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MERGER CONTROL

EUROPEAN UNION LEVEL

Commission conditionally approves Holcim's acquisition of rival cement producer Lafarge

On 15 December 2014, the European Commission approved the acquisition by Swiss cement and construction materials manufacturer Holcim of its French competitor Lafarge, subject to significant commitments by both parties.

In its assessment, the Commission considered that most cement and construction materials are sold only a short distance from their manufacturing site, and the Commission therefore analysed the results of the transaction on narrowly-defined geographic markets. In these markets, the Commission considered that there were many overlapping areas in Europe in which the merged entity would face insufficient competitive pressure from remaining players.

However, Holcim and Lafarge committed early in the investigation to extensive divestitures of their operations that remove most of their overlap. In particular, Holcim agreed to divest the entirety of its business activities in the Czech Republic and Slovakia, as well as most of its activities relating to cement in France and assets in Spain. Indeed, the sale of Holcim's Czech and Spanish assets was the subject of a Commission decision in September (see VBB on Competition Law, Volume 2014, No. 9). Lafarge likewise agreed to divest the entirety of its business activities in Germany and all those carried out in the UK through its joint venture with Anglo American, Lafarge Tarmac.

These divestitures include assets (quarries, plants, and terminals) as well as the management, IT, research and development, and alternative fuel services necessary for the viability of those assets. Furthermore, the parties will not be permitted to close their deal until the Commission has approved the buyer or buyers of the divested assets.

Based on these commitments, the Commission considered that the transaction would not raise competition concerns and conditionally cleared the deal after a phase I investigation.

Commission conditionally approves aerospace joint venture between Airbus and Safran

On 26 November 2014, the European Commission approved the creation of a joint venture active in space launchers, satellite subsystems, and missile propulsion, combining activities of the Airbus Group of the Netherlands and Safran of France. The approval is conditional upon Safran's activities in electric satellite thrusters not being included in the joint venture and on commitments designed to prevent Safran from restricting its supply to others.

The Commission found no risk of anticompetitive effects on the markets for space launchers and missile propulsion, but it had concerns with respect to the markets for a variety of satellite subsystems. Specifically, it found that the joint venture would have had the incentive to restrict access by Airbus's competitors to (1) hall-effect electric satellite thrusters, (2) carbon-carbon cylinders for optical satellites, (3) standard accuracy pressure transducers (SAPTs) for satellites, and (4) thermal protection systems for civil re-entry bodies. Furthermore, the transaction could have led to the exchange of competitors' confidential information between the joint venture and Airbus.

The parties therefore committed to maintain Safran's electric satellite propulsion activities as a separate business from the joint venture. In addition, they agreed to conclude a framework supply agreement with Safran's current main customer for carbon-carbon cylinders, SAPTs, and thermal protection systems. Finally, they also agreed to provide these three components to any third-party prime contractor on non-discriminatory terms. Based on these commitments, the Commission considered the transaction not to raise competition concerns, and it conditionally approved the deal after a phase I investigation.

Commission conditionally approves acquisition by medical technologies company Medtronic of medical device manufacturer Covidien

On 28 November 2014, the European Commission conditionally approved the acquisition of Irish medical device manufacturer Covidien by US medical technologies and therapies company Medtronic. The approval is subject to Covidien's divestiture of a product in development that would have competed with a leading Medtronic device.

The Commission's review focused on markets for peripheral vascular devices, such as stents and balloon catheters used in the treatment of diseases caused by cholesterol-containing fat or clots in blood vessels. In the market for drug coated balloons in particular, Medtronic has the leading device, In.Pact, which faces limited competitive pressure from a small number of competitors. However, Covidien has reached the clinical trial stage of developing its own drug coated balloon, Stellarex, which the Commission considered likely to compete with In.Pact in the near future. The Commission therefore took the view that the acquisition would have eliminated a credible competitor and reduced innovation.

In view of these concerns, Medtronic agreed to sell the entirety of Covidien's worldwide Stellarex business. This includes the equipment, rights and staff the Commission considers will enable the purchaser to bring Stellarex to the market, in conjunction with guarantees by Medtronic to continue to supply the purchaser with the balloons it needs for a transitional period.

The Commission considered that these commitments adequately addressed its concerns and therefore conditionally cleared the transaction.

ABUSE OF DOMINANT POSITION

MEMBER STATE LEVEL

THE NETHERLANDS

Dutch Competition Authority finds no abuse of dominant position by AstraZeneca

On 2 December 2014, the Dutch Competition Authority ("DCA") published a decision of 24 September 2014 in which it found that AstraZeneca did not hold a dominant position on the Dutch market for proton pump inhibitors ("PPIs") and therefore could not have abused its dominant position on this market.

The decision concludes an investigation into AstraZeneca's potentially abusive pricing practices in the period 2002-2010. During this period, several patented PPIs, such as AstraZeneca's Nexium, as well as generic PPIs were available on the Dutch market and competed on the basis of their price and therapeutic value. It emerges from the DCA's decision that AstraZeneca offered large rebates to hospitals purchasing Nexium, whereas it sold Nexium for a much higher price to pharmacies outside hospitals. The DCA examined whether AstraZeneca's pricing strategy for hospitals allowed AstraZeneca to increase its customer base outside hospitals and to prevent the entry and increase in market share of cheaper generic PPIs sold outside hospitals.

The DCA distinguished between the market for the supply of PPIs to the pharmacies of hospitals (the so-called "intramural market") and the market for the supply of PPIs to regular pharmacies (the so-called "extramural market"). The DCA examined for each market separately whether AstraZeneca held a dominant position. With regard to the intramural market, the DCA held that, apart from Nexium, four other PPIs were on offer in generic and non-generic form and Nexium only had a 30% market share on this market. Consequently, the DCA concluded that AstraZeneca did not have a dominant position on the intramural market.

As regards the extramural market, the DCA examined whether AstraZeneca could be considered to have a dominant position with regard to a group of Nexium users on the extramural market which had previously been prescribed Nexium on the intramural market. The DCA considered three factors to be of particular relevance in this regard. First, AstraZeneca had a patent on the active substance of Nexium during the investigation period which prevented other competitors from entering this market. Second, consumers outside hospitals purchasing from pharmacies were not concerned by the price of the PPIs, as their health insurer would cover the costs of the PPIs under the funding system for medicines. Third, greater intramural use of a patented drug led to greater extramural use, since patients who were prescribed a patented drug in hospital continued to use the same drug after discharge. According to the DCA, this spill-over effect of drug use in hospitals could potentially create a group of customers that were locked in on the extramural market for the duration of the patent.

However, in the light of evidence submitted by AstraZeneca with regard to substitution between PPIs with different active substances, their therapeutic effectiveness and the switching behaviour of PPI users, the DCA concluded that Nexium users in this market were not bound to Nexium to such an extent that AstraZeneca could be considered to have the power to behave independently of its competitors towards this group of consumers. Therefore, the DCA concluded that AstraZeneca did not have a dominant position with regard to this specific group of Nexium users on the extramural market.

Since AstraZeneca was not held to have a dominant position on the relevant markets, the DCA did not examine whether AstraZeneca had engaged in abusive behaviour.

SWEDEN

Swedish Competition Authority requests Stockholm City Court to fine tobacco supplier Swedish Match for abusive shelf labelling

On 9 December 2014, the Swedish Competition Authority ("SCA") announced that it had submitted a summons application to the Stockholm City Court requesting the Court to

impose a fine of SEK 38 million (around € 4 million) on the Swedish tobacco products manufacturer and supplier Swedish Match North Europe AB ("Swedish Match") for having abused its dominant position on the market for the sales of snus (a moist powder tobacco) to resellers in Sweden by introducing, during the period from June 2012 to April 2013, a shelf labelling system in its snus coolers that has been detrimental to its competitors.

The SCA's summons application follows a number of complaints lodged by the tobacco suppliers British American Tobacco Sweden AB, Skruf Snus AB and JTI Sweden AB against Swedish Match. In its summons to the Court, the SCA argues that Swedish Match, which has its origins in the previously State-owned tobacco monopoly in Sweden, held at the time of the infringement around three-quarters of the Swedish snus market. According to the SCA, Swedish Match abused this dominant position by introducing a shelf labelling system for its snus coolers according to which competitors would no longer be allowed to design and place their own shelf labels in the coolers of Swedish Match but were forced to either use labelling templates specifically developed by Swedish Match or to accept that their labels were exchanged for generic grey and white labels without pricing information. The SCA held that by doing so, Swedish Match restricted its competitors from exposing and communicating their products and prices to consumers, which has led to reduced price competition. According to the SCA, due to the existing regulatory restrictions on traditional marketing of snus in the media, the marketing and communication to consumers on shelf labels is a particularly important competitive tool in this market.

As a result, the SCA has requested the Stockholm City Court to impose a fine of SEK 38 million (around € 4 million) on Swedish Match for having breached Article 102 TFEU and the corresponding Article 2(7) of the Swedish Competition Act.

