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ABUSE OF DOMINANT POSITION: ECJ validates bpost's quantity discount system as not discriminatory

CARTELS AND HORIZONTAL AGREEMENTS: Commission fines broker ICAP € 14.9 million for participation in Yen interest rate derivatives cartels ■ UK court stops recovery of antitrust fines

VERTICAL AGREEMENTS: German Competition Authority fines another mattress manufacturer for resale price maintenance

INTELLECTUAL PROPERTY: Paris Court of Appeal asks ECJ if payment of royalties pursuant to a license agreement whose patent has been held invalid is compatible with Article 101 TFEU

STATE AID: General Court annuls recovery order of Commission decision relating to the Irish air travel tax

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS: ECJ confirms the extradition of Italian national to the US for alleged participation in marine hose cartel ■ Spanish Supreme Court rules that maximum fine for very serious antitrust breaches is 10% of total business turnover

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MERGER CONTROL

EUROPEAN UNION LEVEL

Commission conditionally approves three-part GSK/Novartis deal

On 28 January 2015, in two separate decisions, the European Commission conditionally approved a complex transaction between pharmaceuticals producers GlaxoSmithKline (GSK) and Novartis that will result in: (i) GSK's acquisition of Novartis' human vaccines business; (ii) the formation of a joint venture for consumer healthcare; and (iii) the acquisition by Novartis of GSK's oncology business. Each element of the transaction involved significant commitments by the parties to address competition concerns.

GSK's acquisition of Novartis' vaccines business

In the vaccines sector, the parties are currently the only suppliers in the EEA for vaccines against bacterial meningitis of certain serogroups. Furthermore, the parties have horizontal overlaps on the Italian and German national markets for bivalent vaccines against diphtheria and tetanus, where the Commission considered remaining competitors unable to competitively constrain GSK after the transaction.

GSK therefore committed to grant a worldwide exclusive perpetual licence for one of its meningitis vaccines and to divest a second meningitis vaccine. It also agreed to enter an exclusive distribution agreement for Germany and Italy, a 10-year supply agreement, and to transfer marketing authorisations in the relevant countries for its diphtheria and tetanus vaccines.

Joint venture in consumer healthcare

In the consumer healthcare sector, the Commission identified several distinct markets in which the joint venture would combine key branded products. In each identified market, the parties committed to divestitures.

On the market for anti-smoking aids in the EEA and Turkey, GSK divested its *NiQuitin* product. On the market for cold sore management products in the EEA and Turkey, GSK divested four branded products and committed to offer a temporary licence for a fifth in the UK and the Netherlands. On the market for cold and flu products in the EEA, GSK divested its *Coldrex* product. On the market for nasal sprays/drops for cold and flu in Sweden, GSK divested its *Nexeril* and *Nasin* products. Finally, on the market for pain management in Sweden, GSK divested its *Panodil* product.

Novartis' acquisition of GSK's oncology business

In a separate decision, the Commission identified concerns regarding the development and marketing of two oncology products: a B-Raf inhibitor called LGX818 and a MEK inhibitor called MEK162.

B-Raf and MEK inhibitors block cell proliferation responsible for tumour growth and progression. LGX818 and MEK162 are being developed and marketed for use against skin cancer but could also potentially be adapted to treat a number of different cancers as well.

The transaction would have reduced the number of companies developing and marketing B-Raf and MEK inhibitors for skin cancer from three to two, and the Commission furthermore considered that the deal would have likely resulted in Novartis abandoning its broad clinical trial program investigating the use of LGX818 and MEK162 against other cancers.

Novartis therefore agreed to a post-closing commitment by which it would return rights over MEK162 to its owner and licensor, Array BioPharma, and would divest LGX818 to Array BioPharma as well. Both commitments are conditional upon Array BioPharma itself having entered a Commission-approved binding partnership with a suitable healthcare company in order to keep the two products active.

Commission conditionally approves Liberty Global's acquisition of De Vijver Media

On 24 February 2015, the European Commission approved the proposed acquisition by international cable operator Liberty Global of joint control in Belgian media company De Vijver

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Media, subject to behavioural commitments to license affected channels in Belgium.

Liberty Global controls the Telenet cable network in Flanders and Brussels. De Vijver broadcasts Belgian television channels Vier and Vijf. Most notably, the Commission considered that other television distributors must be able to offer De Vijver's Vier and Vijf channels in order to compete effectively with Liberty Global's Telenet network, which would give Liberty Global the ability to foreclose other networks from competing with Telenet by withholding these channels.

The parties therefore committed, for the next seven years, to offer the products at issue on fair, reasonable and non-discriminatory terms to any interested TV distributor in Belgium. These commitments specifically included agreeing to license the channels Vier and Vijf, as well as any new basic pay TV channel De Vijver may launch in the future.

MEMBER STATE LEVEL

UNITED KINGDOM

English court denies Ryanair appeal against UK order to divest minority stake

On 12 February 2015, the English Court of Appeal denied Ryanair's appeal against the decision of the UK Competition and Markets Authority ("CMA") ordering it to divest all but a 5% shareholding of its 29.6% non-controlling minority stake in Aer Lingus.

Ryanair has attempted to purchase a controlling interest in its fellow Irish carrier Aer Lingus three times, with the European Commission prohibiting the most recent attempt in February 2013 – a decision Ryanair is currently appealing before the European Courts (see VBB on Competition Law, Volume 2013, No. 3). However, Ryanair still holds a significant minority stake in Aer Lingus – currently 29.6% – which, according to UK authorities, allows it to exert influence on its competitor.

