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| HIGHLIGHTS

MERGER CONTROL:

| Commission conditionally approves acquisition of Equens by Worldline

| Telecom firm Altice fined in France for breaking merger commitments

ABUSE OF DOMINANT POSITION: Commission sends Statement of Objections to Google regarding Android

CARTELS AND HORIZONTAL AGREEMENTS:

| Société Générale's fine substantially reduced for its involvement in the Euribor cartel

| French Court of Appeal reduces fines in wallpaper cartel

VERTICAL AGREEMENTS: Germany refers online sales restrictions for preliminary ruling

INTELLECTUAL PROPERTY/LICENSING: UK appeals in the Seroxat "pay-for-delay" patent settlement agreements published

STATE AID: GC dismisses appeals against state aid decision on excise duty exemptions for Alumina production

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS:

| Irish High Court issues important decision on conduct of electronic searches during dawn raid

| UK Competition Authority fines Pfizer for failing to respond to a request for information within the allocated deadline

TOPICS COVERED IN THIS ISSUE

JURISDICTIONS COVERED IN THIS ISSUE

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VBB on Competition Law | Volume 2016, Nº 4

Table of contents

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MERGER CONTROL

– EUROPEAN UNION LEVEL –

Commission conditionally approves acquisition of Equens by Worldline

On 20 April 2016, the European Commission ("Commission") approved the acquisition by Worldline of Equens (and its subsidiary PaySquare) under the EU Merger Regulation, subject to divestment commitments and behavioural conditions. Worldline is the incumbent operator of payment services and terminals in Belgium and France, and is owned by Atos. Equens is also active in the provision of payment and related services. The transaction was announced in early November 2015 and notified to the Commission on 26 February 2016.

During its review, the Commission identified horizontal concerns (elimination of a competitor) in Belgium and vertical foreclosure concerns in Germany. In Belgium, the Commission found that PaySquare was a recent market entrant and exerted significant price pressure on Worldline. The proposed transaction would eliminate this price pressure.

In Germany, Worldline operated Poseidon software which is used in payment services. The Commission anticipated that other competing network service providers who relied on Poseidon software could be foreclosed access by Worldline.

Accordingly, on 30 March 2016 Worldline submitted divestment commitments to the Commission. Under the remedies, Worldline committed to (a) divesting PaySquare's business in Belgium and (b) granting licenses for the Poseidon software on fair, reasonable and non-discriminatory (FRAND) terms for a period of ten years in Germany.

In particular, the commitments require Worldline to transfer customer contracts, customer data, sales partnership agreements and key personnel responsible for sales, accounts and commercial product management in Belgium. In Germany, the commitments require the granting of a license for Poseidon and its modules to third-party network service providers under FRAND terms, the capping of certain maintenance fees and additional monitoring provisions to ensure compliance by Worldline with the commitments.

– MEMBER STATE LEVEL –

FRANCE

Telecom firm Altice fined in France for breaking merger commitments

On 19 April 2016, Luxembourg-based telecom group Altice was fined a total of €15 million by the French Competition Authority ("FCA") for failing to comply with certain commitments relating to the acquisition by its subsidiary, Numericable, of rival SFR.

On 30 October 2014, the FCA granted its approval for Altice to take sole control of mobile-telephone operator SFR, subject to certain commitments. The transaction, as notified, would have resulted in Altice having high market shares in mobile telephony in two French overseas territories in the Indian Ocean: 66% in La Réunion and 90% in Mayotte. In order to address this, Altice committed to divesting Outremer Télécom, a mobile telephony business which Altice operated in La Réunion and Mayotte. Further, Altice agreed not to interfere with the management of Outremer Télécom's business, pending its divestment.

However, the FCA discovered that Altice failed to respect its commitments as it interfered in the business to be divested by raising Outremer Télécom's tariffs between 17% and 60%. These tariff increases put the competitiveness of Outremer Télécom at risk and allowed customers to terminate their contracts without having to pay extra charges.

The commitment breach was aggravated as Altice's decision to increase tariffs was never communicated to the FCA. Further, the tariff increases were implemented by Altice even though it made a prior commitment to appoint an independent manager to run the divested business.

The FCA considered the tariff increases to be of an "*unprecedented form and extent*", as they were imposed not only on new customers, but also on existing customers, which, according to the FCA, is a very rare business practice from a commercial perspective.

