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VBB on Competition Law

| HIGHLIGHTS

MERGER CONTROL: European Commission conditionally clears acquisition of Arianespace by ASL in market for satellite launch services

CARTELS AND HORIZONTAL AGREEMENTS:

| European Commission imposes record-breaking fines of € 2.9 billion against truck producers

| European Commission accept commitments by container liner shipping companies on price transparency

VERTICAL AGREEMENTS: LEGO amends its rebate system

INTELLECTUAL PROPERTY/LICENSING:

| Court of Justice rules that payment of royalties under a licence agreement where the patent was held invalid may be compatible with Article 101 TFEU

| European Commission adopts a commitment decision on credit default swaps

STATE AID: Commission publishes decision on Netherland's tax ruling favouring Starbucks

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS: Higher fine ceilings for competition law infringements in the Netherlands as of 1 July 2016

PRIVATE ENFORCEMENT: Dutch Supreme Court accepts passing-on defense in private enforcement litigation

TOPICS COVERED IN THIS ISSUE

MERGER CONTROL 4
CARTELS AND HORIZONTAL AGREEMENTS 6
VERTICAL AGREEMENTS 11
INTELLECTUAL PROPERTY/LICENSING 12
STATE AID 14
LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS 15
PRIVATE ENFORCEMENT 17

JURISDICTIONS COVERED IN THIS ISSUE

EUROPEAN UNION 4, 6, 7, 8, 9, 12, 13, 14
FRANCE 5
GERMANY .... 4, 9 , 10, 11
GREECE 15
THE NETHERLANDS 16, 17
ROMANIA 5

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VBB on Competition Law | Volume 2016, Nº 7

Table of contents

| MERGER CONTROL 4

EUROPEAN UNION LEVEL....4

European Commission conditionally clears acquisition of Arianespace by ASL in market for satellite launch services 4

MEMBER STATE LEVEL....4

Higher Regional Court of Düsseldorf suspends ministerial authorisation of acquisition of Kaiser's Tengelmann by EDEKA 4

OTHER DEVELOPMENTS.... 5

| CARTELS AND HORIZONTAL AGREEMENTS 6

EUROPEAN UNION LEVEL.... 6

European Commission imposes record-breaking fines of € 2.9 billion against truck producers.... 6

European Commission accept commitments by container liner shipping companies on price transparency.... 6

General Court largely dismissed appeals in Marine Hose cartel case, but reduces the amount of the fine.... 6

General Court dismissed appeals lodged by Telefónica and Portugal Telecom, but orders the Commission to recalculate the fine 7

Court of Justice dismisses appeals in Prestressing Steel cartel case 7

Price Signalling: Does the Commission's position in the Liner Shipping case deviate from existing case law? 7

Portugal Telecom and Telefonica cases – Non-compete clauses: General Court endorses strict approach to ancillary restraints 8

Portugal Telecom and Telefonica cases – The Commission has to precisely determine the conduct to which the infringement directly or indirectly relates for the purpose of calculating the fine 8

Marine Hose cartel – Principle of personal liability in relation to aggravating circumstances and successor liability 9

MEMBER STATE LEVEL.... 9

German Federal Cartel Office finds German banking industry's general terms and conditions violate competition law 9

German Federal Cartel Office accepts commitments to alleviate competition concerns relating to a joint-venture for the sale of lighters....10

| VERTICAL AGREEMENTS 11

MEMBER STATE LEVEL....11

LEGO amends its rebate system....11

| INTELLECTUAL PROPERTY/LICENSING 12

EUROPEAN UNION LEVEL....12

Court of Justice rules that payment of royalties under a licence agreement where the patent was held invalid may be compatible with Article 101 TFEU 12

European Commission adopts a commitment decision on credit default swaps....13

| STATE AID 14

EUROPEAN UNION LEVEL....14

Commission publishes decision on Netherland's tax ruling favouring Starbucks 14

OTHER DEVELOPMENTS....14

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VBB on Competition Law | Volume 2016, Nº 7

Table of contents

| LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS 15

MEMBER STATE LEVEL 15

Greek competition authority introduces new cartel settlement procedure rules 15

Higher fine ceilings for competition law infringements in the Netherlands as of 1 July 2016 16

| PRIVATE ENFORCEMENT 17

MEMBER STATE LEVEL 17

Dutch Supreme Court accepts passing-on defense in private enforcement litigation 17

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| MERGER CONTROL

– EUROPEAN UNION LEVEL –

European Commission conditionally clears acquisition of Arianespace by ASL in market for satellite launch services

On 20 July 2016, the European Commission conditionally cleared the acquisition of Arianespace by Airbus Safran Launchers ("ASL"). Arianespace is a French company offering satellite launch services to private and institutional satellite operators. ASL is a 50/50 joint venture controlled by Airbus and Safran that manufactures the Ariane launch vehicle. An in-depth investigation was opened by the Commission in February 2016, when it identified preliminary concerns that, *inter alia*, the transaction would give rise to potential anticompetitive flows of sensitive information between Arianespace and Airbus, through the ASL joint venture.

