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JURISDICTIONS COVERED IN THIS ISSUE

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| MERGER CONTROL

– EUROPEAN UNION LEVEL –

Competition Commissioner Vestager discusses possible changes to EU merger control system

In a speech delivered in Brussels on 10 March 2016, EU Competition Commissioner Margerethe Vestager discussed possible ways in which the EU merger control system could be refined. She addressed three main topics.

First, Ms Vestager said it should be examined as to whether the EU notification system can be further simplified, in addition to the options for simplification already considered in the European Commission's 2014 White Paper "Towards More Effective Merger Control" (see VBB on Competition Law, Volume 2014, No. 7). In her words, "if some types of merger[s] hardly ever cause concerns, why ask for a formal notification at all?" She added that transactions that are unlikely to do much harm to competition should be able to go through the system more quickly than they do now.

Second, the Commissioner suggested that the proposal to bring acquisitions of non-controlling minority shareholdings within the scope of EU merger control, as proposed in the 2014 White Paper, will not be implemented any time soon. The Commissioner noted that this issue is still being looked into, but cautioned that she would "need to see compelling evidence that the system could work at European level - without creating a lot of complexity - before we took any more steps in this direction. And what I've seen so far hasn't convinced me that this is a change we absolutely have to make to our system".

Third, Ms Vestager raised the issue of whether the EU notification thresholds, which are currently based only on the parties' turnover, need to be changed. The Commissioner noted that turnover is not always the right metric to determine the significance of a deal. For instance, in some transactions, what matters are the assets, such as a customer base or a pipeline drug. According to Ms Vestager, "by looking only at turnover, we might be missing some important deal that we ought to review". However, the Commissioner recognised that any change to the thresholds would involve a balancing exercise: "we have to see how we could pick out the transactions that matter, without also covering a lot of mergers without much effect on competition in Europe". She added, "for example, the value of a merger could be a good guide to its importance. But we'd need to pick just the right level, to cover the mergers we need to see, without making life harder for innovative startups". Ms Vestager concluded by saying that "whatever we decide in the end, it has to meet one fundamental principle: there should be no doubt whether you need to notify a particular merger. So whatever test we choose has to be easy to apply, and has to give a definitive answer".

The Commissioner has welcomed comments that could contribute to this discussion, but has not given any indication of whether or when the Commission will publish specific proposals for public consultation.

– MEMBER STATE LEVEL –

BELGIUM

Belgian Competition Authority conditionally approves acquisition of Delhaize Group by Ahold

On 15 March 2016, the Competition College of the Belgian Competition Authority ("BCA") approved the acquisition of Delhaize Group by Ahold, subject to a number of conditions. Delhaize (Belgium) and Ahold (The Netherlands) are two major food retailers active in their home countries as well as in the US and in a number of other countries around the world.

The transaction had initially been notified to the European Commission since the European merger notification thresholds were met. However, at the request of the parties, the Commission referred the case to the BCA, based on the fact that the only significant overlap in the parties' activities in Europe is in Belgium (see VBB on Competition Law, Volume 2016, No. 1, p. 5). Following the Commission's referral, the parties submitted a formal notification of the proposed transaction to the BCA on 13 January 2016.

The Competition College approved the transaction but made its approval conditional on the disposal of 8 Albert Heijn outlets (Ahold), 5 Delhaize franchised outlets, and a number of outlets which have not yet been opened. These divestments had been proposed by the parties in order to address potential competition concerns. The Competition College stressed that, in order to comply with the remedies imposed, these shops must be sold to a purchaser with sufficient financial resources, proven relevant expertise, as well as the ability to maintain and develop the divested business as a viable and effective competitive force.

Until the conditions imposed by the BCA are met, the Albert Heijn and Delhaize shops will continue to operate independently in Belgium.

The US competition authorities are still scrutinising the impact of the transaction on the US market, where both parties carry out a significant part of their activities, and are expected to impose divestments as well.

Belgian Competition Authority conditionally approves acquisition of two out of four Utopolis cinema complexes by Kinepolis

On 25 March 2016, the Competition College of the Belgian Competition Authority ("BCA") approved the acquisition of two out of four Utopolis cinema complexes by Kinepolis, subject to structural and behavioural remedies.

Kinepolis notified the BCA of the proposed acquisition of all four Utopolis cinema complexes on 12 October 2015. During the initial phase I investigation, Kinepolis offered no remedies. However, the Competition College had serious doubts as to the admissibility of the transaction and opened an in-depth (phase II) investigation. During the phase II investigation, Kinepolis offered both structural and behavioural commitments, in order to address the competition concerns which had been identified.

The structural commitments consist of the divestment of two out of the four Utopolis cinema complexes, namely the Utopolis complexes in Aarschot and in Mechelen. According to the Competition College, the purchaser should have the necessary financial resources, as well as relevant expertise, or alternatively, be a professional financial investor. The Competition College added that the purchaser should intend to operate the cinemas as a viable and active competitor of Kinepolis.

The behavioural commitments concern the two cinema complexes that will not be divested, namely the cinemas in Lommel and in Turnhout. In operating those cinemas, Kinepolis agreed: (i) not to close them; (ii) to accept vouchers sold by other cinemas in the context of existing cooperation agreements; and (iii) to monitor the degree of satisfaction of the customers of those cinemas with regard to the price/quality ratio. These commitments will apply for a period of three years and will be monitored by the BCA.