Altice stated that it reserved its right to appeal against the decision of the FCA.

IRELAND

CCPC ends long running saga of Kerry / Breeo appeal decision from 2009

On 21 April 2016, the Irish Competition and Consumer Protection Commission ("CCPC") announced in a press release that it would not seek to further challenge in the Irish Supreme Court a decision of the Irish High Court in 2009 to overturn the third (and last) merger prohibition decision of the former Competition Authority under the Competition Act, 2002. The decision has been awaiting a full appeal hearing in the Supreme Court since that time.

Previously, in August 2008, following a Phase II investigation, the CCPC decided to block Kerry Group's acquisition of Breeo Foods on the grounds that it was likely to result in a substantial lessening of competition in a number of grocery product markets (i.e. the product markets for rashers, non-poultry cooked meats and processed cheese). However, on 19 March 2009, Justice Cooke of the Irish High Court set aside that decision. In part, the High Court noted that the conclusions drawn by the CCPC as to the absence of sufficient countervailing buyer power on the part of the main retailers were flawed and unsound and disagreed with CCPC's finding of an absence of countervailing buyer power.

| ABUSE OF DOMINANT POSITION

– EUROPEAN UNION LEVEL –

Commission sends Statement of Objections to Google regarding Android

On 20 April 2016, the European Commission confirmed it issued a Statement of Objections ("SO") to Google concerning the imposition of restrictions on Android device manufacturers and mobile network operators. The investigation was formally opened in April 2015 (see VBB on Competition Law, Volume 2015, No 4). Google now has until July 2016 to formally respond to the Commission's concerns.

Based on the press release, the Commission's preliminary view is that Google abused its dominance in the markets for (i) general internet search services, (ii) licensable smart mobile operating systems, and (iii) app stores for the Android mobile operating system.

The Commission's concerns are based on a finding that Google's Android business model pursues an anticompetitive strategy of protecting and expanding its dominant position in internet search. As Commissioner Vestager explained in a statement, Google's Android business model "*denies consumers a wider choice of mobile apps and services and stands in the way of innovation by other players*". In particular, it is alleged that Google breached Article 102 TFEU by:

- Requiring manufacturers to pre-install Google Search and Google Chrome browsers as default options on devices,
- Preventing manufacturers from selling smart mobile devices running competing operating systems based on the Android open source code, and
- Giving financial incentives to manufacturers and mobile network operators on condition that they exclusively pre-install Google Search on their devices.

The Commission alleges that the restrictive arrangements are imposed by Google through a suite of licencing agreements with manufacturers and developers including, *inter alia*, a Compatibility Definition Document (CDD), Mobile Application Distribution Agreement (MADA) and Anti-Fragmentation Agreement (AFA). Similar to any abuse of dominance allegation, the European Commission has relied on Google's high market share in the relevant markets to underpin the dominance allegation contained in the SO and estimates that Google has shares of in excess of 90% for the relevant markets.

A Fact Sheet accompanying the press release also notes that the network effect of more consumers adopting the Android operating system means that a greater number of developers create apps for that system – which in turn creates barriers to entry that further protect Google's position. Also, the European Commission asserts that the switching cost for a customer to change operating system is high, given that it involves losing apps, data and contacts.

Finally, the Commission continues to investigate Google for an alleged abuse of a dominant position in the market for general internet search services in the EEA by way of systematically favouring its own comparison shopping product in its general search results on the web (see VBB on Competition Law, Volume 2015, No 4).

Commission relieves Deutsche Bahn of duty to meet commitments decision following market developments

On 8 April 2016, the Commission announced that it had adopted a decision to relieve Deutsche Bahn of its obligation to comply with a commitments decision made binding on the company in December 2013. According to the Commission, the commitments decision had achieved its "*main purpose*", which it identified in its press release of the same date as enabling "*electricity providers not belonging to the Deutsche Bahn Group to enter the previously monopolised market for the supply of traction current to railway undertakings*."

Competition Commissioner Vestager added that: "*The growth in the level of competition in the German railway power supply market confirms that the commitments were successful at remedying our competition concerns. This is a good example of how commitment decisions can quickly and effectively open up markets, ensure a level playing field* *and lead to more competition and lower prices for consumers and businesses*."

