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MERGER CONTROL
EUROPEAN UNION LEVEL

Commission closes investigation into misleading information in Munksjö/Ahlstrom notification

On 29 October 2014, the European Commission officially closed its investigation into concerns that Munksjö and Ahlstrom provided misleading information in their notification of the 2012 merger of their label and processing paper businesses. The Commission accepted the parties’ explanations of discrepancies between their market share estimates as reported in the notification and those reflected in their internal documents.

In October 2012, Swedish paper manufacturer Munksjö AB and Ahlstrom Corporation of Finland notified the proposed merger of Munksjö with the label and processing paper business of Ahlstrom. In December 2012, the Commission opened a Phase II investigation, in part due to the parties’ large combined market shares.

Internal documents provided to the Commission as a part of the ensuing investigation suggested that the parties in fact considered the total market to be significantly smaller – and therefore their market shares significantly higher – than they had claimed in their notification. The Commission pointed out these inconsistencies in the course of the investigation but considered that the parties did not adequately explain themselves at the time.

Ultimately, the Commission conditionally approved the merger in May 2013, but based on these discrepancies, the Commission took the preliminary view that the parties had provided incorrect or misleading information in their notification within the meaning of Article 14(1)(a) of the Merger Regulation. The Commission therefore issued a Statement of Objections on 21 February 2014 with a view to issuing fines of up to 1% of the aggregate turnover of the undertakings concerned.

However, in their response to the Statement of Objections, the parties provided further internal documents demonstrating that they had conducted a market reconstruction exercise, which had led them to reconsider the significance of a number of Asian competitors at a late stage of their drafting process. This had led them to correct their market estimates shortly prior to notification.

The Commission therefore considered that it had now received the necessary information and closed the infringement proceedings. However, the Commission stressed that the parties should have disclosed this information at an early stage, in particular by explaining the asymmetries between their internal documents and the notification itself. The case therefore illustrates the importance of justifying to the Commission, in a timely manner, any discrepancies between the parties’ best estimates in their internal documents and in their notification.
ABUSE OF DOMINANT POSITION

MEMBER STATE LEVEL

SPAIN

Spanish Competition Authority fines Spanish Society of Authors and Publishers €3.1 million for excessive pricing

On 14 November 2014, the Spanish Competition Authority (“SCA”) handed down a decision imposing a fine of €3.1 million on the Spanish Society of Authors and Publishers (“SGAE”) for having abused its dominant position in the market for the management of public performance rights of musical works in Spain. The SCA concluded that SGAE had abused its dominant position by charging excessive tariffs for the licensing of intellectual property rights to certain musical promoters, which were significantly higher than those imposed by collecting societies in other EU countries for the same type of services.

SGAE has since announced in a press release that it intends to appeal against the decision of the SCA. It emerges from the press release that SGAE considers that the decision lacks a sufficient legal basis in that it makes no reference to the provisions allegedly infringed. Moreover, it appears that SGAE considers the imposed fine inappropriate as it has not been set in accordance with the relevant provisions of the Spanish Competition Act. SGAE has two months to appeal the decision before the relevant national court.

OTHER DEVELOPMENTS

BELGIUM: On 1 October 2014, the Court of Appeal of Ghent handed down a judgment upholding the decision of the Commercial Court of Dendermonde of 3 November 2010 finding that Ducati North Europe BV (“Ducati”) has abused its dominant position on the Belgian market for after-sale services of Ducati motorbikes by preventing DD Bikes from directly obtaining from Ducati, under the same conditions as Ducati dealers, the components, equipment, technical information and tools necessary to repair Ducati motorbikes. Further
CARTELS AND HORIZONTAL AGREEMENTS

EUROPEAN UNION LEVEL

Court of Justice reduces Guardian’s fine by 30% in flat glass cartel appeal

On 12 November 2014, the Court of Justice of the European Union (“ECJ”) handed down its judgment on the appeal brought by Guardian Industries Corp. and Guardian Europe Sàrl (“Guardian”) against a General Court (“GC”) judgment that dismissed in its entirety their appeal against a 2007 European Commission (“Commission”) decision fining them for their participation in a cartel in the flat glass sector from 20 April 2004 to 22 February 2005. The ECJ partly set aside the GC’s judgment and reduced the fine imposed on Guardian by 30%, i.e., from € 148 million to € 103.6 million.

In its November 2007 decision, the Commission imposed fines totalling approximately € 487 million on four flat glass producers - Asahi, Guardian, Pilkington and Saint-Gobain - for their participation in a cartel. The Commission found that the companies had participated in a single and continuous infringement of Article 101 TFEU, which covered the territory of the EEA, and consisted in the fixing of price increases, minimum prices, target prices, price freezes and other commercial conditions in their sales to independent customers of four categories of flat glass products used in the building industry, as well as in the exchange of commercially sensitive information. Guardian was fined € 148 million for its participation in the cartel. The decision was appealed before the GC, but Guardian’s appeal was dismissed in its entirety (see VBB on Competition Law, Volume 2012, No. 10).

