VAN BAEL & BELLIS

VOLUME 2015, Nº 6

June 2015

# VBB on Competition Law

## | HIGHLIGHTS

**MERGER CONTROL:** EU Commission conditionally approves online rights licensing and administration joint venture between collective management organisations

**ABUSE OF DOMINANT POSITION:** Swedish Competition Authority requests the Stockholm City Court to fine the Stockholm stock exchange for abuse of its dominant position

**CARTELS AND HORIZONTAL AGREEMENTS:**

| EU Court of Justice annuls fine reduction granted by the General Court in Northern Europe banana cartel case

| EU General Court reduces fine of Pacific Fruit in Southern Europe banana cartel case

| Belgian Competition Authority adopts its first settlement decision in supermarkets cartel case

**VERTICAL AGREEMENTS:**

| EU Commission investigates Amazon's e-books distribution contracts

| Quantitative selective distribution: the Paris Commercial Court rejects an action against a car manufacturer

**INTELLECTUAL PROPERTY/LICENSING:** UK Private copyright exception does not amount to state aid

**LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS:**

| ECJ largely confirms EU Commission's dawn raid powers subject to strict compliance with subject-matter of inspection decision

| Amendments to Hungarian Competition Act

### TOPICS COVERED IN THIS ISSUE



### JURISDICTIONS COVERED IN THIS ISSUE





Avenue Louise 165 Louizalaan
B-1050 Brussels – Belgium

Phone: +32 (0)2 647 73 50
Fax: +32 (0)2 640 64 99

vbb@vbb.com
www.vbb.com

**VBB on Competition Law** | Volume 2015, Nº 6

# Table of contents







Avenue Louise 165 Louizalaan
B-1050 Brussels – Belgium

Phone: +32 (0)2 647 73 50
Fax: +32 (0)2 640 64 99

vbb@vbb.com
www.vbb.com

**VBB on Competition Law** | Volume 2015, Nº 6

# Table of contents





Avenue Louise 165 Louizalaan
B-1050 Brussels – Belgium

Phone: +32 (0)2 647 73 50
Fax: +32 (0)2 640 64 99

vbb@vbb.com
www.vbb.com

# | MERGER CONTROL

**– EUROPEAN UNION LEVEL –**

***EU Commission conditionally approves online rights licensing and administration joint venture between collective management organisations***

On 16 June 2015, the EU Commission conditionally approved the proposed joint venture between music collective management organisations PRS for Music Limited ("PRSfM") of the UK, Föreningen Svenska Tonsättares Internationella Musikbyrå u.p.a. ("STIM") of Sweden, and Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte ("GEMA") of Germany. The joint venture will provide multi-territorial online music licenses for users and related copyright administration services to rightholders and other collecting societies.

Collective management organisations ("CMOs") represent the combined copyrights of their members, with one society typically managing a given right or set of rights for all artists in a given country, collectively constituting that society's repertoire. Traditionally, societies allow the licensing of their repertoire on a country-by-country basis through individual agreements with the corresponding CMOs in each country. The parties' joint venture seeks to offer multi-repertoire multi-territorial licenses for online platforms, that is, licenses covering multiple CMOs' repertoires and applicable for use in multiple countries.

Consequently, in the market for multi-repertoire multi-territorial licensing to users, the Commission found no concerns, as the parties had previously offered distinct repertoires, and the combined repertoire offered by the joint venture was considered to constitute a new product. Furthermore, the Commission determined that it should not be possible to charge higher royalty rates for the combined repertoire than for the parties' individual repertoires.

However, in the market for copyright administration services, such as the collection and processing of royalties from online platforms and the provision of database services, the Commission had several concerns. These concerns related primarily to so-called "Option 3 publishers", which license certain rights directly rather than through CMOs but rely upon CMOs for administration services.

First, the Commission was concerned that the joint venture could force Option 3 publishers to use the joint venture's services rather than those of other providers. Second, because PRSfM controls certain types of rights matching those held by Option 3 publishers but allows the publishers to license them together, the Commission was concerned that the joint venture would have an incentive to pressure Option 3 publishers to use its services. Third, the Commission was concerned that the joint venture could make it more difficult for customers to source certain services from competitors, either by prohibiting customers from doing so or by bundling certain kinds of administration services.

The parties therefore agreed to a package of behavioural commitments to address the Commission's concerns regarding copyright administration services:

- First, PRSfM agreed not to leverage its control over certain rights to force Option 3 publishers to use the joint venture's services.

- Second, the parties agreed to leave other CMOs and Option 3 publishers free to choose which administration services they want to use.

- Third, the joint venture agreed to offer key services to its customers on fair, reasonable, and non-discriminatory terms as compared to the terms offered to the joint venture's parents.

- Finally, the joint venture agreed to measures to ensure that customers remain effectively free to source only some copyright administration services from the joint venture and to contract with and even to switch to other providers for other services. These measures included a ban on exclusive contracts, the freedom for customers to terminate their contracts at any time, and the interoperability of the joint venture's database with third party processing solutions.

Based on these commitments, the Commission determined that the market remained open for entry by competing providers, such as other CMOs. It concluded that there were no further concerns and approved the creation of the joint venture, subject to the parties' commitments.

# ABUSE OF DOMINANT POSITION

**– EUROPEAN UNION LEVEL –**

***EU Commission market tests commitments by Bulgarian Energy Holding concerning the Bulgarian wholesale electricity market***

On 19 June 2015, the EU Commission announced that it was market testing commitments offered by Bulgarian Energy Holding ("BEH") to address competition concerns about BEH's behaviour on the non-regulated wholesale electricity market in Bulgaria.

