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HIGHLIGHTS

MERGER CONTROL: Commission clears acquisition of WhatsApp by Facebook

ABUSE OF DOMINANT POSITION: Commission fines Slovak Telekom and Deutsche Telekom for engaging in refusal to supply and margin squeeze

CARTELS AND HORIZONTAL AGREEMENTS: Commission fines banks in two settlements related to Swiss franc interest rate derivatives cartels ■ General Court annuls fine imposed on Soliver in car glass cartel

INTELLECTUAL PROPERTY: Commission opens consultation on patents and standards

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS: New Competition Commissioner takes office ■ General Court partially upholds appeal against Commission decision refusing access to cartel investigation file ■ Belgian Competition Authority argues against extraterritorial enforcement of US antitrust law in US LCD panel cartel case

PRIVATE ENFORCEMENT: ECJ issues ruling on application of EU rules on jurisdiction to competition damages claims

TOPICS COVERED IN THIS ISSUE

JURISDICTIONS COVERED IN THIS ISSUE

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TABLE OF CONTENTS

MERGER CONTROL

EUROPEAN UNION LEVEL

Commission clears acquisition of WhatsApp by Facebook

On 3 October 2014, the European Commission approved the acquisition by Facebook of mobile phone communications application provider WhatsApp. Despite the strong positions of the parties' apps, the Commission found no competition concerns, largely due to the special features of the markets on which the parties are or could be active.

The Commission's investigation addressed the effects of the transaction in the areas of consumer communications services, social networking services, and online advertising services.

With respect to communications services, although both parties offer apps for smartphones, the Commission considered them not to be close competitors, as consumers typically use Facebook and WhatsApp in different ways and many use both apps simultaneously on the same smartphone. Moreover, although both parties' communications apps benefit from network effects and enjoy large user bases, the Commission noted that the consumer communications apps market is characterised by rapid innovation cycles and moreover that the fact that customers can and do use multiple apps limits the exclusionary aspects of network effects.

In the areas of social networking and online advertising, the Commission likewise found no concerns. To the extent that WhatsApp can be considered to provide social networking services, the Commission regarded the parties to be distant competitors due to the very different nature of their products, which the same consumers often use for different purposes. The Commission therefore considered the acquisition of WhatsApp would not strengthen Facebook's position in the market for social networking services. Likewise, with respect to online advertising, WhatsApp does not currently offer advertisements, and the Commission found that, if Facebook began to do so through the WhatsApp application, many alternative suppliers and sources of internet user data for advertising purposes are available.

Commission conditionally approves Liberty Global's acquisition of rival Dutch cable television operator Ziggo

On 10 October 2014, the European Commission approved the acquisition by Dutch cable TV operator Liberty Global of its rival Ziggo, subject to extensive conditions including the divestiture of a rival Pay TV film channel and commitments not to impede the provision of audiovisual content online.

The Commission investigated the effect of the transaction on the Dutch market for the wholesale supply of Pay TV channels and on the Dutch market for the delivery of audiovisual content over the internet, known as over-the-top (OTT) services.

The transaction would have combined the only two "linear Premium Pay TV film channels" in the Netherlands, which the Commission considered would have allowed Liberty Global to increase wholesale prices and/or refuse to supply the Pay TV channel Film1 to its competitors at the retail level. To address this, the parties agreed to divest Film1 to a third party and to continue to carry Film1 on its own Pay TV network for three years, ensuring that it remains a viable competitor to Liberty Global's own channel.

In addition, the parties' strong positions as wholesale cable providers would have given them strong buyer power against Dutch TV broadcasters. The parties had already used their existing position to impose clauses in their carriage agreements with broadcasters that restrict the ability of these broadcasters to offer their content online through OTT services. The Commission was concerned that the transaction would have allowed Liberty Global to further impede the development of these services. Liberty Global therefore agreed to terminate these clauses in the parties' existing agreements and not to conclude carriage agreements restricting OTT services for eight years. In addition, Liberty Global agreed not to congest internet traffic resulting from OTT services and thereby undermine its development by directing it into bottlenecks in Liberty Global's own internet network.

After a Phase II investigation, the Commission considered on the basis of these commitments that there were no further concerns, and it approved the transaction subject to the agreed remedies.

Commission conditionally clears merger between banana producers Chiquita and Fyffes

On 3 October 2014, the European Commission approved the merger between US banana supplier Chiquita Brands International and Irish banana supplier Fyffes, subject to conditions. The transaction combines the number one and number two suppliers of fresh bananas in Europe but was cleared on the basis of commitments not to conclude exclusivity agreements with shippers.

The Commission considered that, despite the parties' high shares in many countries on the market for the import and sale of bananas to retailers and wholesalers, there was no basis for competition concerns. In particular, the Commission found that there are a number of alternative suppliers, that these competitors face no significant obstacles to expanding their activities, that barriers to new market entry at the various levels of the banana supply chain are low, and that supermarkets have strong countervailing buyer power.

However, the Commission considered that Chiquita and Fyffes could potentially have limited competitors' access to the shipping services needed to import bananas. To address this, Fyffes agreed to release the shipper Maersk from an exclusivity clause in its existing shipping agreement, and the parties agreed not to conclude exclusivity clauses with shippers or to incentivise shippers not to deal with competitors for the next ten years.

On the basis of these commitments, the Commission considered there to be no competition concerns on the market for the import and sale of bananas. The Commission also investigated the effect of the transaction on the markets for banana ripening services and for the sourcing and sale of pineapples, but it found no concerns. It therefore approved the merger subject to the agreed conditions.