OTHER DEVELOPMENTS

BULGARIA: On 29 October 2014 the Bulgarian Competition Authority ("BCA") adopted a decision imposing a fine of € 134,000 on V & K Steneto, a water supply and sanitation company and a monopolist on the territory of Troyan municipality, for having abused its dominant position on the market for the provision of reception, collection and treatment services for industrial wastewater by unilaterally imposing an increase in the contractual prices on Lesoplast. The BCA found that although a regulatory regime for water and sewerage services pricing exists and that new ceiling prices had been adopted by the State Agency for Energy and Water Regulation, V & K Steneto could not unilaterally impose those new higher prices on services provided to Lesoplast, because under the terms of their individual contract the procedure for amending contractual prices required either Lesoplast's consent or coordination with the municipality.

CARTELS AND HORIZONTAL AGREEMENTS

EUROPEAN UNION LEVEL

Commission stamps out envelope cartel with € 19 million fine

On 11 December 2014, the European Commission announced that it had adopted a decision under the cartel settlement procedure imposing fines on five major envelope producers: Bong (of Sweden), GPV and Hamelin (both of France), Mayer-Kuvert (of Germany) and Tompla (of Spain). The fines, totalling € 19,485,000, were imposed for the coordination of prices for standard/catalogue and special printed envelopes, the allocation of customers and the sharing of competitively sensitive information. According to the Commission, the cartel operated between 2003 and 2008 in France, Germany, Denmark, Norway, Sweden and the United Kingdom.

This decision is the seventeenth settlement decision adopted by the Commission since the introduction of the procedure in 2009. Interestingly, as the investigation was initiated by the Commission on an *ex officio* basis, no undertaking received full immunity under the Commission's 2006 Leniency Notice. Nonetheless, all of the cartelists received reductions for their cooperation with the Commission during the investigation. Tompla received a 50% reduction as it was the first company to cooperate with the Commission following the opening of the investigation. In accordance with the cartel settlement procedure, the Commission also reduced the fines imposed on all the companies involved by 10% to reflect their acknowledgement of their participation in the cartel and their liability in this respect.

In its announcement, the Commission stated that two of the companies concerned benefitted from further reductions in the fine on account of their inability to pay.

As a result, the Commission imposed the following fines:

- € 4,729,000 on Tompla (ES)
- € 4,996,000 on Hamelin (FR)
- € 4,991,000 on Mayer-Kuvert (DE)
- € 1,651,000 on GVE (FR)
- € 3,118,000 on Bong (SE)

Court of Justice sends marine hose cartel case back to General Court

On 18 December 2014, the Court of Justice of the European Union ("ECJ") handed down a judgment on an appeal by the European Commission against a judgment of the General Court ("GC") that reduced the fine imposed on Parker ITR and Parker Hannifin Corp. for participating in the marine hose cartel. The ECJ annulled the GC's judgment and referred the case back to the GC for a ruling on the merits.

In the 2009 decision under appeal, the Commission imposed fines totalling over € 131 million on eleven undertakings for having participated in a cartel in the marine hoses market with the objectives of market-sharing, price-fixing and the exchange of commercially sensitive information. The cartel was found to have lasted between 1986 and 2007 (see VBB on Competition Law, Volume 2009, No. 1). On appeal, the GC reduced the fine imposed on Parker ITR (formerly known as ITR Rubber) and Parker Hannifin Corp. (the ultimate parent company of Parker ITR) from € 25.6 to € 6.4 million on the grounds that Parker ITR was not liable for the infringement prior to January 2002.

The case arose from Saiag SpA's sale of its marine hoses business to Parker Hannifin Corp. in January 2002. In anticipation of and shortly prior to this sale, Saiag Spa (through its subsidiary ITR SpA) had established a subsidiary, ITR Rubber srl, to which it transferred its entire marine hoses business. In January 2002, Parker Hannifin Corp. acquired ITR Rubber srl (and renamed the company Parker ITR srl). In its decision, the Commission had found Parker ITR srl to be liable for the entire period of the infringement from 1986 to 2007, even for the period during which Saiag SpA and ITR SpA had owned and operated the marine hoses business.

On appeal, the GC overturned the Commission's finding, reasoning that, for the period prior to January 2002, it was for the legal persons operating the marine hose business to answer for that infringement (Saiag SpA and ITR SpA), even though at the date of the infringement decision the operation of the marine hoses business was the responsibility of another undertaking (Parker Hannifin). The GC further reasoned that this conclusion could not be called into question by the principle of economic continuity in cases where an undertaking involved in a cartel (Saiag SpA and ITR SpA) transfers a part of its business to an independent third party and there is no structural link between the transferor and the transferee (see VBB on Competition Law, Volume 2013, No. 5). The Commission challenged that finding and subsequently appealed to the ECJ.

Ruling on the Commission's appeal, the ECJ recalled that the principle of personal responsibility (according to which an infringement is attributed to the natural or legal person operating the undertaking participating in the cartel) is subject to the principle of economic continuity (according to which liability may be imputed, not to the initial operator, but to the new operator in cases of restructuring or other changes within a group of undertakings). In light of the above principles, the main point of dispute between the parties was whether a situation of economic continuity existed between the previous owner (ITR SpA and Saiag Spa) and current owners (Parker Hannifin Corp) of Parker ITR for the purposes of defining the scope of its liability.

In that regard, the ECJ criticised the GC for having failed to examine Saiag SpA/ITR SpA's transfer of its marine hoses business to ITR Rubber separately from the subsequent sale of ITR Rubber to Parker Hannifin and, as a result, for having failed to assess the evidence of economic continuity between the different entities involved (i.e., between, on the one hand, ITR Rubber and, on the other hand, ITR SpA) for the purposes of determining whether there were structural links between the transferor and the transferee. As a result, the ECJ decided to set aside the judgment of the GC and referred the case back to it to determine whether the principle of economic continuity was properly applied.

In addition, the ECJ dismissed a challenge from the Commission that the GC had ruled *ultra petita* when reducing the fine of € 100,000 imposed on Parker ITR for which the parent company, Parker Hannifin Corp., was held jointly and severally liable. However, the ECJ criticised the GC for failing to provide the information necessary to enable the parties to understand why such an amount of reduction was granted and, in addition, to enable the ECJ to review the lawfulness of that reduction. As a result, the GC judgment was also set aside on these grounds.

Based on the above findings, the case has been sent back to the GC which will rule on the merits of the case based on the ECJ's guidelines.

General Court reduces ENI's fine while dismissing four other appeals in paraffin-wax cartel case

On 12 December 2014, the General Court ("GC") handed down judgments on a number of appeals against the Commission's decision in the paraffin-wax cartel case. ENI was the only successful appellant and it saw its initial fine of € 29,100,000 reduced to € 18,200,000.

In October 2008, the European Commission imposed fines totalling € 676 million on nine groups of companies for infringing Article 101(1) TFEU by engaging in a price-fixing and market-sharing cartel in the paraffin-wax sector over a 13-year period. ENI's fine for its involvement in the cartel was increased by 60% on the account of recidivism (see VBB on Competition Law, Volume 2008, No. 11).

In ENI's case, the GC held that the Commission had erred in applying an increase in the fine on account of ENI's purported recidivism. In the decision, the Commission based its finding of recidivism on the involvement of ENI's subsidiaries Anic SpA and EniChem SpA in two previous infringement decisions, the 1986 Polypropylene cartel decision and the 1994 PVC cartel decision. ENI was not however an addressee of either of these previous decisions.

The GC concluded that, in taking account of these earlier decisions to increase the fine, the Commission had violated ENI's rights of defence, as ENI was not an addressee of those previous decisions and therefore had not had the opportunity at the relevant time to contest any attribution of liability to it in its capacity as parent company of Anic and EniChem. By taking the prior conduct of Anic and EniChem into account, the Commission retrospectively imputed responsibility to ENI for these earlier infringements for which it had not been found responsible at the relevant time. The GC accordingly reduced the fine imposed on ENI to the level that would have been set absent the 60% recidivism increase. ENI's other arguments as to its involvement in the cartel were dismissed.

At the same time as its ruling on ENI's appeal, the GC handed down judgments on four other appeals against the Commission's fines from Tudapetrol, Repsol and units of the Hansen and Rosenthal group, dismissing all of them.

Most of the cartel members filed appeals before the GC in this case. Out of nine companies fined by the Commission, five have now had their fines reduced. Earlier this year, the GC had handed down three judgments reducing the fines imposed by the Commission, most notably Sasol, whose fine was reduced from € 318 million to € 159 million (see VBB on Competition Law, Volume 2014, No. 7). The GC had ruled that the Commission had incorrectly found Sasol liable for the conduct of an entity that, for part of the cartel, was only a subsidiary, without establishing to the necessary degree Sasol's actual influence over the subsidiary. Esso and RWE AG also saw their fines reduced. Esso saw a reduction of € 20,800,000, while the GC slightly reduced the amount of the fine imposed on RWE AG by € 1,560,000. Similarly in 2013, one of the cartelists – the French company Total – saw its fines slightly reduced from € 128 million to € 125 million.

General Court annuls Commission decision against Alstom in power transformer cartel case

On 27 November 2014, the General Court ("GC") handed down two separate judgments on the appeals by Alstom and its former subsidiary Areva T&D SA ("Areva"; currently Alstom Grid SAS) against the Commission's decision in the power transformers cartel case. The GC annulled the decision in so far as it concerned Alstom, but dismissed the appeal brought by Areva.

