BELGIUM

This section reviews developments under Book IV of the Belgian Code of Economic Law ("CEL") on the Protection of Competition, which is enforced by the Belgian Competition Authority ("the BCA"). Within the BCA, the Prosecutor General and its staff of prosecutors (collectively, the "Auditorate") investigate alleged restrictive practices and concentrations, while the Competition College (the "College") functions as the decision-making body. Prior to September 6, 2013, Belgian competition law was codified in the Act on the Protection of Economic Competition of September 15, 2006 ("APEC") and enforced by the Belgian Competition Authority, then composed of the Directorate General for Competition and the Competition Council. When relevant, entries in this report will refer to the former sub-bodies of the BCA.

Vertical Agreements

In New Settlement Decision, BCA Fines Algist Bruggeman €5.5 million for Resale Price Maintenance and Other Anticompetitive Conduct

On March 22, 2017, the Auditorate fined Algist Bruggeman NV and its parent company (together, "Algist") €5.5 million for various anticompetitive practices involving yeast products.[1]

Algist is Belgium's leading supplier of baking yeast products. It directly supplies large and industrial bakeries and relies on a network of distributors to supply smaller and artisan bakeries. After receiving information regarding potential anticompetitive conduct by Algist, the BCA conducted dawn raids at Algist's and one of its distributors' premises in June 2013. In early 2016, the Auditorate invited Algist to enter into settlement discussions, which Algist agreed to. The discussions took place April–July 2016.

In its settlement decision of March 2017, the BCA found that Algist had over 60% market shares in a market for certain yeast products and it had been involved in various types of anticompetitive conduct between January 2008 and June 2013. Algist breached Articles 101 TFEU and IV(1) CEL by: (i) conducting resale price maintenance (distributors were required to ask for Algist's approval before granting discounts to customers); (ii) allocating end-customers between its distributors, through its use of discounts to distributors; and (iii) concluding overly long exclusive supply agreements with bakeries.

Algist further breached Articles 102 TFEU and IV(2) CEL by implementing various measures to impede sales of yeast products by cheaper competitors, such as through long-term exclusive supply agreements, selective rebates for bakeries, exclusivity and loyalty rebates for distributors, and by undermining the reputation of competing products.

The Auditorate fined Algist €5.5 million for these infringements, finding no aggravating or mitigating circumstances. As Algist entered into a settlement agreement with the Auditorate, it was granted a 10% fine reduction for acknowledging the infringements. The settlement decision is not appealable.

This decision may reflect a renewed interest of the BCA into vertical restraints, following the trend at EU level and in other Member States. Indeed, the BCA's priority policy for 2016 and 2017 both mention the retail sector and distribution agreements as an area of focus.[2]

1 Auditorate, decision No. BMA-2017-I/O-07-AUD of March 22, 2017, Case Mede-I/O-10/0001.

2 Politique de priorités de l'Autorité belge de la Concurrence pour 2017, available at: https://www.abc-bma.be/fr/propos-de-nous/publications/politique-de-priorites-2017; and Politique de priorités de l'Autorité belge de la Concurrence pour 2016, available at: https://www.abc-bma.be/fr/propos-de-nous/publications/politique-de-priorites-2016.

Policy and Procedure

BCA Publishes Guidance on Bid Rigging in Public Procurement

On January 31, 2017, the BCA published guidance on "collusion in public procurement" intended for buyers.[3] The fight against bid rigging in public procurement is one of the BCA's priorities.[4]

The BCA noted that public procurement is particularly vulnerable to cartels because the market's characteristics make agreements between bidders easier and more appealing.[5] The BCA further underlined that public procurement is a prime target for cartels because every year approximately 20,000 authorities publish calls for contracts for an estimated €60 billion, or about 15% of Belgium's GDP.

The guidance therefore aims to increase (public) buyers' awareness of the risks and costs related to illegal cartels in public procurement. It contains advice on how to identify suspect conduct and potential anticompetitive agreements, as well as practical steps that public authorities can take to ensure increased competition and avoid collusion. By publishing the guidance, along with offering training for buyers and cooperating with public authorities, the BCA hopes to actively contribute to protecting competition in public procurement.

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3 Collusion dans les marchés publics - Un guide pour les acheteurs chargés des marchés publics, available at : https://www.abc-bma.be/fr/propos-de-nous/publications/collusion-dans-les-marches-publics-un-guide-pour-les-acheteurs-charges.

4 Politique de priorités de l'Autorité belge de la Concurrence pour 2017, *supra*.

5 BCA press release of January 31, 2017, available at: https://www.abc-bma.be/fr/propos-de-nous/actualites/communique-de-presse-ndeg2-2017.

FINLAND

This section reviews developments concerning the Finnish Competition Act, which is enforced by the Finnish Competition and Consumer Authority ("FCCA"), the Market Court, and the Supreme Administrative Court ("SAC").

Policy and Procedure

Government Working Group Proposes to Amend Competition Act

On March 14, 2017, the Finnish Ministry of Economic Affairs and Employment's working group on the amendment of the Finnish Competition Act published its report.[6] The working group proposed amendments, among others, to the rules concerning inspections, legal professional privilege, information exchange between Finnish authorities, fines imposed on industry associations, and structural remedies.

The working group proposes the introduction of structural remedies (*i.e.*, an obligation imposed on an undertaking to divest some of its assets) as a new tool in the Competition Act. These remedies could be used only when strict requirements are met. This new remedy would be in accordance with the regulations in force in most EU Member States. Structural remedies would be proposed by the FCCA and imposed by the Market Court.

The working group also evaluated how to ensure that legal professional privilege is respected during inspections. They proposed a new procedure for situations when whether a document falls under legal professional privilege is disputed. Such documents would be reviewed and their legal privilege determined by an FCCA official who is not involved in the enforcement of competition law.

The working group also investigated whether information exchange between the FCCA and other Finnish authorities should be broadened. The working group proposed that the FCCA and other Finnish authorities should have the right to exchange information when it is necessary to carry out their official duties. This right would also include the right to exchange confidential information.

With respect to fines imposed on industry associations, the working group proposed an increase to the maximum amount to make them more effective. The new maximum amount would be 10% of the sum of the turnovers of the association and its 10 largest members involved in the anticompetitive arrangement. The association's fine could not be levied from the members of the association, though they may be fined separately.

Furthermore, the working group evaluated whether companies should have broader legal safeguards with regard to inspections. Among the options considered were the possibility to require advance permission from a court to conduct inspections and the possibility to challenge the legality of the inspection decision or the FCCA's conduct during the inspection in court in separate proceedings, and not only as part of the main infringement proceedings. The various interest groups represented in the working group did not agree on this issue. The majority considered the current safeguards sufficient.

After a public consultation concerning the report, the Ministry of Economic Affairs and Employment will draft a government bill. It remains to be seen whether the amendments proposed by the working group will be accepted, as there already is some opposition.

[6] Report of the Working Group on the Amendment of the Competition Act, Publications of the Ministry of Economic Affairs and Employment 16/2017, March 14, 2017.

FRANCE

This section reviews developments under Part IV of the French Commercial Code on Free Prices and Competition,which is enforced by the French Competition Authority (the "FCA") and the Minister of the Economy (the "Minister").

Abuse

The Paris Court of Appeal Partially Overturns an FCA Sanction Decision for Violation of the Rights of Defense

On February 2, 2017, the Paris Court of Appeal partially overturned an FCA decision imposing a cartel fine on four chemical distributors for breach of one of the parties' rights of defense, and annulled the corresponding fine.[7]

The case started in 2006 when three chemical distributors, namely Solvadis France ("Solvadis"), Brenntag SA ("Brenntag"), and Univar SAS, successively applied for leniency before the FCA. After a six year investigation, the FCA found that the leniency applicants and a fourth company called Caldic Est SASU had entered into an anticompetitive agreement from 1998 until June 2005 to coordinate price increases of chemical commodities and allocate customers. The FCA fined the infringing companies €79 million. Solvadis, as the first leniency applicant, was granted full immunity while Brenntag, despite being the second leniency applicant, was fined the most (€48 million). Brenntag's parent company was held to be jointly liable but did not receive any fine reduction since it did not apply for leniency.

On appeal, Brenntag argued that part of the evidence provided by Solvadis was taken into account by the FCA in violation of Brenntag's rights of defense. In its leniency application, Solvadis claimed that Brenntag's external counsel was personally involved in the anticompetitive agreement and challenged his ethical integrity. These defamatory statements were kept in the case file and the annexes to the case handlers' report, even though nothing in the case file substantiated the alleged participation of Brenntag's external counsel in the anticompetitive practices, and the President of the Paris Bar Association dismissed all charges of violation of professional rules in a public decision in 2012.

The Paris Court of Appeal ruled that the FCA had violated Brenntag's rights of defense by failing to conceal the defamatory comments contained in the case file or distance itself from these allegations. In particular, the Paris Court of Appeal pointed out that although the FCA's case handlers could not withdraw documents from the case file, they were nonetheless entitled to provide an objective opinion on the validity of the evidence submitted, and must ensure the protection of the parties' rights of defense and privacy. As the case handlers had neither distanced themselves from the defamatory statements nor redacted extracts of documents personally targeting Brenntag's counsel, the serious and unfounded accusations against the latter were maintained in the case file and Brenntag's defense could therefore not be freely exercised before the FCA.

The Paris Court of Appeal partially overturned the FCA's decision and annulled Brenntag and its parent company's fine. The Paris Court of Appeal held that while Brenntag's parent company could not benefit from its subsidiary's leniency discount, it could however benefit from the annulment of the sanction, as it had been held jointly liable only in its capacity as parent company.

Interestingly, because the ruling made clear that the Paris Court of Appeal did not give any credit to the contentious allegations, the Court decided that it was able to rehear the case starting from the issuance of the statement of objections. A procedural hearing was scheduled on March 28, 2017.

The FCA Fines French Energy Provider Engie €100 Million for Abuse of Dominance

On March 21, 2017, following complaints from alternative energy supplier Direct Energie and French consumer association UFC-Que Choisir, the FCA

[7] Paris Court of Appeal, February 2, 2017, *GEA Group, Brenntag et autres*, partially quashing French Competition Authority, Decision No. 13-D-12 of May 28, 2013, relating to practices in the commercialization of chemical commodities sector.

found that Engie abused its dominant position in the gas supply markets.[8]

In accordance with the European Union liberalization directives, the French gas and electricity markets have gradually opened to competition since the early 2000s. Therefore, end-consumers can either be subject to regulated gas or electricity tariffs, which only incumbent operators can offer, or decide to exercise their eligibility and be subject to free tariffs, which may be offered by alternative gas and electricity suppliers.

Engie (known as "GDF Suez" until 2015) is the French incumbent gas operator and is present across the entire energy chain in the electricity and natural gas markets. In its complaint before the FCA, alternative gas and electricity supplier Direct Energie claimed that Engie had abused its dominant position in the French retail gas supply market through the implementation of an overall strategy aimed at excluding competitors from the free market by locking in customers subject to regulated gas tariffs.

On September 9, 2014, following Direct Energie's complaint, and pending its decision, the FCA imposed interim measures. Although it indicated that it was necessary to continue the investigation to decide whether the alleged infringements of competition law could be established, the FCA ordered Engie to allow its competitors to access part of its database on customers subject to regulated tariffs (the "historical database") on fair, transparent, and non-discriminatory terms by the end of 2014.