The commitments decision of December 2013 was adopted to end proceedings that were initiated in June 2012 regarding Deutsche Bahn's pricing system in Germany for the electricity used to power locomotives (see VBB on Competition Law, Volume 2012, No. 6). At the time of the investigation, DB Energie, a subsidiary of Deutsche Bahn, was the only supplier of such electricity (known as "traction current"), and only companies in the Deutsche Bahn group were able to fully benefit from available discounts.

To resolve these concerns, Deutsche Bahn offered to apply a single price without volume or duration-based discounts, and also agreed to pay non-Deutsche Bahn group companies a one-time retroactive refund of 4%. These commitments were published in August 2013 (see VBB on Competition Law, Volume 2013, No. 8). In a press release from the time, then-Commissioner Almunia stated "*The Commission has concerns that DB Energie's pricing system, and in particular discounts that only railway companies of the DB Group can achieve fully, may have hampered the development of competition on the markets for rail freight and long-distance passenger transport, in breach of EU antitrust rules.*" The Commission's theory of infringement, as expressed in its press release, was that Deutsche Bahn may have created a margin squeeze on the long distance passenger rail transport and rail freight markets in Germany because the prices charged by it for traction current did not allow competitors on the downstream market (identified as those providing "rail transport services") to trade profitably on a lasting basis.

The price-based commitments thus helped bring an end to this alleged margin squeeze. At the same time, the Commission also accepted commitments from Deutsche Bahn with the aim of attracting new competitors on the upstream market for the supply of traction current to rail transport companies. This was accomplished by requiring the Deutsche Bahn group to introduce a new pricing system for traction current with separate supply prices for electricity and separate grid access fees, and at the same time offer access to its traction current network for third party energy providers so that they can supply traction current to railway undertakings.

The commitments were adopted for five years, but foresaw an earlier termination if 25% of traction current volumes purchased by competitors of the DB Group would be sourced from third party electricity providers. According to the Commission, this has now taken place. In adopting the decision at issue, Deutsche Bahn is now free of all the commitments that it offered, including, interestingly, those that prevented it from implementing volume or duration-based discounts. It will thus be interesting to see if Deutsche Bahn begins to offer discounts to its rail transport service customers, and, if so, whether the new competitors retain their current share of 25% of the market.

CARTELS AND HORIZONTAL AGREEMENTS

– EUROPEAN UNION LEVEL –

European Commission imposes a fine of €5.2 million in canned mushroom cartel

On 6 April 2016, the European Commission announced that it had imposed a fine of €5.2 million on Spanish canned and fresh vegetable company Riberebro for its involvement in a price-fixing and market allocation cartel in Europe from 10 September 2010 to 28 February 2012.

The Commission had previously settled in June 2014 with three other canned and fresh vegetable companies, Bonduelle, Lutèce and Prochamp, for their involvement in the same cartel (see VBB on Competition Law, Volume 2014, No. 7), while Riberebro chose not to settle.

European Commission publishes non-confidential version of its decision in the Alternators and Starters case

On 19 April 2016, the European Commission published the non-confidential version of its *Alternators and Starters* decision in which it had fined, under the settlement procedure, three Japanese car parts manufacturers a total of €137 million for coordinating prices and allocating customers or projects with regards to alternators and starters (see VBB on Competition Law, Volume 2016, No. 4).

The non-confidential version of the decision is available here.

Société Générale's fine substantially reduced for its involvement in the Euribor cartel – this case highlights challenges of the settlement procedure

On 6 April 2016, the European Commission announced that it had reduced the fine imposed on French bank Société Générale from €446 million to €227.7 million after having revised the value of sales used to calculate the fine.

Société Générale had initially settled with the Commission under the settlement procedure, acknowledging that it had been involved in the Euribor interest-rate cartel (see VBB on Competition Law, Volume 2013, No. 12). Despite settling, Société Générale appealed the settlement decision on the ground that the Commission had committed a "*manifest error of assessment*" in calculating the fine. Specifically, Société Générale took the view that the Commission had used the wrong value of sales as a basis for calculating the fine. This was the first time a settlement decision was appealed.

Société Générale dropped its appeal after the Commission confirmed, in a rare occurrence, that it would accept the new sales figures that Société Générale had provided in February 2016 and reduce the amount of the fine accordingly.