The announcement follows the issuance by the Commission of a Statement of Objections ("SO") against BEH on 12 August 2014 for a suspected abuse of dominance (see VBB on Competition Law, Volume 2014, No. 8). According to a press release issued by the Commission at the time, it had taken the preliminary view that territorial restrictions on resales contained in BEH's electricity supply contracts with traders on the non-regulated Bulgarian wholesale electricity market may be in breach EU antitrust rules. The Commission also noted that BEH's contracts contained control and sanctioning mechanisms, allowing BEH to monitor and punish customers who fail to comply with these territorial restrictions.

As summarised in the Commission's press release, BEH has offered to address the Commission's concerns by offering to:

- set up a power exchange in Bulgaria with the assistance of an independent third party with expertise in the operation of power exchanges;
- proffer predetermined volumes of electricity on the day-ahead market on the new exchange for a period of five years;
- ensure the independence of the power exchange by transferring its control to the Bulgarian Ministry of Finance.

A summary of the proposed commitments has been published in the Official Journal and is available at http://eur-lex.europa.eu/legal-content/EN/TXT/?-qid=1434695085057&uri=OJ:JOC_2015_202_R_0002.

The full version can be viewed on the Commission's web page for public consultations and market tests at http://ec.europa.eu/competition/consultations/open.html.

The closing date for the submission of comments is 18 July 2015.

**– MEMBER STATE LEVEL –**

**FRANCE**

***French Competition Authority fines TDF € 5.6 million for abuse of dominance on the Eiffel Tower broadcasting market***

On 11 June 2015, the French Competition Authority ("FCA") imposed fines totalling € 5.6 million on broadcasting company TDF for engaging in practices aimed at foreclosing its competitors from the Eiffel Tower terrestrial broadcasting site in breach of Article 102 TFEU and its French equivalent.

The proceedings were triggered by a complaint lodged on 16 February 2007 by TowerCast against TDF – both broadcasting companies – alleging that TDF had abused its dominant position within the context of a tender offer organised in 2006 by the city of Paris concerning the renewal of the right to broadcast from the Eiffel Tower and for engaging in margin squeeze practices.

First, in its decision, the FCA considered that the broadcasting market of radio and TV programmes transmitted from the Eiffel Tower, due to its strategic importance, constituted a specific market. Thus, TDF, being the market leader and holder of: (i) a legal monopoly until 2006; and (ii) the Eiffel Tower's tenancy agreement, was ruled dominant on this market.

Second, the FCA found that TDF had abused its dominant position in the context of the tender offer and for engaging in margin squeeze practices. With respect to the tender offer, due to its past monopoly and its incumbent role on the market, TDF was the only party in possession of certain technical and price information that was essential for competitors to know in order to make complete and competitive bids. However, despite requests made by the city of Paris on behalf of the competitors, TDF provided such information either too late or inconclusively, thus preventing its competitors from competing fairly in the tender offer. The FCA also found that TDF, a vertically integrated company, engaged in margin squeeze practices by abusing its dominant position as the sole Eiffel Tower broadcaster.

As a result, the FCA imposed fines totalling € 5.66 million on TDF, including € 5 million for its abuse in the context of the renewal of the Eiffel Tower's tenancy agreement, and € 660,000 for engaging in margin squeezing. Both fines were increased by 25% as TDF was considered a repeat offender – it had been fined in 1999 for refusing to install and maintain broadcasting equipment, in a non-discriminatory and transparent way, on the sites it operated.

**SWEDEN**

***Swedish Competition Authority requests the Stockholm City Court to fine the Stockholm stock exchange for abuse of its dominant position***

On 28 May 2015, the Swedish Competition Authority ("SCA") announced that it has submitted a summons application to the Stockholm City Court by which it asks the Court to impose an administrative fine of SEK 31 million (around € 3.4 million) on Nasdaq OMX ("Nasdaq"), the owners of the Stockholm stock exchange, for having abused its dominant position on the market for services relating to the trade of Swedish, Danish and Finnish equities.

The SCA's summons application follows from a complaint lodged by the multilateral trading platform Burgundy in late 2010 against Nasdaq, alleging that Nasdaq had abused its dominant market position in October 2010 by preventing Burgundy from placing its matching engine in a key data centre. The data centre at issue contained Nasdaq's own matching engine as well as the trading equipment of a large number of securities traders.

In its summons application, the SCA held that Nasdaq had used coercive methods to exclude Burgundy from the relevant data centre and that, by doing so, it had sought to foreclose a close competitor from the market. According to the SCA, high-frequency trading of equities requires physical proximity between the customers' trading equipment and trading facilities, and that the cable length between the trading and market equipment is of great importance. Thus, if Burgundy had been able to place its matching engine in the data centre at issue, actual and potential clients of Burgundy would have been able to communicate faster and more cheaply with Burgundy. The SCA found that, by being forced to place its matching engine in another data centre, Burgundy's competitive position in relation to Nasdaq was weakened.

As a result, the SCA requested the Stockholm City Court to impose a fine of SEK 31 million (around € 3.4 million) on Nasdaq for having breached Article 102 TFEU and the corresponding Article 7(2) of the Swedish Competition Act.

# | CARTELS AND HORIZONTAL AGREEMENTS

**– EUROPEAN UNION LEVEL –**

***EU Commission fines food packaging cartel***

On 24 June 2015, the Commission announced its decision finding five separate cartels among eight producers and two distributors of polystyrene foam and polypropylene rigid trays used for the packaging of food sold in shops and supermarkets. In particular, the Commission found that the companies involved fixed prices, allocated customers, rigged bids, and exchanged commercially-sensitive information, all related to the sale of such trays. These cartel activities were conducted through bilateral and multilateral emails, phone calls and meetings, often held in connection with legitimate industry gatherings.

The case began when Linpac, a UK supplier, revealed the existence of the cartel to the Commission. Thereafter, the Commission conducted unannounced inspections in June 2008, following which at least six other companies admitted the infringement and sought leniency. In the decision, the Commission imposed fines totalling € 115.7 million on the producers, with Linpac receiving full immunity and six additional companies receiving fine reductions between 10-50% for their cooperation under the 2006 Leniency Notice. The two distributors involved received significantly lower fines totalling only € 132,000.