In its appeal, Guardian challenged the methodology used by the Commission to calculate the amount of the fine. Guardian argued the fact that the internal sales of other infringing vertically-integrated undertakings (e.g., Saint-Gobain) were not accounted for on the same basis as sales to third parties breached the principles of equal treatment and non-discrimination. The ECJ sided with Guardian and recalled that the Commission, for the purpose of fixing the amount of a fine, could have regard to both the total turnover of the undertaking and to the proportion of that turnover that the goods subject of the infringement account for. However, the Court held that the Commission’s discretion is limited by a number of rules, including those listed in its 2006 Fining Guidelines. Specifically, the ECJ referred to point 13 of the Fining Guidelines, which states that in determining the basic amount of the fine, the Commission must take the value of the undertaking’s sales of goods and services to which the infringement directly or indirectly relates in the relevant geographic area. According to the ECJ, the objective of this point is to adopt, as the starting point for the calculation of the fine imposed on an undertaking, an amount which reflects the economic significance of the infringement and the relative size of the undertaking’s contribution to it.

Taking into account these objectives, the ECJ considered that a distinction should not be drawn between sales decisions depending on whether they are made to independent third parties or to entities belonging to the same undertaking, even where the Commission has not made any finding that internal sales were affected by the cartel. To ignore the value of the sales belonging to that latter category, as done by the Commission, would give an unjustifiable advantage to vertically integrated companies, given that excluding internal sales from the relevant turnover would reduce their relative weight in the infringement to the detriment of the other undertakings. The ECJ considered that such an exclusion would contradict the objectives pursued by point 13 of the Fining Guidelines. As a result, in accordance with its power of unlimited jurisdiction, the ECJ reduced the amount of the fine imposed on Guardian by 30%, from € 148 million to € 103.6 million to place Guardian on an equal footing with the vertically integrated companies whose internal sales had not been counted in the calculation of the fine.

The ECJ’s judgment is significant in two respects. First, the ECJ finds that in calculating fines the Commission is bound under the 2006 Fining Guidelines to treat a party’s internal sales in precisely the same way as external sales in
order to avoid discrimination between vertically integrated and non-vertically integrated companies. Second, the ECJ dismissed the Commission’s arguments that, even if it been incorrect in excluding the internal sales of the vertically integrated companies in its calculation of the fine, this did not affect Guardian’s position given that it had not been the subject of this error. The ECJ simply ruled that, having found the Commission’s approach illegal, it was entitled to substitute its own appraisal for that of the Commission. In so doing, the ECJ attached primary importance to the principle of equal treatment in the calculation of the fine.

OTHER DEVELOPMENTS

EUROPEAN UNION: On 20 November 2014, the European Commission announced that it had sent a Statement of Objections to a number of heavy and medium duty truck producers in relation to their alleged participation in a cartel. The Commission stated that it has concerns that certain truck producers may have coordinated their pricing behaviour in the EEA in violation of Article 101 TFEU.

DENMARK: On 3 and 12 November 2014, the Danish Competition and Consumer Authority (“DCCA”) announced that four construction companies - BGB A/S, Knud Toft Jensen ApS, ASON A/S and Elindco Byggefirma A/S - have accepted to pay fines totalling DKK 11.6 million (around € 1.6 million) for their participation in the bid-rigging and price-fixing cartel in the construction sector. The fine imposed on Elindco Byggefirma amounted to DKK 10 million (around € 1.3 million), which is the highest fine ever imposed by the DCCA in a cartel case. The Danish public prosecutor for serious economic and international crimes has been carrying out a parallel investigation of the same cartel and issued, in October 2014, fixed penalty notices of more than DKK 27 million (around € 3.6 million) addressed to 25 of the 33 construction companies subject to the investigation (see VBB on Competition Law, Volume 2014, No. 10).

SPAIN: On 19 November 2014, the Spanish Competition Authority (“CNMC”) imposed fines of € 3.8 million on thirteen companies which it found had engaged from 2007 to 2014 in a cartel in the sector for the recovery and recycling of paper and cardboard. The professional association representing the interest of these companies was also fined € 150,000. The infringing conduct encompassed market sharing, customer sharing and price fixing as well as the exchange of sensitive information, which was reflected in a set of policy documents signed by all the cartel members in the framework of their professional association.
VERTICAL AGREEMENTS

EUROPEAN UNION LEVEL

European Commission rejects complaint against GSK

The European Commission recently made available the decision by which it rejected in May of this year the complaint of the European Association of Euro-Pharmaceutical Companies ("EAEPC") against GlaxoSmithKline SA, a subsidiary of the group GlaxoSmithKline plc (together, "GSK"), alleging a violation of Article 101 TFEU by GSK in connection with the dual pricing scheme that GSK agreed in 1998 with a number of wholesalers active in Spain.

The Commission decided to reject the complaint as there was insufficient European Union interest to justify further investigation. The Commission substantiated the rejection by reasoning that: (1) the conduct at issue ended as long ago as October 1998 and there was no indication that GSK was planning to implement it again in the future; (2) the conduct has no continuing effects; and (3) national courts and authorities appear to be well placed to handle the issues raised. The decision, therefore, sheds no particular light on how dual pricing schemes are assessed in practice under Article 101 following the annulment by the EU Courts of the original Commission decision which, in 2001, had found GSK’s dual pricing scheme to infringe Article 101. EAEPC has since filed an appeal against the decision with the General Court.

European Commission rejects complaint alleging Piaggio abused dominant position on the scooter market

On 8 October 2014, the European Commission rejected a complaint alleging that Piaggio had abused its dominant position on the scooter market.