In 2009, the Commission imposed fines totalling over € 67.6 million on a number of European and Japanese companies for having participated in a market-sharing cartel that operated on the market for power transformers between June 1999 and May 2003 in breach of Article 101 TFEU and Article 53 of the EEA Agreement. Alstom was fined € 16.5 million and Areva was found to be jointly and severally liable for payment of over € 13.3 million of Alstom's fine (see VBB on Competition Law, Volume 2009, No. 10).

In its decision, the Commission found that Alstom exercised decisive influence over and was therefore liable for Areva based exclusively on the presumption of decisive influence of a parent company over its wholly-owned subsidiary. In its appeal, Alstom challenged that finding by arguing, *inter alia*, that the Commission had failed to adequately state the reasons why it had not successfully rebutted the presumption that it exercised decisive influence over its subsidiary. In its assessment, the GC sided with the applicant and criticised the Commission for hastily brushing aside all the arguments raised by Alstom in support of its claim, even though its arguments were not manifestly irrelevant or meaningless.

During the administrative procedure, Alstom had submitted detailed evidence showing that its subsidiaries behaved autonomously on the market, i.e., the subsidiaries were all responsible for, *inter alia*, their own accounts, sales objectives, sales costs and pricing policy; the group had been structured in such a way that Alstom was not kept informed of its subsidiaries' activities; Alstom had no involvement with the commercial policy of its subsidiaries considering its purpose was limited to holding and administrating its shareholders; Alstom only carried out an *ex post* audit of important financial agreements (and no audit in relation to projects concerning power

transformers had occurred during the infringement period); the alleged infringement only involved the employees of the subsidiary; commercial strategy was defined by the subsidiary's directors; and Alstom's executive committee gave no instructions to its subsidiaries concerning the conduct they should follow on the market.

By not explaining why these arguments were not capable of rebutting the presumption of parental liability, the GC concluded that the Commission had breached its obligation to state reasons and that the decision should therefore be annulled in so far as it concerned Alstom. The GC rejected the Commission's argument that the GC, in the exercise of its unlimited jurisdiction, should nevertheless uphold the decision. The GC considered that its power of unlimited jurisdiction is limited to the assessment of the appropriateness of the level of the fine imposed and excludes any assessment concerning the legality of the decision (which was the subject of the Commission's request).

The GC also rejected the Commission's claim that the decision should be nevertheless upheld because the appellant could not legitimately rely on a claim for failure to state reasons to annul a decision when it is clear that, following its annulment, another, identical decision would be adopted. In that regard, the GC considered that, because the legal issue of whether Alstom's subsidiary behaved independently on the market is a complex one whose outcome cannot easily be predetermined, the Commission is not entitled to presume that an identical decision will be adopted against Alstom. As a result, the GC annulled the Commission decision in so far as it concerned Alstom.

In a separate judgment, the GC dismissed all the claims brought by Areva which challenged the Commission's decision denying it immunity from fines under the 2002 Leniency Notice following its leniency application of 22 September 2004. According to the GC, the Commission had previous indications that anti-competitive meetings between European and Japanese power transformer producers had occurred following inspections at the premises of Hitachi in May 2004 in the scope of different proceedings. The GC ruled that the Commission could legitimately rely on that information to order further inspections, which it did in 2007. The GC also noted that Hitachi filed for leniency prior to Areva (i.e., on 9 September 2004) and had provided the Commission with evidence of a cartel in the power transformer sector. Based on these elements, the GC ruled that the Commission was entitled refuse Areva's immunity application but confirmed the finding that it was entitled to a fine reduction for cooperating in the investigation.

General Court confirms Commission's imposition € 357 million car-glass cartel fine on Pilkington Group

On 17 December 2014, the General Court ("GC") handed down a judgment upholding the Commission's imposition of a € 357 million fine on the Pilkington Group in the car-glass cartel case.

In November 2012, the European Commission announced that it had imposed fines totalling just over € 1.3 billion on four different undertakings for an infringement that took place on the market for car glass between 1998 and 2003. In February 2013, the Commission published a decision reducing the fines originally imposed on Pilkington and Saint-Gobain in order to correct an initial miscalculation (see VBB on Competition Law, Volume 2013, No. 3).

In its appeal before the GC, Pilkington alleged that the Commission had erred in the legal characterisation of the facts and in the assessment of the gravity of the infringement. The GC however rejected this plea as unfounded and affirmed that the overall aim of the cartel was to maintain overall stability of the cartelist's market shares. Moreover, the GC did not consider that the Commission had overstated Pilkington's involvement in the cartel when assessing the fine, finding that Pilkington's fine was appropriate in light of the evidence.

In addition, Pilkington claimed that there had been a miscalculation of the duration of the infringement. In upholding the Commission's reasoning, the GC took into consideration the fact that the applicants had not denied that a specific meeting had indeed taken place between the cartelists and that, according to the agenda for that meeting, price information was

to be exchanged between the applicants. Further, the GC observed that the applicants had not distanced themselves publically from what was discussed during that meeting. The GC found this to be further proof that the undertakings had acted with an anti-competitive intent since 1998 and that there had not been an error in calculating the duration of the infringement.

It is noteworthy that the GC took into account the fact that it was only in the course of the proceedings, several years after the adoption of the contested decision and after the closure of the written procedure, that the Commission corrected two errors made in calculating the fine imposed on the applicants, by adopting the amending decision of 28 February 2013. The GC accordingly ruled that the Commission was to bear 10% of Pilkington's costs incurred during the procedure.

General Court rules on French pharmacists' association rules

In a judgment of 10 December 2014, the General Court ("GC") upheld a 2010 decision of the European Commission and confirmed that the French *Ordre national des pharmaciens* (the "ONP") had restricted competition on the clinical biology analysis market. However, the GC slightly reduced the fine imposed from € 5 million to € 4.75 million.

The case followed a complaint lodged by Labco, a European group of laboratories operating in France and in several other European countries, against decisions taken by the ONP. The ONP is a French professional body of pharmacists to which the French State has delegated tasks of public interest, including the task of contributing to the promotion of public health and quality of care. Since in France clinical biology is mainly carried out by pharmacists, the ONP also plays a major role in that sector. Clinical biology analyses may be carried out only in clinical biology analysis laboratories, which are often small in size.

The European Commission found that the ONP, as an association of undertakings, had infringed Article 101(1) TFEU through engaging in two types of conduct: first, the ONP imposed minimum market prices on laboratories by prohibiting them from granting discounts above a ceiling of 10%; and, second, it prevented groups of laboratories from becoming active on the French market. The latter conduct was reflected in a range of measures that sought to: (i) prohibit the splitting of shares in professional partnerships into, on the one hand, economic and voting rights and, on the other hand, the bare property rights; (ii) ensure that share movements were immediately notified to the ONP; (iii) ensure that biochemist pharmacists held a minimum equity stake in the shares of the laboratory; (iv) ensure that any amendment of the statutes or any management appointment was subject to the prior approval of the ONP. Because of these infringements, the European Commission imposed a € 5 million fine on the ONP.

In its recent judgment, the GC rejected all grounds of appeal and confirmed the European Commission's decision, except with regard to the amount of the fine. The GC observed that the Commission should have taken into account, as a mitigating factor in setting the fine, a French circular letter which could have led the ONP to believe that it had to approve structural changes to companies operating laboratories. However, since this mitigating circumstance only related to one of the measures taken by the ONP, the General Court took the view that it was appropriate to reduce the fine by only € 250,000, i.e., to € 4.75 million.

General Court largely upholds re-adopted decision on concrete reinforcing bar cartel

On 9 December 2014, the General Court ("GC") handed down nine separate judgments largely upholding the Commission's re-adopted decision by which it fined eleven companies over € 83 million for their participation in a cartel in the Italian concrete reinforcing bar sector.

In December 2002, the Commission imposed a total fine of € 85 million on eleven Italian producers of steel reinforcing bar for the implementation of a price-fixing cartel between 1989 and 2000 in breach of Article 65(1) of the European Coal and Steel Community ("ECSC") Treaty (equivalent to Article 101(1) TFEU). In 2007, the GC annulled the Commission's decision on the grounds that the Commission

lacked competence to base a decision on provisions of the ECSC Treaty after this Treaty had expired (see VBB on Competition Law, Volume 2007, No. 11). In 2009, as a result of the GC's ruling, the Commission adopted a new decision, finding the same infringement, but based on Articles 7(1) and 23(2) of Regulation 1/2003 (see VBB on Competition Law, Volume 2009, No. 10).

On appeal, the companies argued among others that the Commission had erred by failing to issue a new Statement of Objections following the GC's annulment of the 2002 decision, that the length of the Commission's administrative procedure had been excessive, and that the Commission had committed errors in calculating the fine. In its judgment, the GC rejected most of the companies' arguments.

However, the GC found that the Commission had failed to take into account in the calculation of the fines imposed on Riva Fire and Ferriere Nord that these companies had not participated in one element of the cartel for a certain period of time. As a result, the GC reduced the basic amount of the fine imposed on Riva Fire by 3%, which resulted in a fine of € 26.1 million instead of the previous fine of € 26.9 million. Similarly, the GC reduced the basic amount of the fine imposed on Ferriere Nord by 6%, which resulted in a fine of € 3.4 million instead of the original € 3.6 million fine.