In August 2013, the CMA found that this minority stake enabled Ryanair to block special resolutions of the Aer Lingus board that were necessary for Aer Lingus to dispose of Heathrow landing slots or, moreover, to engage in mergers, acquisitions, or other partnerships with other airlines (see VBB on Competition Law, Volume 2013, No. 9). In particular because of the importance of consolidation to competitiveness in the current industry climate, the CMA therefore ruled that Ryanair's significant non-controlling shareholding in Aer Lingus resulted in a 'substantial lessening of competition' (an "SLC") in the UK. It therefore ordered Ryanair to divest its shares in Aer Lingus down to 5% to prevent this SLC. Ryanair first appealed to the UK Competition Appeal Tribunal, which denied its appeal in March 2014.

Ryanair then appealed to the Court of Appeal. Most notably, Ryanair claimed that the CMA's requirement to divest its shareholding to 5% was a disproportionate remedy. Ryanair contended that the CMA's duty was to order only a remedy sufficient that the balance of probabilities no longer suggested an SLC would result, whereas the CMA's remedy had sought to remove all possibility of an SLC. The Court of Appeal disagreed, holding that once the CMA determined that the balance of probabilities showed an SLC, the CMA's duty was to take whatever remedy was appropriate to prevent that SLC, not merely to make it less probable.

The Court of Appeal thus denied the appeal. Ryanair has stated that it intends to further appeal to the UK Supreme Court.

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ABUSE OF DOMINANT POSITION

EUROPEAN UNION LEVEL

ECJ validates bpost's quantity discount system as not discriminatory

On 11 February 2015, the Court of Justice of the European Union ("ECJ") ruled on a request from the Brussels Court of Appeal for a preliminary ruling relating to the interpretation of the principle of non-discrimination as laid down in Article 12 of Directive 97/67/EC of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service ("Directive 97/67/EC"). Although the preliminary ruling does not interpret Article 102 TFEU as such, it does address issues that may arise in discount systems.

The ECJ ruled that the system of quantity discounts per sender, as introduced in 2010 by bpost, the incumbent Belgian postal services provider, is not discriminatory to so-called consolidators. Consolidators are third party operators who act as an intermediary between the original customer who generated the mail and the postal administration. They provide services to bulk mailers ("senders") such as the preparation of mail before handing it on to the postal operator (e.g., sorting, printing, placing in envelopes, labelling, addressing and stamping) and the delivery of the mailings (e.g., collection from the senders, sorting and packaging of the mailings in mailbags, transport and delivery to sites designated by the postal operator).

The judgment was given in the context of a dispute between bpost and the Belgian Institute for Postal services and Telecommunications ("IBPT") concerning a decision of IBPT issued on July 2011 to impose a fine of €2.3 million on bpost for applying a discriminatory rebate system in its 2010 contractual tariffs. In 2012, the Belgian Competition Authority imposed a fine of €37.4 million on bpost for the same reason, arguing that bpost had abused its dominant position.

Contractual tariffs are special tariffs compared to the standard tariff paid by the general public. They are laid down in an agreement between bpost and the clients concerned. This agreement can provide for rebates to clients which generate a certain turnover for bpost. The most usual contractual rebates are quantity discounts, which are granted according to the volume of mailings generated during a reference period, and operational discounts, which seek to reward certain routing operations and reflect the costs avoided by bpost.

bpost's quantity discount was calculated on the basis of the volume of mailings supplied to bpost. While the discount applied to both senders (i.e., the end customers) and consolidators, it was calculated on the basis of the turnover generated by each sender individually. Accordingly, the rebate granted to consolidators was not calculated on the basis of the total volume of mailings coming from all senders to which they provided their services, but on the basis of the volume of mailings generated individually by each of their clients. In other words, a sender which handed on a large volume of mailings to bpost benefited from a rebate higher than that obtained by a consolidator which handed on an equivalent volume of mailings resulting from the grouping of mail from a number of senders.

The ECJ noted that this difference in treatment between senders and consolidators constitutes discrimination prohibited under Article 12 of Directive 97/67/EC only if: (i) the senders and consolidators are in comparable situations on the postal distribution market; and (ii) there is no objective justification for the difference in treatment.

Having regard to the objective pursued by the system of quantity discounts per sender, the ECJ held that senders and consolidators are not in comparable situations.

The ECJ noted that the system's objective is to stimulate demand in the area of postal services. The quantity discounts aim to encourage senders to hand on more mail to bpost, which enables bpost to make economies of scale as its turnover increases.

The ECJ continued that only senders are in a position to be encouraged, by the effect of that

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system, to increase the volume of their mail handed on to bpost since they are responsible for originating postal items. Consolidators, in contrast, merely hand on to bpost the mail which they have collected from different senders, which does not have the effect of increasing the overall volume of mail in bpost's favour.

Further, the ECJ noted that its findings are not contradicted by the judgment in *Deutsche Post and Others* (ECJ, 6 March 2008, joined cases C-287/06 to C-292/06, *Deutsche Post AG and Others v. Bundesrepublik Deutschland*), from which it follows that senders and consolidators could be in comparable situations as regards operational discounts. According to the ECJ, the same does not necessarily apply to quantity discounts, such as those concerned in the case at hand.

For these reasons, the ECJ concluded that the different treatment between senders and consolidators which follows from the application of bpost's system of quantity discounts per sender does not constitute discrimination prohibited under Article 12 of Directive 97/67/EC.

In view of this ruling, the Brussels Court of Appeals is expected to annul, at least in part, the IBPT's fining decision of July 2011. Moreover, the ECJ judgment is also likely to have an impact on the appeal that bpost has lodged with the Brussels Court of Appeal regarding the Belgian Competition Authority's fine of €37.4 million for abuse of dominance. As the pleadings in this case have already taken place and the Brussels Court of Appeal has taken the case into consideration, bpost will possibly request the reopening of the oral procedure so as to allow the Court to consider the ECJ judgment.