The Commission's investigation found that the market for satellite launch service providers is highly dynamic and customers have a certain degree of buyer power. However, the Commission considered that potential exchanges of sensitive information could disadvantage competing satellite manufacturers and launch service providers. The exchanges related to (i) flows of information from Arianespace to Airbus about other satelite manufacturers, and (ii) flows of information which could result in less competitive tenders and less innovation in the markets for satellites and launch services.

Although the Commission typically prefers to adopt structural commitments, in this case, it accepted the parties' behavioural commitments to implement firewalls between Airbus and Arianespace in order to prevent information flows that could harm competitors. In particular, the companies committed not to share information about third parties with each other save for what is normally required for the everyday operation of their business. Second, the companies agreed to put in place measures restricting employees' mobility between the companies. Third, the companies offered to provide for an arbitration mechanism to be included in all their future non-disclosure agreements signed with third parties, to ensure the effective implementation of the firewalls.

As a result of the commitments offered by ASL, the Commission's preliminary concerns were addressed in full. Other concerns initially raised by the Commission were not substantiated during its investigation.

- MEMBER STATE LEVEL -

GERMANY

Higher Regional Court of Düsseldorf suspends ministerial authorisation of acquisition of Kaiser's Tengelmann by EDEKA

In a decision of 12 July 2016, the Higher Regional Court of Düsseldorf suspended the ministerial authorisation of the acquisition of the supermarket Kaiser's Tengelmann by its competitor EDEKA.

The German Minister of Economic Affairs, Sigmar Gabriel, issued a ministerial authorisation in March 2016 conditionally clearing the transaction (*see VBB on Competition Law, Volume 2016, No. 3*), after it had been prohibited by the German Federal Cartel Office (*see VBB on Competition Law, Volume 2015, No. 4*). REWE, itself interested in acquiring Kaiser's Tengelmann, and Markant AG subsequently appealed the ministerial authorisation before the Higher Regional Court of Düsseldorf and requested the appeal to be granted suspensive effect. An appeal against a ministerial authorisation does not by itself have suspensive effect, but a court can order such suspensive effect if it has serious doubts about the legality of the authorisation.

After a preliminary examination in summary proceedings, the Court found that the ministerial authorisation is unlawful and ordered its preliminary suspension on the basis of several reasons, which will have to be further examined in the main appeal proceedings. Among those reasons were that during the authorisation procedure the Minister had discussions with EDEKA and Kaiser's Tengelmann, which were not attended by other involved parties. The content of the discussions were also not kept on record. The Court further found that the Minister incorrectly considered preserving collective employee rights as a public interest. Moreover, according to the Court, based on the reasons stated in the

ministerial authorisation, it is not clear whether and to what extent the possibility of cutting jobs at EDEKA was part of the assessment.

- OTHER DEVELOPMENTS -

FRANCE: On 18 July 2016, the French competition authority granted conditional clearance to Fnac's proposed acquisition of Darty. Both companies are active in the retail market for consumer electrical products. Following a six month review, the combined entity must now divest six retail stores in Paris and surrounding suburbs. The merger is noteworthy because, for the first time, the French competition authority considered that sales of electrical products sold in-store and online comprised a single relevant retail market.

ROMANIA: On 5 July 2016, the Romanian Competition Authority (RCA) imposed a fine of approximately € 170,000 on the French advertising group Publicis Groupe Holdings B.V. for its failure to notify the acquisition of a majority stake of 80% in Zenith Media Communications in 2013.

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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 provide detailed analysis of important substantive or procedural developments addressed in these cases.

Summary of Significant Case Developments

European Commission imposes record-breaking fines of € 2.9 billion against truck producers

On 19 July 2016, the Commission announced it had adopted a decision under the cartel settlement procedure fining truck producers a record breaking € 2.9 billion for their participation in a cartel on the market for medium and heavy trucks. The companies involved in the decision are MAN, Volvo/Renault, Daimler, Iveco and DAF.