***EU Commission fines two parking heater suppliers for cartel activity***

On 17 June 2015, the Commission issued a press release announcing its decision to impose fines on two suppliers of automotive parking and auxiliary heaters for engaging in cartel activity. In the announcement, the Commissioner for Competition, Margrethe Vestager, noted that the decision "is a clear signal to companies colluding – or thinking about it – that a cartel will be found out, no matter how few the participants".

According to the press release, Eberspächer and Webasto coordinated prices and allocated customers for two types of heaters: fuel-operated heaters for parked cars and trucks and auxiliary heaters for running cars and trucks. Upon receiving customer requests for price quotations, the suppliers discussed prices and agreed as to which would submit the lowest bid and win the order. These activities, together with the exchange of commercially-sensitive information, took place between 2001 and 2011 and extended throughout the European Economic Area. The suppliers also harmonised their annual price list and discounts in regards to sales involving dealers in Germany and Austria.

The investigation began when Webasto revealed the existence of the cartel to the Commission, in exchange for leniency. Thereafter, the Commission conducted an unannounced inspection at Eberspächer's premises, after which Eberspächer also sought leniency. For revealing the infringement, Webasto received full immunity and therefore avoided a fine of € 222 million. Eberspächer received a fine reduction of 45% for its cooperation, as well as a further reduction of 10% due to the parties' agreement to settle, resulting in a net fine on Eberspächer of € 68.2 million.

***EU Court of Justice annuls fine reduction granted by the General Court in Northern Europe banana cartel case***

On 24 June 2015, the Court of Justice of the European Union ("ECJ") held that providing information to the EU Commission in response to a non-binding request for information does not constitute a basis for a fine reduction. Correspondingly, the ECJ partially annulled the prior judgment of the General Court ("GC") granting such a reduction, and increased the fine on Weichert and Del Monte from € 8.83 million to € 9.8 million. In the judgment, the ECJ also dismissed Del Monte's separate appeal which argued that it should not be held liable for Weichert's participation in the cartel.

The present judgment follows from the Commission's 2008 decision, finding that the banana suppliers Chiquita, Dole and Weichert engaged in weekly bilateral pre-pricing communications between 2000 and 2002, and imposing fines of € 45.6 million on Dole and € 14.7 million on Weichert and Del Monte (see VBB on Competition Law, Volume 2008, No. 10).

Del Monte and Weichert, among others, appealed the decision to the GC. In the subsequent judgment of 14 March 2013, the GC reduced the fine of Del Monte and Weichert as follows: a 60% reduction due to the regulatory regime in the banana sector, a 20% reduction due to Weichert's limited participation in the cartel, and a 10% reduction for Weichert's cooperation during the administrative procedure, resulting in a net fine of € 8.83 million (see VBB on Competition Law, Volume 2013, No. 3).

On appeal by the Commission, the ECJ overturned the GC's grant of a 10% fine reduction for Weichert's cooperation, holding that because the information provided by Weichert was supplied in response to a Commission's request for information, it did not justify an additional reduction. Instead, the Court indicated that, in order to merit a reduction, "the conduct of the undertaking concerned must not only facilitate the Commission's task of establishing the existence of the infringement but also reveal a genuine spirit of cooperation". Thus, despite the fact that the Commission's request for information was non-binding, the Court held that supplying information in response to such a request does not merit a fine reduction.

***EU General Court reduces fine of Pacific Fruit in Southern Europe banana cartel case***

On 16 June 2015, the General Court ("GC") upheld the Commission's decision finding that Pacific Fruit had participated in an illegal price-fixing cartel for bananas. However, the GC reduced the fine imposed on Pacific Fruit from € 8.9 million to € 6.7 million because the Commission failed to prove the entire duration of the cartel.

The judgment arises from the EU Commission's 2011 decision finding that Chiquita and Pacific Fruit, two of the main importers and sellers of bananas in the EU, had fixed weekly sales prices and exchanged price information from July 2004 to April 2005 related to the sale of bananas in Italy, Greece and Portugal. The decision granted Chiquita immunity from fines for revealing the infringement, but imposed a fine of € 8.9 million on Pacific Fruit. Pacific Fruit appealed the decision to the GC.

In its judgment, the GC confirmed the Commission's interpretation of the evidence used to establish the infringement and its characterisation as an infringement by object. The GC also rejected Pacific Fruit's claim challenging the Commission's reliance on documents collected and transmitted by the Italian tax authority on the grounds that the company had not established that such transmission, the lawfulness of which is governed by national law, was declared unlawful by a national court.

However, the GC ruled that the Commission had failed to establish the continuous nature of the infringement. Specifically, the GC concluded that the infringement was interrupted because the Commission lacked documentary evidence that Pacific Fruit had participated in the infringement for five of the eight months cited, from August 2004 until January 2005. Although the leniency applicant had provided evidence of Pacific Fruit's participation during this period, the GC held that corporate statements must be supported by other evidence (which was not produced) if they are disputed.

To reflect the change in the duration of the infringement, the GC reduced the fine from € 8.9 million to € 6.7 million. Interestingly, while the duration of the infringement was substantially reduced, the amount of the fine was not. This approach may be explained by the fining methodology of the 2006 Fining Guidelines, which imposes a high entry fee, irrespective of the duration of the infringement, for the purposes of deterring undertakings from entering into a cartel, even for a short period.