Analysis: The Société Générale case highlights challenges of the settlement procedure

Under the settlement procedure, the Commission and the parties engage in bilateral discussions during which they discuss the scope of the infringement and factors determining the amount of the fine, which include the value of sales on which the basic amount of the fine is to be calculated. During the discussions, the Commission verifies whether an (informal) common understanding exists with the party regarding the scope of the infringement and the value of sales, after which it discloses its assessment of the range of fines to be imposed on the party concerned. At any time, the party may decide to discontinue the settlement procedure and revert to the standard procedure if the party disagrees with the Commission's assessment of the case.

In this context, the appeal lodged by Société Générale against a settlement decision was surprising. Indeed, Société Générale had been free to discontinue the settlement discussions if it had considered that the amount of the possible fine that it was facing did not correspond to its own assessment of the fine.

This case highlights challenges of the settlement procedure. In particular, due to the very nature of the bilateral settlement discussions, a party is not in a position to adequately determine whether it is treated equally as regards other parties until the final settlement decision is adopted.

Based on the amount of the original fines imposed in 2013, Société Générale was put at the same level as other banks, such as Deutsche Bahn and Barclays, even though Société Générale was a smaller player on the market. This situation appears to have been the principal reason for Société Générale's appeal.

– MEMBER STATE LEVEL –

FRANCE

French Court of Appeal reduces fines in wallpaper cartel

On 14 April 2016, the French Court of Appeal reduced the fines imposed on three wallpaper manufacturers for their involvement in a price-fixing cartel in the wallpaper sector between May 2006 and September 2010. In a decision of December 2014, the French Competition Authority ("FCA") found that these companies had breached French competition law (see VBB on Competition, Volume 2015, No. 1). The companies appealed this decision.

Under the French Fining Guidelines, a fine may be reduced where the product that is the subject of the infringement represents a substantial proportion of an undertaking's total turnover. In the present case, the Court of Appeal considered that the proportion of the product subject of the infringement had to be assessed in relation to all sales of such product by the group to which the infringing entity belongs. Under this methodology, the Court of Appeal noted that the cartelised product represented between 76% and 97% of the total turnovers of the groups to which the infringing entities belonged. In its judgment, the Court of Appeal criticized the FCA for having assessed only the proportion of the product subject of the infringement in relation to the sales of the whole group (ranging for different parties between 4 and 11%), without considering whether other entities in the group also had sold the cartelised product.

As a result, the fines were cut as follows: for Société de Conception from €3.56 million to €1.49 million, for MCF from €1.4 million to €594,000 and for Création France/Création Tapeten's from €2.99 million to €898,000.

GERMANY

German Federal Cartel Office accepts commitments in relation to the joint selling of media rights for football matches

The German Federal Cartel Office ("FCO") has recently accepted commitments offered by the German League Association and the German Football League ("DFL") for the joint award of media rights for games of the 1st and 2nd German football leagues ("Bundesliga") starting from the 2017/2018 season.

The FCO had previously established that the joint selling of media rights by the German League Association and the DFL restricts competition between football clubs. Pursuant to competition law, such agreements can only be exempted if the joint marketing of football games leads to improvements of the product for consumers, for which restrictions of competition are indispensable. As previously acknowledged by the FCO (see VBB on Competition Law, Volume 12, No. 2), the joint selling of media rights offers advantages and efficiencies for consumers.

Among the offered commitments, the League Association and the DFL have committed to observe the "no single buyer" rule, according to which no single bidder will be able to acquire the rights to broadcast all the live Bundesliga matches. The FCO found it is sufficient that between 30 and 102 attractive matches of a total of 306 matches (depending on whether all broadcasting channels or only mobile or internet broadcasting are included), together with extensive possibilities for highlight coverage, are purchased by an alternative bidder. The FCO did not insist on a stricter version of the "no single buyer" rule because of the strong position of free TV in Germany and the broadcasting of near realtime game highlights on German free TV, which the marketing model of the League Association and the DFL will maintain. The FCO further took into account that online live sport coverage is still in its early stages and has not yet reached a wide audience. The commitments are now legally binding.

| VERTICAL AGREEMENTS

– MEMBER STATE LEVEL –

GERMANY

Germany refers online sales restrictions for preliminary ruling

On 19 April 2016, in proceedings involving Coty, a producer of branded perfumes, and its distributor Parfümerie Akzente, the Higher Regional Court of Frankfurt (the "Court") referred a question on the ban on the use of online platforms in selective distribution agreements for a preliminary ruling by the European Court of Justice (the "ECJ").