According to the Commission's press-release, the companies engaged restrictive practices which involved coordinating: (i) prices at "gross list" level; (ii) the timing of the introduction of emission technologies to comply with EU emissions standards; and (iii) the passing-on to customers of the cost for the emissions technologies required to comply with EU emissions standards. These activities covered the entire EEA and lasted 14 years, from 1997 until 2011.

Under the Commission's 2006 Leniency Notice, MAN received full immunity for revealing the existence of the cartel, thereby avoiding a fine of about € 1.2 billion. Volvo/Renault, Daimler and Iveco benefited from reductions of their fines between 10% and 40% for their cooperation under the 2006 Leniency Notice. All companies received an additional 10% fine reduction under the Settlement Notice. A sixth company, Scania, opted not to settle and the investigation continues under the standard infringement procedure for this company.

This case is particularly noteworthy as the Commission agreed, for the first time, to settle with the parties after the Statement of Objections under the standard infringement procedure had been issued.

European Commission accept commitments by container liner shipping companies on price transparency

On 7 July 2016, the European Commission adopted a decision that renders legally binding the commitments offered by 14 container liner shipping companies. The commitments aim to increase price transparency for customers and to reduce the likelihood of coordinating prices.

The Commission had previously opened proceedings to investigate 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.

General Court largely dismissed appeals in Marine Hose cartel case, but reduces the amount of the fine

On 14 July 2016, the General Court delivered a judgment in the Marine Hose cartel case, which had been referred back to the General Court by the Court of Justice, in relation to fines imposed by the Commission on Parker ITR and Parker-Hannifin (*see VBB on Competition Law, Volume 2009, No. 1* and *Volume 2014, No. 12*) (Case T-146/09 RENV, *Parker Hannifin Manufacturing and Parker-Hannifin v Commission*).

In its judgment, the General Court dismissed allegations of Commission errors in relation to the principle of economic succession, parental liability and whether ITR Rubber had a leading role in the cartel. However, the General Court annulled the decision in so far as the Commission had held Parker-Hannifin jointly and severally liable for an aggravated circumstance relating to Parker ITR's activity prior to the date of its acquisition by Parker-Hannifin in January 2002.

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General Court dismissed appeals lodged by Telefónica and Portugal Telecom, but orders the Commission to recalculate the fine

On 28 June 2016, the General Court largely dismissed the appeals lodged by telecommunication companies Telefónica and Portugal Telecom, which had challenged a 2013 Commission decision in which fines of respectively € 66.9 million and € 12.3 million had been imposed for an illegal non-compete agreement (*see VBB on Competition Law, Volume 2013, No. 1*) (Case T-208/13, *Portugal Telecom v Commission*; Case T-2016/13, *Telefónica v Commission*). However, the General Court did annul the decision insofar as the Commission had not correctly determined the value of the companies' sales for the purpose of calculating the fines to be imposed.

Court of Justice dismisses appeals in Prestressing Steel cartel case

On 7 July 2016, the Court of Justice ("ECJ") dismissed the appeals lodged by steelmakers Fapricela and Westfälische Drahtindustrie against the General Court's judgment upholding the Commission's 2010 cartel decision concerning prestressing steel (*see VBB on Competition Law, Volume 2016, No. 6*) (Case C-523/15, *Westfälische Drahtindustrie v Commission*; Case C-510/15, *Fapricela v Commission*).

In its orders, the ECJ rejected Fapricela's pleas as manifestly inadmissible, as the company had failed to clearly explain the errors of law the General Court allegedly had made in relation to the substantive infringement and the amount of the fine imposed. The ECJ also dismissed Westfälische Drahtindustrie's appeal by ruling that the General Court had not exceeded the bounds of its unlimited jurisdiction when it set the level of the fine imposed.

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, 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. To alleviate the Commission's concerns, the contain liner shipping companies offered the following commitments:

- the parties will stop publishing and communicating price announcements, *i.e.*, changes to prices expressed solely as the amount or percentage of the increase;
- 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 Commission accepted these commitments, which were made legally binding. The commitments apply for a period of three years starting from 7 December 2016.

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.

Portugal Telecom and Telefonica cases – Non-compete clauses: General Court endorses strict approach to ancillary restraints

Non-compete clauses are standard practice in the context of the acquisition of a business to protect a purchaser's investment. They guarantee the transfer to the purchaser of the full value of the assets transferred by, for instance, preventing the seller from opening a new business servicing the customers that were transferred to the purchaser. Under certain conditions, non-compete clauses do not fall within the scope of Article 101 TFEU if they are directly related, necessary and proportionate to the implementation of the acquisition. If these conditions are met, the non-compete clause is in principle cleared as part of the merger process.

