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Avenue Louise 165 Louizalaan
B-1050 Brussels
Belgium

T +32 (0)2 647 73 50
F +32 (0)2 640 64 99
vbb@vbb.com
www.vbb.com

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GERMANY

German Federal Cartel Office prohibits takeover of Kaiser's Tengelmann outlets by competing food retailer Edeka

On 1 April 2015, the German Federal Cartel Office ("FCO") announced it had prohibited the proposed takeover of Kaiser's Tengelmann food retail outlets by competing supermarket Edeka.

Both parties are full-service supermarkets active in the food retail sector, which is highly concentrated and has already been the subject of a sector inquiry by the FCO (see VBB on Competition Law, Volume 2014, No. 9). Edeka belongs to the leading group of retailers, together with REWE, the Schwarz group (with its Lidl and Kaufland outlets), and Aldi. For Kaiser's Tengelmann, their outlets have market shares of 10–30% in regionally-defined markets.

The FCO found that the merger would have worsened market conditions for consumers in a number of highly-concentrated regional and municipal-level markets. The concentration would also have raised significant competition concerns on the demand side of the market, as manufacturers of branded products would have lost an important group of retailers, and the buyer power of the leading group of retailers – which is already high – would have been further strengthened.

The parties offered commitments to carve out around 100 outlets in Berlin and Bavaria. However, the FCO considered that the particular outlets proposed as carve-outs were those where: (i) the divestitures would have hardly reduced the market share increase; or (ii) there were no competition concerns from the acquisition of the outlet. In some cases, outlets subject to the commitments were already closed or about to be closed.

The FCO stated that conditional clearance would have been possible if the major part of the three regional distribution networks of Kaiser's Tengelmann outlets had been sold to one or two independent competitors, at least in the critical regional sales markets where concerns were raised. However, the FCO said that its suggestions were not further pursued by the parties, and the FCO thus ruled that the proposed commitments did not remedy its competition concerns.

HUNGARY

Hungarian Competition Authority fines Mediaworks and Népszabadság for failure to notify

The Hungarian Competition Authority ("HCA") recently published its decision, issued on 26 November 2014, fining Mediaworks and Népszabadság, two media and publishing companies, for failing to notify the change in the nature of their joint control over MEV and its subsidiary MédiaLOG, a print media distribution company.

MédiaLOG is a subsidiary of MEV, in which Mediaworks and Népszabadság hold a 70% share, while print media company Sanoma holds the remaining 30%. Sanoma had previously held veto rights which the HCA considered had effectively granted it joint control with Mediaworks and Népszabadság. However, due to a change in MEV's articles of association in 2012, the HCA was of the view that Sanoma lost its veto rights and, consequently, that Mediaworks and Népszabadság were obliged to notify their new acquisition of joint control over MEV and MédiaLOG.

The HCA therefore imposed a fine of HUF 81.25 million (approximately € 267,000).

In addition, the HCA determined that the concentration had vertical effects on the market for the distribution of national and regional newspapers. Consequently, the HCA imposed commitments on the parties to ensure the non-discriminatory provision of services by MédiaLOG with respect to this market.

ABUSE OF DOMINANT POSITION

EUROPEAN UNION LEVEL

Commission issues press release on Google case

In a press release issued on 15 April 2015, the European Commission addressed the following issues regarding the Google case:

- first, the Commission announced that it sent a Statement of Objections ("SO") to Google for an alleged abuse of a dominant position in the markets for general internet search services in the EEA by way of systematically favouring its own comparison shopping product in its general search results on the web;

- second, the Commission announced that it formally opened an investigation relating to the mobile operating system Android to determine whether Google has entered into anti-competitive agreements or abused a dominant position in the area of operating systems, applications and services for smart mobile devices; and

- third, the Commission announced that it continues to investigate other Google practices, including the favourable treatment by Google of other specialised search services in its general search results, the copying of rivals' web content, advertising exclusivity and "undue restrictions" on advertisers.