Under the terms of its selective distribution agreement, Coty prohibits distributors from selling Coty's products on online platforms such as eBay and Amazon.com. Parfümerie Akzente violated this prohibition by selling Coty's products on Amazon's online marketplace and Coty initiated legal proceedings. On 31 July 2014, a lower court held that maintaining a prestigious brand image is not by itself a legitimate justification for prohibiting sales on internet platforms in a selective distribution agreement. On appeal, the Court has referred the matter to the ECJ for a preliminary ruling, asking, first, whether an undertaking can impose an outright ban on sales on online third-party platforms even if the platforms satisfy the qualitative criteria stipulated in the selective distribution agreement and, second, whether the prohibition on sales via online third-party platforms constitutes a restriction on passive sales.

The ruling of the ECJ is expected to be of considerable importance given the current alarming degree of divergence in the rulings of courts and competition authorities across the EU concerning the legitimacy of restrictions on platform sales in the context of selective distribution.

UNITED KINGDOM

UK fines supplier of bathroom fittings for online retail price maintenance

On 26 April 2016, the UK's Competition and Markets Authority ("CMA") announced that it had fined Ultra Finishing Limited ("Ultra Finishing"), a supplier of bathroom fittings, £826,000 for retail price maintenance. The CMA found that, from 2012 to 2014, Ultra Finishing issued recommended online retail prices to retailers for the Hudson Reed and Ultra lines of products. Although recommending retail prices is not an infringement of competition law on its own, Ultra Finishing took steps to enforce its recommendations by taking measures such as threatening retailers with penalties for not pricing at or above the recommended prices, charging the noncompliant retailers higher prices, withdrawing their rights to use Ultra Finishing's images online, and ceasing supply. The CMA concluded that Ultra Finishing's conduct stopped retailers from offering discounted prices online, reduced competition between online and regular brick and mortar sales and denied consumers the benefit of lower prices. The company received a 20% reduction in the fine for its admission of the conduct and for assisting the CMA's investigation.

In a press release, Ultra Finishing stated that it ceased the practices as soon as it realised they constituted a violation of competition law and it has provided the CMA with extensive research and documentation of allegedly similar, yet on-going practices in the bathroom fittings industry. The CMA noted that it had received complaints of similar conduct by other suppliers of bathroom fittings in the UK, but it has not yet taken a decision on whether to investigate.

The case is a further example of enforcement activity against restrictions of online sales, which seem to be the main enforcement priority of competition authorities in the area of vertical agreements.

| INTELLECTUAL PROPERTY/ LICENSING

– MEMBER STATE LEVEL –

UNITED KINGDOM

UK appeals in the Seroxat "pay-for-delay" patent settlement agreements published

On 18 April 2016, the summaries of the appeals lodged by pharmaceutical companies Actavis, Alpharma, Generics, GlaxoSmithKline ("GSK"), Merck and Xellia challenging a decision given by the UK Competition and Markets Authority ("CMA") on 12 February 2016 were published. The CMA had fined these companies a total of £45 million for allegedly concluding anti-competitive "pay-for-delay" patent settlement agreements involving Seroxat, an antidepressant medicine, between 2001 and 2004 (see VBB on Competition Law, Volume 2016, No. 2).

In essence, the appellants claim that the CMA erred in finding that the settlement agreements had the object or the effect of restricting competition; that the extensive passage of time between the conclusion of the settlement agreements and the start of the CMA's investigation breached the parties' rights of defense; and that the settlement agreements do not constitute a breach of UK competition law by virtue of the Vertical Agreement Exclusion Order (i.e., the UK equivalent to the EU Vertical Guidelines).

All of the complainants have sought the annulment of the CMA decision, including the fines. Failing that, they seek a substantial reduction of the fines.

| STATE AID

– EUROPEAN UNION LEVEL –

GC dismisses appeals against state aid decision on excise duty exemptions for Alumina production

On 22 April 2016, the General Court ("GC") handed down judgments in three related cases concerning exemptions from excise duties granted by France, Ireland and Italy to alumina producers (Joined Cases T-50/06 RENV II *Ireland v Commission* and T-69/06 RENV II *Aughinish Alumina v Commission*, Case T-56/06 RENV II *France v Commission* and Joined Cases T-60/06 RENV II *Italy v Commission* and T-62/06 RENV II *Eurallumina v Commission*). Ruling for the third time in these cases, the GC dismissed the actions for annulment in their entirety.