In their appeals, Portugal Telecom and Telefónica argued that the Commission had erred in considering that the non-complete clause in the share-purchase agreement, by which Telefónica had acquired from Portugal Telecom the exclusive control of Vivo, one of the main mobile telecom operators in Brazil, amounted to a market-sharing agreement with the object of restricting competition. Pursuant to this non-compete clause, Portugal Telecom and Telefónica undertook to refrain "to the extent permitted by law" from competing with each other on the "Iberian market" (*i.e.*, on each other's respective home markets, Portugal and Spain) for a period of 15 months.

Portugal Telecom and Telefónica claimed that, in the absence of a detailed market investigation, the Commission could not validly conclude that the parties were competitors and that the non-compete clause had restricted competition. The General Court ("GC") dismissed this argument, holding that the very existence of the non-compete clause was a strong indication of potential competition between the parties. Moreover, the restriction consisted of a market-sharing agreement, had a wide scope and took place in a liberalised economic context.

The GC also dismissed the argument that the non-compete clause was necessary to implement the main transaction. It noted that the geographical field of application of the non-compete clause (the Iberian market) was different from that of the Vivo transaction (Brazil). Moreover, many of the parties' pleas were rejected as unsubstantiated, including, for instance, Telefónica's allegation that the clause was imposed by the Portuguese Government or, in any event, necessary for the Portuguese Government to refrain from blocking the deal.

Furthermore, the GC disagreed with the parties that it would follow from the words "to the extent permitted by law" that the non-compete clause would only enter into force subject to its lawfulness being confirmed in the context of a prior self-assessment obligation. The GC ruled that there was nothing to indicate that the clause contained such a prior self-assessment obligation or that the parties considered the clause to be ineffective.

The GC's ruling confirms that non-compete clauses in the context of concentrations require careful review. In order to qualify as an ancillary restraint, they must be strictly necessary to the implementation of the transaction. And even if non-compete clauses are necessary, they still may not be permissible if the parties to the transaction are competitors or potential competitors. Moreover, as the proceedings were initiated by the Commission, it is clear that the Commission is determined to enforce competition law in this area.

Portugal Telecom and Telefonica cases – The Commission has to precisely determine the conduct to which the infringement directly or indirectly relates for the purpose of calculating the fine

Under the Fining Guidelines, the Commission takes as a starting point for setting the fine the value of the undertaking's sales of goods and services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA. This starting point is intended to reflect the economic significance of the infringement and the size of the undertaking's contribution to it.

In *Telefónica* and *Portugal Telecom*, the Commission found that the parties concluded an unlawful agreement not to compete and to share the Spanish and Portuguese electronic communications markets between them. In determin-

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ing the starting point for setting the fine, the Commission took into consideration Telefónica's and Portugal Telecom's value of sales in their respective markets (*i.e.*, Spain and Portugal) during the last full business year of their participation in the infringement (with the exception of global telecommunication services and wholesale international services).

Telefónica and Portugal Telecom both challenged the Commission's fining methodology on the grounds that certain sales should have been excluded. The General Court agreed. Specifically, the General Court considered that when the Commission opts to calculate the fine on the basis of sales which directly or indirectly relate to the infringement, it must define the infringement in a precise manner. This means that the Commission has to determine the services where the parties were and were not potential competitors in Spain or Portugal (*i.e.*, services not directly or indirectly related to the infringement). On this basis, the General Court annulled the Commission's decision insofar as it found that any services provided in Spain or Portugal by the parties (with the exception of global telecommunication services and wholesale international services) directly or indirectly related to the infringement without any further factual or legal analysis.

Because the General Court considered that it did not have sufficient information to re-calculate the amount of the fine, it referred the case back to the Commission.

Marine Hose cartel – Principle of personal liability in relation to aggravating circumstances and successor liability

Under settled case law, a subsidiary and its parent company may be regarded as forming a single economic unit for the purpose of EU competition law. In such case, the Commission may be entitled to hold the parent company jointly and severally liable for the unlawful conduct of its subsidiary and, as a consequence, for the payment of the amount of the fine imposed on the subsidiary.

In the *Parker Hannifin* judgment, Parker-Hannifin challenged the Commission's decision for holding it jointly and severally liable for an aggravated circumstance relating to Parker ITR's activity before it was acquired by Parker-Hannifin which had resulted in a 30% increase in the fine. The General Court agreed. It ruled that a parent company cannot be held liable for aggravated circumstances of a subsidiary's conduct prior to the date of its acquisition. To do so, constitutes a breach of the principle of personal responsibility.