The Commission initially launched an antitrust investigation into four potential abuses by Google in November 2010. In May 2012, the Commission invited Google to submit remedies to address its concerns (see VBB on Competition Law, Volume 2012, No. 5). As a result, during 2013 and 2014, Google submitted several commitment proposals to address the Commission's concerns (see, e.g., VBB on Competition Law, Volume 2013, No. 4). Interestingly, in February 2014, following improved commitments proposed by Google, then Competition Commissioner Almunia announced that such commitments were indeed capable of addressing the Commission's concerns and it was therefore moving towards a decision based on these commitments (see VBB on Competition Law, Volume 2014, No. 2). In response to vocal industry criticism, however, the Commission ultimately did not conclude that those commitments were sufficient.

In a fact sheet published on the same date, the Commission provided further information on its SO, stating that it has preliminarily concluded that Google had systematically given favourable treatment to its own comparison shopping product ("Google Shopping") in its general search results pages. By way of example, Google allegedly shows Google Shopping more predominantly on the screen, and does not apply to it the system of penalties that Google applies to other competing products, which can have the effect of lowering the rank in which those products appear in Google's search result pages. The Commission noted that Google's first comparison shopping site, Froogle, did not benefit from the same favourable treatment and performed poorly, suggesting that the higher rate of growth for Google Shopping is the result of favourable treatment.

Google has apparently been given an initial deadline of 10 weeks to reply to the SO and request a hearing.

In a separate fact sheet issued on the same date regarding the opening of proceedings against Android, the Commission explained that it intends to investigate the following three allegations:

- whether Google has hindered the development and market access of rival mobile applications or services by requiring or incentivising smartphone and tablet manufacturers to exclusively pre-install Google's own applications or services;

- whether Google has prevented smartphone and tablet manufacturers who wish to pre-install Google's own applications or services from developing and marketing, on other devices, modified and potentially competing versions of Android; and

- whether Google has hindered the development and market access of rival applications and services by tying or bundling several of its applications and services together.

Commission sends Statement of Objections to Gazprom for alleged abuse of dominance on Central and Eastern European gas supply markets

On 22 April 2015, the European Commission announced that it sent a Statement of Objections ("SO") to Gazprom alleging that it abused its dominant position as the dominant gas supplier in eight Member States (Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland and Slovakia), where it holds market shares "well above 50% and in some cases up to 100%". The Commission has expressed concerns that Gazprom may be abusing this dominant position by: (i) pursuing an overall strategy to partition Central and Eastern European gas markets; (ii) charging unfair prices; and (iii) making the supply of gas dependent on obtaining unrelated commitments from wholesalers concerning gas transport infrastructure.

More specifically, the Commission has taken the preliminary view that the following conduct may constitute an abuse of dominance under Article 102 TFEU:

- hindering cross-border gas sales in Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland and Slovakia by explicitly prohibiting the export of gas, stipulating that the customer must use the purchased gas in its own country or sell to customers within its country, and in certain circumstances requesting wholesalers to obtain Gazprom's approval for exports or refusing to change the delivery location;

- charging unfair prices in Bulgaria, Estonia, Latvia, Lithuania and Poland based on a number of different benchmarks, including Gazprom's costs, prices in different geographic markets or market prices; and

- making gas supplies in Bulgaria and Poland conditional on obtaining certain infrastructure-related commitments from wholesalers.

As the Commission has noted in a fact sheet published on the same date, it has already taken action against a number of EU-based energy companies for engaging in similar practices.

This development follows the opening of proceedings against Gazprom on 31 August 2012 (see VBB on Competition Law, Volume 2012, No. 9). Gazprom has apparently been given an initial deadline of 12 weeks to reply to the SO and request a hearing.

CARTELS AND HORIZONTAL AGREEMENTS

EUROPEAN UNION LEVEL

Court of Justice dismisses LG appeal in LCD panels case

On 23 April 2015, the Court of Justice of the European Union ("ECJ") dismissed an appeal lodged by LG Display Co. Ltd and LG Display Taiwan Co. Ltd ("LG") against a General Court ("GC") judgment which upheld, for the most part, the European Commission's 2010 decision in the LCD panels cartel case (see VBB on Competition Law, Volume 2014, No. 2).

In late 2010, the Commission issued its decision finding a cartel among six major international manufacturers of LCD panels, including LG and Samsung, which related to two categories of LCD panels ("cartelised LCD panels") in the form of a single and continuous infringement under Article 101 TFEU and Article 53 of the EEA Agreement, extending from October 2001 to February 2006 (see VBB on Competition Law, Volume 2010, No. 12).