GERMANY

German Minister of Economic Affairs conditionally clears merger between EDEKA and Kaiser's Tengelmann

On 17 March 2016, the German Minister of Economic Affairs, Sigmar Gabriel, issued a ministerial authorisation conditionally clearing the acquisition of supermarket chain Kaiser's Tengelmann by rival EDEKA. This transaction had previously been prohibited by the German Federal Cartel Office ("FCO") (see VBB on Competition Law, Volume 2015, No. 4).

According to the German Competition Act, the Federal Minister of Economic Affairs can authorise a concentration prohibited by the FCO if the restriction of competition is outweighed by advantages to the economy as a whole resulting from the concentration, or if the concentration is justified by an overriding public interest. Minister Gabriel found that in this case, public interest aspects, including the protection of jobs and employee rights, outweigh the restriction of competition which, according to the FCO, would result from the transaction.

The ministerial authorisation is subject to conditions relating to the protection of jobs and employee rights, such as dismissal protection, collective agreements and worker's participations. The conditions apply to all locations and departments of Kaiser's Tengelmann. The merger may only be implemented after the Ministry finds that these suspensive conditions have been fulfilled.

Rewe, a competing supermarket chain, announced that it will appeal against the ministerial authorisation to the Higher Regional Court of Düsseldorf.

ABUSE OF DOMINANT POSITION

– MEMBER STATE LEVEL –

GERMANY

German Federal Cartel Office initiates proceedings against Facebook

According to a press release issued by the German Federal Cartel Office ("FCO") on 2 March 2016, proceedings have been initiated against Facebook Inc. as well as the Irish and German subsidiaries of Facebook. The FCO will investigate whether Facebook's terms of service relating to the use of user data, which may be in violation of national data protection law, constitutes an abuse of a possibly dominant position. The FCO has evidence that Facebook occupies a dominant position in the market for social networks. Among other issues, the FCO will examine whether there is a connection between Facebook's potential dominant position and its use of its terms of service and whether consumers are sufficiently informed about the type and extent of data collected. The proceedings will be conducted in close contact with competent data protection officers, consumer protection associations, the European Commission and competition authorities of other EU Member States.

The initiation of proceedings comes in the midst of general discussions about whether technology firms using big data violate competition law and whether the current system of the competition law framework can accommodate a data-driven economy. In a speech given on 18 January 2016, EU Competition Commissioner Margrethe Vestager stated that when a company's use of data is affecting competition so badly that it outweighs benefits, the Commission may have to interfere "to restore a level playing field." However, Ms. Vestager emphasised that "we should not take action just because a company holds a lot of data."

CARTELS AND HORIZONTAL AGREEMENTS

– EUROPEAN UNION LEVEL –

In the following sections, we first provide a factual overview of the significant case developments at EU level, and thereafter offer a detailed analysis of important substantive or procedural developments addressed in these cases.

Summary of Significant Case Developments

International air freight forwarding services – General Court largely upholds European Commission decision

On 29 February 2016, the EU General Court ("GC") largely upheld the European Commission's decision in the Freight Forwarding cartel case, confirming that a number of freight forwarders had participated in one or more cartels aimed at fixing prices and other trading conditions for international air freight forwarding services (T-254/12, Kühne + Nagel International and Others v Commission; T-251/12, EGL and Others v Commission; T-264/12, UTi Worldwide and Others v Commission; T-265/12, Schenker Ltd v Commission; T-267/12, Deutsche Bahn and Others v Commission; T-270/12, Panalpina World Transport (Holding) Ltd and Others v Commission).

The appeals stemmed from the Commission decision adopted on 28 March 2012, in which the Commission imposed fines on 14 international groups of companies totalling € 169 million for their involvement from 2002 to 2007 in four distinct cartels, in breach of EU antitrust rules (see VBB on Competition Law, Volume 2012, No. 3).

European Commission publishes report on functioning of Insurance Block Exemption Regulation

On 17 March 2016, the European Commission published a report on the functioning of the Insurance Block Exemption Regulation (IBER). The current block exemption, which provides for an exemption from Article 101 TFEU for agreements between insurers relating to joint compilations, tables and studies, as well as co-(re)insurance pools, expires on 31 March 2017. The rationale for the exemption of the joint production of statistical information is that only the largest insurers are likely to have an adequate sample of risks from their own insurance portfolio to produce reliable statistics. Joint production of statistical information therefore improves the reliability of statistics, assists smaller insurers and facilitates market entry.

The Commission's provisional findings indicate that the insurance industry no longer appears to require an exceptional instrument such as a block exemption regulation. For example, with respect to co-(re)insurance pools, few institutionalised pools are covered by the exemption, and there is a trend of replacing institutionalised pools with more flexible ways of co(re)insuring risks. Further, the 2010 Horizontal Guidelines offer guidance on how to assess cooperation in the insurance industry, and may be supplemented if additional guidance is necessary.

The Commission will make its final proposals on the future of the IBER in early 2017.

The report and the staff working document are available here.