ABUSE OF DOMINANT POSITION

EUROPEAN UNION LEVEL

Commission fines Slovak Telekom and Deutsche Telekom for engaging in refusal to supply and margin squeeze

On 15 October 2014, the Commission announced that it has imposed a fine of € 38.838 million on Slovak Telekom and its parent company, Deutsche Telekom AG for infringing Article 102 TFEU over the course of more than five years, from 12 August 2005 to at least 31 December 2010. According to its press release, the Commission claims that Slovak Telekom engaged in an abusive strategy to shut out competitors from the Slovak market for broadband services by refusing to supply unbundled access to its local loops to competitors "under fair conditions", and by imposing a margin squeeze on alternative operators which allegedly made it impossible for alternative operators to use its legacy telephone network infrastructure without incurring a loss.

In this respect, it appears from the Commission's press release that the refusal to supply allegation reflects the Commission's concerns that Slovak Telekom unjustifiably withheld network information necessary for the unbundling of the local loops, unilaterally reduced the scope of its regulatory obligation to unbundle and set other unfair terms and conditions in relation to each of the steps needed to obtain access (e.g. collocation, qualification, forecasting, repairs and bank guarantees). This delayed or prevented the entry of alternative operators into the retail broadband services market in Slovakia and amounts to a refusal to grant access. It also appears from the press release that, consistent with previous margin squeeze cases, Slovak Telekom allegedly set the prices for access to its local loops and its retail prices at levels which would force competitors to incur losses if they wanted to sell broadband services to retail customers at retail prices matching those offered by Slovak Telekom.

The Commission also announced that Deutsche Telekom was jointly and severally liable for this fine as a parent company with decisive influence over Slovak Telekom, and that it received an additional fine of € 31.07 million to ensure sufficient deterrence as well as to sanction its repeated abusive behaviour relating to its own margin squeeze in broadband markets in Germany in 2003. In this respect, the Commission's press release stated that Deutsche Telekom (i) was a majority shareholder of Slovak Telekom, holding 51% of its shares, (ii) has a number of special rights allowing it to exercise decisive influence over the company such as the right to nominate the majority of the Board of Directors and to be informed about all management matters within Slovak Telekom, and (iii) actually exercised this decisive influence through overlaps in senior management personnel and by influencing the decision-making process at Slovak Telekom.

The decision has not yet been made available publicly.

Commission closes investigation of telecommunications companies regarding internet connectivity services

On 3 October 2014, the European Commission announced that it had closed its investigation into practices by a number of European telecoms operators in the internet connectivity markets. Previously, the Commission had announced that it carried out a number of dawn raids on 9 July 2013, with press reports at the time indicating that Germany's Deutsche Telekom, France's Orange SA and Spain's Telefonica were all searched based on concerns that had been raised by Cogent Communications that these companies refused to upgrade the capacity of the interconnections, resulting in a poor quality of service to customers (see VBB on Competition Law, Volume 2013, No. 7).

The Commission announced that, following a review of the evidence obtained during the investigation, it took the provisional view that the observed practices did not appear to breach EU antitrust law with a view to shutting out competitors from either the internet transit market or internet content markets. More specifically, the Commission stated that it found no evidence of behaviour aimed at foreclosing transit services from the market or at providing an unfair advantage to the telecoms operators' own proprietary content services. In its press release, the Commission also announced that it nevertheless would continue to monitor the sector closely.

CARTELS AND HORIZONTAL AGREEMENTS

EUROPEAN UNION LEVEL

Commission fines banks in two settlements related to Swiss franc interest rate derivatives cartels

On 21 October 2014, the European Commission announced that it had reached settlements with a number of international banks that participated in two cartels in the market for financial derivatives based on Swiss franc interest rates. Interest rate derivatives are financial products which are commonly used by financial institutions or companies for managing the risk of interest rate fluctuations. Their value derives from a benchmark interest rate. These benchmarks represent an average of the quotes submitted on a daily basis by a number of banks who are members of a panel.

In the first of the cases, the Commission found that two international banks, RBS and JP Morgan, tried to distort the normal course of the pricing of interest rate derivatives denominated in Swiss francs. According to the Commission, between March 2008 and July 2009, they discussed the future Swiss Franc submissions of one of the banks based on the London interbank offered rate ("LIBOR") and at times exchanged information concerning trading positions and intended prices.

Under the settlement procedure, JP Morgan received a reduction in its fines of 10%. As JP Morgan cooperated in the investigation, a further reduction of 40% was granted under the leniency programme. As a result, the Commission imposed a fine of € 61 million on JP Morgan.

In the second case, the Commission found that four major players in the Swiss franc derivatives market, RBS, UBS, JP Morgan and Crédit Suisse, operated a cartel on bid-ask spreads of Swiss franc interest rate derivatives in the European Economic Area ("EEA"). The so-called "bid-ask spread" is the difference between the price at which a market maker is willing to sell and to buy a given product.

Between May and September 2007, the four banks agreed to quote to all third parties wider, fixed bid-ask spreads on certain categories of short term over-the-counter Swiss franc interest rate derivatives, whilst maintaining narrower spreads for trades amongst themselves. This aimed to prevent other market players from competing on the same terms.

As all four banks agreed to settle they benefitted from a reduction in fines of 10%. For their cooperation in the investigation, UBS and JP Morgan received further reductions under the leniency programme, of 30% and 25% respectively. As a result, UBS was fined € 12.7 million, JP Morgan € 10.5 million, and Credit Suisse € 9.2 million.

In both cases, RBS avoided total fines of around € 115 million as it benefited from immunity for revealing the existence of the two cartels to the Commission.