MEMBER STATE LEVEL

GERMANY

German Federal Cartel Office fines SodaStream for abusive conduct

In a press release issued on 22 January 2015, the German Federal Cartel Office ("FCO") announced that it has issued a decision imposing a fine of €225,000 on the producer and distributor of home carbonation systems, SodaStream, for having abused its dominant position on the market for the refilling of gas cylinders for carbonated drinks machines by giving customers the impression that only SodaStream is authorised to refill their gas cylinders.

In 2006, the FCO had previously found that SodaStream (then known as Soda Club) had abused its dominant position on the German market for the refilling of gas cylinders (see VBB on Competition Law, Volume 2006, No. 3). At the time, rather than selling gas cylinders, Soda Club rented the majority of its gas cylinders to retailers and consumers. The FCO found that the ownership it thereby retained was utilised to prohibit companies outside of its distribution network from refilling the gas cylinders. As a result, the FCO issued an order on 9 February 2006 instructing Soda Club to permit companies outside its distribution network to refill cylinders and to attach a label to the cylinders that informs customers of the fact that cylinders may be refilled by third parties.

Following appeals lodged by SodaStream, the FCO's decision of 2006 was upheld by the Higher Regional Court of Düsseldorf in 2007 (see VBB on Competition Law, Volume 2007, No.7) and by the German Federal Court of Justice in 2008 (see VBB on Competition Law, Volume 2008, No.3), which clarified that the said label had to be attached to the cylinders for a time period of three years.

It follows from the January 2015 press release that, after the 2008 ruling of the Federal Court of Justice, SodaStream made the necessary changes to its distribution system. However, through warnings, safety instructions and exclusions of guarantee, SodaStream gave customers and business partners the impression that it alone was authorised to refill the gas cylinders. By way of example, SodaStream indicated on the shrink film of its gas cylinders and on the packaging of reserve cylinders that the cylinders should be refilled exclusively by SodaStream and that unauthorised refilling by third parties may be risky and unlawful.

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The FCO found that by having engaged in the above practices SodaStream abused its dominant position on the market for the refilling of gas cylinders used in carbonated drinks machines and acted contrary to the 2006 order issued by the FCO. Following the FCO's findings, SodaStream has committed to end the practices that were found abusive and to continue attaching, during the next three years, a label to its gas cylinders that emphasises that such cylinders can be refilled by third parties.

The FCO's decision is not final. SodaStream could file an appeal to the Higher Regional Court of Düsseldorf.

Higher Regional Court of Frankfurt rejects complaint against Telekom Deutschland for abusive pricing practices

In a recently published judgment issued on 9 December 2014, the Higher Regional Court of Frankfurt rejected the claim of a major operator of broadband cable, Kabel Deutschland, that Telekom Deutschland GmbH had abused its dominant position on the market for access to cable channels by way of excessive pricing.

In 2003, Kabel Deutschland acquired a subsidiary of Telekom Deutschland including its assets, which consisted mainly of broadband cable networks. The cable channels, through which the broadband cable networks run, remained the property of Telekom Deutschland. However, Telekom Deutschland agreed to rent out the cable channels to Kabel Deutschland according to a rental agreement that the parties negotiated in connection with the transaction.

In 2010, the German Federal Network Agency fixed the rental fees to access certain parts of the cable channels at a level that amounted to one third of the rental fees that Kabel Deutschland paid to Telekom Deutschland under the 2003 rental agreement. As a result, Kabel Deutschland filed a complaint against Telekom Deutschland arguing that it had abused its dominant position on the market for access to cable channels by charging excessive rental fees in the years prior to the fixation of fees. The complaint was rejected by the Regional Court of Frankfurt on 28 August 2013 on the interesting ground that the relevant market was not that of the provision of access to cable channels but the market of company takeovers, on which Telekom Deutschland was not dominant.

In its December 2014 judgment, the Higher Regional Court of Frankfurt upheld the Regional Court of Frankfurt's rejection of the complaint. However, it found that the relevant market would not need to be defined because, even if Telekom Deutschland were found to be dominant, its practices subject to the complaint would not amount to an abuse. According to the Higher Regional Court of Frankfurt, the 2003 rental agreement was part of Kabel Deutschland's acquisition of Telekom Deutschland's subsidiary as a whole, and therefore the acquisition could not be split into a sales and a rental part. Thus, from an economic point of view, the agreed rental fee was part of the consideration that Kabel Deutschland had to provide for the entire transaction.

LUXEMBOURG

City of Luxembourg opens its market for transportation of human remains

On 16 January 2015, the Luxembourg Competition Council closed a case against the City of Luxembourg, following a decision by the City to open the market for the transportation of human remains up to competition.

The case started with a complaint sent to the Competition Council by the Luxembourg Federation of Funeral Undertaking Services and Cremation Services (*Fédération des Entreprises des Pompes Funèbres et de Crémation du Grand-Duché de Luxembourg*). According to the Federation, the City of Luxembourg was abusing its dominant position by maintaining a legal monopoly on the transportation of human remains over its territory and towards its cemeteries. The Council investigated the case and sent a statement of objections to the City of Luxembourg on 28 July 2014.

In its decision, the Competition Council defined the relevant market as the market for the transportation of human remains in the territory of the City of Luxembourg. The Council explained that, due to the existence of the legal monopoly, the market definition had to be

narrowed to the transportation of human remains, excluding other services in the death care industry. The City of Luxembourg was considered to be an undertaking under Luxembourg and European competition laws since it engaged in an economic activity which was carried out by private companies elsewhere in Luxembourg. Therefore, competition law applied to the behaviour of the City of Luxembourg.

As regards the alleged infringement, the Competition Council noted that the bylaw which provided for the legal monopoly was questionable since it eliminated all competition on the market and was not objectively justified by any considerations of social policy, universal service or hygiene. The bylaw also contradicted a 2011 Grand-Ducal regulation which specifically provides for the freedom of establishment of funeral directors.