## – MEMBER STATE LEVEL –

### AUSTRIA

***Austrian Cartel Court fines sports article retailers for horizontal agreements***

On 28 April 2015, the Austrian Cartel Court, upon application of the Austrian Federal Competition Office, imposed a fine totalling € 419,200 against four sports article retailers from St. Anton am Arlberg for anti-competitive behaviour from 2002 to 2014. The four retailers involved (Sport Pangratz & Ess, Alber Sport, Sport Jennewein and, to a lesser extent, Sport Fauner) were found to have fixed prices for winter sport articles and related services and divided the market of travel agencies in the form of non-enticement agreements. Further, some of the sport article retailers maintained prohibited recommendations in relation to winter sport articles and related services. Since the parties involved decided not to appeal, the decision of the Cartel Court is final.

BELGIUM

***Belgian Competition Authority adopts its first settlement decision in supermarkets cartel case***

On 22 June 2015, the College of Competition Prosecutors (Auditoraat / Auditorat) of the Belgian Competition Authority (Belgische Mededingingsautoriteit / Autorité belge de la concurrence) ("BCA") adopted its first ever settlement decision in a cartel case involving 18 retailers and suppliers of drugstore, perfumery and hygiene products ("DPH").

The BCA found that retailers coordinated price increases of specific DPH products in Belgium by exchanging information with other retailers indirectly via each of the relevant suppliers, contrary to Article IV.1 of the Code of Economic Law (Wetboek economisch recht / Code de droit économique) and Article 101 of the Treaty on the Functioning of the European Union. According to the BCA, "the core of the infringement was at retail level, with suppliers acting as intermediaries and facilitators, each of them exclusively for their own products". The BCA found that no direct communication had taken place between retailers and no communication at all had taken place between suppliers.

The investigation started in late 2006 when a supplier, Colgate-Palmolive, sought immunity from fines under the Belgian leniency programme. The BCA then carried out inspections at the premises of retailers Carrefour, Colruyt, Delhaize and Intermarché in April 2007, which uncovered further evidence and led to the prosecution of seven retailers and 11 suppliers.

This case took an unexpected turn in late 2013, with the entry into force of the new Code of Economic Law. The new Code enabled undertakings to challenge the legality of investigative measures before the adoption of a final decision on the merits. As a result, many of the companies involved challenged the legality of the 2007 inspections before the Brussels Court of Appeal. However, the College of Competition Prosecutors made use of the possibility included in the new Code to initiate settlement proceedings. All 18 undertakings agreed to settle, which implies an acknowledgement on their part of their involvement in the infringement as well as an acceptance of the fines in return for a shortened procedure and a 10% fine reduction.

Notwithstanding this fine reduction, the BCA imposed a record fine of € 174 million in total, including € 36 million for Carrefour, € 31 million for Colruyt and € 29 million for Procter & Gamble.

Since all parties agreed to settle, the BCA's decision cannot be appealed. In addition, as a further condition of settlement, the BCA required all undertakings that had challenged the legality of the inspections to withdraw their appeals and interventions in these appeals. Therefore, it seems that this long-running case of nine years has finally come to an end.

GERMANY

***German Federal Cartel Office imposes a € 75 million fine against manufacturers of automotive parts***

According to a press release issued on 24 June 2015, the German Federal Cartel Office ("FCO") imposed a total fine of € 75 million against five manufacturers of acoustic components for the automotive industry, as well responsible individuals. According to the FCO, the manufacturers had rigged bids between 2005 and 2013 through bilateral and multilateral contacts. The parties also agreed on minimum prices, the passing-on of price increases for input material, discounts, compensation for tool costs and the inclusion of price escalation clauses.

This fining decision is the first arising from proceedings triggered by an anonymous submission to the electronic whistle-blowing system of the FCO. The amounts of the individual fines took account of the strong market power and behaviour of the automotive industry and the fact that all companies cooperated with the FCO. The first company that cooperated with the FCO obtained immunity from fines. Furthermore, all companies and individuals concerned entered into a settlement with the FCO.

***L'Oreal and Markenverband e.V. withdraw appeal of information exchange fines***

Between 2011 and March 2013, the German Federal Cartel Office ("FCO") imposed fines totalling € 63 million against

15 companies, the trade association Markenverband and responsible individuals for anti-competitive information exchanges in the sector for personal care and cleaning products (see VBB on Competition Law, Volume 2013, No. 3 and Volume 2011, No. 11). The FCO found that, between 2004 and 2006, the companies exchanged, within a working committee organised by Markenverband, information about upcoming price increases, rebate requests from the retail trade and details about on-going negotiations with retailers. Markenverband was fined for facilitating the information exchange.

Five companies, including L'Oreal and Markenverband, appealed to the Higher Regional Court of Düsseldorf against the fining decision of the FCO. However, after the cement cartel decision of the German Federal Court dealing with the interpretation of the fining provision, according to which fines must not exceed 10% of the total turnover of such undertakings, which, according to the appraisal of the FCO might result in higher fines being imposed (see VBB on Competition Law, Volume 2013, No. 4), four complainants withdrew their appeal in 2013 and 2014. When the Higher Regional Court of Düsseldorf summoned the remaining complainants to the hearing in April 2015, it informed the parties that if the allegations of the FCO are confirmed, depending on the turnover of L'Oreal, the current level of the fine could increase substantially for L'Oreal. As a consequence, L'Oreal and Markenverband withdrew their appeal.

***German Federal Court of Justice confirms that fines may only be attributed to a legal successor in exceptional circumstances if the acquisition took place before 30 June 2013***

In a recently published ruling of the German Federal Court of Justice ("the Court") of 16 December 2014, the Court held that fines for anti-competitive conduct may, under the Code of Administrative Offences ("OWiG") prior to 30 June 2013, only be attributed to a legal successor if both entities are virtually identical from an economic perspective, thereby confirming the prior case law of the Court (see VBB on Competition Law, Volume 2011, No. 12).

The case arose from the 2009 decision of the German Federal Cartel Office ("FCO"), imposing fines against manufacturers of dry mortar for engaging in cartel activities (see VBB on Competition Law, Volume 2009, No. 7), including a € 12 million fine against Maxit Deutschland ("Maxit"), which was subsequently acquired by St. Gobain Weber ("St Gobain") a few months after the FCO's decision.