This is not the first time the Commission has cracked down on anti-competitive conduct in the interest rate derivatives industry. In 2013, the Commission imposed a record total amount of fines on eight banks for participation in a cartel in Euro interest rate derivatives and cartels in Yen interest rate derivatives (see VBB on Competition Law, Volume 2013, No. 11).

ECJ dismisses ICF's appeal in aluminium fluoride cartel case

On 9 October 2014, the European Court of Justice ("ECJ") handed down a ruling dismissing an appeal by the Tunisian company Société des Industries Chimiques du Fluor ("ICF") against the General Court's ("GC") judgment of 18 June 2013 which upheld the European Commission's decision in the aluminium fluoride cartel case.

In 2008, the Commission imposed fines totalling € 4.97 million on a number of aluminium fluoride producers for their participation in a price-fixing cartel that lasted from July 2000 until December 2000 (see VBB on Competition Law, Volume 2008, No. 6). ICF's fine amounted to € 1.7 million. On appeal before the GC, ICF argued, among others, that the Commission had misapplied its 2006 Fining Guidelines and had failed to estimate the total value of sales of the products to which the infringement related. In its 2013 judgment, the GC rejected all the arguments raised by ICF and upheld the Commission's decision (see VBB on Competition Law, Volume 2013, No. 6).

Before the ECJ, ICF argued that the length of the proceedings before the GC had been excessive as it had taken the GC almost five years to hand down its judgment from the filing of ICF's appeal. Moreover, almost three years had elapsed between the Commission's rejoinder and the GC's judgment. ICF also argued that the GC had breached its rights of the defence by upholding the Commission's decision even though the Commission had based its decision on documents not referred to in the Statement of Objections. Finally, ICF argued that the GC had misinterpreted paragraph 18 of the Commission's 2006 Fining Guidelines.

In its judgment, ECJ rejected ICF's action in its entirety and upheld the GC's judgment. In particular, the ECJ held that the question of the allegedly excessive duration of the proceedings before the GC is a question that should be raised in an action for damages brought before the GC, and not in the context of an appeal of the judgment at issue before the ECJ. Nevertheless, the ECJ agreed with ICF that the duration of the proceedings before the GC was in breach of the GC's obligation to rule within a reasonable time and that the length of the proceedings could not be explained by the nature or the complexity of the case at hand. The ECJ also rejected the remaining arguments of ICF and agreed with the GC's interpretation of paragraph 18 of the 2006 Fining Guidelines. In addition, although the ECJ concluded that the General Court had failed to adjudicate within a reasonable time, this could not lead to the annulment of the General Court's judgment. Rather, it gave ICF a right to bring an action for damages.

General Court annuls fine imposed on Soliver in car glass cartel

On 10 October 2014, the General Court ("GC") annulled the Commission's decision of 12 November 2008 in the car glass cartel (the "Contested Decision") insofar as it concerned glass manufacturer Soliver on the grounds that the European Commission (the "Commission") had not established that Soliver had participated in the single and continuous infringement defined by the Contested Decision.

In 2008, the Commission imposed fines totalling almost € 1.4 billion on four producers of car glass for their involvement in a cartel that operated between 1998 and 2003. Asahi/AGC Flat Glass (Japan), Saint-Gobain (France), Pilkington (UK) and Soliver (Belgium) were found to have violated Article 101 TFEU by coordinating their pricing and discount policies and customer strategies, as well as allocating supplies of car glass, with the aim of maintaining the stability of their market shares. Specifically, Soliver was fined € 4.396 million for participating in the infringement during the period from 19 November 2001 to 11 March 2003 and subsequently filed an appeal before the GC (see VBB on Competition Law, Volume 2009, No. 11). Car glass is a type of safety glass used by the automotive industry in vehicle windscreens, windows, side and back lights and sunroofs.

In its judgment, the GC considered that the Commission had not adduced sufficient evidence to establish that Soliver had participated in the single and continuous infringement involving the three larger car glass producers as defined by the Contested Decision. In principle, the GC considered that the existence of a single and continuous infringement does not necessarily mean that an undertaking participating in one or more aspects of the infringement can be automatically held liable for the infringement as a whole. While Soliver had acknowledged the existence of bilateral anti-competitive contacts with two other members of the cartel in relation to specific car manufacturers, the GC considered that the Commission had failed to sufficiently show that Soliver (i) intended to contribute to the common objectives of the single and continuous infringement which formed the subject-matter of the Contested Decision and (ii) was aware of, or should have been aware, of the general scope and the essential characteristics of the cartel as a whole. The GC took particular account of the fact that Soliver never participated in the "club meetings", where the three other infringers discussed the organisation and *modus operandi* of the cartel, and that the leniency applicant considered Soliver as a third party to the cartel which did not benefit from the compensation mechanism that applied within the members of the cartel in relation to the award of contracts.

Considering that the GC found that the Contested Decision had categorised the cartel as a single and continuous infringement and that the decision could not be divided to clearly qualify Soliver's anti-competitive bilateral contacts as a separate infringement, the GC annulled the Contested Decision insofar as it concerned Soliver. The GC considered that it could not itself qualify Soliver's conduct as a breach of Article 101 TFEU without encroaching on the powers conferred on the Commission as regards the investigation and the punishment of EU competition law infringements

MEMBER STATE LEVEL

FRANCE

French Supreme Court partially annuls judgment upholding fines in electrical works cartel case

On 21 October 2014, the French Supreme Court (the "Court") partially annulled a judgment of the Paris Court of Appeal (the "Court of Appeal") which had upheld a decision adopted by the French Competition Authority (the "Authority") in 2011. In its decision, the Authority imposed fines amounting to € 10 million on several companies for exchanging information relating to a tender organised by EDF in the electrical works sector. Following the decision, three companies brought the case to the Court of Appeal, which subsequently upheld the Authority's decision.