However, the Competition Council did not reach a final conclusion on the existence of an abuse of dominant position, as it noted that the City of Luxembourg removed the monopoly from its bylaw on 8 December 2014. The Competition Council therefore decided to close the case.

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CARTELS AND HORIZONTAL AGREEMENTS

EUROPEAN UNION LEVEL

Commission fines broker ICAP € 14.9 million for participation in Yen interest rate derivatives cartels

On 4 February 2015, the European Commission announced that it had imposed fines totalling over €14.9 million on the UK-based broker ICAP for facilitating six cartels in the sector of Yen interest rate derivatives (YIRD) between 2007 and 2010. The decision follows the Commission's resolution of the case against other participations under its cartel settlement procedure.

Interest rate derivatives are financial products which are commonly used by financial institutions or companies for managing the risk of interest rate fluctuations. Their value derives from a benchmark interest rate, such as the London Interbank Offered Rate (LIBOR). The benchmark rate represents an average of the quotes submitted on a daily basis by a number of banks who are members of a panel. The LIBOR is used for ten currencies, including the Japanese Yen (JPY).

In December 2013, the Commission imposed fines totalling over €669 million under the EU cartel settlement procedure on five banks and one broker for their participation in illegal cartels in the YIRD sector (See VBB on Competition Law, Volume 2013, No. 11). ICAP however opted not to settle so the proceedings continued against it under the standard infringement procedure.

In its press release announcing the decision, the Commission states that ICAP contributed to the anti-competitive objectives pursued by the cartelists, including by: (i) disseminating misleading information to certain JPY LIBOR panel banks that did not participate in the infringement with the aim of convincing them to adjust their JPY LIBOR rates to the cartelists' "predictions"; (ii) using its contacts with a number of JPY LIBOR panel banks that did not participate in the infringement to influence their JPY LIBOR submissions; and (iii) serving as a communications channel between traders of two different infringing banks and therefore enabling anti-competitive practices between them.

MEMBER STATE LEVEL

AUSTRIA

Austrian Cartel Court imposes fines of € 17.47 million on 30 companies in freight forwarding sector

In a case brought by the Austrian Federal Competition Authority ("FCA"), the Austrian Cartel Court has imposed fines on 30 companies for price-fixing agreements in the freight forwarding sector. The Court found that the companies had established a committee, named SSK, within which, between 2002 and 2007, they agreed upon prices for consolidated transportation services.

Following a preliminary ruling by the European Court of Justice in this case, the Austrian Higher Cartel Court held, on 2 December 2014, that the companies concerned had infringed Article 101 TFEU and referred the case to the Cartel Court in order to determine the amount of fines (see VBB on Competition Law, Volume 2014, No.1). On 19 December 2014, the Cartel Court imposed fines totalling €17,470,000, with individual fines on each of the 30 companies implicated in the infringement ranging from €2,500 to €7 million.

ITALY

Italian Competition Authority fines ferry operators for failure to respect case-closure commitments

On 28 January 2015, the Italian Competition Authority ("ICA") fined ten ferry services operators, active in the Gulf of Naples and Salerno, for their failure to respect commitments agreed on in a previous investigation.

In 2009, the ICA closed an investigation into a common undertaking (CLMP) among ferry operators in the Gulf of Naples and Salerno following commitments by the ferry operators not to share and exchange confidential business information and to close down their common undertaking. The undertakings concerned

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submitted compliance reports to the ICA in 2010, 2011 and 2012.

Following complaints filed by customers in 2010 concerning increased tariffs for ferry services, the ICA decided to reopen and expand its previous investigation to include, *inter alia*, a new joint undertaking (Gescab), which had been created to coordinate various activities of the ferry operators, including shared ticketing.

During this new investigation, the ICA discovered that the ferry operators had breached their previously agreed commitments: the common undertaking that had been the subject of the previous investigation (CLMP) had simply been replaced by a new one (Gescab) and the coordination activities between the ferry operators that had previously been investigated were still on-going. Moreover, the ferry operators were allocating markets and revenues, fixing prices and coordinating commercial and business decisions.

The ICA therefore decided to fine the ferry operators for their failure to respect the agreed commitments and for an infringement of Article 101 TFEU. The fines imposed total more than €14 million. This is the first time that the ICA has reopened an investigation which it had previously closed following the acceptance of commitments.

SPAIN

Spanish Competition Authority fines waste management cartelists € 98.2 million

On 26 January 2015, the Spanish Competition Authority ("SCA") issued a decision imposing fines on 36 companies and three industry associations for their involvement in a cartel in the waste management and urban sanitation sector.

The cartel uncovered by the SCA consisted of market-allocation agreements, according to which the members of the cartel shared existing and new clients, and exchanged commercially-sensitive information. Furthermore, the SCA found that some of the companies engaged in bid-rigging, either by presenting joint tenders or by engaging in "bid suppression" (i.e., where one member submits a tender while the others agree not to bid in exchange for some services being subcontracted to them). They also agreed not to present any tender if the fees offered by the relevant public authority were not sufficient.

Regarding the three industry associations, the SCA found that they were actively involved in the implementation and policing of the market-allocation agreements, notably through recommendations addressed to their members.

The relevant product markets affected by the cartel were the management of hazardous and non-hazardous waste, the collection of waste paper and packaging, and urban sanitation (which includes water treatment). The SCA found that the anti-competitive conduct took place between 1999 and 2013.

The fines amount to a total of €98.2 million. Four of the cartelists (ACS, FCC, Sacyr and Ferrovial) were hit with 75% of the total fine. The fine represents 3% of the turnover realised by each of the cartelists on the markets where the infringement took place.