In March 2017, the FCA found that Engie had abused the resources at its disposal, due to its status as a former monopoly and supplier of gas at regulated tariffs, to market its free tariff gas and electricity contracts. In practice, Engie had marketed its commercial gas and electricity contracts through the same commercial infrastructure used to market tariff-regulated gas, and used information gathered from its historical database to pre-empt the liberalization of the gas and electricity markets, *inter alia*, by converting customers subject to regulated tariffs to Engie's own free tariff contracts. The FCA pointed out that the historical database, which could not be replicated under reasonable financial conditions and within an acceptable time frame, had granted Engie a decisive advantage compared to its competitors. Finally, the FCA found that Engie had engaged in misleading marketing by telling consumers that it was able to guarantee a higher security of gas supply than its competitors.

Surprisingly, while the FCA stressed that the practices concerned were implemented when consumers were not well informed of the possibility to switch energy suppliers, it nevertheless considered that the gravity of these practices were mitigated by the fact that Engie might not have been aware that its conduct was illegal. As a result of this and because Engie was willing to settle the case, the FCA fined Engie €100 million.

The decision has been appealed before the Paris Court of Appeal.

Policy and Procedure

France Implements the EU Antitrust Damages Directive

On March 9, 2017, French government order No. 2017-303 and implementing decree No. 2017-305 relating to antitrust damages actions were put into effect. The order and the decree transposed the EU Antitrust Damages Directive[9] into French law.[10]

The Antitrust Damages Directive's objective is to encourage the private enforcement of competition law by making it easier for victims to exercise their right to compensation. The directive's key provisions seek to: (i) guarantee easier access to evidence; (ii) ensure that

[8] French Competition Authority, Decision No. 17-D-06 of March 21, 2017, relating to practices implemented in natural gas, electricity and energy services supply sector.

[9] Directive 2014/104/EU of the European Parliament and of the Council 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, OJ 2014 L 349/1 ("Antitrust Damages Directive").

[10] Order No. 2017-303 of March 9, 2017, relating to antitrust damages actions, available at: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034160223&fastPos=1&fastReqId=696038724&categorieLien=id&oldAction=rechTexte.

a national competition authority's decision finding an infringement is binding upon national courts insofar as the existence of that infringement is concerned; (iii) ensure that infringing companies are jointly and severally liable for the entire damage they have caused; and (iv) clarify the burden of proof with regards to the passing-on defense.[11]

Although French law was already generally consistent with the Antitrust Damages Directive, the order establishes a clearer legal framework for victims of competition law infringements. In particular, the order introduces new provisions into the French Commercial Code regarding the disclosure of evidence, passing-on defense, and authority of FCA sanction decisions.

Pursuant to Articles L.483-1 to L.483-11 of the French Commercial Code, national courts may, upon request of the claimant, order the parties or a third party to disclose relevant evidence. However, in line with the Antitrust Damages Directive, leniency statements and settlement submissions are not subject to disclosure. Furthermore, French national courts enjoy a broad discretion to ensure the protection of business secrets, and may only allow claimants to consult non-confidential versions of documents containing business secrets.

Regarding the passing-on defense, the order finally brings to an end the discrepancy between the Antitrust Damages Directive and French domestic law. Under the French Supreme Court (*Cour de Cassation*) *Ajinomoto* line of case law,[12] in an action for damages the burden was placed on the claimant to prove that the overcharge resulting from the infringement of competition law was not passed-on to customers, failing which national courts were not entitled to order compensation. By contrast, the new Article L.481-4 of the French Commercial Code provides that "direct or indirect purchasers of goods or services are presumed not to have passed on the overcharge on their direct customers, unless the defendant, *i.e.*, the infringer, is able to provide evidence to the contrary."

Finally, Article L.481-2 of the French Commercial Code provides that, in the context of an action for damages, an anticompetitive practice is irrefutably established by a sanction decision issued by the FCA or appeal court and which may no longer be subject to an "ordinary" appeal. In other words, although Article 9 of the Antitrust Damages Directive only refers to "final" decisions of national competition authorities, it seems that an FCA sanction decision that may still be appealed before the French Supreme Court will nevertheless irrefutably establish the existence of an infringement of competition law for the purposes of an action for damages. It remains to be seen how French courts will apply these provisions, given that the French Supreme Court can annul an FCA decision and refer the matter to the Paris Court of Appeal.

The order entered into force on March 11, 2017. However, in line with the Antitrust Damages Directive, provisions on the disclosure of evidence apply to proceedings initiated since December 26, 2014.

[11] Articles 5, 6, 9, 11, 13, and 14 of the Antitrust Damages Directive.

[12] *See* Cour de Cassation, Commercial Division, Case No. 09-15816 of June 15, 2010.

GERMANY

This section reviews competition law developments under the Act against Restraints of Competition of 1957 (the "GWB"), which is enforced by the Federal Cartel Office ("FCO"), the cartel offices of the individual German Länder, and the Federal Ministry of Economics and Technology. The FCO's decisions can be appealed to the Düsseldorf Court of Appeals (Oberlandesgericht Düsseldorf, "DCA") and further to the Federal Court of Justice (Bundesgerichtshof, "FCJ").

Horizontal Agreements

DCA Rules on Selective Agreement with Health Insurances

On July 13, 2016, the DCA ruled that agreements in which a health care company requires cooperating dentists to be supplied exclusively with its dentures do not infringe antitrust law.[13]

The respondent, a health care provider, had agreed with several health insurances to offer denture services without extra payments for financially disadvantaged patients. Those services were rendered by dentists with whom the respondent had separate contracts. According to these contracts, the dentists were only allowed to commission denture's from an affiliate of the respondent that produces dentures in China. The claimant, who also produces dentures in China, sought access to the details of the agreement between the respondent and dentists to decide whether to request it's nomination as an alternative supplier.

The claimant argued it had a right to access the information and eventually participate in the supply according to Section 33 GWB. Both the first instance court and the DCA rejected this claim. The DCA argued that the limitation of suppliers was ancillary to fulfilling the main purpose of the agreement between the respondent and dentists. The purpose of the agreement was to improve the quality of denture services and make dentures available to financially disadvantaged patients without additional payments. The respondent had decided to source the dentures internally from an affiliated company. The DCA held that this was admissible under competition law since this would allow the respondent to control quality, costs, and prices.

FCO Closes Proceedings Against Audible/Amazon and Apple

On January 19, 2017, the FCO announced that it had closed its administrative proceedings against Audible, a subsidiary of Amazon, and Apple.[14] The proceedings had been initiated in November 2015[15] and concerned a long term supply agreement between the two companies regarding audiobooks. Audible is a leading supplier of audiobook downloads in Germany. These audiobooks can be accessed from both Audible.de as well as the Amazon trading platform. Audible is one of the major producers of audiobooks in Germany and Europe. The iTunes store operated by Apple is one of the largest digital media trading platforms that, *inter alia*, offers audiobook downloads.

Following a complaint by the German Publishers and Booksellers Association (Börsenverein des Deutschen Buchhandels), the FCO, in close cooperation with the European Commission, conducted an intensive market investigation. After Audible and Apple agreed to abandon an exclusivity provision in their agreement,[16] the proceedings were closed without a formal decision. Going forward Apple will be allowed to purchase digital audiobooks from other suppliers.

DCA Confirms Fines Against Confectionery Manufacturers for Anticompetitive Information Exchanges

On January 26, 2017, the DCA confirmed, and in some cases even increased, the fines imposed by the FCO on

[13] Higher Regional Court of Düsseldorf judgment of July 13, 2016, case VI/U (Kart) 1/16.

[14] *See* FCO press release of January 19, 2017, available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/19_01_2017_audible.html.

[15] *See* FCO press release of November 16, 2015, available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/16_11_2015_Audible.html.

[16] *See* Commission Press Release IP/17/97, "Antitrust: Commission welcomes steps taken by Amazon/Audible and Apple to improve competition in audiobook distribution," January 19, 2017.

four confectionery manufacturers and an industrial association for anticompetitive information exchanges.[17] Between late 2003 and early 2008, 10 members of a working group of the Association of the German Confectionary Industry ("BDSI") exchanged information about their negotiations with food retailers and planned price increases. While most of the companies involved settled the case with the FCO,[18] four companies (namely Bahlsen GmbH & Co. KG, Griesson de Beukelaer GmbH & Co. KG, CFP Brands Süßwarenhandels GmbH & Co. KG, and Feodora Chocolade GmbH & Co. KG) and the BDSI appealed the FCO's decision.

The DCA not only confirmed the FCO's decision but further increased some of the fines, from approximately €14 million to over €21 million in total. The DCA's judgment is the first judicial review of an FCO decision imposing fines for anticompetitive information exchanges. The FCO welcomes the DCA's judgment as it takes a clear stand on the exchange of competitively sensitive information, even if such information is not directly price-related. Due to the increase in fines and fundamental importance of the DCA's judgment, it is expected that it will be appealed to the FCJ.

DCA Confirms Prohibition of Joint Marketing of Round Timber in Baden-Württemberg

On March 15, 2017, the DCA largely confirmed the FCO's prohibition decision[19] against the federal state of Baden-Württemberg concerning the joint marketing of round timber and operation of forest-related services.[20]

The federal state of Baden-Württemberg sold and invoiced wood on behalf of other forest owners and carried out several services directly related to the marketing of round timber through its company Forst BW Baden-Württemberg. Following complaints by the sawmill and wood industry, the FCO initiated proceedings in 2012,[21] in which it found that that: (i) the federal state of Baden-Württemberg qualified as an undertaking for competition law purposes, given that its activities focused on economic objectives rather than responsibilities of public administration; and (ii) the agreements between the federal state and other forest owners fixed prices and restricted sales, qualifying as illegal hardcore restrictions of competition. The FCO allowed for an exception for owners of less than 100 hectares of forest because they were not in a position to market the wood themselves, and as such it was acceptable for them to engage in joint marketing.

The DCA confirmed these findings and largely followed the FCO's reasoning. In particular, the DCA found that: (i) the joint sale of round timber from private and state-owned forests constituted an illegal distribution cartel; and (ii) the federal state of Baden-Württemberg further intensified the resulting restriction of competition by providing other forest-related services, given that it gained decisive influence with regard to amount, quality, and timing of round timber sales.

Notably, the DCA also found that the revision of Section 46(2) of the Federal Forest Act (Bundeswaldgesetz), which exempted the sale of wood

[17] DCA judgment of January 26, 2017, case V-4 Kart 4/15 OWi (not yet published); *see* FCO press release of January 27, 2017, available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/27_01_2017_Suesswaren.html;jsessionid=F9E3AC3A612DD2CC68DACD591FBE9459.1_cid371?nn=3599398.

[18] *See* FCO updated case summary of January 17, 2017, available in German at: http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2017/B11-11-08_aktualisiert.pdf?__blob=publicationFile&v=3. *See also* National Competition Report, January–March 2013, p. 14.

[19] *See* FCO decision of July 9, 2015, case B1-72/12; *see also* National Competition Report, July–October 2015, p. 8.

[20] DCA judgment of March 15, 2017, case VI-Kart 10/15 (V).

[21] Initially in 2008, the FCO and federal state of Baden-Württemberg had agreed on binding commitments by the federal state of Baden-Württemberg and other federal states to not engage in marketing with forest owners with less than 3,000 hectares. In 2012, the FCO decided that these commitments were no longer sufficient to remedy competition concerns, and that new market conditions would constitute a new factual basis, thereby justifying new proceedings, ultimately leading to the revocation of the 2008 decision.

and related services from the scope of German competition law, violated European Law and should be disregarded. Pursuant to Article 103(1) TFEU, the competence to limit the scope of European Competition Law lies solely with the European Council.

The judgment was appealed to the FCJ, and is therefore not yet final.

Abuse

FCJ Rules on Abuse of Dominance by a Pension Fund

On January 24, 2017, the FCJ affirmed[22] a judgment of the Karlsruhe Court of Appeals[23] concerning the use of certain standard business terms by the Pension Institution of the Federal Republic and the Länder (the "VBL"). The VBL, a public-law pension fund, provides insurance coverage for employees of the public sector whose employers are members of the VBL. The VBL covers insurance for approximately 40% of all employees in the public sector. It finances its pension payments exclusively through the (current) contributions of its members. The relevant provisions of the VBL statute oblige resigning members to reimburse the fund for loss of (future) contributions caused by their resignation.