European Commission publishes updated statistics on cartels

On 1 March 2016, the European Commission published an updated version of its statistics on cartel decisions, available here.

Analysis of Important Substantive and Procedural Developments

The European Commission's enforcement power in sectors subject to specific competition regimes

Under Regulation 17/62, the transport sector was subject to a specific competition regime because of its special features, i.e., high level of government intervention and regulation. Under this specific regime, any agreements in the transport sector having as their object or effect "the fixing of transport rates and conditions, the limitation or control of the supply of transport or the sharing of transport markets" were exempt from the general procedural framework for competition law enforcement. Over the years, the scope of this exemption was gradually narrowed, thus broadening the Commission's enforcement powers of the competition rules in the transport sector. The transport sector has been subject to the general procedural framework for competition law enforcement since the adoption of Regulation 1/2003.

In the Freight Forwarding cartel case, the applicants argued that the Commission was not entitled to rely on Regulation 1/2003 as a basis for penalising them for their participation in two of the four cartels for the period prior to 1 May 2004. The GC dismissed this argument. The GC considered that the then-applicable exemption to the transport sector under Regulation 17/62 only covered cartels directly affecting air transport between the European Community and third countries. In contrast, cartels relating to services which were not directly related to air transport services, such as the applicants' freight forwarding services, were not exempted from the application of competition law and from the application of Regulation 17/62. The GC's ruling thus confirms that exemptions to the general competition rules are to be interpreted narrowly.

Leniency: further clarifications from the General Court

The leniency procedure rewards undertakings involved in a cartel that are willing to put an end to their participation in the infringement and cooperate with the Commission's investigation. When an undertaking is first to disclose information and evidence that enable the Commission to either find a cartel infringement or to carry out targeted inspections in connection with the alleged cartel, the undertaking will initially be granted conditional immunity. At the end of the administrative procedure, that undertaking will receive final immunity if it has cooperated genuinely, fully, continuously and expeditiously with the Commission. The aim of the leniency programme is to facilitate the detection of secret cartels, which are – by their very nature – difficult to detect.

In the EGL and Deutsche Bahn judgments in the Freight Forwarding cartel case, EGL and Deutsche Bahn challenged the immunity granted to Deutsche Post on the ground that the evidence provided by Deutsche Post to the Commission was not sufficiently detailed to meet the conditions for immunity.

This was not the initial view of the Commission as it granted Deutsche Post conditional immunity from fines. The Commission decided to do so after Deutsche Post had submitted information and evidence that enabled the Commission to carry out targeted inspections in the international freight forwarding sector. At the end of the administrative procedure, the Commission granted Deutsche Post full immunity from fines for the four separate cartels it identified in its investigation. On appeal before the GC, the other parties to the case challenged the Commission's decision as they argued that the Commission had failed to examine whether the evidence produced by Deutsche Post had in fact covered the conduct at issue in all four cartels.

On appeal, the GC considered that conditional immunity may be granted to an undertaking even though the information which it provided does not allow the Commission to measure the nature and the scope of the cartel. This is because the 2006 Leniency Notice contains no requirement that the material submitted to the Commission for purposes of leniency must constitute information and evidence that specifically relates to the infringement(s) as identified by the Commission at the end of the administrative procedure.

In the Schenker and Deutsche Bahn judgments, the GC further held that the Commission was not in breach of the principle of equal treatment for applying different criteria to Deutsche Post's immunity application and those of other undertakings. According to the GC, the preferential treatment granted to the first undertaking to cooperate with the Commission is justified by the objectives of the Leniency Notice, namely: (i) encouraging undertakings to cooperate as early as possible; and (ii) not conferring on undertakings which only cooperate at a later stage benefits that exceed the level that is necessary to ensure that the leniency programme is fully effective.

Settlements: General Court confirms European Commission's discretion as to whether or not to initiate Settlement Procedures

Under the EU settlement procedure, a party admitting liability to a cartel infringement and waiving certain procedural rights is rewarded with a 10% reduction in the fine.

In the Schenker, Deutsche Bahn and Panalpina World Transport judgments, the GC confirmed that the parties had no right to compel the Commission to engage in settlement discussions. The Commission's broad margin of discretion to determine in which cases it may be appropriate to explore the parties' interest to engage in settlement discussions derives from the use of the word 'may' in Article 10a(1) and recital 4 of Regulation No 773/2004 as well as from point 6 of the Notice on Settlements.

According to the GC, it is also apparent from point 6 of the Notice on Settlements that the Commission does not have to contact the parties to explore their interest in engaging in settlement discussions in order to assess the prospects of reaching a settlement. The Commission retains discretion to determine whether a case is suitable for settlement. In the present case, the GC found that the Commission had not committed any error of assessment by considering that the following aspects of the case were not conducive to achieving a successful settlement: (i) the significant number of parties participating in the procedure (i.e., 47); (ii) the significant number of parties that did not cooperate with the Commission on the basis of the 2006 Leniency Notice; (iii) the likelihood that some aspects of the Commission's approach would be disputed by the parties; and (iv) the advanced stage of the proceedings (i.e., the draft statement of objections had been prepared and discussed).