On appeal to the Supreme Court, the Court dismissed the applicants' claims on the substance, finding that the Court of Appeal had correctly concluded that the exchange of information found by the Authority amounted to cartel behaviour contrary to Article 101 TFEU and its French equivalent. The Court also dismissed the companies' argument that the Authority should not have used evidence collected in the course of dawn raids since the law applicable at the time of the raids did not provide for sufficient judicial review of the inspection decision. For the Court, however, the companies were granted the possibility to challenge the legality of the inspections through a specific procedure provided in an Ordinance of 2008, but had failed to do so.

However, the Court annulled the decision insofar as the determination of the amount of the fine was concerned. In its past practice, the Authority has consistently considered that a company belonging to a group should have its fine increased as a deterrence factor even though its parent company is not held liable for the infringement. However, the Court reiterated the conclusion reached in a previous case of February 2014 according to which fines must be determined individually. According to the Court, a company which acted autonomously on the market cannot see its sanction increased for the sole reason that it belongs to a group. In view of this, the Court annulled the judgment of the Court of Appeal insofar as it confirmed the amount of the fines imposed on the companies and referred the case back to the Court of Appeal as regards the setting of the fine.

GERMANY

German Federal Cartel Office terminates cartel proceedings in market for blood glucose test strips after commitments from Pharmacists' Association Westfalen-Lippe

In a decision of 29 September 2014, the German Federal Cartel Office ("FCO") terminated cartel proceedings concerning an agreement between the Pharmacists' Association Westfalen-Lippe ("AVWL") and health insurance funds, after the AVWL accepted commitments.

The AVWL is an association of pharmacists in the region of Westfalen-Lippe which represents the interests of approximately 95% of the regional pharmacies. Health insurance funds refund costs for pharmaceutical products to the insured. They are obliged under German law to inform doctors and patients about the most economic supply sources for pharmaceutical products.

As part of their medication supply contracts, AVWL had granted a price reduction for blood glucose test strips on the condition that health insurance funds would refrain from providing information to doctors and insured persons using blood glucose test strips concerning alternative, more cost-efficient sources and would always refer to pharmacies as a possible source of supply for blood glucose test strips (the "Agreement").

The FCO found that the Agreement had the object and effect of restricting competition because it hindered insurance funds from supporting the most cost-efficient supply of pharmaceutical products and also restricted competition between the pharmacies within the AVWL and other providers of blood glucose test strips, such as medical supply stores and mail order businesses.

The proceedings were terminated after the AVWL committed to renounce the Agreement and conduct future price negotiations independently of the Agreement. No fines were imposed.

HUNGARY

Hungarian Competition Authority fines four publishers for hard core cartel in market for regional newspapers

On 20 October 2014, the Hungarian Competition Authority (the "GVH") imposed fines totalling HUF 2.1 billion (about € 7.2 million) on the publishers Axel Springer (fine of HUF 616 million), Russmedia (fine of HUF 481 million), Lapcom (fine of HUF 313 million) and Pannon Lapok (fine of HUF 755 million) for sharing the market of county-wide daily newspapers and exchanging information about advertising prices in the regional printed and electronic press. The start of the GVH's investigation was marked by a dawn raid carried out in September 2011 at the premises of Axel Springer and Inform Média, the predecessor of Russmedia.

In its decision, the GVH analysed the product (retail and advertising) and geographic (national and regional) markets for the publishing of daily newspapers in Hungary, and found that, with the exception of the Budapest region (where regional daily papers did not play a role) and the Komárom-Esztergom region (where two daily papers were available), each region in Hungary had only one regional daily newspaper. According to the GVH's findings, this situation was due to the anti-competitive agreements between the four publishers.

The investigation found that the publishers in question concluded various bilateral agreements between November 2000 and April 2010 containing non-compete clauses and price fixing clauses as well as mechanisms to facilitate the coordination of retail prices and advertising prices. According to the GVH, the agreements were part of a comprehensive market-sharing agreement aimed at preventing the four regional publishers from entering each other's territories with secondary daily newspapers or other alternative publications.

Separately, the GVH also established that the publishers shared with each other sensitive information about the prices and the pricing strategies relating to certain categories of advertising.

In view of the long duration and the gravity of the violation, the GVH imposed the maximum fine on each undertaking, amounting to 10% of the undertakings' net turnover from the previous year.

OTHER DEVELOPMENTS

EUROPEAN UNION: On 9 October 2014, the European Commission confirmed that it had carried out dawn raids at the premises of a number of companies active in the production, distribution and trading of the biofuel ethanol. The unannounced inspections took place in two EU Member States and follow earlier inspections in the crude oil, refined oil products and biofuel sectors, carried out by the Commission and the EFTA Surveillance Authority in May 2013 (see VBB on Competition Law, Volume 2013, No. 5). According to the Commission, its inspections are part of an investigation into suspected infringements of Articles 101 and 102 TFEU. In particular, the Commission has concerns that anti-competitive behaviour, such as collusive behaviour when submitting price information to the Price Reporting Agencies, distorts or may have distorted the price benchmarks. These price benchmarks are used for trade in the physical markets and in the financial derivative markets for a number of commodity products, such as ethanol.