That finding impacted the maximum amount of the fine that could be imposed on Parker ITR. This reason for this is as follows. Under the Fining Guidelines, the final amount of the fine must not exceed 10% of the total turnover of the undertaking participating in the infringement. In its judgment, the General Court found that the Commission had not calculated the fine for which only Parker ITR could be held liable (*i.e.*, the fine imposed for the conduct during the pre-acquisition period) solely on the basis of Parker ITR's turnover, but also on the basis of Parker-Hannifin's turnover. The inclusion of Parker-Hannifin's turnover into the calculation of the fine therefore increased the maximum cap of the fine, in breach of the Fining Guidelines.

In light of the foregoing, the General Court exercised its powers of unlimited jurisdiction to reduce the amount of the fine imposed on Parker ITR from € 25.6 million to € 19.9 million, € 6.4 million of which Parker Hannifin is held jointly and severally liable (reduced from € 8.3 million).

- MEMBER STATE LEVEL -

GERMANY

German Federal Cartel Office finds German banking industry's general terms and conditions violate competition law

The German Federal Cartel Office ("FCO") found that certain provisions of the general terms and conditions jointly agreed upon by the German banking industry restrict the use of non-bank online payment systems, in breach of German and EU competition law.

The German Banking Industry Committee and its banking associations have jointly agreed upon general terms and conditions, which are used by all banks active in Germany. These general terms and conditions include special conditions for online banking, according to which online banking customers are not permitted to enter their PIN and TAN codes in non-bank online payment systems to access third party systems. If customers nevertheless do so, they act on their own responsibility. According to the FCO, these special conditions significantly impede the use of non-bank

payment solutions. The FCO also found these rules cannot be considered as a necessary part of the banks' security concept.

The FCO limited its decision to the clauses restricting the use of non-bank payment solutions. The FCO decision comes in the midst of a revision of the European Payment Services Directive, according to which providers of payment initiation services will be subject to state control and have to comply with technical regulatory standards. The new Directive has to be transposed into national law by 2018.

German Federal Cartel Office accepts commitments to alleviate competition concerns relating to a joint-venture for the sale of lighters

In a decision of 21 December 2015, the German Federal Cartel Office ("FCO") accepted commitments resolving potential concerns relating to the sales of lighters of Boomex and Carl Warrlich and their jointly owned company Carbo. As a result, the investigation was closed without the imposition of a fine.

The decision followed the FCO's a 2015 investigation of Boomex and Carl Warrlich, which produce all types of lighters, and their joint-venture Carbo which only produces lighters using kerosene. According to the FCO, the lighters produced by the three entities competed in the same product market.

The investigation found that the parent companies have very strong market positions on the market for lighters. Moreover, two directors of Carbo were found to hold functions in the parent companies and, even though the own sales activities of the joint venture Carbo are limited, these sales nevertheless provided the opportunity for the parent companies to coordinate their behaviour.

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VERTICAL AGREEMENTS

– MEMBER STATE LEVEL –

GERMANY

LEGO amends its rebate system

On 18 July 2016, the German Federal Cartel Office ("FCO") reported that it had terminated proceedings against LEGO, the producer of plastic construction toys, after LEGO committed to provide equal rebate opportunities to brick-and-mortar and online retailers.

According to the FCO, LEGO had tailored its rebate criteria so that only brick-and-mortar retailers could achieve the highest available amount of rebates, for example, by reference to available shelf length. These policies led to online retailers receiving lower discounts than retailers that sell exclusively in brick-and-mortar stores.

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| INTELLECTUAL PROPERTY/ LICENSING

– EUROPEAN UNION LEVEL –

Court of Justice rules that payment of royalties under a licence agreement where the patent was held invalid may be compatible with Article 101 TFEU

On 7 July 2016, the Court of Justice of the European Union (the "ECJ") issued its judgment on a request for a preliminary ruling from the Paris Court of Appeal, which had enquired 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 (Case C-567/14, *Genentech v Hoechst*).

The case concerns a long-standing patent dispute relating to a licence agreement signed in 1992 between Behringwerke, the licensor (of which Sanofi-Aventis Deutschland, a subsidiary of Hoechst, is a successor), and Genentech (a subsidiary of Roche). The licence agreement provided for running royalties in the amount of 0.5% based on the manufacture of a medicine incorporating a patented substance even if, in the country of manufacture, the patent was subsequently found to be invalid.