The GC finally observed that the settlement procedure is not a bargaining tool. It is therefore irrelevant that competition authorities in other countries with such a procedure in place have considered it appropriate to reach settlements.

UTi Worldwide Case: General Court rounds down parent company's fine

Under settled case law, the liability of a parent company cannot exceed that of its subsidiary if the liability of a parent company is entirely based on the conduct of its subsidiary and if no other factors individually distinguish the conduct for which the parent company is being held liable from that of its subsidiary.

In the UTi Worldwide judgment, the GC noted that the Commission took into account the actual duration of the participation of the parties involved in the infringement on a monthly basis, rounded down to the month below and on a pro rata basis. This methodology departs from point 24 of the Fining Guidelines, which provides that periods longer than six months but shorter than one year will be counted as a full year. Under the methodology used by the Commission in the present case, the duration multiplier was set for the subsidiaries at 0.58 for UTi Worldwide UK (corresponding to seven months, two days) and 0.75 for UTi Nederland (corresponding to nine months, 28 days). For the parent company, UTi Worldwide, the duration multiplier was set at 1.41 (corresponding to one year, five months).

Under the Commission's methodology, the rounding down of the duration of the subsidiaries' participation resulted in a combined reduction of one month, which was not granted to the parent company. On the basis of the above case law, the GC therefore reduced the overall fine imposed on UTi Worldwide from € 3.07 million to € 2.97 million, to equal the fines imposed on its subsidiaries.

– MEMBER STATE LEVEL –

GERMANY

German Competition Authority sanctions sanitary, heating and air conditioning cartel

On 22 March 2016, the German Federal Cartel Office ("FCO") imposed total fines of approximately € 21.3 million on nine wholesalers and one individual involved in a price-fixing cartel in the sanitary, heating and air conditioning sector that took place between 2005 and 2013. The fining decision took account of the fact that the companies and the individual concerned cooperated and entered into a settlement.

German Competition Authority sanctions train track cartel

On 10 March 2016, the FCO imposed a fine of almost € 3.5 million on Vossloh Laeis GmbH for collusive tendering in the sector of railway track construction material between 2001 and 2011. The FCO had already imposed fines totalling almost € 100 million on eight companies active in the same sector in 2013 (see VBB on Competition Law, Volume 2012, No. 7 and Volume 2013, No. 8).

German Competition Authority fines manufacturer of concrete railway sleepers for collusive tendering

On 25 February 2016, the FCO concluded its investigation against manufacturers of concrete and wooden railway sleepers and imposed a fine of € 1.5 million against Durtrack GmbH for collusive tendering in 2009. The investigations against the other manufacturers were terminated without fines.

ROMANIA

Romanian Supreme Court lowers fine in fuel cartel

On 24 March 2016, the Romanian Competition Authority ("RCA") issued a statement confirming that Romania's highest court upheld the RCA finding of an infringement of competition law by OMV Petrom Marketing for its involvement in a fuel cartel, but reduced the fine imposed from 137.2 million lei to 109.8 million lei (approximately € 24.6 million). At the end of 2011, the RCA had sanctioned six oil companies, including OMV Petrom Marketing, with fines of almost € 205 million for anti-competitive agreements because they had withdrawn simultaneously Eco Premium gasoline from the Romanian market.

VERTICAL AGREEMENTS

– EUROPEAN UNION LEVEL –

European Commission presents its initial findings on geo-blocking with respect to consumer goods in e-commerce sector inquiry

On 18 March 2016, the European Commission published its initial findings of its sector inquiry into the e-commerce sector in relation to geo-blocking practices. The Commission defines geo-blocking as commercial practices whereby online providers prevent users from accessing and purchasing consumer goods or digital content services offered on their website based on the geographical location of the users (i.e., in a Member State differing from that of the provider).

The Commission's findings, which are based on the replies from more than 1,400 retailers and digital content providers from all 28 Member States, show that geo-blocking is widespread throughout the EU. Digital content is discussed in the section of this newsletter covering intellectual property rights.

With respect to consumer goods, 5% of retailers indicated that they prevented users from other Member States accessing their website, 10% re-routed the user to a website targeting a different Member State, 22% refused to accept payment from users located in a different Member State and 27% refused to deliver the goods to a user located in a different Member State. Retailers mainly used the user's postal address to determine the location, followed by the user's credit / debit card details or country of residence.

As for online marketplaces, over a third reported that they refused delivery on the basis of user location data and almost 30% prevented access to their website. This was most commonly done on the basis of the user's IP address. As for price comparison tools, more than a third of the respondents reported using user information to prevent access to their website or automatically re-routing the user to a website targeting a different Member State. This was chiefly done on the basis of the user's IP address. The role of payment services providers was also mentioned in potentially blocking transactions.

12% of retailers reported that they faced contractual restrictions prohibiting sales to users in different Member States for at least one product category, with restrictions on the sale of clothing and shoes being the most common. As for the nature of the restrictions, respondents reported outright prohibitions on cross-border sales or selling outside of a particular Member State. Some of the prohibitions were formulated by requiring the consent of the supplier to sell to customers in different Member States. It was reported that the restrictions were not always included in contracts, but were at times communicated orally, and some retailers had experienced retaliatory measures, for example, refusals to supply in cases of cross-border sales. Respondents also reported interventions from suppliers with the purpose of stabilising prices, for example, by being asked to raise the price or to not sell in a particular Member State.