UNITED KINGDOM

UK court stops recovery of antitrust fines

On 26 January 2015, the English High Court issued a judgment dismissing lawsuits brought by a tobacco manufacturer, Gallaher Group Limited and Gallaher Limited (Gallaher), and a retailer, Somerfield Stores Limited and Co-operative Group Food Limited (Somerfield), in an attempt to recover £ 54 million in antitrust fines from the Competition and Markets Authority ("CMA").

The fines were originally imposed in 2010 by the Office of Fair Trading ("OFT") in relation to its investigation into anti-competitive practices concerning the sale of tobacco. The investigation began in 2003 and involved Gallaher and Somerfield as well as 11 other parties – six of whom entered into 'early resolution agreements' (i.e., settlements) in 2008. Under the settlements, the settling parties admitted liability and agreed to cooperate with the OFT in exchange for a reduction in fines. However, the OFT's decision was successfully

challenged before the Competition Appeal Tribunal by a number of other parties, leaving those who had not appealed against the decision without a remedy against the imposition of fines, even though the OFT's case had effectively collapsed.

Despite this, the OFT made a subsequent payment to one of the non-appealing parties involved, TM Retail, which had opted for settlement. This provided the foundation on which Gallaher and Somerfield launched their action, arguing that they should be put in the same position as TM Retail on the basis of the principles of fairness and equal treatment. Although the proceedings were initiated against the OFT, they continued against its successor, CMA, after 1 April 2014.

The High Court's judgment addressed the fairness argument and indicated that the OFT should not have given assurances to TM Retail and should have rejected its request to repay the fine on the basis of the European Court of Justice's ruling in *Wood Pulp II*, which held that parties who fail to appeal cannot subsequently benefit from decisions which are favourable to those who did appeal. In light of this factor as well as the protection of public funds and unjust enrichment, the Court held that the OFT's refusal to apply the same approach to the claimants Gallaher and Somerfield was justified and their claims were therefore dismissed.

Reacting to the judgment, the CMA said that the judgment "recognises the importance of finality and legal certainty in competition investigations and inquiries". Yet, the Court's critical comments on the OFT's unfair treatment of the claimants in this case will most certainly provide an incentive for the CMA to re-examine its conduct in the future as regards early resolution agreements, particularly in relation to third party appeals on liability and the repayment of penalties.

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VERTICAL AGREEMENTS

MEMBER STATE LEVEL

GERMANY

German Competition Authority fines another mattress manufacturer for resale price maintenance

According to a press release issued by the German Competition Authority ("BKA") on 6 February 2015, the BKA fined a mattress manufacturer, Metzeler Schaum GmbH (Metzeler), €3.38 million for resale price maintenance. In setting Metzeler's fine, the BKA took account of the fact that Metzeler had cooperated and settled with the authority.

The BKA found that between early 2007 and July 2011 Metzeler had fixed resale prices for certain mattresses. In particular, Metzeler had repeatedly informed resellers verbally and in writing that Metzeler's suggested retail prices for some mattresses were to be viewed as fixed prices and that there was no scope for discounts, especially during promotional activities. Metzeler had also required that advertising, especially promotional advertising, did not contain price comparisons, discount promises or other information as these could "destabilise" the fixed sales price. Metzeler also engaged in what the BKA described as "corrective actions" if some resellers did not comply with the fixed sales prices and advertised prices below the fixed level.

Following dawn raids triggered by complaints, the BKA has been investigating various companies active in the sector. In addition to the fine imposed on Metzeler, the BKA previously fined Recticel Schlafkomfort GmbH €8.2 million for resale price maintenance on 21 August 2014 (see VBB on Competition Law, Volume 2014, No. 8). Proceedings against two other mattress manufacturers are still on-going.

SPAIN

CEPSA and BP fined for not complying with earlier commitments

On 6 February 2015, the Spanish Competition Authority ("CNMC") fined two fuel suppliers, CEPSA and BP, for not complying with commitments given in earlier resale price maintenance cases. The fines amounted to €2.5 million in the case of CEPSA and €750,000 in the case of BP.

In a decision issued on 30 July 2009, the CNMC held that REPSOL, CEPSA and BP had engaged in resale price maintenance. In particular, the CNMC found that the "recommended prices" set by the fuel suppliers were, in reality, fixed prices. This finding was based on the fact that REPSOL, CEPSA and BP had set their wholesale prices as a function of either the average recommended resale price or the average distributors' profit margin in a given area. Other factors taken into account were the approximate 70% combined market share of the three companies, as well as the fact that there was low price elasticity in the market and barriers to entry were high. As a result, the CNMC had found that the recommended retail prices in fact led to price alignment among the three operators. The CNMC therefore imposed: (i) behavioural commitments obliging the companies not to link the wholesale price to the recommended resale price; and (ii) fines totaling €7.9 million.

In the CNMC's current decision, it held that CEPSA and BP had only partly complied with the commitments. Overall, the case is of interest as wholesale prices are set as a function of recommended resale prices in various industries, for example motor vehicle distribution, and in practice this is considered compatible with the Vertical Agreements Block Exemption and has not given rise to competition law concerns.

OTHER DEVELOPMENTS

PORTUGAL: On 3 February 2015, the Portuguese Competition Authority ("PCA") fined the Galp Energia group €9.29 million for implementing anti-competitive clauses in

distribution contracts concerning the gas bottle sector. In particular, Galp Energia granted absolute territorial exclusivity for a period of at least 15 years to the majority of its retailers.

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INTELLECTUAL PROPERTY / LICENSING

MEMBER STATE LEVEL

FRANCE

Paris Court of Appeal asks ECJ if payment of royalties pursuant to a license agreement whose patent has been held invalid is compatible with Article 101 TFEU

The Court of Justice of the European Union ("ECJ") published a request from the Paris Court of Appeal for a preliminary ruling on whether Article 101 of the Treaty on the Functioning of the European Union ("TFEU") precludes a licensee from paying royalties pursuant to a licensing agreement when the patent, covered by that licensing agreement, is held invalid (C-567/14, *Genentech Inc. v Hoechst GmbH*).