In 2008, Hoechst commenced ICC arbitration proceedings for the payment of royalties, subsequent to which Genentech was ordered to pay over € 108 million plus interest dating from 1998. Genentech then requested the Paris Court of Appeal to set aside the arbitration award arguing that ordering the 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.

On 9 December 2014, the Paris Court of Appeal made a request for a preliminary ruling to the ECJ for clarification (*see VBB Competition Law, Volume 2015, No. 2*). In March 2016, Advocate General Wathelet delivered his opinion in which he opined that Article 101 TFEU is not breached if the commercial purpose of the licence agreement is to avoid patent litigation, provided the licensee is able to terminate the licence by giving reasonable notice and retains freedom of action after termination (by, for example, challenging the validity or the infringement of the patent) (*see VBB on Competition Law, Volume 2016, No. 3*).

In its judgment, the ECJ established that the beneficiary of a patent licence must pay the agreed royalty for the use of technology, even where such use does not give rise to an infringement, or where the technology is deemed never to have been protected following the annulment with retroactive effect of the patent.

First, the ECJ clarified that the question from the Paris Court of Appeal not only refers to the case of a revocation of patents, but also to the case of non-infringement of the licensed patents, since Genentech had argued in the main proceedings that it was required to pay the running royalty in the absence of any infringement, contrary to the terms of its licence agreement.

Second, the ECJ recalled the existence of old case-law on the issue of exclusive licence agreements (namely, case 320/87 *Kai Ottung v Klee & Weilbach*), which determines that the obligation to pay a royalty, even after the expiry of the period of validity of the licensed patent, may reflect a commercial assessment of the value to be attributed to the possibilities of exploitation granted by the licence agreement, especially when the obligation to pay is embodied in a licence agreement entered into before the patent was granted. In other words, royalty is the price to be paid for commercially exploiting patented technology whilst ensuring that the licensor will not bring legal proceedings for an infringement against the licensee. The ECJ crucially added that if the licensee may freely terminate the agreement by giving reasonable notice, an obligation to pay a royalty throughout the validity of the agreement cannot fall under the prohibition set out in Article 101 TFEU.

The ECJ therefore concluded that EU competition rules do not prohibit the imposition of a contractual requirement providing for payment of a royalty for the exclusive use of technology that is no longer covered by a patent, as long as the licensee is free to terminate the contract. According to the ECJ, if the licence agreement is still valid and

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can be freely terminated by the licensee, the royalty payment is due, even where industrial-property rights derived from patents which are granted exclusively cannot be used against the licensee due to the fact that the period of their validity has expired.

European Commission adopts a commitment decision on credit default swaps

On 20 July 2016, the European Commission issued a press release to mark the termination of a competition procedure against the International Swaps and Derivatives Association ("ISDA") and Markit.

The Commission had expressed concerns that the parties had breached competition rules by, *inter alia*, refusing to license the Final Price (*i.e.*, the price used following the default of a debt obligation to determine the payments between buyers and sellers of credit-default swaps ("CDS") contracts linked to that debt obligation) and refusing to license the CDX and iTraxx indices for exchange trading. ISDA claims to have proprietary rights in the Final Price and Markit maintains it has owership rights in the iTraxx and CDX index families, which are the most commonly referenced baskets of CDS contracts.

Both parties agreed to change the way in which they license data and indexes with regard to CDS. In essence, ISDA agreed to license its rights in the Final Price, and Markit its rights in the iTraxx and CDX indices, on fair, reasonable and non-discriminatory (FRAND) terms.

The commitments are legally binding and will apply for ten years. Compliance will be monitored by independent trustees and both set of commitments are subject to third-party arbitration in case of dispute.

The Commission's press release is available here.

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STATE AID

– EUROPEAN UNION LEVEL –

Commission publishes decision on Netherland's tax ruling favouring Starbucks

On 27 June 2016, the Commission published the full non-confidential version of its decision in its State aid investigation into Starbucks' tax arrangements in the Netherlands. As reported previously (*see VBB on Competition Law, Volume 2015, No. 10*), the Commission press release issued in October 2015 explained that the Netherlands had breached EU state aid rules when it issued a 2008 tax ruling that artificially lowered taxes paid by Starbucks in two ways (i) by allowing a Starbucks group entity to pay a very substantial royalty to Alki (a UK-based company in the Starbucks group) for coffee-roasting know-how, and (ii) by allowing a Starbucks group entity to pay an inflated price for green coffee beans to a Switzerland-based Starbucks entity.