On 29 December 2009 by LML Italia, the exclusive Italian distributor of LML Ltd., an Indian producer of scooters. In particular, LML Italia distributes scooters with engines ranging from 125cc to 200cc and sold scooters with engines of up to 150cc in the period prior to the complaint.

LML Italia complained that Piaggio allegedly put pressure on multi-brand scooter dealers to terminate their dealer contracts with LML Italia, as well as threatening them with retaliation in case of non-compliance. LML Italia’s complaint also concerned an extended warranty policy (applicable after the expiry of the manufacturer’s warranty), which Piaggio allegedly promoted and which did not cover LML scooters.

In its decision, the Commission rejected the complaint because of the limited probability of finding an infringement of Article 102 TFEU. In particular, the Commission found that Piaggio was very unlikely to be dominant on the Italian market for scooters with engines of 50cc or more. In addition, the Commission found no evidence of pressure exerted on Italian multi-brand dealers not to sell LML’s products. Similarly, there was no evidence that Piaggio was directly involved in the extended warranty policy or that Piaggio was trying to prevent dealers from selling competing extended warranty policies, including those which covered LML scooters.

As a result, the Commission rejected the complaint on the grounds that a more in-depth investigation into LML Italia’s complaint would require considerable resources and would likely be disproportionate, taking into account the low probability of establishing any breach of the EU competition rules.

MEMBER STATE LEVEL

BELGIUM

Belgian Court of Appeal confirms Ducati’s abuse of dominant position for refusing to directly supply components and technical information to independent repairers

On 1 October 2014, the Court of Appeal of Ghent handed down its judgment upholding the Commercial Court of Dendermonde’s decision of 3 November 2010 to the extent it found Ducati North Europe BV ("Ducati") to have abused its dominant position on the Belgian market for after-sales services for Ducati motorcycles. Ducati was found to have abused its dominant position by preventing one of its former authorised dealers and repairers, DD Bikes,
from directly obtaining from Ducati, under the same conditions as Ducati dealers, the parts, equipment, technical information, software and tools necessary to repair Ducati motorcycles.

By way of background, in October 2007, Ducati terminated the contract granting DD Bikes the status of authorised dealer and repairer of Ducati motorcycles. Nevertheless, DD Bikes requested to remain as an authorised repairer so as to keep the right to use the official Ducati logo, to order components and spare parts under the same conditions as other authorised repairers and to carry out repairs covered by the two-year warranty applicable to Ducati motorcycles. However, Ducati refused to grant such status, arguing that only authorised Ducati dealers would be admitted as authorised repairers. As a result, DD Bikes filed a complaint for unfair commercial practices before the Commercial Court of Dendermonde.

In its November 2010 judgment, the Commercial Court first established that the repair of Ducati motorcycles was not part of the same market as the sale of Ducati motorcycles and that, unlike the market for the sale of motorcycles, the repair market was brand-specific. The Court also found the brand-specific market for after-sales services to be national in scope.

The Commercial Court then noted that Ducati’s distribution system could not benefit from the Vertical Agreements Block Exemption (as Ducati’s market share in the after-sales market exceeded 30%) or from an individual exemption under Article 101(3) TFEU. According to the Commercial Court, Ducati unnecessarily forced repairers to also be dealers in order to be considered as authorised Ducati repairers. Ducati also foreclosed competition from repairers that were not authorised dealers, notably by refusing to apply the two-year warranty on motorcycles repaired by repairers that were not Ducati dealers and by limiting access to technical information, specialised tools, parts and accessories to authorised dealers (independent repairers could only purchase parts and accessories from competing authorised dealers/repairers at a higher price). As a result, the Commercial Court found this system to constitute an anticompetitive agreement prohibited by Article 101 TFEU and Article IV.1 of the Belgian Commercial Code.

In addition, the Commercial Court of Dendermonde noted that Ducati was dominant on the market for after-sales services for Ducati motorcycles in Belgium. It emphasised that the owners of Ducati motorcycles are likely to use the services of authorised Ducati repairers and original Ducati spare parts for various reasons, including the fact that the number of independent repairers is limited. After finding Ducati to be dominant, the Court found that Ducati’s decision to only allow its authorised repairers to become authorised repairers constituted an abuse of its dominant position since it prevented independent repairers from competing effectively with official Ducati repairers.

Ducati appealed this judgment before the Court of Appeal of Ghent, which partly upheld the judgment of the Commercial Court.

In its judgment of 1 October 2014, the Court of Appeal followed the Commercial Court’s reasoning on the definition of the relevant market. However, the Court of Appeal disagreed with the Commercial Court as regards the infringement of Articles IV.1 of the Belgian Commercial Code and 101 TFEU. According to the Court of Appeal, DD Bikes had not established that Ducati’s refusal to recognise DD Bikes as an authorised repairer was based on an agreement between Ducati and its authorised dealers or repairers. Therefore, Ducati’s refusal to admit DD Bikes to its authorised repairers’ network constituted unilateral behaviour, which falls outside of the scope of Articles 101 TFEU and IV.1 of the Belgian Commercial Code.