The FCJ held that the provisions stipulating the reimbursement are invalid due to a violation of the German rules on standard business terms (*Allgemeine Geschäftsbedingungen*, or "AGB") and affirmed the Karlsruhe Court of Appeals' order against the VBL to repay the reimbursement to a former member. It also stated that the VBL was liable for damages resulting from the abuse of dominance. The VBL, which was qualified as an undertaking by the FCJ, held a dominant position in the market for public-law pension funds due to its 40% market share. Furthermore, the FCJ held that the use of invalid standard business terms constitutes an abuse of dominance if an undertaking can only use these invalid terms because of its dominant position.

This decision follows the FCJ's *VBL-Gegenwert I* judgment in which it held that the use of invalid statute provisions may constitute an abuse of dominance.[24]

FCO Concludes Proceedings Against Suppliers of District Heating

On February 13, 2017, the FCO concluded its proceedings against suppliers of district heating regarding abusive pricing practices.[25] The FCO did not issue any fines, but instead reached settlement decisions with the suppliers.[26] As part of the settlement decisions, the suppliers committed to compensate their customers for previously (potentially) excessive heating charges by either reimbursements or future price reductions totaling approximately €55 million.

The FCO had initiated formal proceedings based on the findings of its sector inquiry regarding district heating in Germany in 2013 As a result of this sector inquiry, the FCO had found that the average revenues of a number of district heating suppliers clearly exceeded those of other comparable suppliers. This had raised the FCO's suspicion of abusive pricing in several district heating networks operated by several suppliers.

In 2015, the FCO had already concluded its proceedings against Stadtwerke Leipzig GmbH, E.On Hanse Wärme GmbH, and Dalkia GmbH after these suppliers had changed their pricing regimes. In addition, the FCO had previously terminated proceedings against two other suppliers of district heating, Energie SaarLorLux AG and Stadtwerke Rostock GmbH, as it was unable to confirm its initial suspicions of these two suppliers potential abusive behavior.

22 *See* FCJ judgment of January 24, 2017, case KZR 47/14 – VBL-Gegenwert II.

23 *See* Karlsruhe Court of Appeals judgment of August 27, 2014, case 6 U 112/11 (Kart).

24 *See* FCJ judgment of November 6, 2013, case KZR 58/11 – VBL-Gegenwert I.

25 *See* FCO decision of February 13, 2017, case B8-30/13 and FCO decision of February 13, 2017, case B8-31/13.

26 The suppliers are: Innogy SE, Bitterfelder Wärme GmbH, Danpower Energie Service GmbH, EKT Energie- und Kommunal-Technologie GmbH, and Wärmeversorgung Wolgast GmbH (with the exception of Innogy SE, all of the suppliers belong to the Danpower Group).

During the proceedings, the FCO had reached the preliminary finding that the suppliers concerned had enjoyed dominant market positions on several local district heating markets and that they had abused their market power by charging excessive heating prices. By contrast, the suppliers argued that district heating did not constitute a separate product market, as it faces effective competition from alternative energy sources. Since the proceedings were concluded by settlement decisions, the FCO did not have to reach an ultimate conclusion defining the relevant product market.

DCA Rejects NetCologne's Appeal for the Second Time

On March 8, 2017, the DCA rejected an appeal by regional cable network operator NetCologne regarding an alleged abuse of dominance by German public television broadcaster ZDF.[27] The DCA had previously rejected NetCologne's initial appeal on April 30, 2014, but had to re-evaluate its findings after the FCJ had referred the case back to the DCA upon further appeal by NetCologne.[28]

NetCologne requested feed-in fees from ZDF for the transmission of ZDF's programs throughout its cable network for both the future and from 2008–2012, when ZDF paid feed-in fees to the four largest cable network operators, but not to NetCologne. NetCologne argued that ZDF did not have an objective justification for this disparate treatment and abused its dominant position. While NetCologne's claims were partly successful at first instance, the DCA rejected them on appeal. Upon further appeal, the FJC held that NetCologne's claims might be based on an abuse of dominance. However, due to insufficient factual findings, the FCJ referred the case back to the DCA for further investigation, providing the DCA with some legal guidance. In particular, the FCJ found that ZDF enjoys a dominant position on the market for feed-in capacities, as it does not face competition from public or private broadcasters because network operators are obliged to reserve free capacities for public broadcasters only ("must carry").

Based on the FCJ's guidance, the DCA now held that ZDF's refusal to pay feed-in fees to NetCologne for the future does not constitute an exploitative abuse of dominance, as NetCologne was not able to show that the ZDF's services (from which NetCologne benefits) and its own services (from which ZDF benefits)[29] did not have comparable economic value. With respect to NetCologne's claim regarding the feed-in fees for 2008–2012, the DCA found that ZDF paying feed-in fees to a number of network operators, but not to NetCologne, had not impaired NetCologne's competitive position. In particular, the DCA found that no causal link existed between the differential treatment by ZDF and any potential competitive disadvantages for NetCologne.

Vertical Agreements

FCO Fines Furniture Manufacturers €4.4 Million for Resale Price Maintenance

Between August 3 and December 15, 2016, the FCO fined five furniture manufacturers (aeris GmbH, hülsta-werke Hüls GmbH & Co. KG, Kettler GmbH, Rolf Benz AG & Co. KG, and Zebra Nord GmbH) €4.43 million for imposing resale prices on their retailers.[30] The FCO also fined four managers, but abstained from sanctioning the retailers involved for discretionary reasons. The products concerned include free-standing and upholstered furniture, office chairs, and garden and leisure furniture.

Following several retailers' complaints, the FCO initiated proceedings and conducted searches of the manufacturers' premises in June 2014 and July 2015, respectively.

The FCO found that the furniture manufacturers and their retail partners had agreed on: (i) minimum resale prices and rebate ranges that were tied to the recommended resale prices; and (ii) the products that could be sold in the course of individual promotional campaigns. The manufacturers had established a strict

27 *See* DCA judgment of March 8, 2017, case VI-U (Kart) 15/13.

28 *See* National Competition Report, April–June 2016, p. 15–16.

29 The FCJ had found that both parties perform economically valuable services: NetCologne broadcasts ZDF's program, which increases the number of ZDF's viewers and advertising revenues. In return, ZDF gives NetCologne the possibility to merchandise its program.

30 FCO decisions of August 3, November 4, November 30, and December 15, 2016, case B9–190/16.

monitoring system to ensure compliance with these agreements and instructed the retailers to report competitors that had deviated from the agreed price level. In cases of non-compliance, the manufacturers pressured the retailers to raise their prices by threatening to refuse to supply them and, in some cases, actually suspending deliveries.

All companies cooperated and settled with the FCO. With the exception of one case, all decisions are final.

FCO Publishes Guidelines on the Prohibition of Vertical Price-Fixing in the Food Retail Sector

On January 25, 2017, the FCO published draft guidelines on the prohibition of vertical price fixing in the brick-and-mortar food retail sector.[31]

The objective of the guidelines is to inform companies in the food retail sector by providing practical examples of the background, purpose, and scope of the prohibition of vertical price-fixing. The guidelines particularly aim at small and medium-sized companies without regular advice on antitrust matters.

In response to a major FCO investigation closed in 2016, known as the "vertical case,"[32] where 27 retailers and manufacturers in the food retail sector were fined a total of €260.5 million for vertical price-fixing agreements, the FCO tries to assist companies' own assessment of vertical agreements under German and EU competition rules. The guidelines complement the European Commission's Guidelines on Vertical Restraints with regard to common practices in the brick-and-mortar food retail sector.[33]

The first part of the guidelines concerns the legal and economic background of the prohibition of vertical price-fixing. The second part analyses a number of practical examples under applicable antitrust rules. Finally, the guidelines also contain information on FCO proceedings.

Currently, the FCO is reviewing the public's comments, which could be submitted by interested parties via e-mail to the FCO in the first quarter of 2017. Following completion of the consultation procedure, the FCO will publish its final version of the guidelines.

Mergers and Acquisitions

FCO Clears Acquisition of FKP Scorpio by CTS Eventim

On January 3, 2017, following an in-depth investigation, the FCO unconditionally cleared the acquisition of concert and festival organizer FKP Scorpio Konzertproduktionen GmbH ("FKP Scorpio") by CTS Eventim AG & Co. KGaA ("CTS Eventim").[34]

CTS Eventim is the European leader in the ticketing and live entertainment sectors (including festivals, concert tours, and other events, with a particular focus on rock and pop tour concerts and festivals). CTS Eventim is particularly known for its online ticket shop "Eventim.de" and further offers various other ticketing services to event organizers or advance booking offices via an electronic platform. Similarly, FKP Scorpio is active in the live entertainment sector, offering services related to the organization of festivals and concert tours, also with a particular focus on rock and pop events. Both companies further organize their own music events.

The FCO assessed the effects of the concentration on various events and ticketing markets, although CTS Eventim already held a stake in FKP Scorpio prior to the acquisition. While the FCO acknowledged CTS Eventim's very strong market position in the segment of ticket distribution (via its electronic platform and online shop) and its strong position in the markets for rock and pop tour concerts and music festivals, it concluded that CTS Eventim's increased share in FKP

[31] FCO, Guidance note on the prohibition of vertical price fixing in the brick-and-mortar food retail sector, available in English and German at: http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/2016/Consultation_Guidance_note_prohibition_vertical_price_fixing_brickand_mortar_food_retail.html?nn=3591418.

[32] *See* National Competition Report, October–December 2016, p. 12.

[33] Commission notice regarding Guidelines on vertical restraints, OJ 2010 C 130/1.

[34] *See* FCO decision of January 3, 2017, case B6-53/16.

Scorpio would not result in a relevant change of conditions in the market and therefore would not significantly impede competition.

In particular, the FCO defined and assessed distinct multi-sided product markets for ticket system services provided by CTS Eventim through its online platform "Eventim.net" to event organizers and local advance booking offices. In that context, the FCO explored in detail business models of digital platforms. Already in 2015, the FCO had initiated administrative proceedings against CTS Eventim on suspicion that some of CTS Eventim's business practices had abused its market power. The proceedings are still ongoing.

The complexity of business models and economic relationships in the digital markets presents new challenges for the authorities' competition policy and enforcement practice. The FCO recently showed an increased interest in the examination of digital markets and published a working paper examining the market power of platforms and networks resulting from their multi-sided character.[35]

FCO Clears Acquisition of Tolino by Rakuten Inc.

On January 20, 2017, the FCO cleared Rakuten Inc.'s ("Rakuten") acquisition of Tolino from Deutsche Telekom AG.[36]

Tolino is a cloud based technology platform for eBooks used by an alliance of leading German booksellers such as Thalia, Weltbild, and Hugendubel. Rakuten operates an international eCommerce platform with approximately 700 million members. In Germany, Rakuten is active in the eBook market with its eBook store Kobo and its own eReading devices.

The transaction primarily affects the technical level of the market, *i.e.*, the operation of digital platforms for media content, including the sale of reading devices. Further, the FCO also considered the transaction's implications on the eBook market in Germany.

Tolino itself does not act as a retailer, but only offers its platform to booksellers. The FCO found that while the market share of eBooks sold via Tolino's platform accounts for approximately 30–40% of all eBook sales in Germany, Rakuten's share of eBook sales in Germany is very small, *i.e.*, in the low single digit range. Other remaining competitors are large players such as Apple, with its iBook Store, and Google, with its Google Play Store.