In its appeal decision, the Court confirmed the prior judgment of the Higher Regional Court of Düsseldorf, holding that the fine of Maxit could not be attributed to St Gobain. Under the OWiG, applicable until 29 June 2013, the attribution of a fine required a direct relationship between the cartel offender and the legal person for which the offender has acted. This direct relationship ceases to exist if the relevant legal entity is merged into a new legal person. The Court has held that a cartel fine can however be attributed to a legal successor in exceptional circumstances, specifically if the acquired assets remain financially separate, are used in the same or a similar way and constitute a substantial part of the assets of the new legal entity. Even though the Court found that Maxit's assets constituted approximately two thirds of St Gobain's post-merger assets, the Court nevertheless held that it was not sufficient to attribute liability to St Gobain.

Under EU law, Article 23 of the Regulation 1/2003 allows for liability of the legal successor. Generally, in case of doubt the national court has to interpret national law in conformity with EU law. The Court, however, found that the German OWiG cannot be interpreted in conformity with EU law to generally allow for a liability of the legal successor as this would contravene the admissible methods of finding justice, such as an interpretation contrary to the clear wording of the law. It held that the fact that national law might then be found to infringe EU law can equally not justify an interpretation in conformity with EU law.

According to the Court, EU law can also not be applied directly. Namely, Article 23 of the Regulation 1/2003 cannot be applied by the German competition authority as the fining powers set out therein are granted solely to the European Commission. Further, Article 5 of Regulation 1/2003 dealing with the powers of the competition authorities of the Member States does not form the legal basis for a fining decision under national law and does not provide for harmonisation of national sanctions.

This ruling deals with a cartel infringement, fining decision and acquisition prior to 30 June 2013, after which the law was changed and now generally allows the attribution of liability to a legal successor in case of a universal succession. However, as the amended law cannot be applied retroactively, it could not form a basis for attributing liability to St Gobain in the present case. According to the FCO, this decision will potentially have consequences for other pending cases.

**SPAIN**

***Spanish Competition Authority fines cardboard cartel € 57.7 million***

On 23 June 2015, the Spanish Competition Authority ("CNMC") imposed fines amounting to € 57.7 million on 18 companies active on the cardboard sector, as well as the sector association. The CNMC found that the companies exchanged commercially-sensitive information, coordinated price increases and allocated customers on two separate markets: the market for the manufacture of paper used in corrugated cardboard, and the market for the preparation of corrugated cardboard and its transformation into wrapping and packaging materials. The companies used, in particular, the sector association to exchange commercially-sensitive information and to issue recommendations on cardboard prices. The infringement lasted from 2002 to 2013.

***Spanish Competition Authority fines car dealer cartel € 41.1 million***

On 5 June 2015, the Spanish Competition Authority ("CNMC") imposed a € 41.1 million fine on 95 car dealers of Audi, Volkswagen and Seat, two consulting firms and two car dealers' associations. The CNMC found that the dealers agreed on maximum rebates and other commercial conditions and exchanged commercially-sensitive information on the market for passenger cars, and that the consulting firms and the associations facilitated the cartel activities. The anti-competitive practices affected seven regions of Spain, namely, Madrid, Cataluña, Andalucía, the "North Zone", Asturias, Valencia (with respect to Audi-VW) and Madrid (with respect to Seat). The longest infringement started in 2006 and finished in June 2013. The investigations were triggered by leniency applications lodged by Seat S.A, which received immunity from fines.

**– OTHER DEVELOPMENTS –**

EUROPEAN COMMISSION: On 24 June 2015, the EU Commission announced that it has issued a Statement of Objections to five recycling companies, indicating concerns that the companies coordinated to fix the purchase prices they pay for scrap lead-acid batteries in Belgium, France, Germany and the Netherlands. Such allegations concerning the alignment of purchase prices for inputs are unusual for the Commission, which is typically more concerned with alignment of sale prices to customers.

# | VERTICAL AGREEMENTS

**– EUROPEAN UNION LEVEL –**

***EU Commission investigates Amazon's e-books distribution contracts***

On 11 June 2015, the EU Commission issued a press release announcing that it has opened an investigation into Amazon's distribution contracts with publishers of e-books.

In particular, the Commission appears to be mostly concerned by clauses which give Amazon the right: (i) to be informed of more favourable or alternative terms offered by publishers to its competitors; and/or (ii) to be granted terms and conditions at least as favourable as those offered by publishers to its competitors.

The press release specifies that the above-mentioned clauses may shield Amazon from competition by making it more difficult for other e-book distributors to compete with the electronic commerce company and to develop new and innovative products and services. According to the Commission, if this were to be confirmed, the above-mentioned clauses may constitute an abuse of a dominant position.

This case highlights the competition law risks related to "parity" clauses (known also as Most Favoured Nation ("MFN") clauses). So far, price parity clauses have attracted concerns from the Commission in the E-Books case as well as the national competition authorities in the HRS and Booking.com cases (see, e.g., VBB on Competition Law, Volume 2014, No. 3 and VBB on Competition Law, Volume 2015, No. 5).

**– MEMBER STATE LEVEL –**

**FRANCE**

***Quantitative selective distribution: the Paris Commercial Court rejects an action against a car manufacturer***

On 16 June 2015, the Paris Commercial Court (the "Court") rejected a claim for damages brought by Siac, a former member of Renault's selective distribution system, against Renault. Siac, which had been a dealer of new Renault cars for a period of forty-five years, primarily argued that: (i) Renault had provided wrongful reasons for the termination of its distribution contract; (ii) such a termination amounted to "brutal" termination under French law; and (iii) Renault did not objectively examine its new application to re-enter the distribution network in 2009 to sell cars.