Conversely, the Court of Appeal confirmed the existence of an abuse of Ducati’s dominant position on the Belgian market for after-sales services for Ducati motorcycles. First, the Court found Ducati to be dominant on this market, and noted that independent repairers could not exert any countervailing market power owing to limitations applied to the manufacturer’s warranty and the restricted access to parts, specific tools and technical information. The Court then stated that, although companies are
in principle free to choose their business partners and how to dispose of their own property, dominant companies such as Ducati cannot refuse to sell a product - or sell it under unreasonable conditions - in a way that restricts competition. According to the Court, Ducati had abused its dominant position by preventing DD Bikes from directly obtaining from Ducati, under the same conditions as Ducati dealers, the motorcycle parts, equipment, technical information and tools necessary to repair Ducati motorcycles. As a result, DD Bikes could not effectively compete on the market for the maintenance and repair of Ducati motorcycles.

Finally, the Court of Appeal found that Ducati’s conduct did not have an effect on trade between Member States as DD Bikes was only active in the Dendermonde region and, as a result, it ruled that only the Belgian competition rules, and not Article 102 TFEU, applied to the present case.

The Court ordered Ducati to enable DD Bikes to repair and maintain Ducati motorcycles under competitive conditions by supplying it with technical information, specialised tools, software and parts on the same terms as authorised dealers, and imposed a conditional fine of € 1,000 per day (with a maximum of € 200,000) in case Ducati would fail to do so.

The case is important as it extends to the motorcycle repair markets a number of the principles aimed at strengthening the competitiveness of independent repairers which have been applied by the European Commission to the motor vehicle repair markets. Unlike the lower court, the Court did not feel itself able to go so far as to order Ducati to appoint DD Bikes as an authorised repairer, and it remains to be seen whether a refusal to appoint a qualified stand-alone repairer to the authorised repair network would itself be held to infringe the competition rules (as the Commission has claimed may often be the case in the motor vehicle sector).

**Belgian Competition Authority dismisses Spira’s complaint against De Beers**

On 15 October 2014, the Belgian Competition Authority (“BCA”) dismissed on the basis of its enforcement priorities an antitrust complaint filed by A. Spira BVBA (“Spira”), a Belgium-based dealer of rough diamonds, against De Beers UK Limited and Diamdel NV in its capacity as liquidator of Diamond Trading Company (PTY) Limited (“De Beers”), the world’s largest producer of rough diamonds.

De Beers sells rough diamonds in lots to its customers (called “sightholders”). In 2003, De Beers rationalised its distribution system by the introduction of the Supplier of Choice (“SOC”) system. The SOC system was approved by the European Commission in 2003 by way of a comfort letter.

Following the implementation of the SOC system, Spira, who had been acting as a sightholder for De Beers from 1935 to 2003, was no longer allowed to purchase rough diamonds from De Beers. As a result, Spira filed a complaint against De Beers to the European Commission in 2003, claiming that the SOC system infringed Articles 101 and 102 TFEU. The Commission rejected Spira’s complaint by decisions of 27 January 2007 and 5 June 2008. The Commission stated that there was insufficient Community interest to further investigate Spira’s complaint considering the unlikelihood of finding an infringement. Spira lodged an appeal against both decisions.

While Spira’s appeal was pending before the EU General Court, Spira also lodged a complaint before the BCA on 30 October 2009. Spira argued before the BCA that De Beers was attempting to restrict the resale of rough diamonds and to control the downstream market though the SOC system, contrary to Articles IV.1 and IV.2 of the Commercial Code. In addition, Spira sought interim relief from the President of the BCA, who ordered De Beers to temporarily resume its supply of rough diamonds to Spira (see VBB on Belgian Business Law, Volume 2012, No. 8), although the decisions renewing such relief were annulled by the Brussels Court of Appeal on 26 March 2013.

On 11 July 2013, the EU General Court dismissed Spira’s appeal against the European Commission decisions rejecting its complaint (see VBB on Competition Law, Volume 2013, No. 8). Following these developments, the BCA
reassessed the case and decided, on 15 October 2014, to dismiss Spira's complaint on the basis of the BCA's enforcement priorities and its available resources, in accordance with Article IV.42(2) of the Commercial Code. The BCA considered that, since the chances of finding an infringement of competition law were too low to trigger a European Commission investigation, the same reasoning should *a fortiori* apply in Belgium, as the BCA's resources are more limited than those of the Commission. Finally, the BCA noted that the diamond sector was not a priority sector for intervention in 2014.

**OTHER DEVELOPMENTS**

**EUROPEAN UNION:** On 17 September 2014, the Commission is reported to have rejected a complaint lodged by former Mazda dealer Udo Platte against Mazda Motors Deutschland ("Mazda") concerning a distribution agreement dating back to 1984.
INTELLECTUAL PROPERTY

EUROPEAN UNION LEVEL

Advocate General Wathelet issues opinion on compatibility with Article 102 TFEU of injunctions for SEP infringements

On 20 November 2014, Advocate General Wathelet issued an opinion in Case C-170/13 Huawei Technologies v ZTE. At issue is whether Huawei, as a holder of standard-essential patents (“SEPs”) subject to a fair, reasonable and non-discriminatory (“FRAND”) commitment, may seek an injunction in an action for infringement. The case is currently pending before the Court of Justice of the European Union (“ECJ”). In his opinion, the Advocate General concluded that, assuming that the SEP-holder has a dominant position, it constitutes an abuse under Article 102 TFEU to make a request for corrective measures or to seek an injunction against a company that allegedly infringed the SEPs (the allegedly “offending company”) if the SEP-holder has not honoured its FRAND commitment and the offending company has shown itself to be objectively ready, willing, and able to enter into a licensing agreement.