AUSTRIA: According to a press release of 17 October 2014, the Austrian Competition Authority ("BWB") has imposed a fine of € 187,000 on Austrotherm, a manufacturer of insulation material, for having participated from 2009 to 2011 in a horizontal price-fixing cartel concerning the distribution of insulation material. The decision was triggered by a dawn raid concerning several companies in the insulation market and follows to fining decisions against the companies Steinbacher, Swisspor, Baumax, Hornbach, Obi and Bauhaus. Total fines imposed so far amount to € 1.6 million. The BWB has stated that investigations against other companies in same market are ongoing.

DENMARK: On 6 October 2014, the Danish Competition and Consumer Authority ("DCCA") announced that the Danish public prosecutor for serious economic and international crimes has imposed fines totalling more than DKK 27 million (around € 3.6 million) on 25 construction companies involved in a bid-rigging and price-fixing cartel in the construction sector in Denmark between 2005 and 2009. The fines are the result of an ongoing investigation by the DCCA and the public prosecutor into 33 construction companies and their participation in the construction cartel, which has been characterised as one of the most extensive cartels of its kind in Denmark. It appears from a DCCA press release that more fines are to follow, and that the investigation is expected to be completed by the end of this year.

INTELLECTUAL PROPERTY

EUROPEAN UNION LEVEL

Commission opens consultation on patents and standards

On 14 October 2014, the European Commission (DG Enterprise and Industry, soon to be renamed DG Enterprise) launched a period of consultation on patents and standards. The consultation will be closed on 31 January 2015.

The consultation seeks to gather information and views from all interested stakeholders on the interplay between standardisation and intellectual property rights such as patents. The Commission is concerned that standardisation should remain efficient and adapted to the fast-changing economic and technological environment.

Stakeholders are requested to answer questions involving eight key issues : (i) prospective new fields of standardisation for patent-protected technologies; (ii) adaptation of rules and practices governing standardisation to the economic and technological environment; (iii) communication and transparency on patents in order to prevent abuse; (iv) challenges associated with the transfer of standard essential patents to new owners; (v) efficient use of patent pools; (vi) definition of "fair", "reasonable" and "non-discriminatory" licensing terms; (vii) dispute resolution mechanisms for patent standardisation; and (viii) guaranteeing royalties to patent holders against the backdrop of unwilling implementers and injunctions.

The consultation document may be found at:

https://ec.europa.eu/digital-agenda/en/news/public-consultation-patents-and-standards-opens

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

EUROPEAN UNION LEVEL

New Competition Commissioner takes office

On 1 November 2014, the new European Commission under President Jean-Claude Juncker officially started its term of office, which will run until 31 October 2019. In the new Commission, Margrethe Vestager takes over the competition portfolio from outgoing Commissioner Joaquín Almunia.

In his mission letter to Commissioner Vestager, President Juncker has called on the new Competition Commissioner to focus on three specific areas during her term in office:

- Mobilising competition policy tools and market expertise so that they contribute to the Commission's jobs and growth agenda, including in areas such as the digital single market, energy policy, financial services, industrial policy and the fight against tax evasion.

- Pursuing an effective enforcement of competition rules in the areas of antitrust and cartels, mergers and State aid, maintaining competition instruments aligned with market developments, as well as promoting a competition culture in the EU and world-wide.

- Maintaining and strengthening the Commission's reputation world-wide and promoting international cooperation in this area.

General Court partially upholds appeal against Commission decision refusing access to cartel investigation file

On 7 October 2014, the General Court ("GC") accepted that there was an overriding interest in public disclosure of documents in the air cargo cartel and thus partially upheld an appeal brought by Schenker AG against a European Commission decision refusing access to documents. Regulation (EC) No. 1049/2001 regarding public access to European Parliament, Council and Commission documents (the "Transparency Regulation") lays out a general right of access to documents of the EU institutions. There are however a number of exceptions. For example, access may be refused where the commercial interests of the parties concerned would be undermined. The GC clarified that a determination of whether documents may be disclosed requires a balancing of competing interests to be undertaken on a case-by-case basis. In particular, the Transparency Regulation must be weighed against Regulation 1/2003 which is designed to ensure compliance with the duty of professional secrecy in proceedings relating to infringements of EU competition law.

The GC rejected Schenker's plea that the Commission had to carry out an individual examination of each document that makes up the file. The Commission, in refusing access, may decide that an entire category of documents should not be disclosed. Schenker had not established how access to documents in the case file or to the full text of the decision was necessary such that the public interest would override the commercial interests at stake. The argument was also raised that the requested documents should be provided given that, in the meantime, the Commission had issued its decision closing definitively the case. The GC also rejected this plea, pointing out that the Commission could be required to resume the investigations following the annulment proceedings pending before the GC.

Nevertheless, while all of Schenker's other arguments were rejected, the GC did accept that the Commission had violated the requirement under the Transparency Regulation that, if only parts of the document for which access is requested are covered by any of the exceptions, the remaining parts of the document must be released. The GC opined that nothing prevented the Commission from providing Schenker with a non-confidential version of its cartel decision with the parts which were not the subject of confidentiality requests without waiting for all requests for confidential treatment to have been finally settled.

The GC upheld a broad interpretation of the exceptions under the Transparency Regulation by taking the competitive landscape and the nature of the information into consideration. While accepting that some parts of the documents should be released, the GC still confirmed that the Commission may exclude an entire category of documents from disclosure. This case could be seen as a win for the individual's right of access to documents in competition proceedings, but a moderate one. The Commission was only obliged to provide a non-confidential version of the decision implying that it was still the commercial interests of the involved undertakings which were given preference.