In setting the basic amount of the fine imposed on LG, the Commission relied on point 13 of the 2006 Fining Guidelines and concluded that LG's sales to its parent companies (LGE and Philips) had to be taken into account in calculating the value of the sales of products to which the infringement directly or indirectly related, for the following reasons: (i) the sales of cartelised LCD panels to LG's parent companies were also covered by the discussions between the cartel participants; and (ii) the prices of those sales were influenced by the cartel.

The Commission relied on the Leniency Notice to grant total immunity to Samsung and to reduce the amount of LG's fine by 50%, since the evidence that LG had provided was of significant added value in relation to the evidence already in its possession. Although the Commission had granted LG partial immunity for 2006 because LG provided information which constituted evidence of facts of which the Commission was previously unaware, the Commission refused LG's request for partial immunity with respect to 2005 because the evidence submitted by Samsung already extended into 2005. The Commission thus imposed on LG a fine of € 215 million.

The GC rejected LG's appeal against the Commission's decision for the most part, although it reduced the fine to € 210 million, finding that the Commission had erred in taking account of the value of LG's sales for the month of January 2006 when calculating the fine.

In its appeal before the ECJ, LG relied on two grounds. First, it contested the inclusion of the sales of cartelised LCD panels to its parent companies in the value of sales taken into account for the calculation of the fine, since – according to LG – those sales were not affected by the infringement. Second, LG claimed that the refusal by the GC to grant it partial immunity for the year 2005 constituted an error of law; a failure to provide adequate reasoning; and a manifest distortion of the sense of the evidence.

As regards the first ground, the ECJ highlighted that it was undisputed that LG did not form a single undertaking with its parent companies within the meaning of Article 101 TFEU, and therefore that LG's sales to such companies could not be considered internal sales. Referring to its previous case law, the ECJ then held that interpreting point 13 of the 2006 Fining Guidelines as applying only to turnover related to sales established as having been affected by the cartel would be contrary to the goal pursued by that provision, namely adopting a fining amount which reflects both the economic significance of the infringement and the relative size of the undertaking's contribution to it. Accordingly, the ECJ confirmed that the Commission was entitled to take account of LG's sales to its parent companies, irrespective of whether the parents actually paid LG higher prices because of the cartel. The ECJ added that ignoring sales made to third parties, on the ground that the undertaking participating in the infringement has structural links with those third parties, would give an unjustified advantage to such an undertaking, by allowing it to avoid the imposition of a fine proportionate to its importance on the relevant product market.

As regards the second ground of appeal, LG first claimed that the GC had failed to demonstrate that the information submitted by Samsung in relation to 2005 constituted a sufficient basis for the Commission to establish that the infringement continued throughout 2005. According to LG, the evidence submitted by Samsung was very limited in time and scope and would therefore not have enabled the Commission to investigate and penalise the cartel with respect to the year 2005, while LG's contribution was of much greater value as it related to the entire duration of the infringement until February 2006; the main multilateral meetings; the participants in full; and the various categories of products. However, the ECJ held that the GC's statement that "the Commission knew, because of the evidence provided by Samsung, that bilateral contacts between certain cartel participants had continued in 2005" was sufficient to conclude that the information provided by LG concerned facts not previously unknown to the Commission and to therefore reject the request for partial immunity for the year 2005. According to the ECJ, the GC was thus not required to examine whether the information was such as to enable the Commission to make new findings. The ECJ noted that, although an undertaking providing information to the Commission under the Leniency Notice cannot be certain that it meets the conditions to be granted partial immunity, the Leniency Notice is designed to create a climate of uncertainty within cartels so as to encourage their reporting.

VERTICAL AGREEMENTS

MEMBER STATE LEVEL

BELGIUM

Belgian Competition Authority dismisses Spira's appeal against its decision to close De Beers case

On 25 March 2015, the Competition College of the Belgian Competition Authority ("BCA") dismissed Spira's appeal against a decision which rejected Spira's complaint against De Beers' distribution system.