The underlying national proceedings pitted two Chinese telecommunications firms against each other, namely Huawei and ZTE. Huawei is the owner of patents considered as essential to the Long Term Evolution (LTE) standard, which was developed under the aegis of the European Telecommunications Standards Institute (“ETSI”). Huawei notified the patents to ETSI and then committed to grant licences to third parties on FRAND terms. Following a breakdown of the negotiations for the conclusion of a licensing agreement on FRAND terms, Huawei brought an action for patent infringement before the German District Court of Düsseldorf (the “referring court”).

In the view of the referring court, there is a potential divergence between the respective requirements set out by the European Commission in the Motorola and Samsung decisions (see VBB on Competition Law, Volume 2014, No. 4) and those set out by the German Bundesgerichtshof in its Orange-Book-

Standard judgment. The Commission appears to be more sceptical of SEP-based injunctions than the German court. Indeed, while the Commission considers that an injunction against a willing licensee to enter into a licensing agreement can constitute an abuse of dominant position, the German court considers that seeking injunctive relief in relation to SEPs is an abuse of dominant position in very limited circumstances only such as where the prospective licensee had previously offered to conclude an unconditional and binding licensing agreement with the SEP-patent holder. In that context, the ECJ has been called upon to analyse whether, and in what circumstances, an action for infringement brought by a SEP-holder against an undertaking which manufactures products in accordance with that standard constitutes an abuse of dominant position.

The Advocate General considered that a pure and simple application of either approach would not be appropriate on account of, on the one hand, the factual differences of the present case with that of the German case (i.e., the German case dealt with a de facto standard, whereas the standard in the present case is subject to FRAND terms) and, on the other hand, the belief that, pursuant to the Commission’s approach, the mere willingness of the prospective licensee to negotiate in a highly vague and non-binding fashion is not sufficient to limit the SEP-holders’ right to bring an action for injunction.

According to the Advocate General, the SEP-holder must present the allegedly offending company with a written offer of a licence on FRAND terms, and that offer must contain all the terms normally included in a licence in the sector in question, including the precise amount of the royalty and the way in which that amount is calculated. If the offending company does not provide a considered and serious response to that offer, such as by making a reasonable counter-offer in writing on any terms with which it disagrees, or otherwise engages in conduct that is purely tactical, dilatory, and/or not serious, an application for corrective measures or for an injunction does not constitute an infringement of Article 102 TFEU. For these purposes, the conduct of the offending company cannot be regarded as dilatory or not serious if it requests that FRAND terms are determined.
either by a court or arbitration tribunal, or if it reserves the right after entering into a licence agreement to challenge the validity, the use or the essential nature of the patent.

The Advocate General also noted that in order to avoid an infringement, the SEP holder must, before making a request for corrective measures or seeking an injunction, alert the offending company to the infringement at issue in writing, giving reasons and specifying the SEP concerned and the way in which it has been infringed by that company. However, these precautionary steps are, according to the Advocate General, not necessary if it has been established that the offending company is fully aware of the infringement.
LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

EUROPEAN UNION

Entry into force of new cooperation agreement with Switzerland

On 1 December 2014, the new cooperation agreement in competition matters concluded by the European Union with the Swiss Confederation entered into force. The agreement, which was signed already in May 2013, strengthens co-operation between the Commission and the Swiss Competition Commission (see VBB on Competition Law, Volume 2013, No. 5).

The new cooperation agreement with Switzerland is qualified as a ‘second generation’ cooperation agreement as it goes beyond the previous cooperation agreements concluded by the European Union. It will enable EU and Swiss competition authorities to closely coordinate their enforcement activities and, most importantly, exchange protected and confidential information without the consent of the companies concerned, and in some instances, outside of a formal investigation. It is the first “second generation” agreement that the European Commission has negotiated.

This new cooperation agreement provides a framework for co-operation and co-ordination of enforcement activities. It increases co-operation for an effective implementation of competition rules. The agreement provides for regular contacts in order to discuss policy issues, enforcement efforts and priorities. It also requires the European and Swiss competition authorities to notify each other with respect to their enforcement activities if these may affect important interests of the other party. Moreover, the cooperation agreement enables the competition authorities to coordinate their enforcement activities when they pursue enforcement activities in related matters (e.g., dawn raids). In addition, the competition authorities no longer have to rely on a waiver issued by a leniency applicant in enforcement activities.

The key element of the new cooperation agreement is the intended exchange of specific, case-related information between the European and Swiss competition authorities. This information exchange is determined by strict conditions protecting personal data and business secrets. Such an exceptional and advanced form of cooperation between competition authorities is an innovation in a bilateral cooperation agreement. According to Article VII, paragraph 2 of the cooperation agreement, the Swiss and the European competition authorities can share opinions and exchange information concerning the application of their respective competition laws if certain requirements are met (i.e., the information must relate to the same case and be for the purpose of the initial request). However, no evidence can be used to impose sanctions on natural persons.

MEMBER STATE LEVEL

GERMANY

German Federal Court of Justice rules on internal allocation of cartel fines among joint debtors

In a judgment of 18 November 2014, the German Federal Court of Justice dealt with the allocation of a fine imposed by the European Commission among joint debtors.

The Commission, in a decision of 22 July 2009, had imposed a fine of € 13.3 million for illegal cartel arrangements in the market for calcium carbide and magnesium granulate jointly and severally against SKW, a company directly involved in the cartel.