The FCO applied a similar reasoning to the market for reading devices: Rakuten is the second player behind Amazon in Germany. In addition, the incremental increase in market share caused by Rakuten is only marginal. Further, the FCO found that competitive pressure also arises from tablets and smartphones, which can also be used to read eBooks via apps.

Lufthansa May Lease Air Berlin Aircraft

On January 30, 2017, the FCO cleared, under the German merger control rules, a so-called wet-lease agreement for 38 short- and medium-haul passenger aircrafts, including cockpit and cabin crews, between German airlines Lufthansa and Air Berlin.[37] The aircrafts will be stationed at German and Austrian airports and will continue to be operated by Air Berlin. The transfer of slots for take-off and landing previously held by Air Berlin was not part of the transaction.

The FCO concluded that the usual route-based assessment would not be appropriate because: (i) the agreement did not involve the transfer of slots; and (ii) the market investigation had shown that the agreement did not have any effect on the re-allocation of Air Berlin's slots. Instead, the FCO included in its assessment all short- and medium-haul point-to-point traffic to and from Germany and Austria, where the aircraft would be stationed. Based on this definition of the relevant market, the FCO found no competition

[35] *See* FCO, Working Paper, The Market Power of Platforms and Networks, Executive Summary, available in English at: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Think-Tank-Bericht-Zusammenfassung.pdf?__blob=publicationFile&v=4; FCO, Working Paper, The Market Power of Platforms and Networks, available in German at: https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Think-Tank-Bericht.pdf?__blob=publicationFile&v=2.

[36] FCO press release of January 20, 2017, available in English at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/20_01_2017_tolino_rakuten.html?nn=3591568.

[37] *See* FCO decision of January 30, 2017, case B9 – 190/16.

concerns as a result of the agreement. In particular, the FCO did not object to Lufthansa's resulting capacity-share of slightly above 40% (presumption of dominance applies) because of Lufthansa's low passenger load factor for transfer routes to major hubs.

According to the FCO, the wet-lease agreement could possibly constitute a concentration pursuant to Section 37(1) No. 1 GWB. In particular, the FCO found that: (i) a transfer of title is not necessary (and Lufthansa even secured purchase and dry-lease options for some of the aircraft); (ii) the term of the agreement is particularly long; (iii) the agreement covers almost one quarter of Air Berlin's fleet; and (iv) regarding the availability of the aircraft, Lufthansa will assume Air Berlin's prior position in the market even without the transfer of slots. However, in the absence of competition concerns, the FCO ultimately left open whether the wet-lease agreement constituted a concentration within the meaning of German competition law.[38] However, the FCO noted that it may decide to assess the agreement under Article 101 TFEU or Sections 1/2 GWB going forward.

FCO Clears Acquisition of the Online Broker OnVista by Comdirect Bank

On February 17, 2017, the FCO cleared comdirect bank's acquisition of OnVista's following a Phase I review.[39] OnVista and comdirect bank are both online brokers offering their customers the possibility to sell and buy securities on different stock exchanges and other trading platforms, mostly without any advice.

The FCO examined the effects of the merger both in the market for online and offline banking services (wide market definition) and in the market for online banking services offered by online brokers for private clients without any transaction advice (narrow market definition). Further, the FCO also considered the implications in the online advertisement market. The FCO left the exact market definition open because it found that the transaction will not lead to a significant impediment of competition irrespective of market definition.

The FCO found that customers had sufficient alternative online brokers to turn to, and also could use several depots at the same time, so-called multi-homing. Further, for so-called heavy traders, there would be a number of brokers offering more sophisticated and complex products. In the market for online advertising, the incremental increase in market shares caused by the transaction was marginal.

Policy and Procedure

Regional Court of Mannheim Dismisses CDC Damages Action Against the German Cement Cartel

On January 24, 2017 as part of the long-standing German cement cartel saga, the Regional Court of Mannheim dismissed a cartel follow-on damages action filed by CDC Cartel Damage Claims SA ("CDC") against German cement producer HeidelbergCement AG.[40] CDC had alleged damages of more than €138 million based on claims assigned to it in 2014–2015 by 23 mostly medium-sized companies that, according to CDC, had purchased cement in HeidelbergCement AG's distribution area during the cartel.

The Regional Court of Mannheim found the action to be admissible. It was not precluded by a 2015 judgment by which the DCA had dismissed CDC's initial action against several cement producers for lack of standing.[41] The DCA's 2015 reasoning was based on earlier assignments by cement purchasers to CDC—the DCA had, however, explicitly not ruled on the merits of the alleged claims that were assigned later in 2014–2015 (in its 2015 decision, the DCA had

[38] The European Commission had previously found that the wet-lease agreement did not constitute a concentration within the meaning of the EU Merger Regulation. The parties argued that the transaction also did not constitute a concentration within the meaning of German competition law and therefore submitted only a precautionary notification to the FCO.

[39] *See* FCO case summary of February 17, 2017, case number B4-105/16, available in German at: https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Fusionskontrolle/2017/B4-105-16.html?nn=3591568.

[40] *See* Regional Court of Mannheim judgment of January 24, 2017, case 2 O 195/15.

[41] *See* DCA judgment of February 18, 2015, case VI-U (Kart) 3/14; *see also* National Competition Report, January–March 2015, p. 19.

considered the 2014–2015 assignments to be inadmissible).

However, in the present case, the Regional Court of Mannheim dismissed CDC's action on the merits because it considered the alleged claims to be time-barred. Irrespective of any knowledge of the circumstances giving rise to a damages claim, the applicable maximum limitation period for such claims under German law is 10 years. Given that the alleged damages claims arose prior to or in 2002, the maximum limitation period for each individual claim expired in the course of 2012, at the latest. In the Regional Court of Mannheim's view, the limitation period was not suspended. The rules on suspension of limitation by the initiation of cartel proceedings do not apply to damages claims that arose prior to when the rules came into force in July 2005. Moreover, the limitation period was not suspended by the filing of CDC's initial action with the District Court of Düsseldorf because the claims assigned in 2014–2015 were not at issue in the initial action.

Cologne Fiscal Court Rejects Tax Deductibility of Cartel Fines

On November 24, 2016, the Cologne Fiscal Court decided that a fine imposed by the FCO for anticompetitive conduct was not tax-deductible.[42]

Pursuant to Section 4(5) No. 8 of the German Income Tax Act ("EStG"), fines are generally not tax-deductible. However, this prohibition does not apply in so far as unlawful benefits have been disgorged.

In 1999, the Federal Fiscal Court had ruled that the FCO's fines generally include a disgorging element whenever anticompetitive profits are taken into account in determining a fine.[43] According to the present decision, this reasoning cannot be upheld under the revised GWB. The Cologne Fiscal Court based its decision on the fact that the FCO now has discretion whether or not to disgorge profits generated as a result of anticompetitive conduct according to Section 81(5) GWB.

The Cologne Fiscal Court particularly rejected the plaintiff's argument that the disgorging character of the fine could be assumed based on the FCO's calculation methodology taking into account the cartel-related turnover of the infringer. According to the Cologne Fiscal Court, including anticompetitive profits as a calculation factor does not necessarily mean that part of the profits are disgorged by the fine. The Cologne Fiscal Court found that taking the harm caused by an infringement into account is common practice in determining fines. The EStG exception for disgorged profits would be superfluous if it could be assumed that every fine includes some disgorging element. Consequently, the fining entity's intent in imposing the fine needs to be taken into account for the application of Section 4(5) EStG.

Applying this reasoning to the present case, the Cologne Fiscal Court found that the fine imposed on the plaintiff by the FCO did not disgorge profits generated as a result of the plaintiff's cartel activities. The Cologne Fiscal Court consequently rejected a partial tax-deductibility of the fine. The FCO's fine notice expressly stated that it aimed to punish the infringer exclusively and did not include a disgorging element.

The judgment has been appealed and is pending before the Federal Fiscal Court.[44]

American Bar Association Criticizes FCO's Draft Guidance on Remedies in Merger Control

In December 2016, the American Bar Association Sections of Antitrust Law and International Law (together the "ABA Sections") commented on the FCO's draft Guidance on Remedies in Merger Control (the "FCO Guidance") published two months prior.[45]

[42] *See* Cologne Fiscal Court decision of November 24, 2016, case 10 K 659/16.

[43] Federal Fiscal Court decision of June 9, 1999, case I R 100/97.

[44] Pending as case I R 2/17.

[45] Joint comments of the American Bar Association Section of Antitrust Law and Section of International Law on the Bundeskartellamt's public consultation version of Guidance on Remedies in Merger Control, December 2, 2016, available in English at: http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Stellungnahmen/Stellungnahme%20-%20Konsultation_L

In particular, the ABA Sections discussed and criticized two aspects of the FCO Guidance: (i) the FCO's general preference for divestitures (rather than behavioral remedies); and (ii) the preference for upfront buyers (rather than more flexible approaches where appropriate).

With respect to behavioral remedies, the ABA Sections stated that the FCO Guidance offers too limited a scope for behavioral remedies and criticized the FCO's "clear preference for divestments." In the ABA Sections' view, the mere fact that some level of monitoring may be required (at the parties' expense) should not disqualify a behavioral remedy from consideration, if a behavioral remedy can address the competitive concerns without imposing any material monitoring burden on the competition authority going forward. Contrary to the FCO Guidance, the ABA Sections also think that firewall remedies (so-called "Chinese walls") can be effective in resolving competitive concerns, *i.e.*, sharing of competitively sensitive information, in merger cases, particularly in vertical transactions or joint ventures. While they understood that, under the GWB, remedies must not subject the conduct of the companies involved to continued control, the ABA Sections submitted that the FCO should clarify the concept of "continued control" in greater detail, given that some acceptable remedies, such as access remedies and licensing remedies, appear to involve some level of "continued control."

The ABA Sections also criticized the FCO Guidance's preference for upfront buyer solutions as "departing from the international mainstream." While the FCO Guidance appears to contemplate clearance only after this condition has been fulfilled, this approach is, in the ABA Sections' view, more restrictive than the approach followed by most jurisdictions, including the European Commission, which treats an upfront buyer solution as more practical in some situations, but indicates that those situations are the exception to the rule. The ABA Sections stated that the EU approach is preferable because it strikes an appropriate balance between the interests of the parties to quickly close the main transaction and of the regulators to be adequately assured that divestitures will be implemented successfully.

FCO Publishes 2016 Annual Summary Review

In January 2017, the FCO published its annual summary overview of its main activities in 2016, focusing on the digital economy, cartel prosecution, merger control, and an outlook for 2017.[46]

The FCO highlights the key role the digital economy played in the FCO's 2016 activities. It refers, among other things, to its investigation into Facebook's possible abuse of dominance in the market for social networks, the report on big data the FCO had published together with the French Competition Authority, cases involving best-price clauses, mergers in the area of online platforms, and the upcoming reform of the GWB that aims to provide the FCO with tools to better assess competition issues in the online economy.

The annual summary also summarizes the FCO's cartel prosecution activities. In 2016, the FCO received leniency applications from 59 companies. It also received relevant information from anonymous whistleblowers through its website. The FCO, moreover, carried out 17 dawn raids at more than 80 companies. In seven cases, the FCO imposed fines totaling over €124 million.

In the course of 2016, the FCO reviewed approximately 1,200 merger filings, ten of which were in-depth reviews. In four of these ten cases the parties eventually withdrew their notifications; the remaining six transactions were cleared (one subject to conditions).

The food retail sector will be one of the areas where the FCO expects further work in 2017, given continuous complaints from manufacturers about

eitfaden_Zusagen_in_der_Fusionskontrolle_ABA_2016.pdf?__blob=publicationFile&v=2. FCO draft Guidance on Remedies in Merger Control, available in English at: http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Guidance%20on%20Remedies%20in%20Merger%20Control.pdf?__blob=publicationFile&v=2.