This decision appears to mark the end of a long judicial saga involving Spira BVBA ("Spira"), a Belgian dealer of rough diamonds, and De Beers, the world's leading producer of rough diamonds. Spira contested, both before the European Commission and before the BCA, the decision of De Beers to reorganise its distribution network through the introduction of the Supplier of Choice ("SOC") system. Under the SOC system, Spira was no longer allowed to purchase rough diamonds from De Beers, which Spira considered to infringe Articles 101 and 102 TFEU and the corresponding provisions of Belgian law (current Articles IV.1 and IV.2 of the Code of Economic Law).

However, Spira's complaint before the European Commission was dismissed. Moreover, Spira's action before the General Court against this dismissal also failed (see VBB on Competition Law, Volume 2013, No. 8). Following this judgment, the College of Competition Prosecutors of the BCA reassessed the case and decided, on 15 October 2014, to dismiss Spira's complaint. The College of Competition Prosecutors noted that the European Commission had considered the chances of finding an infringement of competition law to be too low to trigger an investigation and found that the same reasoning should *a fortiori* apply to the BCA, whose resources are more limited than those of the European Commission.

Spira appealed this decision before the Competition College of the BCA, which noted that Spira's complaint before the BCA was based on arguments identical or similar to those it had raised before the European Commission. The Competition College found that, in the current context of European competition law, it is not only appropriate but even necessary for the College of Competition Prosecutors to give consideration to the assessment made by the European Commission as to the likelihood of finding a competition law infringement. Therefore, the Competition College confirmed the College of Competition Prosecutors' decision to dismiss Spira's complaint.

OTHER DEVELOPMENTS

AUSTRIA: According to a press release issued by the Austrian Competition Authority ("BWB"), the competition court of Austria has imposed a fine of € 653 775 on a supplier of mineral water, Vöslauer Mineralwasser AG, for vertical price-fixing. In particular, between January 2007 and December 2012, Vöslauer Mineralwasser AG imposed fixed retail prices on its distributors.

EU / BELGIUM / THE NETHERLANDS: Investigations into distribution agreements appear to be high on the agenda of the European Commission, as well as the Belgian and Dutch competition authorities as indicated by various public announcements and comments made recently. It is clear that these authorities intend to prioritise investigations into distribution agreements to a greater extent than in recent years, which includes looking into restrictions of online sales. For its part, the European Commission seems set to launch a wide-ranging sector inquiry into e-commerce next month.

FRANCE / ITALY / SWEDEN: According to press releases issued by the Italian Competition Authority ("ICA"), the Swedish Competition Authority ("SCA") and the French Competition Authority ("FCA") on 21 April 2015, these authorities have accepted commitments submitted by Booking.com concerning price-parity clauses. According to these commitments, Booking.com will limit the scope of the price-parity clauses. In particular, hotels will be free to offer their accommodation at prices lower than those displayed on Booking.com through other online travel agents and offline sales channels.

However, the price-parity clauses will continue to be binding in relation to hotels' own websites.

GERMANY: According to a press release issued by the German Competition Authority ("BKA") on 2 April 2015, the BKA has issued a Statement of Objections against Booking.com concerning price parity clauses. A similar investigation concerning Expedia is still on-going in Germany.

INTELLECTUAL PROPERTY / LICENSING

EUROPEAN UNION LEVEL

Director-General for Competition delivers speech on competition law enforcement and standard essential patents

On 21 April 2015, Alexander Italianer, Director-General for Competition, delivered a speech regarding competition law enforcement in relation to standard essential patents ("SEPs"). Mr. Italianer's speech broadly described the known principles of the European Commission's enforcement policy with regard to SEPs and examined cases such as Motorola and Samsung (see VBB on Competition Law, Volume 2014, No. 4). In Mr Italianer's opinion, these cases represent a near optimal balance between the intents of patent holders and licensees in Europe.

In addition, Mr. Italianer discussed patent assertion entities ("PAEs"), often referred to in a derogative manner as "patent trolls". In this regard, Mr. Italianer indicated that "[the Commission] ha[s] nothing against the business model as such. Enforcing and monetising intellectual property is a perfectly legitimate way of doing business." Mr. Italianer went on to say that PAEs will simply be held to the same standards as other owners of intellectual property rights.