Commission study on the economic impact of retail on choice and innovation in the EU food sector

On 2 October 2014, the European Commission published a study on the evolution of the European food retail market over the last ten years, aiming to assess the key drivers of choice and innovation, their development and economic impact. The study comes against a background of criticism, regarding the functioning of the food supply chain and in particular the impact of the large retail chains' bargaining power, as well as of the successful introduction of their own brands (so-called private labels). Large retailers would allegedly unilaterally and retroactively change contractual prices and put pressure on suppliers to, e.g., bear the cost of unsold goods and promotion campaigns. The result would be less money for suppliers to invest in new products, thereby precluding choice and innovation for consumers.

One of the main conclusions of the study is that in Member States with moderately concentrated retail markets choice and innovation do not seem to be affected by the bargaining power of retailers over suppliers. Another finding is that while choice in shops has been progressively increasing since 2004, the economic crisis was an important factor leading to decrease in innovations since 2008.

The Commission has invited stakeholders to submit views and comments on the study results to COMPE-TF-FOOD@ec.europa.eu, preferably before 30 January 2015.

Methodology

The study covers both choice and innovation in the food retail market. Choice is identified as: food choice (the product assortment on retail shelves) and shop choice (the number of shops to which a consumer has access within a normal distance). Innovation refers only to product innovation, assessed both with reference to the number and the types of innovation: new product, extension, packaging, etc.

Some of the key potential drivers of choice and innovation specified are:

- Concentration of retailers and of suppliers at national/local level;
- Measure of imbalance between retailers and suppliers;
- Shop type and size, as well as new shop opening in the area;
- Socio-economic characteristics (GDP per capita, unemployment);
- Private label share and product category turnover;
- Region / Member States characteristics (access to finance, legal environment).

The study employs quantitative assessment of choice and innovation at a local level across 23 product categories and 343 shops in nine Member States located in 105 representative consumer shopping areas. The three shop types analysed – hyper markets, supermarkets and discount stores – are regarded as making up "modern retail". At national level the evolution and concentration of the market was measured in fourteen Member States in the period between 2004 and 2012. At local level however, for reasons of scarcity of information, the sample was limited to four or six Member States.

Evolution in terms of choice, innovation and concentration

After the 2008 economic crisis seeking lower prices has become a key priority for EU consumers. Other trends impacting the European grocery retail market are: changes in household composition, aging population and increased interest in new health issues. As a consequence certain product categories have grown, such as fresh products, organic food, gluten-free products. A number of innovations are also related to the desire for more convenient products (e.g., readily prepared meals).

In the period 2004-2012 discount shops experienced the strongest growth (81% increase in sales areas between 2000 and 2011), followed by hypermarkets (46%) and supermarkets (26%). Generally, **choice** available to consumers increased:

- Choice in **alternative products** as a whole increased in average by 5.1% per year, the annual growth rate being 7.9% before the crisis an only 2.4% since 2008. Discounters registered the strongest growth.
- The variety of **product sizes** also increased but differed considerably across the product categories.
- The number of **brand suppliers** increased, with variations across shopping areas, product categories and shop type.
- Choice in the **number of shops** in a consumer's shopping area increased on average by 1.6% each year.

Importantly, the number of **innovations** in the post-crisis period actually decreased:

- The **number** of innovations increased on average by 3.8% over 2006-2008 but fell over 2008-2010 (-1.2%) and even more significantly over 2010-2012 (-5.3%). The share of innovations in the total number of products decreased steadily as of 2006. Discount stores and hypermarkets were growing before 2008 in terms of innovations, whereas only discount stores continued the trend after the crisis.
- **Types** of innovation changed as of 2006, with innovations on new packaging becoming considerably more common over time in most Member States (30% of total innovations in 2012 compared to approximately 6% in 2004). This comes at the expense of the shares of new varieties and range extensions.

Concentration levels of retailers and suppliers varied across Member States, product category and level of analysis (local or national):

- A clear trend towards greater concentration of **retailers** was observed as a whole (both modern retail and smaller stores).
- Concentration of **brand suppliers** generally increased and more so during the pre-crisis period.
- The analysis of the **balance** between suppliers and modern retailers, measured at national level and by product category, showed that overall situations in favour of retailers are matched by those in favour of suppliers.

Conclusions on the factors driving choice

- **Economic prosperity and product category turnover** are favourable factors for choice, in addition to the shop types and size whose impact on choice is obvious. Thus, drivers of choice were found to be: GDP per capita of the region, national turnover in the product category, certain shop characteristics (format, floorspace) and presence of a new shop opening in the local area. Hypermarkets were found to offer the most choice and discounters the least.
- **Econometric analyses** found, at least for the countries sampled, very little evidence that the concentration of modern retailers had been an economic driver of choice.
- **The impact of suppliers' concentration** was found to be negligible.
- There was very little evidence that **the measure of imbalance between modern retailers and suppliers** had an impact on choice.

- **The impact of private labels** on the evolution of choice was found to be positive but small. Up to a moderate level, it is associated with slightly more choice, but a higher share of private labels may result in less product variety.

Conclusions on the factors driving innovation

- **The main drivers** for innovation were found to be the level of employment of the shop's region, measure of retailers' business expectations, the national turnover in the product category, shop characteristics and a new shop opening.

- **The impact of shop type and size** was obvious. The impact of being a discounter, relative to being a hypermarket, was greater for innovation than for choice, suggesting that the narrower range offered by discounters tended to focus on less innovative products.

- Some **general economic drivers** have had strong impact on innovation, such as the rate of unemployment in the region.

- Some evidence was found that **greater concentration among modern** retailers at a local level was associated with less innovation.

- **Greater concentration among suppliers** at procurement level was associated with less innovation.

- **A larger imbalance away from suppliers** and towards modern retailers was generally found to be associated with more innovation.

- Little evidence was found that **a larger share of private labels** curbed innovation, at least up to a certain level.