Furthermore, the GC found that the Commission had failed to show that, at the time of the 2009 decision, SP and Lucchini still formed part of a single undertaking. The GC pointed to the fact that Lucchini's ownership in SP had changed since the date of the first decision in that, in 2007, the Severstal group acquired 79.82% of SP's shares from Lucchini. In addition, the GC noted that SP did not have any turnover in 2007, and could therefore not be fined. As a consequence, the GC annulled the Commission's decision in so far as it held SP jointly and severally liable for the fine of € 14.35 million imposed on Lucchini.

MEMBER STATE LEVEL

FRANCE

French Competition Authority imposes record fines of over € 951 million on manufacturers of cleaning products and hygiene and personal care products

On 18 December 2014, the French Competition Authority ("FCA") imposed record fines totalling € 951.1 million in two separate decisions against a number of manufacturers active on the market of cleaning products and the market of hygiene and personal care products. The FCA found that these manufacturers had, for each of these markets, coordinated their commercial policy towards large retail chains as well as coordinated their price increases, from 2003 to 2006.

In the first decision, the FCA imposed fines of € 605.9 million on ten manufacturers representing over 70% of the market of hygiene and personal care products. The addressees of the decision include Henkel, Reckitt Benckiser, Procter & Gamble, Unilever, l'Oréal, Johnson & Johnson and Beiersdorf. The fines range from € 8.13 million (Johnson & Johnson) to over € 189 million (L'Oréal). Colgate-Palmolive was exempt from fines as it benefited from immunity under the Leniency Notice for blowing the whistle on the cartel arrangements, while Henkel had its fine reduced by 30% for cooperating with the investigation. Most of the other addressees had their fines reduced by 16% to 18 % for not contesting the facts.

In the second decision, fines totalling over € 345 million were imposed on eight manufacturers representing over 70% of the market of cleaning products. The addressees of the decision include Colgate-Palmolive, Reckitt Benckiser, Unilever, Procter & Gamble and Bolton Manitoba. The fines range from € 7.9 million (Bolton Manitoba) to over € 108 million (Reckitt-Benckiser). SC Johnson received immunity under the Leniency Notice for blowing the whistle, while Colgate-Palmolive and Henkel respectively received 50% and 25% reductions for cooperating with the investigation. Most of the other addressees had their fines reduced by 16% to 18 % for not contesting the facts.

SWEDEN

Swedish Competition Authority requests Stockholm City Court to fine TeliaSonera and GothNet for participation in bid-rigging cartel

On 18 December 2014, the Swedish Competition Authority ("SCA") announced that it has submitted a summons application to the Stockholm City Court requesting the impositon of fines totalling more than SEK 35 million (around € 3.7 million) on TeliaSonera Sverige and Göteborg Energi GothNet for having participated in bid-rigging in relation to a public tender in 2009.

In 2009, the City of Gothenburg procured data communication services. The SCA found that, on this occasion, TeliaSonera and GothNet entered into an agreement according to which TeliaSonera would refrain from making a bid, even though the two parties were competing against one another on the same market. GothNet, on the other hand, made a bid and ended up winning the procurement procedure. Subsequently, GothNet appointed TeliaSonera as its exclusive subcontractor.

In its summons, the SCA claims that the arrangement between TeliaSonera and GothNet constituted an illegal bid-rigging cartel. As a result, the SCA requests the Stockholm City Court to impose a fine of SEK 16.96 million (around € 1.8 million) on GothNet and a fine of SEK 18.8 million (around € 2 million) on TeliaSonera for their participation in the infringement.

OTHER DEVELOPMENTS

EUROPEAN UNION: On 4 December 2014, the European Court of Justice ("ECJ") handed down a judgment on a reference from a Dutch court on whether Article 101(1) TFEU applies to a collective labour agreement which regulates the minimum fees to be paid to self-employed musicians. The agreement at stake was concluded between an employers' organisation and employees' organisations that negotiated both for employed musicians and for self-employed musicians. The ECJ noted that that, in these circumstances, the self-employed persons are "undertakings" and that the employees' organisation is acting as an "association of undertakings" for the purposes of Article 101 TFEU. Therefore, the ECJ concluded that a provision of a collective labour agreement, in so far as it was concluded by an employees' organisation in the name, and on behalf, of self-employed persons who are its members, does not constitute the result of a collective negotiation between employers and employees. It therefore cannot be excluded, by reason of its nature, from the scope of Article 101(1) TFEU. The ECJ added, however, that this will not be case if the service providers are in fact not genuinely self-employed, i.e., service providers in a situation comparable to that of employee.

VERTICAL AGREEMENTS

EUROPEAN UNION LEVEL

European Commission rejects complaint by Suzuki car dealer

On 14 October 2014, the European Commission rejected a complaint by a Slovakian car dealer ("Auto Team") who had been terminated as a Suzuki authorised dealer on 27 January 2011.

In particular, Auto Team alleged that it was terminated by Suzuki because it was selling vehicles to consumers from other Member States. Auto Team provided the Commission with, inter alia, e-mails from two Suzuki executives, that in the eyes of the Commission on a full investigation "might reveal that they had the potential to interfere with dealer's ability to engage in passive sales to consumers and resellers from other Member States".

According to Suzuki, Auto Team was terminated because its showroom did not comply with Suzuki's minimum quality requirements. Suzuki provided evidence that Auto Team had been informed of Suzuki's objections to Auto Team's showroom on several occasions prior to the contract termination.

Although the Commission acknowledged that such conduct could have infringed Article 101(1) and not have qualified for exemption under Article 101(3), it decided to use its discretion to reject the complaint primarily because the conduct complained of was no longer ongoing. In particular, Suzuki provided the Commission with a copy of a circular that it had sent to all Slovak Suzuki dealers dated 18 May 2011 explaining the legal position as regards sales to buyers from other Member States. The circular informed the dealers about their rights under the dealership agreement, as well as EU competition law, and stated explicitly that passive sales of new vehicles are not restricted in any way. The Commission took the view that the circular "rectified" the e-mails Auto Team pointed to in its complaint. As Auto Team had not provided any evidence that the behaviour complained of continued after the circular was sent, the Commission found that the behaviour occurred completely in the past and there were no indications that it currently affected competition. The Commission concluded on this basis that a further investigation by it would be disproportionate and emphasised that the national courts were in a position to adequately deal with the issues raised in the complaint.

The Commission's discussion of market definition in the decision, in which it rejected the complainant's claim that there was a market for Suzuki cars in Slovakia, merits separate comment. Although the Commission did not, consistent with its practice to date in other cases, take a definitive position on product market definition, it found the complainant's claim that the market is brand-specific to be unrealistic. Concerning the geographic market, which the Commission has previously tended to view as national, it noted the possibility that the market is now EU-wide, taking into account changes in recent years including the introduction of the Euro and more harmonised pricing by manufacturers across the Member States. The Commission, however, stopped short of taking a definitive position and concluded that the market is either national or EU-wide.

MEMBER STATE LEVEL

BELGIUM

Belgian Competition Authority advises Antwerp Court of Appeal as amicus curiae

On 17 November 2014, the Belgian Competition Authority ("BCA") filed a brief as *amicus curiae* before the Court of Appeal of Antwerp in a case concerning a vertical agreement in the express delivery sector.

Under Article IV.77 of the Belgian Commercial Code, the BCA can, on its own initiative or at the request of a Belgian court, issue an opinion as *amicus curiae* on the application of Belgian or EU competition law to a specific case. This possibility did not exist before the entry into force of the new competition law provisions in September 2013. Until then, the BCA could intervene as *amicus curiae* on the interpretation of European competition law only, pursuant to Article 15(3) of EU Regulation 1/2003.

The BCA filed a brief before the Court of Appeal of Antwerp in the context of proceedings between Biomet Belgium BVBA ("Biomet") and AGX Group BVBA ("AGX"). In 2008, AGX and Biomet entered into a vertical agreement whereby AGX would transport and deliver the surgical equipment Biomet lends to hospitals for use in surgery. Under this agreement, AGX enjoyed permanent exclusivity over Biomet's "standard orders", but such exclusivity did not extend to "rush orders". The issue of the potentially anticompetitive nature of this agreement arose before the Court of Appeal of Antwerp. On 23 June 2014, the Court adopted an interim judgment requesting the BCA to take a position on the definition of the relevant market, on the calculation of the market shares of the parties and on whether the agreement appreciably restricted competition.

The BCA first defined the relevant market on the basis of the decisional practice of the European Commission, which distinguishes between express delivery and standard delivery of small packages (of less than 31.5 kg) and between domestic and international delivery services. On this basis, the BCA determined that the relevant market was the Belgian market for the express delivery of small packages, without further narrowing this definition to medical or surgical packages, contrary to Biomet's claim.

Secondly, the BCA noted that the submissions and evidence filed by the parties in the procedure did not enable it to determine exactly the level of their market shares in the relevant market. However, based on the judgment adopted at first instance by the Commercial Court of Antwerp on 3 April 2012 and on the submissions of the parties, the BCA considered that the market shares of both parties were very probably below 15%.