Finally, Mr. Italianer also made clear that the Commission is closely following the outcome of patent litigation in Germany before the Mannheim district court. In that case, the SEP-holder is suing a phone distributor (Deutsche Telekom) rather than its manufacturers. There is speculation that the SEP-holder took this approach to avoid its FRAND commitments, i.e., the promise to license patented technology that forms part of a standard on terms that are fair, reasonable and non-discriminatory.

Mr Italianer's speech can be read here.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

MEMBER STATE LEVEL

BELGIUM

Belgian Competition Authority discloses its enforcement priorities for 2015

On 21 April 2015, the Belgian Competition Authority ("BCA") published its enforcement priorities for the year 2015.

The BCA has applied similar criteria to that of the Office of Fair Trading (OFT), the former UK competition authority, as set out in its 2008 Prioritisation Principles to determine whether a case should be investigated or prosecuted. The criteria includes:

- the (direct and indirect) impact of the possible infringement on consumer welfare;
- the strategic significance of the case for the BCA, in view of the sector affected or the opportunity to clarify the interpretation of competition law;
- the risk that the investigation will not lead to a successful outcome; and
- the resources required to initiate or pursue an investigation.

In addition, the BCA discloses a list of "strategic priorities and priority sectors for 2015":

- Liberalised sectors and network industries, especially energy and telecommunications: the BCA specifies that it finds the competition dynamics on the mobile and fixed telephony market to be different, and it adds that it will have "a specific focus on the less dynamic markets".
- Distribution sector and its links with suppliers (for instance in the agri-foodstuffs industry): in light of a current investigation and of a study on prices in supermarkets in neighbouring countries.
- E-commerce and media sector: the BCA wants to focus on consumers' access to content, regardless of the technological support used. The BCA also announces that it will use its advisory power to raise awareness on "possible regulations which would impede the arrival or development of new entrants".
- Banking sector: in light of the infringements revealed by the investigations of other competition authorities and of the priority given to this sector by the European Commission.
- Services to undertakings (and consumers): the BCA intends to keep applying competition law to associations of undertakings whenever necessary and to call for the suppression of barriers to entry relating to the legal form of undertakings.
- Public procurement sector: the BCA notes that this sector amounts to 10-15% of the national income and is particularly vulnerable to anti-competitive agreements, since quantities are set by the contracting authority regardless of prices.

The BCA also announced that, in view of its limited staff, it will focus this year on anti-competitive agreements, since they significantly harm price competition and innovation on the market.

Finally, it should be noted that the enforcement priorities identified above are only indications of the BCA's policy and do not limit the competence of the BCA to investigate other sectors or practices.

FRANCE

Former French procedure on dawn raids found contrary to Articles 6 and 8 of the European Convention on Human Rights

On 2 April 2015, the European Court of Human Rights ("ECtHR") ruled that two dawn raids carried out by the French Competition Authority ("FCA") in 2007 infringed Articles 6(1) and 8 of the European Convention on Human Rights ("ECHR").

The case related to dawn raids performed by the FCA back in 2007 on the premises of undertakings active in the construction industry, including the claimants Vinci Construction and GTM Génie Civil et Services.

The ECtHR confirmed a previous ruling which found that the applicable French procedure at that time, whereby undertakings could only introduce an appeal against the judicial decision authorising the dawn raids before the French Supreme Court (*Cour de cassation*), was contrary to the right to a fair trial pursuant to Article 6(1) ECHR.

The ECtHR also found that the right to private life protected by Article 8 ECHR had been infringed by the FCA. The claimants had argued that the FCA had seized documents in a massive and undifferentiated manner and, as a result, judicial protection was not sufficient.

In its judgment, the ECtHR ruled that the seizure of documents was not massive and undifferentiated, even though such seizure concerned entire mailboxes. However, the Court also considered that undertakings must be able to appeal the regularity of the seizure before a judicial court.

In the present case, a French judge had ruled that the seizure was in line with the formal requirements provided under French law. However, such judicial control was found to be unsatisfactory by the ECtHR since the judge did not perform a concrete examination of the regularity of the seizure even though it had found that privileged lawyer-client correspondence had been seized.