The Commission noted that these practices suggested at least four different sets of concerns under Article 101 TFEU: (i) suppliers restricting sales in particular Member States; (ii) suppliers restricting active sales in particular territories regardless of whether these territories had been allocated to other retailers; (iii) suppliers restricting passive sales to territories allocated to other retailers; and (iv) suppliers restricting retailers from selling to all end users in the context of selective distribution systems.

Importantly, the report also noted that geo-blocking does not constitute an infringement when adopted as a unilateral business decision by a non-dominant undertaking.

The results of these findings will feed the Commission's on-going analysis in the e-commerce sector inquiry to identify potential competition issues and will also complement actions launched within the framework of the Digital Single Market Strategy, which aims at addressing regulatory barriers that may hinder cross-border e-commerce. The Commission plans to present a preliminary report in mid-2016 detailing all of its findings from the on-going e-sector inquiry. The final report is scheduled for the first quarter of 2017.

The Commission may also open investigations against individual firms to ensure compliance with competition law, should it identify any specific competition concerns on geo-blocking.

The Commission's staff working document on geo-blocking practices in e-commerce is available here.

– MEMBER STATE LEVEL –

AUSTRIA

Higher Regional Court of Vienna fines Hewlett-Packard for resale price maintenance

In a recently published judgment issued on 1 December 2015, the Higher Regional Court of Vienna (the "Court") imposed a fine of € 640,000 on Hewlett-Packard for engaging in resale price maintenance.

Between 2009 and 2014, employees of Hewlett-Packard engaged in resale price maintenance for electronic products, including printers, multifunctional devices and notebooks. Hewlett-Packard also restricted online distribution by requesting online retailers to raise prices when these were set below a certain level. The resellers complied with these instructions in some cases and took Hewlett-Packard's price expectations into account in their pricing policy generally.

The Court found that these agreements and concerted practices constituted a hardcore infringement of Article 101(1) TFEU as well as of Article 1 of Austrian Competition Law ("KartG"). The Court recalled that, in the case of horizontal price-fixing, it can be assumed that an assessment of the anti-competitive effects of the conduct is not necessary. According to the Court, the same applies to vertical agreements which impose restrictions on resale prices and, in particular, when the agreements aim to coordinate horizontally prices between resellers. The Court held that, in such cases, the general assumption that vertical agreements are less damaging to competition than horizontal agreements does not apply. The Court considered that this is demonstrated further by the fact that the Vertical Agreements Block Exemption Regulation excludes resale price maintenance from its scope by designating it as a hardcore restriction. Finally, according to the Court, a justification under Article 101(3) TFEU was not apparent, and Hewlett-Packard had not argued that one applied in this case.

When setting the fine, the Court took into account the fact that Hewlett-Packard was under pressure in the concentrated Austrian retail market; had cooperated with the Austrian Federal Competition Authority in the investigation; and did not dispute the facts of the case.

This case illustrates how resale price maintenance is treated virtually as a per se infringement in national case law, as possible justifications under Article 101(3) are rarely assessed in any detail.

ITALY

Italian court annuls antitrust decision concerning MasterCard's fees

On 24 February 2016, the Consiglio di Stato, the highest administrative court of Italy, dismissed an appeal by the Italian Competition Authority ("ICA") against certain judgments of the TAR Lazio, a lower administrative court (the "appealed judgments"), and annulled the ICA's Decision No. 21768 of 3 November 2010 concerning MasterCard (the "Contested Decision").

In 2009, the ICA had opened an investigation into MasterCard, focusing on: (i) certain licensing agreements between MasterCard and several banks; and (ii) the establishment of common multilateral interchange fees ("MIFs"). The ICA alleged that these practices, combined with the licensees' commercial conduct, resulted in MIFs being kept artificially high, as MIFs are passed on to the licensees' customers and consumers without any negotiation. Having refused the commitments offered by the parties in 2009, the ICA adopted the Contested Decision in 2010 finding that the conduct constituted an infringement of Article 101 TFEU, and imposed fines on MasterCard and the licensees ranging from € 50,000 to € 2.7 million.

In 2011, the targeted parties brought actions for annulment against both the Contested Decision and the decision not to accept commitments. The TAR Lazio found that the actions to set aside the appealed judgments were well-founded. As for the Contested Decision, the TAR Lazio found that the ICA's decision to refuse the commitments offered by the parties was marred by a lack of adequate reasoning and, consequently, the Contested Decision finding an infringement had to be annulled.

In its judgment, the Consiglio di Stato confirmed the decision of the TAR Lazio and dismissed the appeals, but disagreed with the lower court's reasoning. The Consiglio di Stato disagreed with the lower court's finding that both of the ICA's decisions in this case were tainted by an error of law by being inextricably intertwined, so that the illegality of one automatically implied the invalidity of the other. For such a nexus to exist, the Contested Decision finding the infringement had to be a necessary consequence of the decision to reject the commitments, without there being a need for the Contested Decision to undertake a new evaluation of the legality of the conduct. As no such nexus existed between the ICA's decision to refuse the commitments and the Contested Decision finding an infringement, the appealed judgments were found to contain an error of law on this point.