[46] *See* FCO press release of January 10, 2017, available in English at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/10_01_2017_Jahresrueckblick.html;jsessionid=DE9288EEDD432843E116017D0E11F2FB.2_cid387?nn=3591568.

increasing market power of retailers. The FCO also hopes that the upcoming reform of the GWB will close all existing loopholes that made it possible for companies to avoid fines by restructuring measures. The FCO finally welcomed the current discussion on whether it should be given the power to enforce consumer protection in the digital economy.

District Court of Bonn Rules on the Scope of Access to Files by Potential Cartel Victims

On February 6, 2017, the District Court of Bonn rendered another decision clarifying the standards applicable to requests for access to the FCO's files by potential cartel victims.[47] The District Court of Bonn confirmed the FCO's decision to grant a potential cartel victim access to its fining decisions (redacted for business secrets and personal data) and rejected the applicant's request for further redactions.

Given that, according to the FCO's findings, the applicant for access was a customer of cartel-related goods and the cartel presumably led to increased earnings for the cartel participants, it qualified as a potential victim. In the District Court of Bonn's view, the potential victim's intention to launch a follow-on damages action constitutes a legitimate interest, which outweighs the cartel participants' interests to avoid redress.

In particular, the presumption of innocence does not prevent a disclosure of the names and functions of individuals involved in the infringement. The FCO is only obliged to consider whether the information in dispute could be relevant for the potential victim when establishing damages claims. It is up to the defendant in a subsequent follow-on damages action to put forward arguments against these claims.

Further, the District Court of Bonn rejected the applicant's request to prevent the FCO from disclosing fining decisions adopted with respect to other companies and individuals involved in the infringement. According to the District Court of Bonn, these decisions may serve as a basis for potential follow-on damages actions as well. In the District Court of Bonn's view, this even holds true where such decisions include information on misconduct in which an employee of the applicant was involved but that was—due to discretionary considerations—not taken into account for the FCO's final fining decisions.

Monopolies Commission Publishes Special Report on Competition in Health Insurance Markets

On March 7, 2017, the Monopolies Commission, an independent expert committee advising the German government and legislature in the areas of competition law and regulation, published a Special Report on "conditions and perspectives in the German health insurances system," calling for more competition in the health insurance markets.[48]

In the Monopolies Commission's view, statutory and private health insurance providers are facing significant challenges, in particular ever increasing health care costs, but the current system does not provide sufficient incentives for insurance providers to look for ways to ensure optimal health care for its members while simultaneously reducing costs.

To promote effective competition, the Monopolies Commission suggests, among other things, that statutory health insurers offer more flexible rates and policies. Members of private insurance companies should be able switch their insurance provider more easily. More generally, the Monopolies Commission wants the health care sector to make broader use of digitalization, such as supporting prevention through mobile apps or ensuring that medical treatments are tailored for each patient by digitally connecting physicians, patients, and insurance companies.

The German legislator (Bundestag and Bundesrat) still needs to decide on the draft law. The government likely aims to enact the law before the elections in September.

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[47] *See* District Court of Bonn judgment of February 6, 2017, case 52 OWi 70/16.

[48] *See* Monopolies Commission, Special Report 75 ("Conditions and perspectives in the German health insurances system"), available in German at: http://www.monopolkommission.de/images/PDF/SG/s75_volltext.pdf. A summary is available in English at: http://www.monopolkommission.de/index.php/en/reports/special-reports/special-report-75.

German Legislator Approves Ninth Amendment to the GWB

On March 9, 2017, the German Federal Parliament (Bundestag) adopted the ninth amendment to the GWB (the "Ninth Amendment").[49] Subsequently, on March 31, 2017, the German Federal Council (Bundesrat) passed the Ninth amendment. This paved the way for promulgation in the Federal Law Gazette (Bundesgesetzblatt) after the Ninth Amendment has been executed by the Federal President. The amended law is expected to enter into force in the second quarter of 2017.

The Ninth Amendment aims at preparing German competition law for the challenges resulting from the increased importance of the digital economy. Under the amended law, and contrary to previous German case law,[50] a relevant product market can be defined even where services are rendered without charge. This modification will subject free of charge customer-provider relationships to the GWB rules on abuse of dominance. Furthermore, the Ninth Amendment introduces "transaction consideration" as a new threshold criterion in merger control, thereby supplementing the current turnover-based thresholds that many targets in the digital economy do not meet, particularly startups.

With regard to administrative fines, the amended law closes the infamous "sausage gap," *i.e.*, the currently legal possibility to evade cartel fines through corporate restructuring measures that aim at "eliminating" the charged entity. Based on the EU law notion of an "undertaking," fines for infringements of competition law can now be imposed on: (i) parent companies that have "determining" influence on the infringing entity; (ii) legal successors of the infringing entity or the liable parent company; and (iii) economic successors of the infringing entity.

Finally, the Ninth Amendment transposes the EU Antitrust Damages Directive[51] into national law. While many of the revisions are of a declaratory nature, some modifications are expected to promote cartel damages actions under German law—in particular the new disclosure regime, which is largely unprecedented in German law.

FCO Releases Interim Report on Dairy Plants' Supply Conditions Towards Milk Producers

On March 13, 2017, the FCO released an interim report on its ongoing investigations of supply conditions set by German dairy plants towards milk producers,[52] which it had initiated against Deutsches Milchkontor eG in 2016.[53] In its 2012 sector inquiry, the FCO had already found potentially anticompetitive practices in the dairy/raw milk market.[54]

Based on information gathered from 89 dairy companies, the FCO has found that the supply conditions for raw milk have hardly changed since the liberalization of the milk market in 2015. The interim report identifies three factors that may be detrimental to raw milk producers. First, the FCO notes the long duration of supply contracts between dairy plants and milk producers resulting from open-ended terms combined with long cancelation periods. Second, the majority of examined contracts contain exclusive supply clauses. Third, the report identifies "subsequent pricing," *i.e.*, the determination of the supply price only after delivery. According to the FCO, these factors hinder the market entrance of new competitors and the change of milk producers to another dairy plant, and diminish the famers'

[49] Neuntes Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen.

[50] *See* DCA judgment of January 9, 2015, case VI – Kart 1/14 (V).

[51] Directive 2014/104/EU of the European Parliament and of the Council 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, OJ 2014 L 349/1.

[52] *See* FCO's Interim Report on Conditions of the Supply of Raw Milk of March 13, 2017, available in German at: http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Sachstand_Milch.html?nn=3591286

[53] *See* FCO press release of April 21, 2016, available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/21_04_2016_Milch.html?nn=3591568.

[54] *See* FCO press release of January 19, 2012, available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2012/19_01_2012_SU-Milch.html?nn=3591568; *see also* National Competition Report, January–March 2012, p. 14.

negotiating power. The report concludes in a "preliminary legal analysis" that the aforementioned contract terms infringe German competition law as they result in the foreclosure of the market. As appropriate countermeasures, the FCO suggests amendments to the existing supply relationships, such as shorter termination periods, price determination before delivery, and the agreement of fixed deliveries including certain adjustment mechanisms.

The FCO is particularly concerned over the milk producers' "structural inferiority." Therefore, the FCO released its report at such an early stage to promote a discussion among the relevant stakeholders and politicians to overcome the current (burdensome) situation.

Legislative Proposal for National Register of Convicted Undertakings

In March 2017, the Federal Government has proposed the creation of a national register of convicted undertakings.[55] The purpose of the register, which shall be maintained by the FCO, is to make it easier for public authorities to check if undertakings have been convicted or fined for certain infringements. This will help fight corruption and white collar crime. Under German public procurement law, certain infringements preclude liable undertakings from being awarded contracts by public authorities.

The register will cover convictions of and fines imposed on undertakings and individuals concerning, *e.g.*, breaches of competition law and bid rigging, as well as other infringements occurring in economic contexts such as tax avoidance, bribery, social security fraud, etc. Only infringements of German law will be included in the register. Infringements for which undertakings or individuals were convicted or fined prior to the creation of the register would not be included. The register would be confidential, *i.e.*, only public authorities would have access.

[55] BReg Press Release, *Entwurf eines Gesetzes zur Einführung eines Wettbewerbsregisters*, available in German at: https://www.bundesregierung.de/Content/DE/Artikel/2017/03/2017-03-29-wettbewerbsregister.html. The full draft is available in German at: https://www.bmwi.de/Redaktion/DE/Downloads/E/entwurf-eines-gesetzes-zur-einfuehrung-eines-wettbewerbsregisters.html.

GREECE

This section reviews competition law developments under the Greek Competition Act (Law 3959/11)703/1977 (the "Competition Act"), enforced by the Hellenic Competition Commission ("HCC").

Horizontal Agreements

The HCC Issues its First Decision Under the Settlement Procedure, Sanctioning a Price-Fixing Arrangement in the High-Quality Cosmetics Market

On February 3, 2017, the HCC settled a case examining anticompetitive arrangements in the market for high quality and price cosmetics.[56] The investigation focused on: (i) agreements between wholesalers/distributors (Estee Lauder Hellas, Gerolymatos SA, L'Oréal Produits De Luxe Hellas, Sarantis SA, and Parfums Christian Dior Hellas) aimed at indirectly fixing resale prices of retailers through the determination of a uniform level of discounts; and (ii) agreements between eight retail/distribution undertakings belonging to Hondos family members (the "Hondos companies") aimed at applying a uniform pricing policy at the retail level consisting of an extensive network of retail shops operating under the Hondos trademark, both owned and under franchise.

Following the issuance of a Statement of Objections against all the undertakings involved, the Hondos companies expressed their interest to settle in the framework of the HCC Decision 628/2016, which had introduced a settlement procedure in cartel cases. The purpose of this procedure is to simplify and accelerate the administrative procedure for the issuance of HCC decisions, as well as to limit the appeals filed against HCC decisions before the Administrative Court of Appeals.

The HCC split its investigation into two cases (one for Hondos companies and another for the wholesalers/distributers). The settlement decision is addressed to the Hondos companies, while the HCC's decision for the other undertakings—which did not apply for the settlement procedure—is expected shortly.

The Hondos companies' settlement included bilateral meetings with the HCC, the submission of proposals for settlement, the issuance of a Statement of Objections, and, finally, the submissions of settlement declarations. The Hondos companies admitted that they had applied a uniform policy regarding their agreements with their suppliers, as well as uniform pricing, discount, and promotion policies to the entire Hondos network of shops. The implementation of such uniform policies was controlled by a joint venture company (owned by five members of the Hondos family, who each had a 20% share), which was a vehicle for their cooperation.

The infringement lasted for almost three years, from 2003 to 2006. The HCC took into account the prolonged difficult situation of the Greek economy as a whole and of the cosmetics sector in particular, and concluded that an onerous fine would put a strain on the Hondos companies, which had approximately 3,000 employees. A 15% fine reduction was applied to each company's fine, as provided by the settlement procedure. The HCC fined the Hondos companies of total of €1 million, with the fines ranging from €25,000–185,000 per company.

The HCC is currently dealing with its second settlement procedure, which relates to a cartel involving approximately 50 Greek and foreign construction companies charged with bid rigging practices in public construction works in the past 25 years. The large Greek companies expressed their interest to settle after the issuance of a Statement of Objections. At that point, the other companies' proceedings were temporarily suspended (and then continued) while the settlement procedure began. The administrative proceedings in this cartel case are still ongoing and their conclusion is greatly anticipated because of, *inter alia*, the legal issues arising from the interaction between the two sub-sets of a single proceeding in various fields, such as use of evidence, confidentiality matters, etc.

[56] HCC Decision 636/10.1.2017.

ITALY

This section reviews developments under the Competition Law of October 10, 1990, No. 287, which is enforced by the Italian Competition Authority ("ICA"), the decisions of which are appealable to the Regional Administrative Tribunal of Latium ("TAR Lazio") and thereafter to the Last-Instance Administrative Court (the "Council of State").