For the ECtHR, a judge facing reasoned claims that documents had been seized although they were not related to the investigation, or were subject to lawyer-client privilege, must perform an accurate examination and a concrete test of proportionality and, when appropriate, order their restitution.

The ECtHR thus concluded that the then-applicable French procedure for appeal against dawn raids decisions was contrary to Articles 6(1) and 8 ECHR. If the current French judicial control regarding the seizure of documents subject to lawyer-client privilege appears now to be in line with the ECtHR's findings, this judgment could still require improvements regarding the inspection of seized documents which are not related to the investigation.

France adopts new leniency program

On 3 April 2015, the French Competition Authority ("FCA") published its new Leniency Notice (*Communiqué de procédure du 3 avril 2015 relatif au programme de clémence français* – the "Leniency Notice") following comments received on its draft notice, to which only minor changes were brought (see VBB on Competition Law, Volume 2015, No. 3).

The new Leniency Notice clarifies the role of the "Leniency Officer" throughout the proceedings. General information on the implementation of the leniency programme can be obtained anonymously by companies from the Leniency Officer, prior to submitting any application. Should a company subsequently decide to submit a leniency application, the Leniency Officer will organise meetings with each of the leniency applicants to keep track of their order of "arrival".

The new Leniency Notice also provides guidance on the procedure for introducing leniency applications during inspections. Indeed, potential leniency applicants may now request an appointment to submit an application during inspections, although such an appointment will only take place after the inspections have been carried out.

In addition, the Leniency Notice provides that the FCA will systematically publish a press release when it conducts an inspection, in order to inform all potential leniency applicants at the same time and thus avoid giving an advantage to the raided company. In doing so, the FCA will, however, refrain from publishing the name of the companies inspected so as to safeguard the presumption of innocence. According to the Notice, a second press release will be published should the FCA bring the proceedings to an end. The Leniency Notice further clarifies the applicants' obligations to cooperate with the FCA. It also introduces an important novel concept concerning applications for a reduction

in the fines (type 2) by providing a hierarchy rank to such applications. These applications will be rewarded on a decreasing basis following pre-established reduction thresholds (i.e., 25-50% reduction for the first applicant, 15-40% reduction for the second, and 25% reduction maximum for the third).

In addition, the Leniency Notice introduces a "partial immunity" mechanism whereby if a company is the first to provide clear evidence to establish additional facts which directly impact the FCA's fine setting factors (e.g., extended duration of anti-competitive practices, additional products/territories covered by the practices, etc.), the FCA will not hold such facts against the company concerned when calculating the fine.

Finally, the Leniency Notice extends the possibility of submitting "summary applications" for all types of leniency submissions. Under the former regime, summary applications were only available in relation to applications for total immunity, and then only in cases where the FCA did not have any information regarding the alleged infringement (type 1A immunity application).

PRIVATE ENFORCEMENT

EUROPEAN UNION LEVEL

FRANCE

French Court sentences two companies to pay damages following a commitment decision

On 30 March 2015, the Paris Commercial Court sentenced Eco-emballages and Valorplast to pay € 400,000 in damages to their competitor DKT.

This judgment is interesting as it grants civil damages following a 2010 commitment decision by the French Competition Authority ("FCA"). During that procedure, the two companies, active in the recycling sector, provided several commitments which led the FCA to bring its investigation to an end without any finding of infringement.

Although the FCA did not conclude that there was an infringement of competition law, the Paris Commercial Court based its judgment almost exclusively on the factual findings of the FCA. The Court thus considered that the competition concerns expressed by the FCA in its commitments decision had indeed constituted anti-competitive practices resulting in a finding of fault on the part of Eco-emballages and Valorplast by the Court.

The damages granted by the Court covered DKT's actual prejudice, the loss of opportunity as well as moral damages.

GERMANY

Higher Regional Court of Düsseldorf upholds judgment rejecting cartel damages claim against cement manufacturers

On 18 February 2015, the Higher Regional Court of Düsseldorf ("the Court") upheld an earlier judgment of the Regional Court of Düsseldorf of 17 December 2013 rejecting a damages claim in the amount of approximately € 131 million brought by Cartel Damage Claims SA ("CDC") against members of a cement cartel (see VBB on Competition Law, Volume 2014, No. 1).