The Consiglio di Stato subsequently considered the alleged illegality of the Contested Decision finding an infringement. The court found that the Contested Decision had to be annulled, not because of the illegality of the refusal to accept commitments, as held by the TAR Lazio, but because it was vitiated by a failure to conduct a proper preliminary investigation and by an erroneous assessment in finding an infringement. More specifically, the Consiglio di Stato found, firstly, that the Contested Decision violated the parties' procedural rights, as it was based on reasons other than those underlying the decision to open the investigation and, secondly, that it resulted from an erroneous assessment of the alleged anti-competitive effects of the conduct.

PORTUGAL

DIA Portugal Supermercados offers commitments to address concerns about resale practices

On 15 March 2015, DIA Portugal Supermercados ("DIA Portugal"), a supermarket chain, offered commitments to the Portuguese Competition Authority ("PCA") to address concerns about alleged restrictions on resale prices contained in contracts with franchisees. These concerns had caused the PCA to open proceedings against DIA Portugal in April 2014. Under the proposed commitments, DIA Portugal will send a circular letter to its franchise network, clarifying that DIA Portugal only recommends resale prices or determines maximum resale prices and that franchisees are free to adopt lower prices. Furthermore, DIA Portugal commits not to conclude any franchise contracts with clauses limiting the freedom of franchisees to determine autonomously how low to set their resale prices.

The proposed commitments are currently the subject of a consultation.

| INTELLECTUAL PROPERTY/ LICENSING

– EUROPEAN UNION LEVEL –

Advocate General Wathelet concludes that payment of royalties under a licence agreement where the patent was held invalid may be compatible with Article 101 TFEU

On 17 March 2016, Advocate General Wathelet issued his opinion on a request for a preliminary ruling from the Paris Court of Appeal, which inquired as to whether Article 101 TFEU precludes a licensee from paying royalties pursuant to a licensing agreement when the patent, which is the subject of that licensing agreement, has been held invalid (C-567/14, Genentech Inc. v Hoechst GmbH).

The underlying proceedings involve a long-running patent dispute between Behringwerke, the licensor (of which Sanofi-Aventis Deutschland, a subsidiary of Hoechst, is a successor) and Genentech Inc. ("Genentech"), the licensee, a subsidiary of Roche. The origin of the dispute lies in a licence agreement signed in 1992 granting the licensee a world-wide non-exclusive licence for the use of a patented substance and process. While the patent was definitely revoked by the European Patent Office in 1999 for lack of novelty, the licence agreement provided for running royalties in the amount of 0.5% based on the manufacture of a medicine incorporating the patented substance. The royalties would be due even if, in the country of manufacture, the patent was found to be invalid. Genentech manufactured and sold the top-selling medicine Rituxan® (whose yearly sales were at some point about € 5 billion), which implemented the technology of the subject matter of the licence agreement. Rituxan® is indicated for the treatment of various forms of lymphoma and other conditions.

Hoechst began ICC arbitration proceedings in 2008 for the payment of royalties, pursuant to the licence agreement. The arbitrator ultimately sided with Hoechst and ordered Genentech to pay over € 108 million plus interest from 1998. On appeal, Genentech requested the Paris Court of Appeal to set aside the arbitration award on the grounds, inter alia, that it breached international public order. According to Genentech, the award that found a breach of a licence agreement without establishing any patent infringement and, as a result, ordered a payment of running royalties, is contrary to Article 101 TFEU and the principle of free competition as the licensee must bear unjustifiable costs for a technology which is no longer patented and is thus accessible without restriction. Genentech added that under EU law, royalties cannot be paid to a licensee for the use of an invention which would not constitute a patent infringement in the absence of such an agreement.

The Paris Court of Appeal stayed the proceedings and made a request for a preliminary ruling to the Court of Justice of the European Union ("ECJ") (see VBB on Competition Law, Volume 2015, No. 2)

In his opinion, the Advocate General considered that an arbitral award giving effect to a licensing agreement according to which the licensee has to pay royalties, even if the patents protecting the technology are revoked, does not violate Article 101 TFEU provided four conditions are satisfied.

First, Article 101 TFEU is not breached where the commercial purpose of the licence agreement is to avoid patent litigation. In this respect, the Advocate General noted that Genentech's obligation to pay royalties did not flow from the use of a technology protected by valid patents, but from the licensing agreement alone. The Advocate General deferred to the arbitrator's interpretation of the licensing agreement that its commercial purpose was for Genentech to use the licensed product to avert patent litigation. The Advocate General also recalled that the aim of Article 101 TFEU was not to regulate commercial relations between undertakings in a general way, but rather to prohibit agreements which have the object or effect of preventing, restricting or distorting competition within the internal market.

Second, the licensee should be able to terminate the licence by giving reasonable notice. In the present case, the obligation to pay royalties imposed on Genentech was stipulated to last only for the duration of the licensing agreement, which Genentech was free to terminate on a short 2 months' notice. The Advocate General noted that, after termination of the licensing agreement, Genentech would be in the same position as its competitors.

