules on confidentiality are reinforced in the new guidelines.

The new guidelines will enter into force on the day of their publication in the Belgian Official Journal.
On 19 November 2015, the Regional Court of Düsseldorf (the "Court") rejected a car insurer's claim for damages resulting from the European Commission's decision in the car glass cartel case. This judgment indicates that it remains difficult for indirect purchasers of products that formed the object of a cartel to prove that the damage resulting from the cartel has been passed on to their market.

In 2008, the Commission fined four car glass producers for participating in market-sharing, discussing target prices, and allocating customers, between 1998 and 2003 (see VBB on Competition Law, Volume 2008, No. 11). The total fine imposed on the producers amounted to over €1.3 billion. According to both EU law and German law, such a Commission decision constitutes binding proof in national courts that the conduct in question has taken place, was anti-competitive and is therefore illegal.

In 2010, Huk-Coburg, a German insurance company, claimed damages of at least €21.56 million (while leaving the exact determination of the amount to the discretion of the Court and claiming almost double that amount with interest included) for having paid excessive prices for the settlement of insurance claims related to car glass during the period of 1998 to 2006.

The Court accepted that the Commission decision finding a cartel constitutes prima facie evidence of higher prices in the market for car glass, and found that the car glass manufacturers had not put forward sufficient evidence to prove the contrary. Moreover, the Court noted that it is unlikely that the cartel participants would have continued their cooperation for such a lengthy duration if the cartel had not had the effect of lessening competition. Consequently, the Court acknowledged that damage had occurred with respect to the car glass manufacturers' direct customers, namely car manufacturers, who had paid higher prices as a result of the cartel.

However, the Court found that Huk-Coburg had not advanced sufficient elements proving that the damage had been passed on to the downstream market of car insurance (i.e., indirect customers). In the judgment, reference is made to the so-called ORWI case law of the German Federal Supreme Court, in which that Court found that there is no presumption that an increase in price during the cartel period, on a market level downstream of the cartel's direct customers, is attributable to that cartel. Rather, such a causal relationship must be materially established, in a concrete sense, by the indirect customers, which Huk-Coburg failed to do.

The principle established in the ORWI case is based on the assumption that the direct customers of the cartel participants would possibly have charged the same price to their customers, even in the absence of the cartel. The Court lists a number of relevant factors to take into account in this regard, including price elasticity of supply and demand; the duration of the cartel; and the intensity of competition on that market level. The Court deemed that the evidence adduced by Huk-Coburg did not show that the direct customers of the cartel members had determined their price on the basis of costs, rather than on value, target, or some other consideration.

The Court acknowledged the existence of certain market conditions suggesting that a passing-on of the higher price could have taken place, namely the inelasticity of demand by end users, the absence of alternatives, and the fact that all car manufacturers were equally affected by the cartel. However, the Court also referred to the particularity of this sector, in which car manufacturers (i.e., direct customers) have a monopoly with regard to the original spare parts market. Further, the Court considered, a monopolist sets its price based on profit maximisation, rather than on costs. This is illustrated by the fact that car manufacturers have a significant profit margin and are able to sell the car glass at 7 to 10 times more than their purchasing price. As a result, the Court concluded that car manufacturers were capable of absorbing the cartel surcharge into their own margins, and that a passing-on of this surcharge had therefore not
necessarily taken place. The Court thus rejected Huk-Coburg’s claim for damages.