- **The economic importance of the drivers** was generally larger for innovation than for choice, in particular for new packaging innovations.

Overall considerations

Commenting on the study, Alexander Italianer, the Director-General for Competition, summarised the effects of these developments for competition. He underlined the importance of the economic environment and the positive influence of new shop openings. However, "if a main local operator purchases shops in an area where concentrations are already high, then this will probably not stimulate choice and innovation" and will vindicate intervention by competition authorities in merger cases.

Concerning **concentration** and the resulting imbalances in bargaining power, whereas in some product categories the retail sector is much more concentrated than the supply side, the inverse situation also exists. Crucially, Mr. Italianer noted that "if a retailer twists the arm of a supplier in individual bilateral negotiations, then he may well be in the wrong, but it falls beyond the scope of competition enforcement". Contract law and fair trading laws may be better placed to address situations of superior bargaining power. If imbalances in favour of retailers do not seem to have a negative impact on choice and innovation in moderately concentrated retail markets, further research is needed for the rest.

Despite the fact that in many Member States **private labels** represent more than 25% of the modern retail food sales, it seems that private labels do not hamper choice and innovation. At least if they do not obtain a majority share in a product category.

National competition authorities

A number of NCAs have initiated investigations in the sector, such as the Danish and Spanish NCAs in 2011, the Belgian and Finnish ones in 2012, the Italian authority in 2013 and the German one in 2014. They have focussed on several problems:

- **Buying alliances**, where retailers join forces in order to gain better purchasing conditions. The concern is that if competition between members is reduced, they will have fewer incentives to pass on benefits to the consumers.

- **Negotiations on prices**, whereby under a kind of "Most Favoured Nation" clause a retailer agrees to sell a supplier's product at a certain price, if the supplier convinces other retailers to do the same. A 2014 report released by the German competition authority suggested that these practices may facilitate collusion between brand manufacturers and retailers, since inter-brand competition decreases.

- Very **concentrated wholesale markets**, where retailers and suppliers could, in the words of Mr. Italianer, "end up colluding unintentionally, in networks of parallel agreements or parallel behaviour".

Conclusions

The main conclusions on the evolution of modern retail are that:

- Concentration of retailers has increased in almost all Member States;

- Modern retail has expanded, covering 50-90% of total food sales;

- The top five retailers in many Member States cover more than 80% of the modern retail segment;

- Buying alliances have increased importance for retailers on national or international level;

- Private labels have become a great success.

Against this background, however, Mr. Italianer highlighted that concentration in the modern retail sector does not always increase: national markets are in constant movement, market shares change quickly and new retailers enter the market. Retail concentration may also be balanced out by other factors, such as consolidation of brand manufacturers.

MEMBER STATE LEVEL

BELGIUM

Belgian Competition Authority argues against extraterritorial enforcement of US antitrust law in US LCD panel cartel case

On 10 October 2014, the Belgian Competition Authority ("BCA") submitted to the US Court of Appeals for the Seventh Circuit its views as *amicus curiae* opposing the extraterritorial enforcement of US antitrust law in the LCD (liquid – crystal display) Panel cartel case.

The issue arose in the context of a damages claim lodged by Motorola Mobility ("Motorola") against companies Motorola accused of having fixed the price of LCD panels used into its mobile phones. Importantly, only 1% of the LCD panels concerned were bought and delivered to Motorola in the US; another 42% of the panels were bought by Motorola's non-US subsidiaries, assembled outside of the US and shipped to Motorola for resale in the US. The remaining 57% presented no link whatsoever with the US.

The US District Court for the Northern District of Illinois, Eastern Division, considered that Motorola's claim regarding all but the 1% of the LCD panels delivered in the US was barred by the Foreign Trade Antitrust Improvements Act ("FTAIA"), which provides that US antitrust law does not apply to conduct involving trade or commerce with foreign nations unless (i) such conduct has a "direct, substantial, and reasonably foreseeable effect" on US domestic or import commerce, and (ii) this effect "gives rise to a claim" under US antitrust law. The Court of Appeals for the Seventh Circuit initially upheld the District Court's ruling, finding that there was no direct effect of the conduct on US commerce. However, on 1 July 2014, the Court decided, at the request of the United States and of the US Federal Trade Commission, to rehear the appeal.

The BCA based its intervention in this appeal procedure on its interest in "ensuring that U.S. antitrust laws and the availability of civil damage actions in U.S. courts do not interfere with Belgian and EU enforcement efforts". Relying heavily on *F. Hoffman-La Roche Ltd. v.*

Empagran S.A., a case dating back to 2004 in which the former Belgian Competition Council also filed an *amicus curiae* brief, the BCA's views are essentially two-fold.

First, the BCA considered that principles of comity should limit the scope of US antitrust laws, failing which "conflicting policies may well become a significant obstacle to trade and investment". The BCA noted that "the manufacture and sale of LCDs to Belgian purchasers appropriately calls for the application of Belgian antitrust laws under Belgian competition laws and the FTAIA". The BCA stressed that Belgium also had to acknowledge the jurisdictional limits of its antitrust laws: the BCA referred to the annulment by the Brussels Court of Appeals of the fine it had imposed on a flour mill, Brabomills, as the turnover the BCA had taken into account for the calculation of the fine might have included sales outside of Belgium, which created a risk of double jeopardy.