Horizontal Agreements

The Council of State Fully Upholds the Decisions of the TAR Lazio Annulling the Fines Imposed on Generali and UnipolSai for Alleged Concerted Practices in the Insurance Sector

On March 7, 2017,[57] the Council of State upheld the judgments of the TAR Lazio[58] quashing the ICA's decision[59] fining Generali Italia S.p.A. ("Generali") and UnipolSai Assicurazioni S.p.A. ("UnipolSai") for bid rigging practices in the market for insurance services for civil liability of public transport vehicles. The ICA had fined Generali and UnipolSai approximately €30 million for rigging 58 tenders for third party liability insurance for vehicles of 15 local public transport companies. According to the ICA, Generali and UnipolSai agreed that they would not respond to the invitations to tender, thus compelling the relevant contracting authorities to negotiate, on less favorable terms, a new agreement with the incumbent company, *i.e.*, the company that was awarded the concerned insurance services in the previous tender.[60]

The decision of the Council of State clarifies the standard of proof for the ICA in concerted practices cases.

As far as the unlawful contacts between the parties were concerned (the so-called "exogenous evidence" of an anticompetitive agreement), the Council of State considered that the two main evidential elements on which the ICA based its findings were not sufficient to demonstrate the existence of a concerted practice.

The first evidence, *i.e.*, the existence of a working group on local public transport within the Italian Association of Insurers ("ANIA"), did not meet the relevant standard of proof as there were many elements demonstrating the lawfulness of the activities of this working group. First, the working group had been established upon proposal by the Italian Authority for the Supervision of the insurance sector's ("IVASS") to resolve the lack of participants in calls for tenders for the award of third party liability insurance services for public local transport. Second, Generali and UnipolSai attended only two of the six meetings that the ICA had investigated and there was no evidence that these two meetings facilitated the alleged anticompetitive conduct.

The second piece of evidence on which the ICA relied, *i.e.*, the existence of allegedly anticompetitive guidelines issued by ANIA, also did not prove the existence of a concerted practice. The guidelines had been issued by ANIA's legal counsel, which had provided advice on the issue of the obligation to enter into an agreement in a particularly complex legislative framework, and therefore the guidelines were not imputable to the parties to the alleged concerted practice but were referable to ANIA. Also, the interpretation of the relevant legislative framework provided by ANIA's legal counsel was plausible and consistent with the interpretation provided by IVASS.

The Council of State also recalled the settled case law according to which, in the absence of unlawful contacts, the ICA bears the burden to prove that parallel market behavior is the result of an anticompetitive agreement and there are no alternative explanations (for instance, the characteristics of the relevant market).

On these grounds, the Council of State held that the ICA fell short of proving the existence of an anticompetitive concerted practice. The ICA failed to demonstrate that it had been possible for Generali and

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57 Council of State, judgment of March 7, 2017, *UnipolSai Assicurazioni S.p.A. et al. and ICA* (Judgment No. 1066).

58 TAR Lazio, judgments of December 18, 2015, *UnipolSai Assicurazioni S.p.A. and ICA* and *Generali Italia S.p.A. and ICA* (Judgments No. 14282 and 14281).

59 ICA, decision of March 25, 2015, *Gare RCA per trasporto pubblico locale* (Case No. I744).

60 For a more detailed description of the ICA's decision and of the judgments of the TAR Lazio, *see* National Competition Report, October–December 2015, pp. 30–31.

UnipolSai to implement the practice without the cooperation of other undertakings active in the market that could have disrupted coordination. According to the Council of State, the fact that the other market operators that were not part of the alleged anticompetitive agreement held a total market share of 60–70% ruled out: (i) the existence of the anticompetitive agreement (insofar as even theoretically it could not have been enforced by the parties); and (ii) the possibility to apply the economic theory of the so-called competitive fringe (according to which, smaller undertakings operating in a cartelized market adopt market conducts equivalent to those of the cartelists) given that the parties to the alleged anticompetitive agreement actually represented the majority of the undertakings operating in the relevant market.

Moreover, the Council of State held that Generali and UnipolSai's conduct could have been explained on different legitimate grounds, for instance because the market was not profitable.

Abuse

The ICA Refrains from Contesting Noncompliance with a Previous Infringement Decision by Telecom Italia

On December 21, 2016, the ICA found[61] that Telecom Italia, the incumbent national telecoms operator, had complied with the ICA's infringement decision of May 9, 2013 (the "ICA 2013 Decision").[62]

The ICA 2013 Decision found that Telecom Italia had abused its dominant position in the provision of wholesale access to the local network and broadband internet, by hindering the expansion of its competitors (the Other Licensed Operators, "OLOs"). Specifically, the ICA held that from 2009–2011 Telecom Italia had rejected an unjustifiably high number of OLOs' requests for the activation of wholesale services (issuing so-called "KOs"), discriminating against OLO's compared to its own internal divisions. This constructive refusal to supply adversely affected the OLOs' ability to provide services in a timely manner to customers. Consequently, the ICA fined Telecom Italia €88.2 million and ordered it to refrain from future similar conduct.

On appeal, both the TAR Lazio and the Council of State confirmed the ICA 2013 Decision.[63] Moreover, the Council of State rejected Telecom Italia's defense that the different procedures for the activation of services to OLOs were compatible with the regulatory framework. Adding to the ICA's conclusions, the Council of State clarified that the constructive refusal to supply consisted of specific procedures that were structurally different from those applicable to requests coming from Telecom Italia's own divisions.

In July 2015, following complaints submitted by two OLOs (Fastweb S.p.A. ("Fastweb") and Vodafone Italia S.p.A. ("Vodafone")), the ICA began an investigation. According to Fastweb and Vodafone, Telecom Italia had failed to comply with the ICA 2013 Decision by: (i) continuing to reject an excessively high number of requests for activation of services; (ii) applying different procedures for the activation of services to OLOs in comparison to its own divisions; and (iii) carrying out additional similar conduct of constructive refusal to supply.

The ICA found that the conduct fined in 2013 had not continued and no similar conduct had occurred.

In particular, in December 2016, the ICA noted the substantial improvements in the performance levels of Telecom Italia's supply system, which led, from 2013, to a substantial decrease in the number of KOs for all services, both in aggregate terms and for each single service, traditional and innovative.

In addition to the reduction in KOs (and although neither the ICA 2013 Decision nor the regulatory framework required Telecom Italia to change its supply procedures), the ICA examined the project of

[61] ICA, decision of December 21, 2016, *Wind-Fastweb/Condotte Telecom Italia - Inottemperanza* (Case No. A428C).

[62] ICA, decision of May 9, 2013, *Wind-Fastweb/Condotte Telecom Italia* (Case No. A428). *See also* National Competition Report, April–June 2013, p. 23.

[63] TAR Lazio, judgment of May 8, 2014, *Telecom Italia and ICA* (Judgment No. 4801); and Council of State, judgment of May 15, 2015, *Telecom Italia and ICA* (Judgment No. 2479). *See also* National Competition Report, April–June 2015, p. 23.

radical reorganization of the supply procedures that Telecom Italia had undertaken. The reorganization aimed at removing the procedural differences between the requests for activation of services originating from OLOs and Telecom Italia's internal division. Telecom Italia launched the reorganization after the May 2015 Council of State judgment and, incidentally, after the ICA's investigation commenced in July 2015. The ICA considered the reorganization appropriate to remove the competition concerns and to guarantee equal treatment between OLOs and the internal divisions of Telecom Italia.

The ICA addressed allegations of Fastweb and Vodafone contesting the timing of the reorganization. The ICA found that, in 2013, Telecom Italia informed the Italian Communications and Media Authority (the "ICMA") of its intention to reorganize the supply procedures. At that time, the ICMA launched a public consultation (in which the OLOs argued that the proposed change in supply procedures was inadequate to address the competition concerns) and eventually concluded that a reorganization of Telecom Italia's procedures would be disproportionate. Thus, in December 2016, the ICA upheld Telecom Italia's defense that, due to the outcome of the public consultation, it decided to implement the reorganization only after the Council of State judgment was published and after the reorganization was ICMA approved.

Accordingly, the ICA concluded that no continuity between the infringing conduct in the ICA 2013 Decision and the conduct for which the ICA opened the noncompliance proceedings could be established. Fastweb and Vodafone have appealed the ICA's decision.

The Court of Appeal of Milan Sheds Light on the Issue of Proof of Causal Link and Damage in Follow-On Actions in Abuse of Dominance Cases

On January 2, 2017,[64] the Court of Appeal of Milan rejected the appeal brought by Telecom Italia against the decision of the Court of First Instance of Milan (the "Milan CFI")[65] in a follow-on action based on the ICA's decision concerning Telecom Italia's abuse of dominance in the market for the supply of wholesale termination services.[66]

The ICA established that: (i) Telecom Italia applied more favorable technical and economic conditions for the supply of wholesale termination services to its commercial divisions than to its competitors; (ii) the prices applied to its business customers were lower than the termination costs borne by competitors to offer the same services; and (iii) Telecom Italia had abused its dominant position given that competitors could not replicate its offers.

The Milan CFI upheld a follow-on claim for damages brought by Brennercom. In particular, the Milan CFI held that Brennercom's action could be qualified as a follow-on action even if the company was not a party to the proceedings before the ICA and that, for this reason, Brennercom did not have to prove the infringement committed by Telecom Italia. However, the Milan CFI ruled that Brennercom still had to prove the causal link between the abusive conduct and the damage it suffered, and the quantification of this damage. The Milan CFI concluded that Brennercom had suffered €433,000 worth of damage as a consequence of Telecom Italia's abusive conduct.

Telecom Italia's appeal of the Milan CFI's decision contested the proof of the causal link and damage.

Telecom Italia argued, *inter alia*, that: (i) there was a lack of evidence in relation to the causal link between Telecom Italia's abusive conduct and the damage suffered by the respondent; (ii) the Milan CFI illegitimately deferred the proof of the causal link to the court-appointed expert; (iii) the court and court-appointed expert should not prove the casual link on the basis of presumptions, leading to the reversal of the burden of proof (the claimant should provide the necessary evidence); (iv) Telecom Italia could not apply tariffs to its competitors' prices higher than those applied to its commercial divisions, given that the ICMA approves tariffs for wholesale termination

[64] Court of Appeal of Milan, judgment of January 2, 2017, *Telecom Italia and Brennercom* (Judgment No 1/2017).

[65] Milan CFI, judgment of December 27, 2013, *Telecom Italia and Brennercom* (Judgment No. 16319/13).

[66] ICA, decision of August 3, 2007, *Tele2/Tim-Vodafone-Wind* (Case No. A357).

services; Telecom Italia could only apply lower prices to its commercial divisions, and Brennercom did not provide evidence that it was forced to lower its tariffs or to change its commercial strategies to retain its customer base.

In relation to the causal link, the Court of Appeal of Milan held that the Milan CFI did not illegitimately reverse the burden of proof, but it applied the principle that the ICA's decisions constitute evidence having a strengthened evidentiary value in follow-on actions. Therefore, according to this principle, Telecom Italia needed to provide evidence that all the anticompetitive offers were directed to customers for which there was no actual or potential competition with Brennercom and that, therefore, no damage could have arisen as a consequence of Telecom Italia's abuse. Given that no evidence had been provided by Telecom Italia, the Court of Appeal of Milan ascertained the existence of a causal link between Telecom Italia's abusive conduct found by the ICA and the damage suffered by Brennercom.

Telecom Italia also argued that, by applying theoretical economic principles, the Milan CFI did not establish the existence of the causal link nor the existence of damage, given that Brennercom did not provide evidence of customer diversion, modification of its prices, or change of its commercial strategies.