Third, the licensee should be able to challenge the validity or infringement of the patents.

Fourth and finally, the licensee should retain freedom of action after termination. In the present case, the Advocate General noted that Genentech's freedom of action was not subject to any clause preventing it from challenging the validity or the infringement of the patents concerned and the licence agreement did not restrict in any way its freedom of action after termination.

In addition, the Advocate General considered that national courts have the power to review whether arbitral awards comply with EU competition law regardless of whether or not a violation of EU competition law was raised before the arbitral tribunal. He added that such a review should not be limited to flagrant or manifest violations. A limitation imposed on national courts to review international arbitral awards is contrary to the principle of effectiveness of EU law. Therefore, parties to agreements which might be regarded as anti-competitive cannot put these agreements beyond the reach of review under Articles 101 TFEU and 102 TFEU by resorting to arbitration (See, Case C-126/97, Eco Swiss China Time Ltd v Benetton International NV).

European Commission presents its initial findings on geo-blocking with respect to online digital content in e-commerce sector inquiry

On 18 March 2016, the European Commission published its initial findings of its sector inquiry into the e-commerce sector in relation to geo-blocking practices. The Commission defines geo-blocking as commercial practices whereby online providers prevent users from accessing and purchasing consumer goods or digital content services offered on their website based on the geographical location of the users (i.e., in a Member State differing from that of the provider).

The Commission's findings, which are based on the replies from more than 1,400 retailers and digital content providers from all 28 Member States, show that geo-blocking is widespread throughout the EU. Consumer goods are discussed in the section of this newsletter covering vertical agreements.

With respect to online digital content, a majority (68%) of the providers replied that they resort to geo-blocking users located in other Member States, mainly on the basis of the user's IP address. The extent to which online digital content service providers from different Member States resort to geo-blocking varies considerably: in some Member States (e.g., Italy), only a minority of respondents (46%) use geo-blocking to prevent access to and use of their online digital content services. In other Member States (e.g., UK) a majority of respondents (83%) rely on geo-blocking.

The findings also reveal that geo-blocking mostly results from contractual restrictions in agreements between digital content providers and right holders (59%). Only a minority of respondents (9%) indulge in geo-blocking without being required to do so contractually. Licensing agreements for fiction television (78%), films (77%) and sports (69%) involve more geo-blocking than licensing agreements for other digital content categories.

The results of these findings will feed the Commission's on-going analysis in the e-commerce sector inquiry to identify potential competition issues and will also complement actions launched within the framework of the Digital Single Market Strategy, which aims at addressing regulatory barriers that may hinder cross-border e-commerce. The Commission plans to present a preliminary report in mid-2016 detailing all of its findings from the on-going e-sector inquiry. The final report is scheduled for the first quarter of 2017.

The Commission may also open investigations against individual firms to ensure compliance with competition law, should it identify any specific competition concerns on geo-blocking.

The Commission's staff working document on geo-blocking practices in e-commerce is available here.

| STATE AID

EUROPEAN UNION: On 7 March 2016, the European Commission launched a public consultation to seek stakeholders' views on the review of Commission Regulation 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (General Block Exemption Regulation ("GBER")). The Commission intends to include exemptions for investment aid to ports and airports in the GBER and also plans to address some technical issues associated with the current GBER. The Commission invites comments on its proposal by 30 May 2016. It will then publish an updated draft, which will be subject to a second public consultation, planned for autumn 2016, before deciding on the final revised GBER.

EUROPEAN UNION: In March 2016, the European Commission published an updated version of its Frequently Asked Questions ("FAQs") on Commission Regulation 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (General Block Exemption Regulation ("GBER")). The FAQs, which provide practical guidance on the interpretation of each of the GBER's articles, is a working paper prepared by the Commission but is stated not to be binding on it.

EUROPEAN UNION: On 8 March 2016, the Court of Justice of the European Union ("ECJ") dismissed the appeal brought by Greece against a judgment of the EU General Court ("GC") handed down on 16 July 2014. The GC had dismissed an action for annulment of a Commission Decision of 7 December 2011 which found that certain compensation payments made by the Greek Agricultural Insurance Organisation constituted incompatible state aid and ordered their recovery. The case is interesting for two reasons. First, the ECJ confirmed that the compensation payments conferred an advantage on the members of the compulsory insurance scheme even if the payments were financed by the members' contributions, and that the compensation payments were made through state resources because the private compulsory insurance contributions were entered in the state budget as state revenue. Second, the ECJ confirmed that in the area of state aid, the Commission is bound by the guidelines that it issues (in this case, the Temporary Community Framework for State aid measures to support access to finance in the current financial and economic crisis), to the extent that they do not depart from the Treaties or breach general principles of law. However, contrary to the GC, the ECJ added that, irrespective of the existence of such guidelines, the Commission is still obliged to examine the compatibility of the aid measure directly on the basis of the Treaty (in this case, Article 107(3)(b) TFEU) if the Member State justifies such a request. However, Greece did not provide sufficient evidence justifying the direct application of Article 107(3)(b) TFEU. The ECJ dismissed the appeal in its entirety.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– EUROPEAN UNION LEVEL –

ECJ reinforces safeguards concerning Commission's requests for information

On 10 March 2016, the Court of Justice of the European Union ("ECJ") annulled on appeal a series of European Commission decisions requiring several cement manufacturers to supply information within the context of a cartel probe in the cement sector (the "Contested Decisions"). The ECJ held that the Commission's Contested Decisions were not adequately reasoned (Case C-268/14 and others, Italmobiliare SpA and others v. European Commission).