In addition, the BCA highlighted that an expansive enforcement of US antitrust laws would undermine Belgium's and other nations' enforcement of competition laws. Specifically, the BCA claimed that the proper functioning of its leniency programme requires that "the foreign firms seeking leniency can make an adequate assessment of the potential consequences of alleged infringements, which requires in turn that they may rely on principles of causality and jurisdiction developed in the spirit of comity". The BCA concluded that "[i]f seeking leniency and acknowledging infringement were to expose the foreign firm to the consequence of civil suits in the U.S. courts, such infringers would have little incentive to enter into amnesty programs".

Therefore, the BCA submitted that the District Court's order should be affirmed. The jurisdictional restraint advocated by the BCA in the US LCD Panel cartel case is in stark contrast with the position taken by the General Court in the 27 February 2014 *Innolux* judgment, which upheld the Commission's decision to calculate the fine on the basis of the value of LCD panels incorporated in China and Taiwan into downstream products sold in the EU (see VBB on Competition Law, Volume 2014, No. 2). That judgment is currently under appeal before the Court of Justice.

CZECH REPUBLIC

Dawn raids under Czech law violate right to respect for private life

On 2 October 2014, the European Court of Human Rights ("ECtHR") ruled that a dawn raid conducted in 2003 by the Czech Competition Authority (the "Authority") pursuant to Czech law was contrary to the right to respect for private life under Article 8 of the European Convention on Human Rights ("ECHR").

In 2003, the Authority carried out a dawn raid in the premises of Delta Pakerny (the "Company"), a bakery investigated in relation to a probe into an alleged cartel in the bakery sector. During the course of the investigations, the Company's management refused to give the Authority access to various folders stored on the employees' computers on the grounds that they contained private information.

The Authority imposed a fine of € 11,500 on the Company for obstructing the investigation but that fine was subsequently annulled by a lower court on the ground that the incriminating facts alleged against the Company were not sufficiently specified. As a result, the Authority adopted a new infringement decision on the same grounds in 2006, which was upheld by the Czech courts.

Having unsuccessfully appealed against the 2006 decision and having exhausted the internal remedies available, the Company brought the case before the ECtHR arguing, *inter alia*, that the Authority violated the right to respect for private life under Article 8 ECHR as well as the rights to a fair trial, effective judicial protection and property.

The ECtHR held that, although the right to carry out dawn raids interferes with the Company's right to privacy, such interference can be justified provided that (i) it is prescribed by law; (ii) it pursues a legitimate objective; and (iii) it is necessary. Regarding the last condition, the ECtHR has consistently required that sufficient guarantees against arbitrariness must be provided by the national legal system (i.e., procedural guarantees through prior judicial authorisation or through adequate court review).

In the case at hand, the ECtHR found that Article 8 ECHR had been breached as the procedural guarantees provided to the Company under Czech law were not sufficient. Specifically, Czech law did not subject dawn-raids to prior judicial authorisation and the Czech courts did not verify the grounds, scope and proportionality of the inspection. In addition, the Czech legislation did not include any provision allowing for direct challenge to the regularity of an inspection decision.

PRIVATE ENFORCEMENT

EUROPEAN UNION LEVEL

ECJ issues ruling on application of EU rules on jurisdiction to competition damages claims

On 23 October 2014, pursuant to a request from a Latvian court, the Court of Justice of the European Union ("ECJ") issued a preliminary ruling on the application of Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the "Brussels Regulation") to damages actions for breach of EU competition law.

The request originated from a dispute before the Lithuanian Court of Appeal in the course of which flyLAL-Lithuanian Airlines AS ("LAL") sought compensation for damages against two Latvian companies, Starptautiskā lidosta Rīga VAS and Air Baltic Corporation AS, for alleged breaches of EU competition law.

The Lithuanian Court of Appeal granted LAL's applications for provisional and protective measures in December 2008. Subsequently, in January 2012, a Latvian District Court ordered the enforcement of the Lithuanian interim judgment, resulting in appeals being brought by the Latvian companies before a higher court of appeal in Latvia.

Specifically, the Latvian companies claimed that since the dispute in the main proceedings pertained to airport charges determined by the State of Latvia, it did not constitute a civil or commercial matter, thereby precluding the application of the Brussels Regulation pursuant to Article 1(1). It was also claimed that even if the Brussels Regulation did apply, then Article 22(2) (exclusive jurisdiction) would be applicable as the reduction in airport charges were applied by way of decisions taken by organs of commercial companies. Finally, the Latvian companies claimed that since LAL was in liquidation, the enforcement of the Lithuanian judgment would be against public policy under Article 34(1) of the Brussels Regulation as there would be no means of recovery available against LAL if the damages action was ultimately dismissed.

The Latvian Court of Appeal decided to stay the proceedings and to refer preliminary questions to the ECJ on the interpretation of the Brussels Regulation.

In its judgment of 23 October 2014, the ECJ ruled that an action to seek legal redress for damage relating to an alleged infringement of competition law is civil and commercial in nature and thus within the remit of Article 1(1) of the Brussels Regulation. Importantly, the Court added that the conclusion remains unchanged even though the infringements resulted from provisions of Latvian law and the Latvian State owned the majority of the shares in the two companies concerned.

On the scope of Article 22(2) of the Brussels Regulation, the ECJ held that, since the substance of the original dispute concerns a claim for compensation arising from alleged competition law infringements, it does not constitute proceedings concerning the validity of the decisions of a company's organs within the meaning of Article 22(2).

As regards public policy, the ECJ clarified that the concept seeks to protect legal interests that are expressed through a rule of law, and not purely economic interests. The Court further noted that the provisional and protective measures at issue in the main proceedings simply required the monitoring of the Latvian companies' assets, without any payment required to be made. The ECJ concluded that the mere invocation of serious economic consequences does not constitute an infringement of public policy within the meaning of Article 34(1) of the Brussels Regulation.