The Court of Appeal of Milan considered that, taking into account the asymmetry between the evidence and documentation held by the dominant and excluded undertakings, economic theories and analyses were to be given full evidential value. As for the argument that Brennercom had not provided evidence that it was forced to lower its tariffs or change its commercial strategies to retain its customer base, the Court of Appeal of Milan held that this was not necessary given that, in margin squeeze cases, to assess the existence of damage the only circumstance that needs to be verified is the loss of profits.

The TAR Lazio Confirms that the Lawful Exercise of Contractual Rights May Constitute an Abuse of Dominance

On January 23, 2017,[67] the TAR Lazio confirmed that Società per azioni esercizi aeroportuali ("SEA"), the company managing airport facilities in Milan, had abused its dominant position in the market for the provision of handling services to commercial aviation despite "lawfully" protecting its commercial interests. This however, led to the foreclosure of a competitor.

In 2008, the SEA granted ATA Ali Trasporti Aerei and ATA Ali Servizi (together, "ATA") an exclusive concession for the management of the facilities for general aviation, while ATA undertook to modernize those facilities, which it never did. Although the SEA was aware of ATA's contractual breach since 2011, it did not threaten to nor terminate the concession until two years later, when Società Acqua Pia Antica Marcia ("SAPAM"), the parent company of ATA, started a competitive procurement procedure to find a buyer for its shares in ATA. During the procurement procedure the SEA's bid was beaten by Cedicor, a new entrant. Only then did SEA terminate ATA's concession, practically nullifying the results of the competitive process and ultimately preventing the competitor, Cedicor, from entering the market.

The ICA found that the SEA had: (i) tried to hinder the procedure launched by SAPAM by contesting the alleged inefficiencies and lack of information in a competitive procurement procedure by the seller and its advisor; (ii) terminated the concession with ATA only after it learned that Cedicor had presented the best offer, diminishing ATA's business value, which in great part came from the concession with the SEA; and (iii) presented a higher second offer for the purchase of ATA and finally signed the purchase contract with SAPAM although, following the termination of the concession, SEA would in any case have been entitled to use the facilities. According to the ICA, this conduct was part of SEA's strategy to exclude Cedicor.

The SEA challenged the ICA decision before the TAR Lazio alleging that: (i) it did not have a dominant

[67] TAR Lazio, judgment of January 23, 2017, *SEA and ICA* (Judgment No. 1188).

position because it had licensed the management activity to ATA and it therefore did not operate in the market where the abuse allegedly took place; and (ii) by terminating the concession, it had protected its commercial interests that had been damaged by ATA's contractual breach.

The TAR Lazio rejected the SEA's plea that it did not have a dominant position, stating that a dominant position is not the result of "mathematical data" in the form of market share, but a "de facto situation" in which an undertaking is in a position to influence the working of competition in the relevant market.

In this case, this power came from the sub-licensing agreement, which SEA had the power to terminate. The termination caused a decrease in ATA's commercial value and therefore influenced Cedicor's commercial behavior. Furthermore, the TAR Lazio reiterated settled case law according to which a dominant position and an abuse of dominance do not necessarily have to refer to the same market but may refer to related markets.

The TAR Lazio also rejected the second plea, recalling that, pursuant to settled case law, an infringement of Article 102 TFEU can take place even when the conduct is fully compliant with civil law provisions on the termination of contracts. The TAR Lazio upheld the ICA's conclusions that SEA had strategically exercised its contractual rights to alter the outcome of the competitive procedure and that SEA's conduct had no other rational explanation except to prevent Cedicor's market entry.

Policy and Procedure

The TAR Salerno Finds that Antitrust Penalties for Anticompetitive Agreements Do Not Entail the Automatic Exclusion of the Infringing Company from a Public Procurement Procedure

On January 2, 2017,[68] the Regional Administrative Tribunal of Salerno ("TAR Salerno") found it unlawful to exclude from a public procurement procedure an undertaking that the ICA had previously found liable for an infringement of competition law and, in particular, for bid rigging.

The TAR Salerno upheld the appeal brought by CNS Consorzio Nazionale Servizi Società Cooperativa ("CNS")[69] against a 2016 decision of a tender committee not to admit CNS to the public procurement proceedings for the purchase of cleaning services for hospitals, due to a 2015 ICA decision that ascertained CNS's involvement in bid rigging for a public tender concerning the concession of cleaning services for schools in 2012.

The TAR Salerno held that the "additional penalties" that can justify the exclusion of a given undertaking from public procurement proceedings pursuant to Article 80(5)(c) of the new Italian Public Procurement Code (Legislative Decree No. 50/2016)[70] do not include antitrust penalties. The Italian legislator deliberately and clearly chose not to mention antitrust penalties as a cause of exclusion. Directive 2014/24/EU on Public Procurement set out the principle that the contracting authority *may* exclude a bidder from a procurement procedure in case it "has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition."

Secondly, the TAR Salerno found that the decision to exclude CNS on antitrust grounds was not adequately reasoned, since the decision did not clarify how CNS's 2012 conduct could have an impact on the "moral requirements" referred to in the Public Procurement Code.

68 TAR Salerno, judgment of January 2, 2017, *CNS and Azienda Ospedaliera Universitaria Ospedali Riuniti San Giovanni di Dio e Ruggi D'Aragona* (Judgment No. 10).

69 CNS is a cooperative entrusted by its members to participate in public procurements and conclude contracts with contracting authorities, mainly in the sectors of facility management, energy, ecology, cleaning, logistics, and services in museums.

70 Article 80(5) of the new Italian Public Procurement Code states causes for which the contracting authorities shall exclude operators from the procurement procedure. Among them, Article 80(5)(c) includes deficiencies in the execution of previous public procurement contracts or concessions that caused the termination of the contract, an order to compensate damages, or "other penalties."

Furthermore, the TAR Salerno held that the antitrust penalty imposed by the ICA could not, in any case, result in the *automatic* exclusion from procurement procedures given that there is a "self-cleaning" mechanism in Article 80(7) of the new Italian Public Procurement Code, which enables an undertaking lacking "moral requirements" to demonstrate its effort to indemnify the damaged subject. According to this provision, the contracting authority cannot automatically exclude the bidder from the procurement procedure but must enable it to demonstrate its reliability.

NETHERLANDS

This section reviews developments under the Competition Act of January 1, 1998 (the "Competition Act"),[71] which is enforced by the Netherlands Authority for Consumers and Market (Autoriteit Consument & Markt, "ACM").[72]

Horizontal Agreements

Rotterdam District Court Confirms Private Equity Company's Parental Liability in Flour Cartel Case

On January 26, 2017, the Rotterdam District Court confirmed the ACM's September 2015 decision on appeal,[73] which found two private equity companies to be liable, as parent companies, for the cartel infringement of their subsidiary flour producer Meneba.[74] In its December 2010 decision, the ACM fined 14 flour producers, including Meneba, €81.6 million in total for participating in a cartel.[75] The flour producers had entered into various anticompetitive agreements, such as pricing agreements, dividing customers, and buying up competitors to drive them out of the market.

On administrative appeal before the ACM, two cartel participants claimed that Meneba's ultimate parent companies, private equity firms, were not held liable for Meneba's infringement. The ACM further investigated this matter and corrected this omission in its September 2015 decision on appeal. One of these parent companies, Bencis, appealed to the Rotterdam District Court.

According to the Rotterdam District Court, liability is applicable/imputable to various companies that belong to the same "chain" and this does not exclude private equity firms. What matters is whether a portfolio company (subsidiary) determines its conduct on the market independently or whether the private equity firm (parent company) exercises decisive influence so that they must be regarded as one economic entity. The conduct and powers of a private equity company are not necessarily the same as those of a mere financial investor. The Rotterdam District Court agreed with the ACM that, on the basis of all facts and indications, Bencis exercised such decisive influence on Meneba that they must be regarded as one economic entity. Therefore, Bencis was rightly liable for Meneba's infringement.

Moreover, in a separate judgment, the Rotterdam District Court confirmed that two individuals are liable for the conduct of a German flour producer that participated in the cartel.[76] Because this German company was a partnership, and the two individuals were its general partners, the ACM rightfully fined and held them liable for the company's infringement. According to the Rotterdam District Court, the fact that the entity changed its legal form before the cartel ended (it became a partnership with limited liability) is irrelevant because the two individuals continued to form part of the same economic entity by managing both the old and, subsequently, new entity.

Rotterdam District Court Confirms ACM Decision in Prefabricated Concrete Garages Case

On March 16, 2017, the Rotterdam District Court confirmed the ACM's June 2015 decision[77] in the prefabricated concrete garages case.[78] From February 2010 until July 2012, the two largest suppliers of prefabricated concrete garages in the Netherlands, two German companies, had concluded anticompetitive agreements such as price-fixing, dividing customers, and hindering competitors from becoming more active in the market. The ACM found this to be a very serious infringement. While one supplier, Rekers Betonwerk GmbH & Co. K G and Rekers Betonwerk GmbH (together, "Rekers"), was not fined because it

[71] Decisions of the ACM are available at www.acm.nl, case-law is available at www.rechtspraak.nl.

[72] The ACM is the successor of the Netherlands' Competition Authority *(Nederlandse Mededingingsautoriteit*, "NMa") as of April 1, 2013.

[73] *Meel*, Case 6306, ACM decision on appeal of September 11, 2015.

[74] Rotterdam District Court, Judgment of January 26, 2017, ECLI:NL:RBROT:2017:588.

[75] *Meel*, Case 6306, ACM decision of December 16, 2010.

[76] Rotterdam District Court, Judgment of January 26, 2017, ECLI:NL:RBROT:2017:637.

[77] *Juwel, Rekers*, Case 14.0409.31, ACM decision of June 1, 2015 and ACM decision on appeal of February 17, 2016.

[78] Rotterdam District Court, Judgment of March 16, 2017, ECLI:NL:RBROT:2017:1907.

notified the ACM of the cartel, the other supplier, Juwel Betonbauteile GmbH ("Juwel"), received a fine and subsequently appealed it.

Juwel claimed that its fine should be lowered because its participation in the cartel had ended in February, and not in July, 2012, and because the ACM used an excessively high gravity multiplier in calculating the fine.

While the Rotterdam District Court acknowledged that Juwel actively "claimed" its last customer in February 2012, Juwel did not distance itself from the cartel, but continued to discuss a new customer order with Rekers, which under the agreement should have been allocated to the latter, and continued to receive customer information from Rekers until July 2012. The ACM therefore correctly determined the duration of the cartel for fine calculation.

Concerning the gravity multiplier, the Rotterdam District Court agreed with the ACM that the cartel covered far-reaching horizontal anticompetitive agreements, covering the entire territory of the Netherlands, constituting a single continuous infringement. The two suppliers charged much higher prices than under normal market conditions and deprived customers of choice in an already narrow market. They also conspired to hinder other (German) prefabricated concrete suppliers from expanding their customer base in the Netherlands. Juwel claimed that the ACM's gravity multiplier for calculating the fine was excessively high in this case, namely 3.5, compared to 2.75 or 3 in previous similar cases. The Rotterdam District Court rejected this claim and explained that in those cases (silver-skin onions cartel, first-year onion sets cartel, and natural vinegar cartel) the old fine calculation method was applicable. However, the fine calculation method applicable in this case (*Boetebeleidsregels 2013*) has a higher maximum gravity multiplier compared to the old methods. Therefore, the ACM correctly determined the gravity multiplier.

Gelderland District Court Awards Damages to Electricity Grid Operator TenneT

On March 29, 2017, the Gelderland District Court ordered ABB, a Swiss engineering company participating in the gas insulated switchgear ("GIS") cartel, to pay €23 million damages plus interest to Dutch electricity grid operator TenneT.[79]

From 1988 until 2004, ABB and other multinational companies participated in a GIS cartel for the which the European Commission fined the companies over €750 million in 2007. GIS is heavy electrical equipment used to control energy flows in electricity grids, and is the major component of turnkey power substations.