The parent company, having paid € 6.8 million of the total fine which, on appeal had been reduced to € 12.3 million (cases T-395/09 and T-384/09), initiated legal action against its acquirer and the sole shareholder of the acquirer, neither of which were active in the cartel.

The parent company argued that the amount paid should be reimbursed by the two subsidiaries since the parent company was not itself involved in the cartel.
The Regional Court of Munich and, on appeal, the Higher Regional Court of Munich dismissed the legal action. Notably, the Higher Regional Court found that the parent company alone had to pay the cartel fine since it benefited from potential profits or increases in corporate value brought about by the cartel arrangements.

The German Federal Court of Justice annulled the appeal judgment. Recalling the ruling of the Court of Justice of the European Union in Joined Cases C-231/11 P to C-233/11 P Siemens v Commission, the Federal Court of Justice held that the internal allocation of cartel fines among joint debtors is to be assessed according to the laws of the Member States. Since under German law all circumstances that are relevant to the assessment of the internal allocation of the fines have to be taken into account, the decision of the Higher Regional Court could not be upheld. The Federal Court of Justice thus referred the matter back to the Higher Regional Court of Munich which will have to reach a new decision taking account of all relevant circumstances of the case, such as the level of contribution to the illegal conduct and benefits derived from the cartel arrangements, when assessing the internal allocation of the cartel fine.

IRELAND

Irish legislation merging competition and consumer authorities enters into force

On 31 October 2014, the Competition and Consumer Protection Act 2014 (“Act”) entered into force in Ireland. The Act was passed in August 2014 (see VBB on Competition Law, Volume 2014, No. 8). The following innovations have been brought about with the entry into force of the Act:

- Two former Irish authorities - the National Consumer Agency and the Competition Authority - are merged into one entity, the Competition and Consumer Protection Commission (“CCPC”);
- The CCPC will be given extensive criminal investigation powers such as the power to question overnight;
- The Act allows the CCPC to compel disclosure of information normally protected by legal privilege;
- A criminal offence has been created where a person fails to disclose material information to the police about a hardcore cartel;
- The minimum turnover thresholds for merger notifications have been lowered and the previous reference to worldwide turnover has been replaced with a reference to turnover in Ireland;
- The Act requires that more joint ventures (projects that are ‘lasting’) will need to be notified than before;
- The review periods for mergers have been extended and there an allowance is made for a suspension period where the CCPC can request additional information;
- There are special provisions for media mergers (newspaper publishers, broadcasters, etc) which must be notified not to the CCPC but to the Irish Minister for Communications, Energy and Natural Resources.

The entry into force of this Act brings about significant changes to Irish competition law. The CCPC was established on 31 October 2014 and has already commenced its duties. Besides the CCPC being granted additional powers to the former Competition Authority, amendments to the merger procedure mean that more undertakings operational in Ireland are now under an obligation to notify than before. Further, the extension of merger review periods mean that undertakings may have to undergo longer delays before a transaction may proceed.

ITALY

Italian Competition Authority adopts new fining guidelines

On 31 October 2014, the Italian Competition Authority (the “ICA”) adopted its new fining guidelines (the “ICA Fining Guidelines”) pursuant to Article 15(1) of Law No. 287/90 (the
“Italian Competition Act”). The adoption was preceded by a public consultation.

The ICA Fining Guidelines set forth the principles the ICA is to adopt when sanctioning infringements of EU and Italian competition law. Nonetheless, the ICA clearly states that these guidelines only provide general guidance and must not be strictly interpreted. In general, the ICA Fining Guidelines are in line with the European Commission’s 2006 Guidelines on the method of setting fines (the “EU Fining Guidelines”), even though there are some small differences.

First, like the EU Fining Guidelines, the ICA is to set the basic amount of the fine by taking into account the value of the undertaking’s sales of goods or services which were the object of the infringement, in the relevant market, during the year of the last infringement. In this respect, the ICA specifies that, should the offender be an association of undertakings, the value of sales will be the overall contributions paid by its members.

Second, with regard to the basic amount as a proportion of the value of sales, the ICA Fining Guidelines fix the maximum percentage of the value of sales that can be applied (i.e., 30%) and also specify several “hard-core restrictions” (such as secret cartels) which will not allow the application of a percentage below 15%.

Third, the ICA Fining Guidelines introduce explicit provisions with regard to collusion in public tendering. In this respect, the ICA Fining Guidelines specify that, in general terms, the value of sales considered will be the value of the awarded contract.

Additionally, with reference to aggravating and mitigating circumstances, the ICA suggests that they will usually represent, individually, less than a 15% increase / decrease of the basic amount and, in total, not more than 50% of the basic amount. Furthermore, regarding the aggravating circumstance of repeated infringement, the ICA Fining Guidelines indicate that only past infringements over the last five years preceding the initiation of the infringement will be considered. As for mitigating circumstances, the ICA Fining Guidelines provide that (i) compensation of damages caused to harmed entities and (ii) the adoption and respect of a specific compliance program may be considered in reducing the fine. Finally, the ICA does not provide for a mitigating circumstance in case of negligent infringements.

Moreover, the ICA Fining Guidelines explicitly provide that undertakings assisting the ICA in discovering an infringement other than the one under investigation may obtain a fine reduction of up to 50%.