CDC is a Belgian company that specialises in enforcing claims of third parties injured by competition law infringements. In the present case, 36 companies ("assignors") had assigned their claims against the members of a cement cartel to CDC. These claims follow a prohibition and fining decision adopted in 2003 by the German Federal Cartel Office ("FCO") against cement manufacturers for anti-competitive agreements.

The assignments of claims for damages to CDC was based on sales contracts pursuant to which, in return for assigning their damages claims to CDC, the assignors received a lump sum of € 100 and a prospective 65% to 85% of the damages in the event of a successful outcome of CDC's legal action against the members of the cement cartel.

During interim proceedings, the admissibility of CDC's damages claim was examined by the court. The admissibility of CDC's claim was affirmed by the Higher Regional Court of Düsseldorf in May 2008 (see VBB on Competition Law, Volume 2008, No. 5) and, on appeal, by the German Federal Court of Justice in April 2009 (see VBB on Competition Law, Volume 2009, No. 4).

On the merits of the case, the Court, in its 18 February 2015 judgment, upheld the Regional Court of Düsseldorf's earlier decision of 17 December 2013 and rejected the appeal filed by CDC.

Like the Regional Court, the Court found that the assignment agreements concluded before 1 July 2008 were invalid because at that time CDC was not formally admitted to pursue claims of a third party and therefore infringed the then-applicable German Legal Advice Act.

As regards claims assigned after the amendment of this law in July 2008, the assignment was considered to be contrary to public policy because it unduly shifted the financial risk for the proceedings towards the defendants since CDC did not have financial means to pay the costs of the proceedings if it

were to lose the case. Contrary to the assertions of CDC, the Court found that the shifting of the financial risk for the proceedings was the main aim of the assignment. The Court held that this could be concluded from the clear discrepancy between the rights and obligations agreed upon in the assignment contracts: whereas the assignors would receive a share of 65% to 85% of the damages obtained in case of a successful outcome of the legal action, their contributions to costs for the preparation and conduct of the proceedings were minor. According to the Court, since the assignment is contrary to public policy it is void and CDC therefore has no legal capacity to assert the claims for the damages in question.

Further, the Court found that claims against two members of the cartel were time barred. This is because CDC, due to the assignment agreements being void, did not have legal capacity to assert claims which thus did not interrupt the applicable limitation period.

The Court did not decide whether new assignment agreements concluded in 2014, when CDC claims to have been sufficiently solvent, are valid as it did not accept CDC's application for amendment to its initial damages claim to include the new assignment agreements of 2014.

Finally, CDC's claim was rejected because it had been based on a "national" cartel, while the FCO's fining decision had unveiled regional cartels and, according to the Court, a national cartel did not in fact exist. An application for amendment of the claim submitted in this respect was equally rejected.

UNITED KINGDOM

New UK Consumer Rights Act has implications for private damages actions in competition law

The new Consumer Rights Act 2015 ("CRA") adopted on 26 March 2015 will introduce significant changes to the private enforcement of competition law in the UK. The CRA is expected to enter into effect by 1 October 2015 and, according to the UK government, represents some of the most significant reforms concerning consumer law to be enacted within a generation. This reform has serious implications for private actions involving breaches of competition law by expanding the powers of the Competition Appeal Tribunal ("CAT") and introducing new procedures for collective proceedings and collective settlement. These developments further demonstrate how the UK regulator is aiming to crack down on anti-competitive behaviour.

Expanding the powers of the CAT

The CRA provides for the expansion of the jurisdiction and the powers of the CAT, which is expected to have the effect of turning the UK's specialist antitrust court into a first-class competition court of preference. UK courts in general have long been favoured as a jurisdiction for competition claims due to their favourable disclosure rules as well as their willingness to assert jurisdiction. However, barriers were in place for competition claimants looking to bring 'stand-alone cases', where the High Court was the only viable venue – as the CAT did not have statutory authority to hear such cases. The current reform aims to thereby improve claimants' access to remedy through the following means:

Hearing 'stand-alone cases': The CAT will be able to adjudicate on 'stand-alone cases' (i.e., damages actions where there has been no finding of infringement by a competition authority against the defendant) as opposed to the current limited system of hearing 'follow-on actions' only. Following the reform, the CAT will have jurisdiction to hear stand-alone and follow-on claims, as well as cases involving both.