The underlying proceedings involve a long-running patent dispute between Behringwerke, the licensor (of which Sanofi-Aventis Deutschland, a subsidiary of Hoechst, is a successor), and Genentech (a subsidiary of Roche), the licensee. The origin of the dispute lies in a license agreement signed in 1992 granting the licensee a world-wide non-exclusive license for the use of a patented substance and process. While the patent was definitively revoked by the European Patent Office in 1999 for lack of novelty, the license agreement provided for running royalties in the amount of 0.5% based on the manufacture of a medicine incorporating the patented substance even if, in the country of manufacture, the patent was subsequently found to be invalid. Genentech manufactured and sold the top-selling medicine Rituxan® (whose yearly sales are around €5 billion), which implemented the technology of the subject matter of the license agreement. Rituxan® is used for the treatment of various forms of lymphoma and other conditions.

Hoechst began ICC arbitration proceedings in 2008 for the payment of royalties, pursuant to the license agreement. The arbitrator ultimately sided with Hoechst and ordered Genentech to pay over €108 million plus interest dating from 1998.

Genentech requested the Paris Court of Appeal to set aside the arbitration award on the grounds, *inter alia*, that it breached international public order. According to Genentech, an award that found a breach of a license agreement without establishing any patent infringement and, as a result, ordered a payment of running royalties, is contrary to Article 101 TFEU and the principle of free competition, as the licensee must bear unjustifiable costs for a technology which is no longer patented and is thus accessible without restriction. Genentech further argued that under EU case law, royalties cannot be paid to a licensee for the use of an invention which does not constitute a patent infringement.

The Paris Court of Appeal stayed the proceedings and made a request to the ECJ for a preliminary ruling as to whether Article 101 TFEU precludes the payment of royalties for the sole use of the rights attached to the licensed patent if that patent has been declared invalid.

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STATE AID

EUROPEAN UNION LEVEL

General Court annuls recovery order of Commission decision relating to the Irish air travel tax

On 5 February 2015, the General Court handed down two judgments in which it partially upheld Aer Lingus' and Ryanair's appeal against a Commission decision in relation to an air travel tax imposed by the Irish authorities on all flights departing from an Irish airport.

The air travel tax is an excise duty which airline companies operating in Ireland must pay in respect of every passenger departing on an aircraft from an airport situated in Ireland. In July 2009, Ryanair filed a complaint with the Commission arguing that several aspects of the tax constituted unlawful state aid. One of its claims related to the exemption of transfer and transit passengers from payment of the tax. Whilst the Commission considered that this exemption did not constitute state aid, the General Court disagreed and partially annulled the Commission decision in a judgment issued on 25 November 2014 (see VBB on Competition Law, Volume 2014, No. 12).

The more recent judgments of the General Court relate to another aspect of the air travel tax, namely the difference in the tax rate depending on the distance travelled. Between 30 March 2009 and 1 March 2011, a rate of €2 applied to all flights departing from an airport to a destination within 300km from Dublin airport, while a rate of €10 applied in all other cases. In a decision issued on 25 July 2012, the Commission considered that the application of the lower rate for short-distance flights constituted state aid incompatible with the internal market. It therefore ordered the recovery of that aid from the beneficiaries, including Aer Lingus and Ryanair. The Commission decided that the amount of the aid corresponded to the difference between the lower rate of the air travel tax (€2) and the standard rate (€10), i.e., €8, levied on each passenger.

The General Court confirmed the decision of the Commission insofar as it decided that the higher rate was the reference rate and that the application of the lower rate constituted state aid in favour of airlines whose flights were subject to that lower rate. However, the General Court found that the Commission was not entitled to consider that the advantage enjoyed by the airlines amounted automatically, in all cases, to €8 per passenger. The Commission should have taken into account the extent to which the advantage resulting from the application of that reduced rate could have been – even only partially – passed on to the passenger. Only if the airline companies had systematically increased the price of their tickets excluding tax by €8 per ticket, the advantage would not be passed on and the Commission could order the recovery from the airlines of €8 per passenger. The Commission should have accurately assessed the advantage actually enjoyed by the airlines or, if this proved impossible, conferred that task to the national authorities, providing them with the necessary information in that respect.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

EUROPEAN UNION LEVEL

ECJ confirms the extradition of Italian national to the US for alleged participation in marine hose cartel

On 28 January 2015, the European Court of Justice of the European Union ("ECJ") rejected the appeal brought by Italian citizen Romano Pisciotti concerning the legality of his extradition to the US on cartel charges as clearly unfounded and inadmissible.

The extradition came at the request of the US authorities, which investigated suspected bid-rigging and anti-competitive price agreements affecting the supply of marine hoses from 1986 until 2007. This conduct was also subject to fines totalling €131.51 million imposed by the European Commission in January 2009 (see VBB on Competition Law Volume 2009, No. 1).

In this context, the US authorities had charged Mr Pisciotti with participating in the conspiracy and had placed him on the "Red Notice" list maintained by Interpol. On 17 June 2013, Mr Pisciotti was arrested at Frankfurt airport, where he was changing planes on his way back to Italy from Nigeria. In August 2013, the US authorities officially requested Germany to extradite Mr Pisciotti under the terms of the extradition treaty between the US and Germany. The German Higher Regional Court authorised the extradition of Mr Pisciotti after reviewing the US authorities' extradition file (see VBB on Competition Law, Volume 2014, No. 4).