Similar to the Fiat decision (*see VBB on Competition Law, Volume 2016, No. 6*), the detailed 103-page decision shows that the Commission fundamentally rejects the transfer pricing methodology which was accepted by the Dutch tax authorities when issuing its 2008 tax ruling. The Commission found that Starbucks tax advisor failed to perform a critical assessment to identify the Starbucks' group entity's principal function for the transfer pricing analysis. In turn, that group entity's principal function was 'wrongly accepted' by the Dutch tax administration as the basis for calculating the accepted remuneration. On 29 January 2016, the Netherlands lodged an appeal against the Commission decision.

- OTHER DEVELOPMENTS -

EUROPEAN UNION: On 25 June 2016, a Communication from the European Commission amending Annex I to the Guidelines on regional aid for 2014-2020 was published in the Official Journal of the European Union. The Guidelines on regional aid present the rules under which Member States can grant state aid to companies operating in the less advantaged regions of Europe. Following the publication by Eurostat of gross domestic product data for 2012-2014, the Commission has reviewed the areas that are eligible, and the level of permitted intensity, for aid under Article 107(3)(a) and (c) of the Treaty on the Functioning of the European Union.

EUROPEAN UNION: On 13 July 2016, the European Commission published a Special Eurobarometer report on the perception and awareness about transparency of state aid. The report is based on a survey of 27 818 EU citizens across all EU member states. The survey was conducted to (i) assess the level of awareness among EU citizens about state aid and information available about state aid; (ii) identify the opinions and attitudes regarding the information that should be publicly provided about state aid; and (iii) determine the opinions and attitudes about transparency of state aid. In summary, the survey showed that the respondents do not feel well informed about state aid and think information about aid given to companies is difficult to find.

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LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– MEMBER STATE LEVEL –

GREECE

Greek competition authority introduces new cartel settlement procedure rules

On 21 July 2016, the Hellenic Competition Commission ("HCC") adopted the terms and conditions of the settlement procedure in cartel cases, modelled after the EU equivalent procedure, under which companies cooperating in an antitrust investigation can receive a fine reduction.

The aim of the new procedure is to simplify and speed up the handling of pending cases, and to introduce a streamlined administrative process which would allow the HCC to adopt infringement decisions relating to Article 1 of the Greek Competition Act and/or Article 101 TFEU more rapidly. The settlement procedure is also designed to reduce the number of appeals against the HCC's decisions before administrative courts.

The new Greek settlement procedure covers cases where undertakings clearly and unequivocally acknowledge their participation in horizontal agreements and the subsequent breach of competition law under Article 1 of the Greek Competition Act and/or Article 101 TFEU. By doing so, they can obtain a fine reduction of 15% from the fine imposed under HCC's current guidelines on fines, as long as certain conditions are met.

Firstly, undertakings or associations of undertakings must unequivocally acknowledge to having participated in an infringement and accept their liability relating to that infringement. Secondly, parties must agree not to request full access to the file, or an oral hearing before the HCC's Board.

The official settlement proposal of each party must include at least:

› Acknowledgement of the parties' participation and liability for the infringement;

› Acceptance of the maximum amount of the fine that may be imposed by the HCC;

› The parties' confirmation that they have been informed of the HCC's finding of an infringement and that they have been given the opportunity to make their views known to the authority;

› The parties' confirmation that, in view of the above, they waive their right to obtain full access to the HCC's file or to be heard in an oral hearing;

› Waiver of the right to challenge HCC's jurisdiction and the validity of the procedure followed.

The HCC has discretion to decide which cases qualify for settlement, taking into account a number of factors in making its assessment, such as (i) the number of companies under investigation and the number of companies genuinely interested in settlement; (ii) the number and nature of the alleged infringement(s); (iii) whether there is scope for achieving any procedural efficiencies or resource savings through settlement; and (iv) any aggravating circumstances.

The initiation of settlement discussions can be made at the parties' initiative at any stage of the investigation, but the HCC pointed out that procedural efficiencies will be less likely if settlement is initiated after the statement of objections has been issued.

The HCC clarified that the settlement procedure does not involve negotiation over the evidence or the finding of an infringement. Nonetheless, the parties will be able to make themselves heard in the framework of the settlement procedure, and will be able to influence the HCC's objections through argument. Bilateral meetings between the parties and the HCC are an integral part of the settlement procedure, aiming at providing each party with the necessary information regarding the case. This includes the material facts of the infringement and their legal assessment; the duration and gravity of the liability of each undertaking; evidence pointing to violation of competition law; and the calculation of the fine to be imposed.