Implementing a 'fast-track': A new fast-track procedure will be introduced by the CAT, allowing for simpler cases (i.e., those involving less cost and evidence) to be resolved more expediently. This reform is meant to enable SMEs to bring private actions against larger corporations whose behaviour has been alleged to be anti-competitive and in breach of competition rules.

Granting injunctions: The CAT will be able to issue injunctions, providing claimants' with immediate relief by requiring cessation of anti-

competitive conduct. This reform will be particularly useful for 'fast-track' cases, where the scope for relief will be considered early on in the process. This approach broadens the powers of the CAT from its current ability to award damages only.

Extending the limitation period: The CRA aligns the limitation period for bringing claims before the CAT with those applicable to bringing a civil claim before the High Court, i.e., six years from the date on which the cause of action accrued.

Collective actions and settlement

The CRA introduces new procedures for collective actions and collective settlement, as well as a redress scheme. The object of the reform is to provide prospective claimants with effective means to enforcement. However, broadening the scope of collective actions has caused some commentators to worry that the UK could be headed in the direction of US-style class actions. To avert such concerns, the CRA provides for safeguards which prohibit damages-based fee arrangements and exemplary damages in collective actions. The new procedures set out as follows:

Implementing 'opt-out' collective actions: The CRA broadens the range of representatives to a private damages action by including anyone (i.e., businesses, individuals or trade associations) directly affected by the alleged infringement, as long as the CAT deems such representatives as 'just and reasonable'. Thus, the effect could be that all UK customers affected by the infringement could be represented unless they actively seek to 'opt-out' of the action. In addition, non-UK customers may 'opt-in' to the action and can therefore be represented before the CAT. This reform is in contrast to the current approach in which a designated body (i.e., the consumer association Which?) must bring a collective damages action before the CAT and affected individuals to a collective action must 'opt-in'.

Increasing damages calculations: The CAT will be able to assess damages on an aggregated basis for the group, as opposed to the current approach which calculates damages on an individual basis as per opted-in claimant. Under this new approach, any awarded damages that are unclaimed within a specified period will either be paid: (i) to a prescribed charity; or (ii) towards a representative's costs as incurred in connection with the proceedings.

Implementing 'opt-out' collective settlement: The CRA provides for the possibility of representatives to collectively settle a case prior to bringing the claim before the CAT, so long as the CAT then deems the terms of settlement 'just and reasonable'. The representatives may negotiate on behalf of all UK claimants (as part of one group) who have not 'opted-out' as well as those non-UK claimants that have 'opted-in'.

Implementing a redress scheme: The CRA provides for the Competition and Markets Authority ("CMA") to authorise voluntary redress schemes whereby companies that have been the subject of an infringement finding – by the CMA itself or the European Commission – may offer compensation in consequence of an infringement decision. In return, the CMA can take account of this form of cooperation when assessing the level of the fine. It is, however, important to note that the scheme will not have the effect of protecting the company in breach of competition rules from being subject to private damages actions.

The changes outlined under the CRA and applicable to private damages actions in competition law are significant. They are expected to have an impact on the number of claims brought before the CAT and the size of damages paid out to claimants. They broaden the horizon of consumer litigation and also ease the way for more business-to-business claims, particularly as SMEs are encouraged to seek redress for harm suffered due to infringing conduct by larger entities.

It should be noted that further reforms will soon be needed to bring UK law into alignment with the EU Directive 2014/104 of the European Parliament and the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (see VBB on Competition Law, Volume 2014, No. 11). The

EU Directive was adopted when the CRA had already been designed and its adoption process was in a final stage. Some aspects of the EU Directive, which will further facilitate private enforcement claims, were thus not covered by the CRA such as amendments to the applicable limitation periods under UK law, the introduction of a rebuttable presumption of harm and additional terms of settlement (i.e., when settling infringers can be asked to contribute to damages, or the size of reductions in damages claims in an action brought against a non-settling party involved in the infringement).

The full CRA can be accessed here: http://www.legislation.gov.uk/ukpga/2015/15/pdfs/ukpga_20150015_en.pdf