Finally, the ICA affirms that an undertaking, engaging in conduct which involves multiple competition law infringements, will be sanctioned for the most severe conduct and the fine may be increased up to three times.
PRIVATE ENFORCEMENT

EUROPEAN UNION LEVEL

Council and Parliament adopt Directive on Antitrust Damages Actions


The Directive was proposed in June 2013 as part of a package to address major legal and practical obstacles that, in many EU Member States, prevent the effective exercise of the right to damages for violations of competition law (see VBB on Competition Law, Volume 2013, No. 6). However, a number of its provisions have been adjusted in the course of the legislative process, most notably those relating to the evidentiary effect of Member State competition authority decisions, the disclosure of evidence in a competition authority’s files, and claims by indirect purchasers and the passing-on defence.

As now adopted, the Directive provides a legal framework that Member States must implement to govern actions for damages under national law for violations of EU competition law or of national laws that parallel EU competition law.

First, the Directive codifies case law of the European Court of Justice by explicitly recognising a right to full compensation for harm caused by infringements of competition law, encompassing actual loss, loss of profit, and interest. The Directive likewise provides that national rules regarding the exercise of this right must conform to the principle of effectiveness (the exercise of the right must not be practically impossible or effectively difficult) and the principle of equivalence (such rules must not be less favourable than those governing similar actions relating to national law). In addition, however, the Directive also explicitly provides that full compensation may not lead to overcompensation, whether by means of punitive, multiple, or other types of damages.

Next, the Directive seeks to address difficulties claimants frequently face with regard to access to evidence. To this end it provides that national courts must be able to order the disclosure of items of evidence or “relevant categories of evidence” upon the request of a claimant presenting a reasoned justification sufficient to support the plausibility of its claim. However, this disclosure must be proportionate, considering, among other factors, the need to prevent so-called ‘fishing expeditions’. The Directive requires penalties for parties that refuse to comply with disclosure orders or destroy evidence.

However, in order to safeguard the effectiveness of public enforcement, which frequently relies upon leniency programs and the cooperation of defendants, special rules will apply to the disclosure of evidence from the investigation of a competition authority. Certain such evidence will be permanently protected from disclosure, in particular all voluntarily-provided leniency statements and settlement submissions. Other evidence will be protected from disclosure until the competition authority’s proceedings are closed, namely all other information prepared specifically for the proceedings (such as responses to requests for information), information drawn up by the authority and sent to the parties, and withdrawn settlement submissions. All other evidence – including contemporaneous documents – will be disclosable at any time, subject to a further proportionality test considering, among other factors, the need to safeguard the effectiveness of leniency programs.

As a further source of evidence in damages actions and to prevent conflicting results, the decision of a Member State’s competition authority will irrefutably establish an infringement in that Member State’s courts. Decisions of another Member State’s national competition authority will constitute at least prima facie evidence.

Next, the Directive seeks to harmonise a number of procedural rules regarding the exercise of the right to damages.

In this respect, limitation periods must be at least five years, beginning at the earliest after
the infringement has ceased and the claimant knows or reasonably should know of its claim. Limitation periods must also be suspended during and for at least one year after a competition authority’s investigation.

The Directive requires that co-infringers be jointly and severally liable but able to recover contribution from one another based on their relative responsibility for the harm caused. However, immunity recipients will be jointly and severally liable only to their direct and indirect purchasers or where the claimant cannot otherwise obtain full compensation.

The Directive also resolves legal uncertainties by providing clear rules regarding claims by indirect purchasers and the passing-on defence. It states that indirect purchasers have a right to full compensation for the harm suffered, but that the defendant may use the ‘passing-on’ defence to show that harm was reduced or eliminated. The defendant will bear the burden to prove pass-on. However, indirect purchasers will enjoy a presumption that harm was passed on to them where they prove the defendant’s infringement caused an overcharge to direct purchasers and the indirect purchaser bought the product subject to the infringement. Courts must avoid multiple liability by considering other cases and information in the public domain.

Furthermore, the Directive requires that courts are empowered to estimate the amount of harm where the claimant demonstrates it suffered harm but cannot precisely quantify it on the evidence available. At the same time, it will be rebuttably presumed that cartel infringements cause harm.

Finally, the Directive provides rules to facilitate consensual dispute resolution, such as the suspension of limitation periods during the process and the reduction of settling claimants’ claims by the share of harm of the settling co-infringer.

The Directive will enter into force 20 days after its publication in the Official Journal. Member States will then have two years to implement the Directive. Member State legislation specifically implementing the Directive shall not apply retroactively, including to any actions commenced before the entry into force of the Directive.

MEMBER STATE LEVEL

UNITED KINGDOM

UK retailers seek permission to appeal decision in case concerning limitation periods in private damages actions

Following a decision issued on 30 October 2014, the Commercial Court of England and Wales (“CC”) has denied a request made on behalf of a number of UK retailers (Arcadia, Asda, B&Q, Comet, Debenhams, House of Fraser, Iceland Foods, New Look Retailers, Next Retail, Record 2 Shop, WM Morrison, and Argos) to appeal against its judgment in which a period of 30 years was struck out of potential damages from their lawsuit against payment card group Visa. The retailers are now seeking permission to appeal directly from the Court of Appeal (“CoA”). The appeal hinges on the issue of when limitation periods start running once the relevant facts are available to the claimant(s) to pursue a damages claim following a competition law infringement. In this case, the claimants argued that they did not have access to all the relevant information, i.e., specific knowledge of Visa’s conduct, needed in order to “trigger” the running of the limitation clock. The decision of the CoA as to whether or not to grant leave to appeal will have serious implications for future damages claims in the UK, particularly in light of the recent adoption of the EU Directive on Antitrust Damages Actions (the “EU Directive” – See this Newsletter for more details on the Directive).