With regard to the claim of wrongful termination, the Court noted that the then-applicable motor vehicle block exemption Regulation 1400/2002 ("Former MVBER") required car manufacturers to state objective and transparent reasons for terminating distribution agreements in order to ensure that termination was not in fact being used by the supplier to sanction practices of the dealer which the supplier could not validly restrict under the block exemption. Since Renault had explained the termination on the basis of the weak commercial performance of the dealer and that Siac had failed to demonstrate that termination was instead a consequence of conduct which the supplier could not validly restrict under the block exemption, the Court ruled that Renault's termination was not wrongful. In respect of the alleged "brutal" termination, the Court found that Renault had provided two years of prior notice to Siac, which is in line with the requirements set out in the Former MVBER. Since the termination period was in line with the distribution contract, EU competition law and industry practice, the Court rejected the claim.

Finally, applying the Auto 24 ruling of the EU Court of Justice ("ECJ") from 2011, the Court also found that Renault did not wrongfully reject Siac's new application to become a member of its distribution network in 2009 to sell cars. Renault operated a quantitative selective distribution system for the sale of cars and apparently applied a cap (numerus clausus) which fixed the total number of dealers it appointed. When Siac re-applied prior to the termination taking effect, Renault informed Siac that the total number of dealers in the network would be reduced by one when Siac's termination took effect and that it would not appoint another dealer from the town where Siac's dealership was located.

According to the judgment, it follows from the Former MVBER that a car manufacturer can apply whatever quantitative criteria it chooses to limit the number of dealers and, provided the criteria are defined, the manufacturer is not required to justify these criteria or, as the ECJ had also held in Auto 24, to apply them in a uniform or non-discriminatory manner. The Court found that Renault had defined the quantitative basis on which it selected new dealers by informing Siac that the maximum number of dealers in the network would be equal to the total number of dealership contracts that would remain in force after Siac's termination. The Court did need to consider whether or not this basis was reasonable and, as a result, it found that Renault was not required to examine Siac's new application to become a member of its distribution network. Furthermore, it found that it was not inconsistent with Renault's quantitative criteria that another existing Renault dealer opened a sales outlet in the town where the Siac dealership was located.

The judgment is significant in that the Court strongly endorses the freedom of suppliers to select dealers in a quantitative selective distribution system in the manner in which they consider best reflects their commercial interests. In doing so, the Court avoids taking a formalistic approach in considering the apparent technical requirement to "define" quantitative criteria that applied under the Former MVBER. This freedom should be even stronger under the current block exemption regime that governs vertical agreements in all sectors as – in the absence of any reference to quantitative criteria in Regulation 330/2010 – it is debatable whether there is now any requirement to define specifically quantitative criteria.

### – OTHER DEVELOPMENTS –

POLAND: According to a press release issued by the Polish Competition Authority ("PCA") on 8 June 2015, the PCA has invited companies using price parity clauses in the online hotel booking sector to voluntarily abandon the implementation of such clauses. The PCA specified that, if the companies were to stop implementing such clauses, the authority would refrain from opening a formal investigation.

# | INTELLECTUAL PROPERTY/LICENSING

**– MEMBER STATE LEVEL –**

**UNITED KINGDOM**

***UK Private copyright exception does not amount to state aid***

On 19 June 2015, the UK High Court ruled that the government's decision to introduce private copying rules, which allow people who have acquired permanent and legal copies of copyrighted works to make personal copies of that material, without introducing a mechanism to compensate rights holders for that activity did not amount to unlawful state aid. Still, these copyright rules were declared illegal on other grounds.

EU copyright laws require EU countries that elect to introduce a new private copying exception into their national laws to ensure that rights holders receive fair compensation for that activity. However, Directive 2001/29 on the harmonisation of certain aspects of copyright offers EU countries the possibility to introduce such an exception without an associated mechanism for compensating rights holders where only de minimis harm to rights holders would arise as a result of private copying activities. This was the path chosen by the UK government: it did not envisage a compensation mechanism because it considered that the private copying exception would not result in more than de minimis harm for rights holders.

The British Academy of Songwriters, Composers and Authors (BASCA), the Musicians' Union (MU) and UK Music took issue with the position of the UK government and claimed that a compensation mechanism should be set up for the harm caused by the new copyright exception. In parallel, the Incorporated Society of Musicians Limited, an intervener, supported the position of the claimants arguing that the introduction of the private copyright exception in the absence of a compensation mechanism amounted to illegal state aid contrary to Article 107(1) of the Treaty on the Functioning of the European Union ("TFEU").

The intervener argued that the copyright exception would create substantial benefits for technology firms, such as cloud storage providers, in the forms of reduced: (i) costs due to not having to pay for, or reduce licence fees for, storing copies in a private cloud; (ii) administrative costs due to not having to negotiate licenses; and (iii) legal risk and uncertainty. The intervener further submitted that the economic advantages granted to technology firms in the form of the new copyright exception were not benefits they would have received under ordinary market conditions. Finally, it was argued that the UK Government, despite its prerogative pursuant to EU law to impose a private copying levy on technology firms, had foregone potential revenue.

The High Court dismissed the claim of the intervener on the grounds that Article 107 TFEU did not apply because there was no aid granted through State resources. The High Court considered that, according to settled EU case law, state aid rules do not apply to a generalised legislative scheme unless there is a clear and direct nexus between the advantage and the foregoing of revenue. In the present case, however, the link between the advantage conferred and the foregoing of revenues on the part of the State was deemed far too remote, indirect and informal for it to amount to aid through State resources.

The High Court was also convinced by the fact that the alleged financial advantage granted to technology firms was "inherent" in the modification to the copyright law – an incidental consequence of the introduction of a general legislative measure designed to meet other legitimate aims and objectives. The High Court added that any ruling to the contrary would unduly expand the scope of application of the state aid rules. It would cause many pieces of legislation to be considered as potential aid simply because they conferred a collateral benefit upon a definable category of natural or legal persons who were in business.

# LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

**– EUROPEAN UNION LEVEL –**

***ECJ largely confirms EU Commission's dawn raid powers subject to strict compliance with subject-matter of inspection decision***

On 18 June 2015, the Court of Justice of the European Union ("ECJ") delivered a judgment on an appeal brought by German railway company Deutsche Bahn AG against a General Court ("GC") judgment whereby Deutsche Bahn's action for the annulment of three Commission inspection decisions and of the measures taken under those inspections was dismissed in their entirety. The ECJ partially set aside the judgment of the GC (Case C-583/13 P, Deutsche Bahn and Others v Commission).

First, Deutsche Bahn argued that there had been a misinterpretation and misapplication of the fundamental right to the inviolability of the home provided for in Article 7 of the Charter of Fundamental Rights and Article 8 of the European Convention for the Protection of Human Rights ("ECHR"). The appellant argued that the GC disregarded the aforementioned fundamental right when it ruled that the lack of prior judicial authorisation did not affect the lawfulness of the contested inspection decisions.

The ECJ confirmed the ruling of the GC stating that interference by a public authority can go further for professional or commercial premises or activities than in other cases. Moreover, the lack of prior judicial authorisation is only one of the factors to be borne in mind when determining whether Article 8 ECHR has been infringed. Therefore, the GC did not err in law in holding that the lack of prior judicial authorisation was incapable, in itself, of rendering the inspection measure unlawful.

The ECJ further held that the GC's detailed examination satisfied the requirements of the European Court of Human Rights ("ECtHR") and that all the safeguards were guaranteed in the present case. In addition, the presence of a post-inspection judicial review is considered by the ECtHR as capable of offsetting the lack of prior judicial authorisation and thus capable of constituting a fundamental guarantee in order to ensure the compatibility of the inspection measure in question with Article 8 ECHR. This is the case under EU law as well as Article 20(8) of Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty ("Regulation 1/2003") which expressly states that a Commission inspection decision is subject to review by the ECJ. Consequently, there is no infringement of Article 8 ECHR or Article 7 of the Charter and the first ground of appeal was rejected.

Second, Deutsche Bahn argued that there had been a misinterpretation and misapplication of the right to effective judicial protection provided for in Article 47 of the Charter and Article 6(1) ECHR, as a pre-inspection judicial review should be available.

The ECJ stated that the GC had rightly held that the key issue is the intensity of the review and providing an appropriate remedy when needed, and not the point in time when the review is carried out. It is open to undertakings that have undergone an inspection to challenge the lawfulness of the inspection decision before the EU Courts. They need not wait until the Commission has adopted the final decision on the suspected infringement to bring an action for annulment. Furthermore, if the investigation decision is annulled or it is found that there has been an irregularity in the conduct of the investigation, the Commission will be prevented from using any documents or evidence which it might have obtained through its investigations. Hence, Article 6(1) ECHR and Article 47 of the Charter are not disregarded by there not being any prior judicial review (post-inspection judicial review is sufficient) and the second ground of appeal was also rejected.

Third, Deutsche Bahn argued that there had been an infringement of the right of defence due to irregularities vitiating the conduct of the first inspection carried out by the Commission in its premises.

The ECJ recalled that as per Article 20(4) of Regulation 1/2003, the Commission is required to state reasons for the decision ordering an inspection by specifying its subject matter and purpose. Under Article 28(1) of Regulation 1/2003, information obtained during investigations must not be used for purposes other than those indicated in the inspection warrant or decision. It follows that the Commission's agents may only search for documents coming within the scope of the subject-matter of the inspection.

In the present case, it had been established that, before the first inspection, the Commission had informed its agents of other potentially anti-competitive practices attributed to Deutsche Bahn which were not covered by the decision authorising the inspection. The ECJ therefore considered that the first inspection was vitiated by irregularity since the Commission's agents, being previously in possession of information unrelated to the subject-matter of the inspection, proceeded to seize documents falling outside the scope of that inspection. Additionally, the ECJ noted that: (i) the second inspection decision was adopted while the first one was still underway; and (ii) the third inspection was partially based on information gathered during the first two inspections. Hence, the Court concluded that the conditions under which information concerning another suspected infringement was gathered during the first inspection, are capable of affecting the legality of the second and third decisions given the importance of the information gathered during the first inspection in triggering the second and third inspections.

Consequently, the ECJ held that the GC had erred in law in holding that the Commission had valid reasons for its conduct, that is, providing the officials with general background information on the case, as the information concerned a separate potential infringement. Further, the Commission should have provided reasons when it was clear that the information fell outside the subject matter of the first inspection decision. It disregarded the safeguards forming the framework for its powers of inspection. Thus, the ECJ upheld the third ground of appeal.

Therefore, the ECJ set aside the judgment of the GC in so far as it dismissed the actions brought by Deutsche Bahn against the second and third inspection decisions and annulled the second and third inspection decisions. It dismissed the remainder of the appeal.

***DG Competition publishes best practices on disclosure of information in data rooms***

On 2 June 2015, the Directorate-General for Competition ("DG Competition") published its best practices on disclosure of information in data rooms in Article 101/102 and merger control proceedings. Such best practices provide practical guidance on when and how to use data rooms to disclose in a restricted manner business secrets and other confidential information obtained during proceedings under EU antitrust rules as well as under the Merger Regulation. They explain the role of data rooms, the general principles applied by DG Competition in deciding whether to organise a data room, the scope of the data included in the data room, the organisation of data rooms as well as the involvement of data providers and the role of the Hearing Officer.