The cases relate to exemptions from excise duties on mineral oils used for the production of alumina. Under the EU rules on excise duties, harmonising EU Member States' legislation, Member States may petition the Council for exemption from the minimum uniform levy. France, Ireland and Italy did so for exemptions granted to alumina producers. The Council authorized those exemptions and extended them until 31 December 2006.

However, in 2001, the European Commission ("Commission") initiated a formal state aid investigation procedure against the three Member States. In 2005, following an investigation that lasted just over 49 months, the Commission decided that the exemptions constituted unlawful state aid. The Commission ordered the recovery of the part of the aid granted after the date of publication in the Official Journal of its decisions to initiate the formal investigation procedure. The three Member States and the beneficiaries of the excise duty exemptions in Ireland and Italy brought an action for annulment against the Commission decision.

In 2007, the GC annulled the Commission decision, but its judgment was set aside by the ECJ in 2009. In 2012, the GC annulled the Commission decision on other grounds, but in 2013 the ECJ again set aside the GC judgment. In its second judgment, the ECJ ruled that the Council's decisions authorising the Member States to introduce an exemption do not have the effect of preventing the Commission from examining whether that exemption constitutes state aid. The powers conferred on the Commission by the Treaty in the area of state aid are also not hindered by the fact that the Council adopted its authorisation decision in the area of excise duties on a proposal from the Commission itself. According to the ECJ, that fact however had to be taken into consideration in relation to the obligation to recover the incompatible aid, in light of the principles of protection of legitimate expectations and legal certainty, as was correctly done by the Commission when it declined to order the recovery of aid granted before the date of publication in the Official Journal of its decisions to initiate the formal investigation procedure.

Contrary to its first two judgments of 2007 and 2012, the GC now confirmed the Commission's decision. As the GC is bound by the ECJ's judgment on points of law, the GC applied the ECJ's analysis regarding the different powers conferred on the Council and the Commission as well as the ECJ's reasoning regarding the principles of legitimate expectations and legal certainty.

In addition, the GC examined a possible infringement of the principle of legitimate expectations in light of the Commission's delay in adopting its decision. The GC ruled that a period of 49 months between the initiation of the formal investigation procedure and the adoption of the contested decision did not constitute a reasonable period. However, the GC then ruled that this delay was not an exceptional circumstance capable of having given rise, on the part of the beneficiaries of the aid, to a legitimate expectation that the aid at issue was lawful, since (i) the exemptions were applied after the Commission's initiation of the formal investigation procedure; and (ii) the aid schemes had not been notified to the Commission. As the beneficiaries could therefore not reasonably believe that the exemptions at issue would encounter no objection, the GC rejected the plea. Other pleas raised by the applicants regarding the qualification of the exemptions as unlawful state aid were also rejected by the GC.

The judgment of the GC, applying the ECJ's analysis, is interesting as it confirms the Commission's central role in the area of state aid, which cannot be affected by the acts of EU institutions (including the Commission itself) in other areas of EU competence. Moreover it shows that an unreasonably long investigation period may not be sufficient to give raise to legitimate expectations.

– OTHER DEVELOPMENTS –

EUROPEAN UNION: On 13 April 2016, the European Commission published its **interim report** on the state aid sector inquiry into capacity mechanisms, i.e. national measures to ensure sufficient electricity supplies, which was launched in April 2015 (see, VBB on Competition Law, Volume 2015, No. 5, p. 18). While confirming that capacity mechanisms may be an appropriate instrument in specific situations, the Commission points to two main shortcomings. The interim report is open for public consultation. Interested parties are invited to submit their comments by 6 July 2016.

| LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– MEMBER STATE LEVEL –

IRELAND

Irish High Court issues important decision on conduct of electronic searches during dawn raid

On 5 April 2016, Justice Barrett of the High Court handed down an important decision concerning the conduct of electronic investigations by the Competition and Consumer Protection Commission ("CCPC") in Ireland.

The case arose out of a dawn raid conducted by the CCPC in May 2015 on the premises of Irish Cement Limited, located in Louth, Ireland. The company under investigation appealed the decision of the CCPC to electronically extract a copy of the complete email inbox of a senior employee. In part, the company sought a declaration that the CCPC acted *ultra vires* and outside the scope of the search warrant in seizing certain information. In a 71 page decision, the Court agreed to grant a declaration that, on balance, certain materials seized by the CCPC during its dawn raid were not covered by the terms of the search warrant – and were accordingly unauthorised.