In April 2014, the European Commission rejected the plea brought by Mr Pisciotti, which argued that the Commission should act against Germany, pursuant to Article 258 TFEU, as when arresting him Germany breached the principle of the freedom to provide services. The Commission concluded that EU law did not apply. Mr Pisciotti subsequently appealed this decision before the General Court ("GC") but the appeal was ultimately declared inadmissible. Mr Pisciotti further appealed to the ECJ.

In its order, the ECJ ruled that Mr Pisciotti's appeal was in part: (i) clearly unfounded because the GC had committed no error of law; and (ii) clearly inadmissible because Mr Pisciotti was challenging the Commission decision and not the GC order.

This case marks the first time a person has been successfully extradited to the US on the basis of his involvement in a cartel. The US authorities previously succeeded in securing the extradition of Ian Norris from the UK in connection with the carbon graphite cartel, but that extradition ultimately proceeded due to Mr Norris's participation in conduct designed to obstruct the course of justice, rather than due to his involvement in the cartel itself (see VBB on Competition Law, Volume 2010, No. 3).

MEMBER STATE LEVEL

AUSTRIA

Austrian Supreme Court rules on the conditions for granting access to files of competition law proceedings

In a recently published judgment issued on 28 November 2014, the Austrian Supreme Court upheld the granting of access to files to third parties for the preparation of damages claims concerning a competition law infringement.

On 1 December 2006, the Austrian Cartel Court found that Europay Austria (now called Paylife), a network operator for point of sales payment systems using bankcards, participated in a cartel with Austria's major banks and abused its dominant position on the market for card payment services in Austria. In 2013, third parties requested access to the files of the proceedings in order to claim damages caused by Europay's violations of competition law.

In June 2014, the Austrian Court of First Instance ("CFI") granted access to the requested files. According to the CFI, the third parties had a clear interest in having access to these files, since there were no other legal possibilities for them to substantiate their damages claims. The CFI held that there was also no public interest to deny access and, as the legal proceedings were dated, the files were

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unlikely to contain any business secrets that were still relevant.

The decision of the CFI was based on the assumption that the cartel proceeding at issue had a link with EU law and therefore Article 39 (2) of the 2005 Austrian Federal Law on Cartels and Other Restrictions of Competition ("KartG") – according to which access to the files of cartel proceedings can only be granted if the parties to the proceedings give consent – was not applicable. In *Donau Chemie* (see VBB on Competition Law, Volume 2013, No. 6), the Court of Justice of the EU considered Article 39 (2) KartG as incompatible with the EU principle of effectiveness. Consequently, Article 39 (2) KartG cannot be applied to proceedings dealing with requests for access to files linked to EU law.

In the 28 November 2014 judgment, the Austrian Supreme Court found that the principles the ECJ highlighted in *Pfleiderer* (see VBB on Competition Law, Volume 2011, No. 6) and *Donau Chemie* – that national provisions must not make it practically impossible to claim damages caused by violations of EU competition law – can be generalised and should also apply to violations of Austrian competition law (without any link to EU law). Therefore, according to the Supreme Court, if the parties to the competition proceedings, as in the present case, do not consent to the access to file, it is to be determined by a two-stage assessment whether access should nevertheless be granted: (i) it has to be established whether the third party has a concrete legal interest in having access to the file; and (ii), it has to be determined whether the right of the third party requesting access to the file outweighs the right of the parties to the proceedings.

In the case at hand, the Supreme Court found that the CFI correctly weighed the interests. Notably, the preservation of the effectiveness of the leniency program was not at risk as no leniency application had been made. Furthermore, the cartel proceedings had been completed for some time, therefore, the information in the files was not current and the respondent failed to establish why, despite this time lapse, business secrets worthy of protection could still be affected.

BELGIUM

Belgian Supreme Court overturns Court of Appeal judgment on statute of limitation

On 22 January 2015, the Belgian Supreme Court (*Hof van Cassatie* / *Cour de cassation*) partially set aside a judgment issued by the Brussels Court of Appeal on the limitation period applicable to investigative measures in competition cases.

The contested judgment was adopted in the framework of a dispute between the Brussels Competition Authority (*Belgische Mededingingsautoriteit* / *Autorité belge de la concurrence*) ("BCA") and the incumbent Belgian telecoms company Belgacom. Belgacom was accused by competing mobile telecoms operators Mobistar and KPN (parent company of Base) of abusing its dominant position on the broadband market. Further to these complaints, the former competition authority (replaced by the BCA in 2013) inspected Belgacom's premises on 12 and 13 October 2010. Belgacom subsequently appealed a number of procedural decisions made by the College of Prosecutors (*Auditoraat* / *Auditorat*) of the former competition authority before the Brussels Court of Appeal. After obtaining a preliminary ruling from the Belgian Constitutional Court on some of the issues, the Brussels Court of Appeal found in favour of Belgacom and, in a landmark judgment issued on 5 March 2013, recognised legal professional privilege in regards to the communications of in-house lawyers (*See, this Newsletter, Volume 2013, No. 3, p. 27*). This judgment was appealed before the Supreme Court by the College of Prosecutors and by the BCA.

The Supreme Court dismissed most of the arguments put forward by the appellants. In particular, the Supreme Court ruled that the Court of Appeal was right to have found Belgacom's appeals on procedural decisions admissible, including decisions on the use of languages in the administrative procedure and the confidentiality of documents seized, despite claims by the BCA that these appeals should

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have been brought before the former Competition Council (*Raad van mededinging / Conseil de la concurrence*) and not the civil courts. The Supreme Court also set aside various claims made by the BCA as regards the selection of data inspected during the dawn raids and considered to be within the scope of the investigation.

However, the Supreme Court considered that the Court of Appeal had not responded to the BCA's argument that, pursuant to Article 88 of the former 2006 Competition Act, the College of Prosecutors was entitled to investigate facts which took place more than five years preceding the decision to open the investigation when the infringement was considered to be continuous or repeated.