Finally, the BCA analysed the effects of the agreement. The BCA noted that the exclusivity clause, which was of indefinite duration, covered the entire territory of a Member State of the EU. As a result, such a restriction could affect competition within the internal market and fall under Article 101 TFEU, provided it had an appreciable effect on competition. However, the BCA found that this restriction could not have an appreciable effect on competition, as it met the conditions set out under the European Commission's *De Minimis* Notice. In particular, none of the parties' market shares exceeded 15% and the contested exclusivity clause did not constitute a restriction "by object" as defined by EU case law. The BCA concluded therefore that the agreement between Biomet and AGX fell outside of the scope of both Article 101 TFEU and its Belgian equivalent, Article IV.1 of the Commercial Code.

This opinion the BCA does not bind the Court of Appeal of Antwerp, which still has to rule on the merits of this case.

STATE AID

EUROPEAN UNION LEVEL

General Court partially annuls Commission decision which did not qualify Irish air travel tax as state aid

The General Court issued a judgment on 25 November 2014 in which it upheld Ryanair's appeal against a Commission decision in relation to an air travel tax imposed by the Irish authorities for all departing flights from an Irish airport.

The air travel tax did not apply to transit and transfer passengers which Ryanair alleged to be in favour of competing airline operators Air Lingus and Aer Arann who carry a larger proportion of such passengers. Therefore, Ryanair submitted a state aid complaint to the European Commission covering several measures, including the unjustified exemption of that air travel tax for transit and transfer passengers. In its decision of 13 July 2011, the European Commission rejected Ryanair's complaint and found that there was no state aid in the absence of the selectivity requirement being fulfilled. The formal investigation procedure was consequently not opened in respect of the air travel tax.

The General Court considered that the duration of the preliminary investigation phase, which lasted almost two years, exceeded the length normally required for such investigations without any sound justification for extending the length of that preliminary investigation. The European Commission had sought the opinion of the Irish authorities in relation to Ryanair's complaint and received only one, succinct, reply letter from the Irish authorities. In the light of these facts, the General Court concluded that the duration of the preliminary investigation was excessive.

Moreover, the European Commission's analysis of the selectivity criterion was found incomplete and inconsistent by the General Court. For these reasons, the General Court ruled that the European Commission should have opened the formal investigation phase to verify whether the air travel tax was not selective and amounted to state aid. By not initiating that phase, the European Commission prevented Ryanair from submitting its observations with regard to the Irish air travel tax, resulting in a violation of its procedural rights. The General Court thus annulled the Commission decision as far as the air travel tax is concerned.

OTHER DEVELOPMENTS

EUROPEAN COMMISSION: A public consultation on the European Commission's draft guidelines for the examination of state aid to the fishery and aquaculture sector runs until 20 January 2015. The updated guidelines do not contain substantial changes to the state aid regime for agriculture. The main changes relate to the reformed common fisheries policy and the establishment of the European Maritime and Fisheries Fund.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

EUROPEAN UNION LEVEL

General Court upholds Commission's dawn raid powers regarding previous national investigations and manipulation of electronic evidence

On 25 and 26 November 2014, the EU General Court ("GC") handed down two judgments dismissing in their entirely claims against the European Commission's investigative powers with regard to dawn raids carried out on the premises of French telecom company Orange (previously France Télécom) and Czech energy company Energetický a průmyslový holding ("EPH").

Orange: the discretion of the Commission to conduct dawn raids in the presence of prior national inspections

In September 2012, the French Competition Authority ("FCA") had adopted a decision against Orange in the sector of reciprocal interconnection services for internet connectivity, considering that from all examined practices only margin squeeze could be a potential competition concern. In that context, it adopted a commitment decision. In June 2013, the European Commission ordered an inspection on the premises of Orange with regard to practices very similar to the ones examined by the FCA. Orange challenged the Commission inspection decision before the GC.

First, Orange argued that the Commission decision was unnecessary and disproportionate, since the FCA had conducted an investigation covering identical practices and adopted a commitment decision without finding an infringement of Article 102 TFEU. Therefore, the objectives sought by the contested decision had already been achieved. The Commission was required, under the principles *ne bis in idem* and good administration, to first consult the file of the FCA and then, only if necessary, conduct an inspection. Moreover, it could only legally seek information additional to that in the file.

Concerning the suitability of the decision, the GC stated that Orange's reasoning was in conflict with the case-law according to which the Commission is not bound by the decisions of national authorities, and is always capable of taking individual decisions under Articles 101 and 102 TFEU. Moreover, a decision by which an NCA accepts commitments or refuse to intervene could not be considered as a decision confirming the absence of an infringement. Also, the GC confirmed that the absence of intervention from the Commission, upon receipt of the FCA's notification that it has decided to accept commitments, does not amount to an acknowledgement of the merits of that decision.

On the necessity of the contested decision, the GC accepted that the conducts examined by the FCA and the Commission were very similar, only the geographic and temporal scope differed. The GC also accepted that it was "desirable" for the Commission to consult the FCA's case file, particularly since the Commission could in principle use the elements in it as evidence. The duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case was all the more important, first, in light of the margin of appreciation of the Commission in the application of its power to conduct inspections, and, second, given that this power constituted an obvious interference with the right to privacy. Nonetheless, the GC concluded that the examination of the FCA's file could not constitute an alternative to the Commission's inspection, insofar as the FCA itself had not conducted dawn raids and its decision was taken only on the basis of voluntarily submitted information. It was sufficient that one of the Commission's aims was to find evidence of proof of intention or plan to violate competition law, notwithstanding that the notion of abuse does not require bad faith. Moreover, even in the presence of evidence relating to the existence of an infringement, the Commission could legitimately consider it necessary to order further inspections.

Secondly, Orange raised the arbitrary character of the Commission decision, in view of the identity of the contested decisions with the decision of the FCA and the conduct of the Commission during the inspection (its research

on the seized computers was based on keywords related to the FCA investigation and commitment decision). The GC reiterated that the Commission's obligation to specify the subject matter and purpose of the inspection constitutes a fundamental guarantee of the undertakings' rights of the defence, but held that it could not be imposed on the Commission to indicate, at the preliminary investigation stage, the elements leading it to envisage the existence of a violation of Article 102 TFEU.

EPH: the powers of the Commission to impose fines for refusal to submit to a dawn raid

In this second case, which lead to a judgment delivered on 26 November 2014, EPH contested the legality of a Commission decision imposing a procedural fine of € 2,500,000 for a refusal to submit to an inspection by negligently allowing access to a blocked e-mail account and intentionally diverting e-mails to a server. In the course of the dawn raid, the Commission inspector had requested that the e-mail accounts of four persons holding key positions at EPH be blocked and re-set with new passwords, so that inspectors would have exclusive access to them during the inspection. Several hours later, an IT employee of the company unblocked one of those accounts upon request of its owner. The IT department was also asked to prevent the e-mails addressed to those four accounts from arriving in the respective inboxes. Thus, new e-mails stayed on the group server and could not be seen by the inspectors.

EPH did not challenge the evidence on which an infringement was found but argued that the Commission had not proven that its conduct during the inspection resulted in the production to the inspectors of incomplete business records. The conduct resulted from "mere inadvertence" and was neither negligent nor intentional. With regard to the negligent access to a blocked e-mail account, the GC held that the mere fact that the inspectors did not obtain, as requested, exclusive access to this account, was sufficient to characterise the incident as a refusal to submit to the inspection decision. The Commission had the burden of proving that access was granted to the data in the blocked account – a fact not contested by EPH – but was not required to prove that those data were manipulated or deleted. With regard to the argument that negligence was not demonstrated to the requisite legal standard, the GC considered that the omission of the company to ensure exclusive access was sufficient, insofar as it had received detailed instructions from the inspectors. Furthermore, once EPH was informed of the inspection decision, it was not for the Commission to inform each person of their duties but for the undertaking to ensure that the persons authorised to act on its behalf did not impede the implementation of the Commission's instructions.

Concerning the intentional diversion of incoming e-mails, the GC rejected the claim that since the e-mails destined for the blocked account remained stored on the group server, the inspectors had access to them at all times. On the contrary, the GC found that the inspectors should have been able to access all the e-mails normally to be found in the inbox, without being obliged to gather data from other places. Moreover, pursuant to its duty of cooperation, EPH was required to make the e-mails from the account available to the inspectors and not merely claim that they could have found the data elsewhere at its premises. For establishing an infringement, it was thus sufficient for the diverted e-mails to be covered by the inspection decision and the fact that the diversion related only to a limited number of non-essential emails for an inspection dating back to 2006 was considered irrelevant.

Furthermore, with regard to EPH's claim of infringement of its rights of defence, the GC considered that the applicant was clearly informed of the scope of its duty to cooperate by the inspection decision and the accompanying explanatory note. The inspectors were under no obligation to point out that infringements could result in a fine. Notably, the GC rejected the claim that for the protection of the rights of defence the Commission had a greater obligation to inform because, unlike the affixing of a seal, the blocking of an e-mail account was not apparent as such to everyone: after receiving the unequivocal instructions from the inspectors, it remained for the undertaking to implement them.