The UK retailers first brought their claims against Visa in a lawsuit filed in London with proceedings commencing on 23 July 2013. All well-known high-street brands, the retailers were claiming damages from Visa for its alleged excessive multilateral interchange fees (“MIFs”) imposed on merchants in the UK, EEA and Ireland. MIFs are fees which merchants are subject to for every transaction carried out by a customer using a payment card. The fees are charged by the cardholder’s bank to the merchant’s bank per transaction and the fees are set through multilateral agreements between
member banks. However, in the case of

payment schemes involving Visa, in the

absence of a multilateral agreement between

cards, the charge defaults to fees set by Visa. It

was this issue upon which the retailers claimed

that the MIFs amounted to a breach of

competition law under Article 101 of the Treaty

on the Functioning of the European Union

(TFEU), s. 2 of the Competition Act 1998 and/or

s. 4 of the Irish Competition Act 2002.

Furthermore, the claims against Visa covered

a period of 37 years, taking account of all

payments made under these types of

agreements since 1977.

In fact, the payment card market in general has

already drawn attention from competition

authorities in Europe, causing the European

Commission to initiate antitrust investigations

into practices concerning MIFs carried out by

MasterCard and Visa. In February 2014,

following a lengthy investigation into Visa, the

Commission finally ended its probe with no

formal finding that Visa had violated competition

rules after accepting Visa’s commitments to

significantly cut its MIFs in order to facilitate

cross-border competition. In contrast, on 11

September 2014, the EU Court of Justice

confirmed the Commission’s findings that

MasterCard’s interchange fees were restrictive

of competition in the Internal Market, and

thereby in breach of EU competition rules.

Counsel for Visa claimed that it was this EU

Court of Justice judgment that prompted the

retailers’ action rather than the “discovery of a

new fact” as the retailers were not able to

produce evidence of any new relevant facts

coming to light between the period of 2007 and

2013. Thus, they could not prove that there was

no concealed information and in fact

continue to conceal relevant facts, which

impeded the retailers’ ability to bring their claims

earlier. These allegedly concealed yet relevant

facts were particularly concerned with the

secrecy surrounding: (i) how the MIFs were set;

(ii) the precise nature and scope of such

arrangements; and (iii) the levels at which they

were applied. Further, the retailers claimed that

the limitation period could not commence until

they were made aware of all the required facts.

Counsel for Visa countered that the initiation of

the Commission’s investigation had brought

enough ‘relevant facts’ forward – within the

meaning of the Limitation Act 1980 – to start the

running of the limitation period. Visa further

argued that this was a publicised case rather

than a ‘secret cartel’, meaning that the facts of

the case had been in the public domain for a

period of more than six years before the claims

were brought.

The judges in the case accepted Visa’s

arguments and considered that the retailers did

does not begin to run until either the claimant(s)
discovered the damaging behaviour or could

have been reasonably expected to discover it.
The retailers argued that the limitation period

could not have been triggered as Visa had

deliberately concealed information and in fact

continue to conceal relevant facts, which

impeded the retailers’ ability to bring their claims

earlier. These allegedly concealed yet relevant

facts were particularly concerned with the

secrecy surrounding: (i) how the MIFs were set;

(ii) the precise nature and scope of such

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the case had been in the public domain for a

period of more than six years before the claims

were brought.

The judges in the case accepted Visa’s

arguments and considered that the retailers did

have sufficient relevant facts to initiate a prima

facie claim, which they had done. Therefore, the

CC held that the limitation period had run out for

any claims on infringements prior to 2007. On

11 November 2014, the same court denied the

retailers’ request to appeal against the decision.

As a result, the retailers are seeking leave to

appeal directly from the CoA.

The case raises an interesting point of law

regarding the calculation of limitation periods in

cases concerning purported deliberate

concealment of material facts in the wake of the

EU Directive, which was formally adopted on 10

November 2014 and must be implemented by

Member States into national law within two

years. As counsel for the retailers cautioned,

this is a new area of the law to be explored by

the courts – the effect of the Limitation Act 1980

in the context of a competition claim.

cause of action is concealed, time does not

...
Under Article 10, the EU Directive outlines the rules applicable to limitation periods, namely that a limitation period shall not begin to run before the cause of action has ceased and the claimant either knows or can be reasonably expected to know of: (i) the concerned behaviour and the fact that it amounts to an infringement of competition law; (ii) the fact that the infringement caused harm to the claimant; and (iii) the identity of the infringer. Moreover, the limitation period for bringing an action must be at least five years. Finally, the limitation period must be suspended if a national competition authority takes action in initiating an investigation in regards to a competition law infringement which relates to the damages action. Such a suspension will come to an end at the earliest one year after the infringement decision becomes final or after the proceedings have been otherwise terminated. Following the UK judgment, counsel for the retailers reasoned that it was “contrary to EU law and leads to an extraordinary situation where competition-law infringers are incentivised to conceal facts relevant to victims’ damages claims”. As the clock is already figuratively running, only time will tell how the UK courts will choose to deal with this matter and how far aligned that approach will be with EU law.