The decision is significant in a number of respects. Firstly, the Court engaged in a detailed analysis of the relationship between an individual or company's privacy rights under Article 8 of the European Convention on Human Rights ("ECHR") and the application of the CCPC's search and seizure powers under Irish law. In effect, the Court found that while the CCPC had not yet breached Article 8 of the ECHR, a breach would arise if the CCPC proceeded to review seized data, some of which may contain material outside the scope of the search warrant. Secondly, the Court identified a legislative gap in the Irish rules as it was possible for the CCPC to collect material during a search which would fall outside of the scope of its investigation. Thirdly, the decision may prompt a review of similar search powers for statutory bodies under Irish legislation.

In a separate press release, the CCPC indicated that it is considering carefully the implications of the judgment and that its investigation into alleged anti-competitive practices by Irish Cement in the supply of bagged cement will continue. An appeal is expected.

THE NETHERLANDS

Dutch Competition Authority's fining methodology upheld by the highest Dutch appeal court

On 24 March 2016, the Industry Appeals Tribunal (the "Tribunal"), the highest Dutch administrative appeal court in competition law matters, upheld a judgment of a lower court confirming that the Dutch Competition Authority (the "DCA") can rely on an undertaking's EU-wide turnover to calculate a fine for cartel infringements and that it does not have to limit itself to the turnover generated by that company in the Netherlands.

In May 2012, the DCA imposed an aggregate fine of over €9 million in an onion cartel case. The DCA found that five undertakings growing and processing onions agreed, inter alia, on the maximum area of land that each of them would farm, thereby limiting production and aiming to increase selling prices (see VBB on Competition Law, Volume 2012, No. 6). The fines imposed were, for the first time, based on the EU-wide turnover of the undertakings involved. According to the DCA, sales to customers outside the Netherlands, which were affected by the cartel, could have had an impact on the competitive process and structure of the onion industry in the Netherlands. In setting the fine, the DCA took into account the fact that neither the European Commission nor other Member States would initiate an investigation concerning the same cartel.

On appeal, the lower court held that Regulation 1/2003 provided the DCA the competence to enforce EU competition rules and to impose fines on the basis of the EU-wide turnover of the infringing companies (see VBB on Competition Law, Volume 2014, No. 3).

The Tribunal concurred with the lower court and held that the DCA's competence to impose fines on the basis of Regulation 1/2003 is not limited by the territorial scope of the EU internal market. The Tribunal considered, on the basis of the European Court of Justice's judgment in case C-231/14 Innolux, that the competence to impose fines must be distinguished from the territorial jurisdiction to enforce the prohibition of restrictive agreements. According to the Tribunal, Dutch law determined whether a cartel fine could be imposed on the basis of the turnover generated by sales to customers outside the Netherlands, since Regulation 1/2003 was silent in this regard. The Tribunal considered that the DCA's applicable fining guidelines did not stipulate that the fine must be based solely on the turnover generated by the infringing companies in the Netherlands. Consequently, for the purpose of calculating the fine, the DCA was allowed to also take into account the turnover from sales that were not made in the Netherlands.

UNITED-KINGDOM

UK Competition Authority fines Pfizer for failing to respond to a request for information within the allocated deadline

On 12 April 2016, the UK's Competition and Markets Authority ("CMA") imposed a fine of £10,000 on pharmaceutical company Pfizer for failing to respond to a request for information within the allocated deadline.

The CMA is currently carrying out an investigation into alleged excessive and unfair prices for phenytoin capsules, an anti-epilepsy drug. In the framework of its investigation, the CMA issued a statement of objections in which it expressed the preliminary view that Pfizer may have abused its dominant position in breach of competition law. In this respect, the CMA requested Pfizer to provide some information, and a 15-working day deadline was fixed to respond to that request.

However, Pfizer submitted its response 5 days after the allocated deadline, which, according to the CMA, was "without reasonable excuse". The CMA considered that Pfizer had not provided sufficient reasoning as to why it needed more time to answer the information request, despite asking the company to do so.

This is the first time the CMA imposes an administrative fine on a company for not complying with a request for information since it has been empowered to do so under a new 1 April 2014 provision of the UK Competition Act.

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