Finally, EPH argued that it did not understand how the fine was calculated. The Commission had stressed the importance of a fine with a deterrent effect, emphasised the higher risk of manipulation of electronic records, noted that the infringement comprised two separate incidents of serious nature and considered that the infringement had continued for a significant period of time. The GC considered that in the absence of Commission guidelines on the method of calculation of procedural fines, the Commission's reasoning was "disclosed in a clear and unequivocal fashion" and it was not required to express, in absolute figures or as a percentage, the basic amount of the fine and any aggravating or mitigating circumstances. Also, the GC insisted that the deterrent effect of the fine was all the more important in the case of electronic files, which were much easier and quicker to manipulate than paper files. Lastly, in comparing the fine imposed to that in case *E.ON Energie AG* for a breach of seal (0.14% of the relevant turnover as compared to 0.25% in the present case), the GC concluded that similarly the infringement was particularly serious by its own nature but consisted in two separate actions, one of which deliberate.

General Court takes a stand against competition authority forum shopping

On 17 December 2014, the General Court ("GC") delivered a judgment in case T-201/11 in which it validated the Commission's rejection of a request to investigate a complaint on the grounds that a parallel procedure had been initiated at national level by a national competition authority ("NCA"). This judgment is noteworthy as it is the first instance that an EU court has ruled on the question of the Commission's rejection of a complaint on the grounds that an NCA is already dealing with the case. In so doing, the GC has firmly ruled against forum shopping as regards the choice of competition authority to deal with a complaint.

This case stems from allegations brought to the Commission in 2009 by Si.Mobil of Slovenia. Si.Mobil claimed that Mobitel, the dominant player on the Slovenian retail telephone market, had abused its dominant position on both the retail and wholesale markets. It argued that Mobitel was involved in applying an exclusionary strategy contrary to Article 102 TFEU. More specifically, the allegations related to margin squeezing and predatory pricing. By way of written correspondence, the Commission informed Si.Mobil that the Slovenian competition authority had already initiated an investigation with regard to the same conduct and that it did not intend to pursue the case. Later, on 24 January 2011, the Commission issued a formal decision rejecting the complaint on the grounds that the Slovenian competition authority was already dealing with the case and that there was not a sufficient EU interest for it to proceed.

In its recent judgment, the GC interpreted for the first time the provisions of Regulation 1/2003 on the determination of the authority to deal with a competition case. Under Recital 18 and Article 13(1) of Regulation 1/2003, competition cases are to be dealt with by the most appropriate competition authority: the relevant NCA or the EU Commission as the case me be.

The principle novelty of this judgement is the GC's ruling based on Si.Mobil's plea about the appropriate authority. Si.Mobil was of the view that the Commission had made a manifest error in its application of Article 13(1) of Regulation 1/2003. Recital 18 of Regulation 1/2003 provides that, in order to ensure that cases are dealt with by the most appropriate authority, a competition authority may suspend or close a case on the ground that another authority is dealing with it or has already dealt with it. Further, as envisaged under Article 13(1), sufficient reasons must be provided in order for the Commission to reject a complaint in such a situation: first, an NCA must be dealing with the case and second, the case must be in relation to the same agreement, decision of an association or anticompetitive practice. The GC clarified that the requirement to provide sufficient reasons would be met upon satisfaction of these two criteria.

The GC emphasised that Regulation 1/2003 grants parallel powers to the Commission and NCAs and provides for a system of close cooperation between them. Si.Mobil was not justified in making the argument that there was a right to have a case dealt with by one particular authority over another. The GC added that its judicial review of Article 13 of Regulation 1/2003

is limited to verifying whether there had been a breach of procedural rules, in this way the Commission is left with a wide discretion in its application of the provision.

The GC also ruled that the Commission had not erred in deeming that it had not been determined that there was a sufficient degree of EU interest in this case. The GC affirmed that the Commission benefits from a certain level of discretion in its enforcement priorities. In this regard, the Commission must take the facts of each case into account and carry out a balancing exercise so as to ascertain the level of EU interest in a case. The GC did not accept that the Commission is bound by an exhaustive list of criteria in determining the level of EU interest and that the Commission may give weight to just one criterion in making such a determination – as it did in the case at hand.

Commission proposes amendments to procedural rules in competition proceedings in order to reflect Damages Directive

On 17 December 2014, the European Commission published a proposal to amend its procedural rules and notices following the recent adoption of Directive 2014/104 on competition damages actions (see VBB on Competition Law, Volume 2014, No. 11). The proposed amendments concern Regulation 773/2004 on the procedural rules and four Commission communications, namely the communications on access to the file, leniency, settlements and the cooperation between the Commission and member states' courts.

With regard to Regulation 773/2004, the Commission's proposal aims at formalising into hard law provisions which are currently only contained in soft law (i.e., notices). Specifically, the main changes relate to leniency statements, settlements and access to the file.

First, the Commission proposes to create a new article in Regulation 773/2004 to reflect the basic principles of the 2006 Leniency Notice. On the substance, the proposal does not contain any novelty with regard to the current situation.

Second, the Commission proposes to amend Article 10(a) of Regulation 773/2004 in relation to the settlement procedure. Pursuant to the proposal, the Commission will be able to set a time limit within which the parties may commit to follow the settlement procedure by introducing settlement submissions reflecting the results of the settlement discussions and by acknowledging their infringement of Article 101 TFEU and their liability. Prior to the setting of a time limit by the Commission, the undertakings concerned will be granted access to some information in a timely manner (e.g., objections, evidence, non-confidential version of documents in the file, range of potential fines). Settlements submissions, which can also be made orally, can be dismissed by the Commission after the expiration of the time limits.

Third, the proposal will amend Article 15 of Regulation 773/2004 which deals with access to the file. The proposed amendment provides a specific set of rules for access to settlement and leniency documents. As mentioned above, the Commission will grant access to the evidence and documents requested by undertakings wishing to introduce settlement submissions. In addition, access to the file will be granted to the parties following the adoption of the statement of objections should it not reflect the parties' settlement submissions. Such an access will also be granted unconditionally when a Statement of Objections is addressed to undertakings with which settlement discussions were discontinued. The proposed amendment also provides that leniency corporate statements and settlement submissions can only be granted at the Commission's premises and cannot be copied.

Finally, the Commission's proposal will create a new Article 16 relating to access to the file. According to this new article, information obtained under Regulation 773/2004 shall only be used for the purposes of judicial or administrative proceedings relating to the application of Articles 101 and 102 TFEU. Furthermore, access to leniency corporate statements and settlement submissions will only be granted for the purposes of exercising the rights of defence in proceedings before the Commission. Before the courts, information obtained from such statements can only be used by undertakings wishing to exercise their rights of defence before the EU Courts against a

Commission decision. Such information can only be used before national courts in cases relating to the allocation of joint and several liability between undertakings and to the review of fines imposed by a competition authority under Article 101 TFEU. Additionally, the proposed amendments also provide that some information can be used in proceedings before national courts only after the proceedings before the Commission have terminated. This would be the case of information prepared by other natural or legal persons specifically for the Commission's proceedings and of information that the Commission has drawn up and sent to the parties in the course of its proceedings.

Concerning the Communication on access to the file, the proposed amendments mainly provide for minor changes, including the update of references to the latest Decision on the terms of reference of Hearing Officers, and the Commission's Notice on best practices for the conduct of proceedings. The major change envisaged by the proposed amendments relates to the express mention of possible penalties under national law for persons using information from the file in cases which do not relate to proceedings for the application of the EU competition rules. According to the proposal, should the breach of such limitations be caused by an external counsel, the Commission can report the infringement to the Bar of that counsel for disciplinary action.

In relation to the amendments to the Leniency Notice, the proposal explicitly states that the use of information obtained through access to the file which infringes the provisions of Regulation 773/2004 can be regarded as failure to cooperate and gives rise to penalties to be laid down under national law. Moreover, the proposal provides that should such use of information occur after the notification of a prohibition decision, the Commission may ask the EU Courts to increase the fine of the responsible undertaking. Another significant change contained in the proposal relates to the mention that the Commission will never transmit leniency corporate statements to national courts in cases of damages for breach of Articles 101 and 102 TFEU.

In respect of the Notice on settlements, the settlement procedure will be amended in order to deprive the parties of the current possibility to unilaterally revoke a settlement request as provided by point 22 of the Notice. In addition, it follows from the proposed amendments that the Commission will not transmit settlement submissions to national courts in cases of damages for breach of Articles 101 and 102 TFEU.

Finally, the proposal also aims at amending the Notice on cooperation between the Commission and EU Member States' courts. In line with the amendments dealing with the Leniency and Settlement Notices, the Commission proposes to introduce a provision aiming to ensure that disclosure of documents to national courts does not unduly affect the effectiveness of EU competition law, in particular with reference to pending investigations and to the functioning of the leniency and settlements programs. Therefore, no leniency applications or settlement submissions will be disclosed to national courts. Similarly, other types of information will not be disclosed to national courts in damages proceedings before the case has been closed against all investigated parties by the Commission.

The proposed amendments are open to consultation until 25 March 2015. Reportedly, the Commission intends to adopt the amended texts before the end of 2015.

MEMBER STATE LEVEL

BELGIUM

Brussels Commercial Court dismisses European Union's damages claim in lifts and escalators cartel case

On 24 November 2014, the Brussels Commercial Court dismissed, for lack of sufficient evidence, the first action for damages ever brought by the European Commission on behalf of the European Union against members of a cartel.