The Supreme Court therefore partially quashed the appeal judgment on this ground and sent part of the case back to the Brussels Court of Appeal for the latter to readdress this issue.

Belgian Court of Appeal deems dawn raids carried out on travel agents illegal

On 18 February 2015, the Brussels Court of Appeal (the "Court") ruled that antitrust dawn raids carried out by the Belgian Competition Authority ("BCA") at the premises of travel agents in 2006 were illegal as they were not subject to prior authorisation by an independent judge.

In February and March 2006, the BCA inspected the premises of several travel agents, including TUI Travel Belgium NV ("TUI"), in the context of an antitrust investigation on alleged illegal pricing agreements. Several travel agents decided to appeal the BCA decision to use the data obtained in relation to the dawn raids before the Brussels Court of Appeal. The appeals were based on several grounds, including the illegality of dawn raids carried out without prior judicial authorisation.

The Court first made clear that, since TUI was the only claimant that had been investigated by the BCA, it was the only party to the proceedings that had a right which could be infringed.

The Court also recalled that, under the 1999 competition law applicable at the time of the dawn raids, inspections in the private homes of employees of the undertaking under investigation were subject to the "*prior authorisation of an examining magistrate*", contrary to inspections of the premises of the undertaking itself.

The Court then stated that Article 15 of the Belgian Constitution enshrines the principle of inviolability of the home unless otherwise specified by law, and that under this principle, private homes cannot be distinguished from offices, or moral persons from natural ones. Also, Article 15 of the Constitution, interpreted in accordance with Article 8 of the European Convention on Human Rights ("ECHR"), must be understood as subjecting inspections to a judicial authorisation. Any derogation of this principle should be exceptional and justified by reasons related to the infringement at stake.

The Court noted that Article 23 of the 1999 competition law constituted an exception to this principle. However, there was no indication that such exception was strictly necessary to reach the goal pursued by the law.

Interestingly, the Court dismissed the argument that, under Articles 6.1 ECHR and 8.1 ECHR, the absence of a prior judicial authorisation could be remedied by an effective judicial review within a reasonable period: indeed, the Court noted that "*on this issue, the rights and freedoms guaranteed at the national level go further than what is required by the ECHR*". The Court also deemed irrelevant the fact that the inspections also concerned an infringement of EU law and that, at the EU level, no prior authorisation from an examining magistrate is required.

Moreover, the Court considered that, pursuant to the ECHR case law, Article 6 ECHR and Article 47 of the Charter of Fundamental Rights of the European Union require that an appeal before a judge be available within a reasonable period. This notion of reasonable period implies that the appeal should prevent any measure from being based on an illegal decision or, if this cannot be avoided, should offer an appropriate remedy. However, neither the 1999 competition

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law (applicable at the time of the inspections) nor the 2006 competition law (which replaced it from 1 January 2007 to 2013) provided for an appeal against a decision to carry out an inspection. Equally, there was no remedy available to avoid that an injured party had to defend itself against data illegally obtained.

The Court noted that the breach had permanent consequences. The contested data was incorporated in the statement of objections filed by the College of Prosecutors in 2011. Were the BCA to proceed with this case file, the Competition College, which is the decision-making body of the BCA, would have to grant the parties access to the file which would include data forming the basis of the objections put forward by the College of Prosecutors but which the Competition College could not see. In such a legal and factual framework, the BCA would certainly breach the principle of good governance and the rights of defence of the undertakings concerned. The same obstacles would arise were the case later appealed before the Brussels Court of Appeal.

As a result, the Court annulled the BCA decision to use the data obtained "*in the framework of, or thanks to*" the inspections of 23 February 2006 and 7 March 2006 and decided that such data shall not be used as evidence. In practice, this ruling is likely to substantially undermine the BCA's case against the travel agents, although BCA can file an appeal (limited to points of law) against this judgment before the Supreme Court of Belgium.

Finally, it is worth noting that the current Belgian competition law, which entered into force in 2013, subjects all antitrust inspections to the prior authorisation of an examining magistrate.

SPAIN

Spanish Supreme Court rules that maximum fine for very serious antitrust breaches is 10% of total business turnover

On 5 February 2015, the Spanish Supreme Court issued a ruling which put an end to the controversy surrounding the interpretation of Article 63.1 of the Spanish Competition Act ("SCA") regarding the maximum level of fines that can be imposed in cases of competition law infringements.

The case concerned an appeal against a decision issued on 19 October 2011 by the Spanish Competition Authority ("CNMC") sanctioning a cartel which entailed business coordination and bid-rigging activities in the sector of maintenance works for road surfaces. The cartel involved up to 53 undertakings, which were found to have concerted their business strategies in a total of 13 different public tenders relating to works for refurbishing, strengthening and maintaining road surfaces. Accordingly, the CNMC imposed fines of up to 10% of the total turnover of each undertaking for a breach of Article 1 SCA and Article 101 TFEU.

A lower Spanish court (Audiencia Nacional), when ruling on an appeal against the CNMC decision, had considered that the percentages of turnovers referred to in Article 63.1 SCA as the maximum amount of fines (i.e., 1% for minor infringements, 5% for serious infringements, and 10% for very serious infringements) should be applied to the turnover generated by the infringing company in the business sector affected by the infringement and should not include the turnover generated in other business sectors. Therefore, the court partially annulled the decision of the CNMC and ordered the latter to consider only the turnover generated by the business activities affected by the infringement for the calculation of the fines and for the application of the 10% limit.

On further appeal, however, the Spanish Supreme Court quashed the lower court judgment and ruled that the maximum fine for very serious breaches of competition rules is 10% of the total turnover of the company engaged in the infringement, as opposed to only taking account of the turnover generated in the business sector concerned by the infringement.

This judgment is expected to be applied to at least 17 pending cases which have been awaiting a decision on the now-settled controversy.

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