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Parties' submissions and any other statements made in the course of settlement discussions are considered confidential and cannot be used in the context of other judicial or administrative proceedings.

Finally, the HCC stated that the use of the new settlement procedure may be combined with the leniency regime. A leniency applicant may settle a case and benefit from both leniency and settlement discussions. As far as the fine is concerned in such a case, the fine reduction awarded under the settlement procedure and the fine reduction under the leniency programme will be cumulative.

THE NETHERLANDS

Higher fine ceilings for competition law infringements in the Netherlands as of 1 July 2016

On 1 July 2016, a new law entered into force in the Netherlands which foresees in an increase of the maximum amount of the fines that the Dutch Competition Authority ("DCA") can impose for infringements of competition law.

As a result of the legislative change, the DCA can impose a maximum fine of € 900,000 or, if higher, 10% of the undertaking's annual turnover, whereas under the previous rules, it could only impose a maximum fine of € 450,000 or, if higher, 10% of the undertaking's annual turnover. With respect to cartel infringements, the new fining rules provide that this ceiling is multiplied by the number of years of the cartel duration subject to a maximum of 4 years. Consequently, the fine for a cartel infringement can amount up to 40% of the undertaking's annual worldwide turnover.

The DCA's fining guidelines have been amended in accordance with the new legislation. In addition, the new fining guidelines provide for a different fining methodology with regard to fines for natural persons. Pursuant to this methodology, the basic fines for natural persons are divided into four different ranges. The applicability of these ranges is made contingent upon, amongst others, the annual turnover of the undertaking concerned.

The new fining rules only apply to infringements that have started on or after 1 July 2016.

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| PRIVATE ENFORCEMENT

– MEMBER STATE LEVEL –

THE NETHERLANDS

Dutch Supreme Court accepts passing-on defense in private enforcement litigation

On 8 July 2016, the Dutch Supreme Court ("the Court") handed down a judgment upholding the availability of the passing-on defense in private enforcement litigation. The ruling resulted from a civil claim for damages brought by the electricity company TenneT against the gas-insulated switchgear ("GIS") manufacturer ABB.

In 2007, the European Commission imposed a fine on ABB for its participation in the GIS cartel. Following the Commission decision, TenneT brought an action for damages and claimed that due to ABB's participation in the cartel it had paid an overcharge on a GIS installation purchased from ABB during its participation in the cartel. ABB contended in response that TenneT had passed on the overcharge to its customers.

The Court was asked to rule on the question whether the passing-on defense under Dutch law is to be assessed in the context of the determination of the extent of the damage or in the context of the so-called doctrine of *voordeelstoerekening*. Pursuant to this doctrine, the defendant can offset any benefit conferred on the claimant against the damages that result from the same tortious act. This benefit can only be offset, if there is a sufficiently direct causal link between the tortious act and the benefit and if offsetting the benefit is reasonable. TenneT argued before the Court that the passing-on defense is to be assessed under the doctrine of *voordeelstoerekening*, since it followed from the Court's case law in this regard that the strict requirement of a causal link between the wrongful act and the benefit conferred on the claimant would narrow down the possibility of a successful passing-on defense.

At the outset, the Court determined that although the present case was not (yet) covered by the Antitrust Damages Directive and the Dutch draft legislation for its implementation, it was nevertheless desirable that Dutch law was interpreted in a way that was compatible with this directive and draft legislation. According to the Court, the passing-on defense can be assessed both in the context of the determination of the extent of the damage and under the doctrine of *voordeelstoerekening*, since, under both approaches, it is to be determined whether the claimant is in the same position as he would have been if the tortious act would not have taken place. Therefore, both approaches require the benefit conferred on the claimant to be taken into account for the determination of the extent of the damage, provided that it is reasonable to do so. Furthermore, the burden of proving the passing-on was held to be on the defendant under both approaches.

As to the strict causal link between the benefit conferred on the claimant and the tortious act that the Court had established in its previous case law regarding *voordeelstoerekening*, the Court explicitly reversed its case law on this point. The Court determined that this causal link is to be a *conditio sine qua non* link in the sense that no benefit would have been conferred in absence of the tortious act.

Consequently, the Court established that a judge that must rule on a passing-on defence is, subject to the parties' contentions, free to choose whether to address this defence under the doctrine of *voordeelstoerekening* or in the context of the determination of the extent of the damage, since the same legal standard applies to both approaches.

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