This action was based on a decision of 21 February 2007 by which the European Commission had fined four companies, Kone,

Otis, Schindler and ThyssenKrupp, a total of EUR 992 million for their participation in a cartel on the markets for the sale, installation, maintenance and renewal of lifts and escalators in Belgium, Germany, Luxembourg and The Netherlands (see VBB on Competition Law, Volume 2007, No. 3). All appeals against this decision were dismissed by the General Court and the Court of Justice of the European Union ("ECJ") (see VBB on Competition Law, Volume 2011, No. 7, and Volume 2012, No. 10).

In June 2008, the European Commission brought an action for damages before the Brussels Commercial Court. Acting this time as an injured party, the Commission sought over € 6 million from the members of the cartel for the damage allegedly suffered from having had lifts and escalators of several EU buildings maintained and modernised at prices artificially raised by the cartel.

In an interim judgment dated 18 April 2011, the Court declared itself not to have jurisdiction for the part of the Commission's claim relating to lifts and escalators located in Luxembourg. The Court also decided to refer several questions to the ECJ for a preliminary ruling, with a view to determining whether the European Commission could legally seek damages on the basis of a decision which it had adopted itself in its capacity of competition authority. On 6 November 2012, the ECJ held that the full effectiveness of EU law requires that any natural or legal person, including the European Union, can claim compensation for harm suffered as a result of a violation of competition rules. The ECJ added that, although national jurisdictions are bound by the Commission's decisions on the existence of an infringement of competition law, they remain free to determine whether claimants have individually suffered a prejudice caused by the anticompetitive conduct (see VBB on Competition Law, Volume 2012, No. 12). Further to this judgment, the Court resumed the proceedings and ruled on the Commission's claim.

In its judgment, the Court recalled that, under Belgian law, any action for damages must satisfy three cumulative conditions: it must establish the existence of (i) misconduct by the defendant; (ii) damage suffered by the claimant; and (iii) a causal link between the misconduct and the damage (Article 1382, Civil Code). Although the misconduct had already been established by the Commission's 2007 decision finding a breach of EU competition law, the Court decided that the Commission had not sufficiently demonstrated the existence of its alleged damage and the causal link between such damage and the cartelists' anticompetitive behaviour.

The Court first stated that the existence of the alleged damage had to be established in order to obtain compensation, even though its exact scope can be unclear. The damage has to be determined to an extent compatible with the principle of legal certainty, i.e., with a "high degree of probability". In addition, the Court considered that the law applicable to this case was the Belgian legislation in force at the time the action had been brought. Therefore, contrary to the Commission's views, it could not rely on the (rebuttable) legal presumption that any cartel causes damage, a principle embraced by the recently adopted Directive on antitrust damage actions, since this Directive has not yet been implemented under Belgian law.

Turning to the evidence, the Court considered that the Commission's submissions did not suffice to determine the situation in which the European Union would have found itself in the absence of the cartel, in order to compare the cartel prices with the supposed competitive prices. In addition, the Court noted that the cartelists engaged in bid-rigging rather than price fixing and that, at the time of the cartel, 30% of the market was held by non-cartelist undertakings, which maintained a level of price competition that the cartelists had to take into account. Therefore, it could not be assumed that the cartelists necessarily overcharged their customers. Furthermore, the Court found that the reports submitted by the Commission did not determine the number of contracts covered by its claim. According to the Court, these reports did not sufficiently prove that the European Union had effectively and certainly suffered specific damage since they did not show that the European Union had paid higher prices during the cartel's lifespan than after this period for the same product, the same level of service and under the same contractual conditions. The

Court also dismissed as unsupported by any evidence the Commission's argument that the European Union had lost a real chance to buy cheaper lifts and escalators.

Finally, the Court found that the causal link between the cartel and the alleged damage had not been proven, especially since the European Union appeared to have expressly concluded a significant part of the maintenance contracts through private negotiations instead of public tenders, which *de facto* excluded competition.

The Court therefore dismissed the European Commission's claim and ordered it to bear the costs of the procedure. The Commission can appeal the Court's judgment before the Brussels Court of Appeal.

Brussels Court of Appeal grants third party limited access to file

On 19 November 2014, the Court of Appeal of Brussels issued an interim judgment ordering the Belgian Competition Authority ("BCA") to grant to a third party access to the inventory of the procedural file and limited access to the content of the procedural file in a merger case involving its competitors.

De Persgroep NV was registered as an interested third party in the merger proceedings before the BCA between Corelio NV and Concentra NV, two competitors of De Persgroep in the publishing sector. These proceedings led, on 25 October 2013, to the conditional clearance of the creation of a joint venture called "Mediahuis".

De Persgroep decided to appeal from the BCA's clearance decision. De Persgroep requested, as an interim measure, that the BCA be ordered by the Court to submit to the Court (i) the confidential and non-confidential versions of the contested decision; (ii) the *erratum* related to both versions of the contested decision; and (iii) the inventory of the procedural file and of the investigation file, in order for the Court to give access to the non-confidential version of the objected decision and *erratum* and to the inventory of the procedural and investigation file to De Persgroep. At a later stage, De Persgroep would then request access to specific documents of the file, based on the inventory. The BCA, together with Corelio and Concentra, objected to this request, alleging that the Code of Economic Law does not provide for a right of access to documents by a third party in competition cases.

The Court decided to accede partially to the request of De Persgroep.

In essence, the Court held that the effectivity of the appeal procedure and the exercise by the Court of its full jurisdiction require that the pleas are liable to be substantiated by the information included in the file about the notified concentration. This encompasses all factual and legal circumstances relevant to the case. The Court also noted that the grounds of appeal submitted by De Persgroep could not be deemed manifestly unfounded on the mere basis of the information contained in the application.

Therefore, the Court ordered to be given access to the concentration file such as it was communicated to the Competition College of the BCA, as well as to other documents which were submitted to the College, in accordance with Article IV.79(5) of the Code of Economic Law. The Court determined that this access would cover (i) all documents and submissions filed by the College of Competition Prosecutors before the Competition College in the context of the concentration; (ii) all documents supporting the draft decision of the Competition Prosecutor; (iii) all submissions by notifying parties and interested third parties to the Competition College; (iv) the adopted decision(s) and all their possible addenda, amendments and implementing instruments; (v) all correspondence and emails exchanged by the Competition College; and (vi) the inventory of documents describing and listing the documents mentioned under (i) to (v).

As regards the right of an interested third party, such as De Persgroep, to obtain access to these documents, the Court first noted that the contested decision had a subjective dimension as regards De Persgroep since its interests are individually and directly affected by the concentration between its competitors.

Also, the Court considered that the pleas put forward by De Persgroep were unable to be

heard properly if De Persgroep could not access or be informed of the content of the documents of the procedural file supporting the contested decision. Thus, the principle of equality of arms, the effectivity of the appeal and the exercise by the Court of its full jurisdiction required that De Persgroep be granted access to the procedural file.

In practice, the Court decided to give De Persgroep access to the inventory of the file, further to which De Persgroep was given a month to identify the documents to which it felt access should be granted or about which information should be provided in order to enable it to have an effective right of appeal against the contested decision. De Persgroep would have to provide reasons for such requests. Significantly, the Court did not extend such access to the investigation file which, as the BCA stated, is not available to the Competition College when it decides on a case. Finally, the Court did not give De Persgroep access to the non-confidential version of the challenged decision, since the company had already received it.

Belgian Constitutional Court confirms legality of appeal procedure against use of documents and data seized by national competition authority

On 10 December 2014, the Belgian Constitutional Court dismissed the actions challenging the legality of the appeal available to companies against the use of documents and data seized during dawn raids carried out by the Belgian Competition Authority ("BCA").

Article IV.79 of the Code of Economic Law provides for an appeal against the decisions of the College of Prosecutors in Competition Matters (the "College of Prosecutors") to use documents and data seized during dawn raids carried out in the context of antitrust investigations. However, this appeal can only be filed after completion of the investigation, *i.e.*, once the College of Prosecutors has issued a Statement of Objections ("SO") and to the extent that the SO is actually based on the document or data whose confidentiality is disputed. As a result, an appeal cannot be filed immediately following the seizure of the contested documents and is limited to the documents referred to in the SO.

The French- and German-speaking Bar Councils and the Institute of Company Lawyers challenged the legality of Article IV.79 of the Code of Economic Law before the Belgian Constitutional Court, arguing that this provision infringed the principle of equality and non-discrimination enshrined in Articles 10 and 11 of the Belgian Constitution, combined with other rules of law.

The parties contended that the fact that an appeal was only possible at such a late stage of the proceedings constituted a breach of Article 6 of the European Convention on Human Rights ("ECHR") and Article 47 of the Charter of Fundamental Rights of the European Union (the "Charter"), which guarantee the right to a fair trial, including the right to an effective remedy before a court. By contrast, decisions to use seized documents or data can be appealed immediately when the prosecution is carried out under criminal procedural law, which was allegedly discriminatory vis-à-vis defendants in antitrust proceedings. Also, the parties claimed that Article IV.79 of the Code of Economic Law insufficiently protected every aspect of the right to privacy, such as the inviolability of the home and of the correspondence and the individual property rights, in breach of Article 8 of the ECHR and Articles 15, 16, 22 and 29 of the Constitution.