The best practices state as a general principle that data rooms are aimed at giving addressees of a Statement of Objections access to the Commission's file in order to protect their rights of defence in exceptional cases where meaningful non-confidential versions of the file cannot be provided or would be excessively burdensome. Therefore, the data room procedure seeks to balance the Commission's duty to protect confidential information of the data providers and the rights of the defence of addressees of a Statement of Objections. It is designed as a unique tool for allowing access to addressees of a Statement of Objections to confidential information included in the Commission's file in a restricted manner, by limiting the number and/or category of persons having access to and use of the information to the extent strictly necessary for the exercise of rights of defence. According to the best practices, DG Competition can decide at its sole discretion whether a data room procedure is appropriate in a particular case taking into account the circumstances of the case at hand, the nature and degree of sensitivity of the information, the progress of the case, the resource implications of operating data rooms, the risk of information leaks and the need for expedition.

With regard to the scope of the data included in the data room, the best practices recall that data rooms have been used mostly for the disclosure of quantitative data relied on in a Statement of Objections, which includes data on sales, price, costs, margins, etc. In exceptional cases, access has also been granted to qualitative data, such as internal strategy documents, to which the same basic principles apply. In addition, the best practices provide that the Commission may anonymise certain data included in the data room by taking any measure to protect the identity and confidentiality of data providers including translating all documents into the same language, removing their document IDs, changing the currency of economic values, redacting countries and territories or aggregating figures.

The best practices also provide practical guidance on the organisation of data rooms. As for the timing of such organisation, although they can be organised at any moment, it is specified that they will normally take place before the oral hearing. The guidance also provides that data room participants are in principle limited to the external economic advisors and external legal counsel of the addressees of a Statement of Objections. In addition, the best practices set out the rules which are to be respected such as the prohibition to take any copy or note out of the data room, the prohibition to progress any external communication from the data room or the obligation for the external advisors to sign a non-disclosure agreement prior to getting access to the data room. They also provide guidance on the "data room report" which is the only document that can be communicated by the external advisors to the addressees of the Statement of Objections with regard to the information in the data room and can only contain non-confidential information after scrutiny by DG Competition services. Finally, the guidance warns that the lack of compliance with the data room rules will result in expulsion from the data room and may also result in damages actions and complaints before the relevant bar associations or other relevant associations in case of violation of deontological rules.

In addition, the best practices include provisions regarding the involvement of data providers, whose consent on the organisation of a data room will be sought and who will be entitled to express concerns on the data room procedure. It follows from the best practices that the data providers' legal counsel may be granted access to the data room for the sole purpose of ensuring that appropriate safeguards are in place.

Finally, persisting disagreement between DG Competition and the addressees of a Statement of Objections in relation to the disclosure of confidential information may be brought before the Hearing Officer who may decide on the issue, including by ordering the disclosure of confidential information in a data room.

## – MEMBER STATE LEVEL–

### HUNGARY

***Amendments to Hungarian Competition Act***

On 18 June 2015, various amendments to the Hungarian Competition Act (the "Tpvt") were published in Hungary's Official Journal. The amendments introduce, in particular, the following changes:

- A concentration may be notified only after the publication of the invitation to tender, the conclusion of the contract or the acquisition of the controlling rights, whichever of these events is the earliest (which means that a "good faith intention to conclude an agreement", which is considered to be sufficient under EU law, does not seem to suffice under the amended provisions of the Tpvt).

- The relevant turnover thresholds in merger proceedings shall be calculated on the basis of the most recent business year for which a valid annual report is available at the moment of the merger filing (rather than, as previously required, on the basis of the most recent business year for which a valid annual report is available at the moment of the publication of the invitation to tender, the conclusion of the contract or the acquisition of the controlling rights – whichever of these events is the earliest).

- Besides imposing fines, the Hungarian Competition Authority (the "GVH") is now empowered to sanction competition law infringements committed by small and medium-sized enterprises ("SMEs") by issuing warnings and, at the same time, imposing the obligation to implement a compliance program. Warnings may be issued only to SMEs and only if: (i) the SME concerned has never before infringed competition law; (ii) the infringement in question does not violate EU competition law; (iii) the infringement in question does not involve bid rigging; and (iv) the infringement in question was not committed against particularly vulnerable persons.

- The GVH is again entitled to impose sanctions for anti-competitive practices concerning agricultural products if the infringement in question infringes EU competition law (whereas, previously, since 2012, the GVH was essentially prevented from independently sanctioning any kind of anti-competitive practice in the agricultural sector – see VBB on Competition Law, Volume 2014, No 5, p. 11).

These amendments entered in force on 19 June 2015.

**– OTHER DEVELOPMENTS–**

EUROPEAN UNION: On 4 June 2015, the European Commission published its Report on Competition Policy 2014. The Report provides an overview of the most important competition policy developments and enforcement actions taken by the Commission in 2014. It is accompanied by a Commission Staff Working Paper, which describes these developments in more detail. In its 2014 Report, the Commission puts a particular emphasis on the completion of a connected digital single market, the improvement of the energy markets and the achievement of a fairer and more transparent financial sector. The Report and Staff Working Paper are available here: http://ec.europa.eu/competition/publications/annual_report/

EUROPEAN UNION: On 24 June 2015, the European Commission announced that Johannes Laitenberger will take over the function of Director-General of DG Competition as of 1 September 2015. Mr Laitenberger, a German citizen with a law background, joined the Commission in 1999. He was case-handler within DG Competition for a few months and then was part of and later headed the cabinet of Commissioner Viviane Reding. He also headed the cabinet of José Manuel Barroso, then President of the Commission. He is now Deputy Director-General of the Commission's Legal Service. Mr. Laitenberger will replace Alexander Italianer who will be appointed Secretary-General of the Commission as of 1 September 2015. A curriculum vitae of Johannes Laitenberger is available here: http://ec.europa.eu/civil_service/docs/directors_general/laitenberger_en.pdf

Avenue Louise 165 Louizalaan
B-1050 Brussels
Belgium

Phone: +32 (0)2 647 73 50
Fax: +32 (0)2 640 64 99

**vbb@vbb.com**
**www.vbb.com**