In 2008/2009, the Commission carried out inspections at the premises of cement manufacturers after it had opened an investigation of its own accord, without having been informed of alleged practices by a leniency applicant. The Commission then initiated proceedings against several of those companies. As part of its investigation, the Commission relied on Article 18(3) of Regulation 1/2003 to adopt decisions to request information. As noted by the ECJ, these decisions required the disclosure of "extremely extensive and detailed information relating to a considerable number of transactions, both domestic and international, in relation to twelve Member States over a period of ten years".

A number of addressees of the Contested Decisions lodged appeals before the EU General Court ("GC") alleging inadequate statement of reasons in the Contested Decisions, all of which were largely dismissed (see VBB on Competition Law, Volume 2014, No. 3). Four cement producers decided to appeal the GC judgments to the ECJ.

In its judgments, the ECJ held that the Commission's Contested Decisions were not adequately reasoned. From the outset, relying on Article 296 TFEU, the ECJ recalled that the statement of reasons for measures adopted by EU institutions must be appropriate to the measures at issue and must disclose clearly and unequivocally the reasoning followed by the institution in such a way as to enable the persons concerned to ascertain the reasons for such measures and to enable the EU courts to review their legality. Importantly, the ECJ took the view that "the question whether the statement of reasons relating to the [Contested Decisions] met the [above] requirements of Article 296 TFEU must be assessed in light not only of its wording, but also of the context in which that decision was taken".

In the present case, the ECJ noted that the "excessively succinct, vague and generic […] statement of reasons" of the Contested Decisions did not make it possible for the addressees of the requests for information to determine with sufficient precision either the products to which the investigation related (i.e., "cement products and other materials used in the production of cement and of cement-based products industries") or the scope of the alleged infringement (i.e., "restrictions on imports into the EEA from countries outside of the EEA, market-sharing and price-coordination practices as well as other anti-competitive practices relating thereto") justifying the adoption of the Contested Decisions. Similarly, the geographical scope of the alleged infringement was found to be ambiguous when read in conjunction with the Commission's prior decision to initiate proceedings.

The above statement of reasons could not be justified given that the Contested Decisions were "adopted at a time when the Commission already had information that would have allowed it to present more precisely the suspicions of infringement by the companies involved". Specifically, the Contested Decisions were adopted: (i) more than two years after the initial inspections; (ii) after a number of other requests for information had already been sent and answered; and (iii) several months after the decision to initiate proceedings.

The ECJ judgments stand for the proposition that the far-reaching investigative powers of the Commission are clearly constrained by fundamental rights, including the investigated parties' rights of defence. While early requests for information may be adopted on the basis of preliminary evidence, if sent at a later stage of the proceedings, they must be based on sufficiently precise indications which enable the addressee of the request to understand the purpose of the investigation and the possible infringement alleged. If the Commission fails to abide by this obligation, then the undertakings concerned should bear in mind that they have at their disposal a remedy enforceable before EU Courts.

– OTHER DEVELOPMENTS –

BELGIUM: On 22 March 2016, the new guidelines concerning the leniency regime under Belgian competition law were published in the Belgian Official Journal and entered into force on that same day. The new guidelines were adopted by the board of the Belgian Competition Authority on 1 March 2016. The Dutch version of the new guidelines can be found here; the French version can be found here.

PRIVATE ENFORCEMENT

– MEMBER STATE LEVEL –

BELGIUM

Constitutional Court hands down judgment on limitation period applicable to civil damages claim for competition law infringement

On 10 March 2016, the Belgian Constitutional Court held that a non-contractual civil damages claim based on an infringement of competition law cannot become time-barred before there is a final decision with res judicata character on the existence of a competition law infringement. Another interpretation of Article 2262bis, §1, second paragraph of the Belgian Civil Code (i.e., the general statute of limitations for a tort-based civil damages claim) would be in conflict with the principle of equal treatment.

The Constitutional Court explained that in a civil procedure the plaintiff carries the burden of proof and that the existence of a competition law infringement is essential for the establishment of a tort-based fault under civil law. According to the Court, the fact that a competition law infringement usually requires a complex factual and economic analysis of the available evidence makes this burden very heavy. The Court went on to consider that since the limitation period for bringing a damages claim already starts to run before there is a final decision on the existence of a competition law infringement, the plaintiff is compelled to initiate civil proceedings without being able to rely on a final decision as evidence of a tort-based fault. According to the Court, this hampers the plaintiff's ability to bring an action for damages. The Court stressed that its judgment is in line with Article 10 of the new European Directive 2014/104/EU on antitrust damages actions, even though the Directive has not yet been implemented in Belgium and does not have to be implemented until 27 December 2016 (see VBB on Competition Law, Volume 2014, No. 11).

The case will now return to the Commercial Court of Dendermonde, which had referred a question for a preliminary ruling to the Constitutional Court.

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