The Constitutional Court rejected the appeal. With reference to the case-law of the European Court of Human Rights, the Constitutional Court first stated that administrative proceedings, such as antitrust proceedings, do not have to be identical to criminal proceedings. The Court found that the legislator's objective to establish an efficient procedural framework for appeals in the context of antitrust proceedings could justify departing in some respects from proceedings in criminal matters.

However, the Constitutional Court noted that administrative proceedings have to comply with the right to a fair trial under Article 6 of the ECHR and Article 47 of the Charter. This implies that an effective judicial review, in both fact and law, must be available to the parties against the

contested decision within a reasonable time in order to offer an appropriate mechanism for redress.

In this respect, the Court recalled that Article IV.79 of the Code of Economic Law provides for an appeal mechanism pursuant to which the Brussels Court of Appeal can exclude confidential documents from the investigation file. The Court also noted that pursuant to Article 19(2) of the Judicial Code, the Brussels Court of Appeal can be requested to take interim measures, including the suspension of a decision of the College of Prosecutors relating to the data added to the prosecution file.

In addition, the Constitutional Court underlined that litigious data which is not used to support the SO is not part of the procedural file and is therefore not accessible to the Competition College which will rule on the merits of the case. Therefore, such data cannot harm the parties subject to the measures taken by the College of Prosecutors.

As a result, the Constitutional Court dismissed the case.

JUDICIAL DEVELOPMENTS OF GENERAL SIGNIFICANCE

EUROPEAN UNION LEVEL

ECJ unexpectedly opines against validity of draft EU agreement to accede to ECHR

On 18 December 2014, the Court of Justice of the European Union ("ECJ") delivered an eagerly awaited opinion on the accession of the EU to the European Convention on Human Rights and Fundamental Freedoms ("ECHR"). The ECHR is an international agreement signed by the Council of Europe which entered into force in 1949 and comprises 47 Member States including all 28 EU Member States. The European Court of Human Rights (ECtHR) was established under the ECHR.

The issue of the EU's accession to the ECHR is almost as old as the EU itself. However, great steps forward have been made, particularly in the past decade. Earlier, in 1996, the ECJ delivered an opinion to the effect that there was no legal basis at that time for the EU to accede to the ECHR. The importance of the EU's observance of human rights was nevertheless reinforced significantly with the coming into force of the Treaty of Lisbon in 2009. Not only did the Treaty of Lisbon make the Union's bill of rights - the Charter of Fundamental Rights - legally binding, but also Article 6(2) of the Treaty of European Union made it a treaty obligation that the EU "shall accede to the ECHR".

On 5 April 2013, a draft accession agreement was agreed upon following negotiations which had commenced in 2010. One of the steps contemplated by the draft agreement was the obtaining of an opinion from the ECJ on whether the agreement was compatible with the EU Treaties. In July 2013, the Commission asked the ECJ to give an opinion on the compatibility of the draft agreement with EU law.

Opinion 2/13 on the draft agreement on the accession of the EU to the ECHR (the "Opinion"), delivered by the ECJ on 18 December 2014, is significant as it postpones, for the time being, any progression towards the EU acceding to the ECHR. The Opinion identifies problems in the draft agreement with regard to the compatibility with EU law of the EU's accession to the ECHR.

In its Opinion, the ECJ noted that as the EU is not a State like the other ECHR Member States, its particular characteristics must be duly accounted for in an accession agreement.

The Opinion demonstrates the ECJ's fears as to the possibility of the circumvention of the preliminary ruling procedure of the ECtHR. Under Protocol 16 to the ECHR, signed in 2013, the superior courts of ECHR Member States may request from the ECtHR an advisory opinion on the application of or the interpretation of the rights protected under the ECHR. The ECJ points out that the draft agreement does not contain any provision which clarifies the relationship between the preliminary ruling procedure and the ECHR opinion request system.

As a result of accession, the ECHR would be binding upon the institutions of the EU and on its Member States, and would therefore form an integral part of EU law. In that case, the EU, like any other ECHR Contracting Party, would be subject to external control by the ECtHR. In essence, the accession as provided for under the draft agreement would enable the ECtHR to act as an external supervisor not only for the EU courts but also the EU's other institutions. Essentially what seems worrying for the ECJ is that, in the sphere of fundamental rights, it would inevitably be the ECtHR which would have the final say. It follows that ECtHR judgments would become binding on the EU and all its institutions and that, by contrast, the interpretation by the ECJ of a right recognised by the ECHR would not be binding on the ECtHR. The ECJ, designated the 'guardian' of the EU treaties, does not accept this possible supremacy of the ECtHR over the interpretation of EU law, including the Charter.

The ECJ further states that accession is liable to undermine the autonomy of EU law as well as adversely affecting the division of powers between the EU and its Member States. Where the rights recognised by the Charter correspond to those guaranteed by the ECHR, the power granted to Member States by the ECHR must be limited to that which is necessary to ensure that

the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not compromised. The draft agreement does not contain any provisions addressing these concerns.

Moreover, under Article 344 TFEU, the ECJ has exclusive jurisdiction in any dispute between the Member States and between those Member States and the EU regarding compliance with the ECHR in matters of EU law. Accession risks undermining this provision unless textual amendments are included in this respect.

Undoubtedly, the Opinion comes as a significant setback to the accession process. If amendments to the text of the agreement are made specifically addressing the ECJ's concerns, progression may still be made in future. For the moment, negotiations must recommence within the Council and accession is not envisaged for the near future.

PRIVATE ENFORCEMENT

EUROPEAN UNION LEVEL

Advocate General Jääskinen issues opinion on jurisdiction in damages claims under Brussels Regulation

On 11 December 2014, Advocate General Niilo Jääskinen issued his opinion in Case C-352/13, *CDC Cartel Damage Claims Hydrogen Peroxide* v. *Evonik Degussa and Others* on the jurisdiction of Member States courts under the Brussels I Regulation in the context of private damages actions for competition law infringements.

In 2006, the European Commission issued a decision finding that nine companies had participated in a cartel relating to hydrogen peroxide and perborate. In 2009, Cartel Damage Claims (CDC), a Belgian litigation funding company, filed a claim for damages before the Regional Court of Dortmund, Germany, against six of the addressees of the Commission's decision, including Evonik Degussa GmbH. Only Evonik Degussa was based in Germany, but in September 2009, CDC and Evonik Degussa settled, leaving the action to continue before the German court without a German defendant.

Several defendants objected that the Regional Court of Dortmund did not have jurisdiction over the dispute. In this respect they claimed that it was not the proper forum under Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the "Brussels I Regulation"), or at minimum that it did not have jurisdiction after the withdrawal of the German "anchor" defendant. The defendants also contended that the court's jurisdiction was precluded by an arbitration clause. The Regional Court of Dortmund therefore referred the preliminary question of its jurisdiction to the Court of Justice of the European Union ("ECJ").

Advocate General Jääskinen first examined whether the German court could have jurisdiction over the non-German defendants under Article 5(3) of the Brussels I Regulation, which provides that in matters relating to tort, delict, or quasi-delict, a defendant may be sued in the Member State where the harmful event occurred. The Advocate General considered that, if applying Article 5(3) to competition law damages actions was not to be excluded in principle, it was nonetheless inappropriate for a case involving a horizontal infringement over a long duration with a complex structure, which as a result involved participants and victims dispersed across the EU. In such a case, contrary to the very purposes of the Article, applying Article 5(3) would result in jurisdiction being proper in a multitude of courts, rather than in the identification of the court having the closest link to the action or best placed to assess liability. The Advocate General therefore took the view that Article 5(3) would not be an appropriate basis for jurisdiction in this case.

Advocate General Jääskinen next addressed the application of Article 6(1) of the Brussels I Regulation, which effectively allows the use of an "anchor" defendant to tie multiple defendants to a single action in one jurisdiction if "the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings". Case law has established that "irreconcilable judgments" in this sense refers to divergences in the context of the same situation of fact and law. The Advocate General considered the defendants to be in such a situation despite differences in when and where they participated in the cartel, because they were nonetheless parties to a single and continuous infringement. In this context, the possibility that defendants could face joint and several liability in some Member States but not in others could in principle present a risk of irreconcilable judgments, though it was for the national courts to assess the existence of this risk.

The Advocate General further addressed whether the withdrawal of the claim against the "anchor" defendant affected the national court's continuing jurisdiction over the matter. Here, the Advocate General considered that, once the court has properly acquired jurisdiction, it is not relevant whether claims against a given defendant are withdrawn. However, an exception would arise where the use of the "anchor" defendant under Article 6(1) had been

abusive. Such abuse would occur, for example, where the settlement with that defendant had already been effectively agreed before the claimant brought the action, but the claimant and defendant had concealed this in order to establish jurisdiction over the remaining defendants in the settling defendant's domicile.

Finally, the Advocate General addressed whether account could be taken of an arbitration or jurisdiction clause in the relevant supply contracts. The Advocate General considered that such a clause is not *per se* inapplicable in the context of an action arising from a competition law infringement, but that it would however deprive the prohibitions of Article 101 TFEU of useful effect if the claimant were unaware of the infringement at the time they adhered to the arbitration or jurisdiction clause. The Advocate General expressed doubt that, in the case of a secret cartel, the claimants would have had sufficient knowledge of the infringing agreements and of their illegality to give valid consent to an arbitration or jurisdictional clause covering claims arising from those illegal agreements.