ABB was not fined because it brought the cartel to the European Commission's attention. However, such immunity does not bar ABB's customers from claiming damages in national proceedings. TenneT brought damages proceedings in 2011, and established that ABB was liable for TenneT's damages for buying overpriced GIS.[80]

In 1993, TenneT bought a GIS installation from ABB for its switching station in Eemshaven. According to TenneT's calculations, based on a comparison of ABB's offers during and after the cartel, TenneT overpaid by 54–64%, which amounts to approximately €21–25 million. ABB contested these claims, but failed to provide appropriate data on its production and raw material costs. Its reports on profit margins were not appropriate for calculating TenneT's damages.

Moreover, ABB claimed that TenneT did not suffer any damages because it passed those higher prices on to its customers, the electricity users. The Gelderland District Court agreed. However, it deemed the chance that TenneT's electricity users would bring damages actions against ABB themselves negligible. Because TenneT is a wholly state-owned company, the Gelderland District Court considered that the damages it ordered ABB to pay to TenneT will be passed on to TenneT's customers in the future, either as lower transportation or electricity fees or in the form of other measures. Therefore, the Gelderland District Court deemed it effective to order ABB to pay damages to TenneT and dismissed ABB's counterclaims.

[79] Gelderland District Court, Judgment of March 29, 2017, ECLI:NL:RBGEL:2017:1724.

[80] Supreme Court, Judgment of July 8, 2016, ECLI:NL:HR:2016:1483.

SPAIN

This section reviews developments under the Laws for the Defense of Competition of 1989 and 2007 ("LDC"), which are enforced by the regional and national competition authorities, Spanish Courts, and, as of 2013, by the National Markets and Competition Commission ("CNMC") (previously the National Competition Commission ("CNC")).

Horizontal Agreements

The CNMC Fined the ACB for Imposing Discriminatory, Unjustified, and Disproportionate Conditions on Newcomer Clubs Promoted to the First-Tier Basketball League

On April 11, 2017, the CNMC fined the Asociación de Clubes de Baloncesto ("ACB") €400,000 for infringing Article 1 of the LDC by imposing discriminatory, unjustified, and disproportionate economic and administrative conditions on basketball clubs being promoted to the ACB League—Spain's highest-level male basketball competition—in the cases where the clubs being promoted had never played in the ACB League before.[81]

On December 5, 2014, basketball club CB Tizona filed a complaint against the ACB for alleged collusive agreements that imposed onerous economic and administrative conditions on promoted clubs. At the end of each season the best two clubs of the LEB ORO League—Spain's second-tier male basketball league—can be promoted to the ACB League, while the worst two teams in the ACB League are relegated to the LEB ORO League. To be promoted, the qualifying teams must fulfill over 20 economic and administrative conditions laid down by the ACB. These conditions include an ACB League "entry fee" and a contribution to the Promotion and Relegation Regulation Fund (or *Fondo de Regulación de Ascensos y Descensos*) ("FRAD").

The money collected from the ACB League entry fee, which was over €3 million in the 2016–2017 season, was distributed equally among incumbent ACB clubs. However, different rules applied to clubs that had already played in the ACB League and rejoined after having been relegated to the LEB ORO League, with varying discounts being applied in different years.[82] The contribution to the FRAD was collected from all acceding clubs to cover the relegated clubs' expected economic losses resulting from their relegation. Both mechanisms had been in place since the 1992–1993 season.

The ACB sought to rely on competition law precedents[83] establishing that sports legislation may limit freedom of action of the participants in a sports competition if these limitations pursue legitimate objectives (including, *inter alia*, protecting athletes' health, audiences' safety, and clubs' financial stability) and if the anticompetitive effects are inherent and necessary to attain these objectives. According to case law, interdependence between competitors in sports competitions must also be taken into account. Any restrictive measures must be proportional and applied in a transparent, objective, and non-discriminatory manner.

The CNMC instead found that the entry fee was discriminatory, unjustified, and disproportionate. The CNMC held that the only possible rationale for the entry fee was to serve as an expropriation mechanism tapping into promoted clubs' future income. The ACB did not invest revenue from the entry fee in the competition itself. The CNMC found that the entry fee was disproportionate because it was greater than promoted clubs' average annual income. Furthermore, the fee had increased considerably since 1991—despite sporting authorities' express opposition—with no additional advantages being provided in return. Finally, the CNMC held that the entry fee was discriminatory because 8 out of 18 clubs in the ACB

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[81] Case S/DC/0558/15, *ACB*, CNMC decision of April 11, 2017.

[82] The entry fee was set in the 1992–1993 season, then doubled in the 1993–1994 season and linked to inflation from that point on. Furthermore, between the 1992–1993 and 2003–2004 seasons, clubs that had paid the entry fee could recoup 50% if relegated again, but had to pay it back to the ACB upon later promotion. Since the 2003–2004 season, promoted clubs that had already played in the ACB League only had to pay the difference between the present entry fee and the entry fee applicable when relegated.

[83] *Meca Medina and Mancej v. Commission* (Case C-519/04 P) EU:C:2006:492.

(those that have played uninterruptedly in the ACB League since the 1992–1993 season) have never paid the fee and, if these clubs are relegated in the future and then are promoted, they will only be required to pay an actualization rate.

Regarding the FRAD contribution, the CNMC concluded that it was discriminatory because, though it was presented as an insurance mechanism, no link could be established between the payers and beneficiaries of the fund. Nine of the current ACB clubs have not contributed to the fund but would still benefit from it if they are relegated to the LEB ORO League. The CNMC noted that for the FRAD to function as a genuine insurance mechanism, all ACB League clubs need to contribute, because they are all insured by the fund. Finally, the CNMC rejected the ACB's claim that the FRAD was based on the principle of solidarity, because only less commercially well-established promoted clubs contributed to the fund, and were thereby placed at a disadvantage.

The ACB also argued that it can self-regulate under Spanish law and that its bylaws had been approved by the sporting authorities, so it could not be liable of an anticompetitive infringement because the actions at issue were mandated by the law. The CNMC rejected this argument, establishing that the decision on entry fees and the FRAD contribution had been taken unilaterally by the ACB and therefore fail to meet the test of being required by law (a test that had to be interpreted restrictively).

This decision follows a trend in recent years towards closer scrutiny of sports by competition authorities across Europe.

Mergers and Acquisitions

The CNMC Unconditionally Approves the Acquisition of Joint Control of Mytaxi and Hailo by Daimler and Hailo

On November 24, 2016, the CNMC approved, without conditions, the acquisition of joint control by Daimler AG ("Daimler") and Hailo Network Holdings Limited ("Hailo"), over both Intelligent Apps GmbH ("Mytaxi") and Hailo.[84] Mytaxi, operated by Daimler, and Hailo are two platforms that enable users to hire cabs through a mobile application ("app") or the internet. The transaction involved Mytaxi acquiring Hailo´s platform and Hailo obtaining, in turn, a shareholding and veto rights in Mytaxi, which led to joint control of the new combined entity.

The CNMC found that the relevant product market was at least as small as the market for intermediary services for hiring a cab or a VTC (chauffeur driven vehicle) through apps. This was described by the CNMC as a two-sided market involving both users who download and use the apps and cab drivers or VTCs who make themselves available to potential customers through the apps. The CNMC considered further segmenting the market into cab-hiring apps (*e.g.* Mytaxi) and VTC-hiring apps (*e.g.* Uber, Cabify) due to differences in their respective regulatory frameworks, and in particular: (i) the fact that cabs have their prices set by local authorities; and (ii) the considerably lower number of authorized VTCs overall, which has an impact on their availability. However, the CNMC ultimately left the market definition open on this point. the CNMC defined geographical markets covering the metropolitan areas of Madrid and Barcelona.

The CNMC found that direct hire (*i.e.*, the activity of hiring a cab directly on the street, an option not available to VTCs) was a separate market, noting that cab drivers generally see the use of intermediaries as a client-acquisition channel that is complimentary to direct hire, rather than a substitute for it.

In addition to direct hire and apps, cab drivers can also use traditional intermediaries (radio) for client-acquisition purposes. Although the CNMC accepted that there was some degree of substitution between virtual and traditional intermediaries, it ultimately found that traditional intermediaries formed a separate product market for the purposes of the transaction. This was because the level of substitution between the two was not symmetric. In particular, the CNMC noted that, in terms of the demand for the final service, a customer who is accustomed to hiring a cab

[84] Case C/0802/16, *Daimler/Hailo/Mytaxi/Negocio Hailo*, CNMC decision of November 24, 2016.

through the app, with all its additional benefits (*e.g.*, payment through the app, possibility to rate the driver, estimation of the distance and time to the destination, knowledge of the price in advance, etc.), was unlikely to go back to using traditional intermediaries in response to a small price increase. Moreover, apps and traditional intermediaries tended to be used by different types of customers.

The combined market share for both VTC apps and cab-hiring apps was around 50–60% in Madrid in 2015. In Barcelona, where Cabify is less widespread, the combined market share was around 80–90%. For cab-hiring apps only, the resulting combined market shares for intermediary services for cabs in 2015 were at least 60–70% in Madrid and 80–90% in Barcelona. Despite these extraordinarily high market shares, the CNMC found that the transaction would not have negative effects on the driver-side or customer-side of the market because the use of app intermediaries had only recently developed and had not achieved a significant market presence, representing only around 2–5% of total cab rides. In addition, the CNMC held that the economies of scale and network effects resulting from this transaction would not be significant enough to prevent third parties from being able to compete in the market. In short, the CNMC concluded that the parties would continue to face competitive pressure from traditional intermediaries and apps for VTC operators.

This decision provides clarity on the CNMC's approach to transactions in two-sided markets concerning the digital economy, where the authority appears ready to carry out a detailed dynamic analysis of the competitive situation and potentially approve the transaction, even where the parties have high market shares.

Policy and Procedure

The CNMC Dismantled Nine Cartels and Imposed €227 million in Fines During 2016

On February 24, 2017, the CNMC released a report evaluating its 2016 enforcement activity ("the CNMC report").[85] In 2016, the CNMC imposed €227 million in fines, 96% of which were cartel fines. This is less than in 2015, although total fines in 2015 (€550 million) were the highest ever recorded.

Conducts. The CNMC dismantled nine cartels and imposed €218 million in fines (brought down to €150 million due to reductions for leniency applicants). In addition, the CNMC issued three fining decisions for restrictive conduct and two decisions for failure to comply with a previous CNMC decision.

The CNMC report highlighted the cartel in adult diapers (accounting for more than half of the fines imposed in 2016), where manufacturers coordinated, through an association, to fix prices of products financed by the National Health Service, and directed products to pharmacies while restricting their distribution to the institutional channel. The cartel ran from 1996 until 2014 and the investigation was triggered by a leniency applicant (P&G) who obtained full immunity. Incidentally, this was the first decision where the CNMC fined managers, using its newly acquired power.[86] Other cartels featured in the report were the cash and valuables transportation cartel (over €46 million in fines) and the cement and concrete cartel (€29.17 million in fines).

The CNMC heightened its action in public tender markets and against bid-rigging, both in its role as enforcer and in fostering prevention through trainings and increased procedural checks. The report detailed that the CNMC fined four undertakings for market-sharing and price-fixing, through a temporary joint venture (UTE), in the supply of railway turnouts to railway infrastructure administrators. The CNMC also dismantled a cartel on international removal services for the employees of several ministries. Despite its active role in public tender markets, thus far the CNMC has been reluctant to use its new powers enabling it to temporarily prohibit a company from bidding for government contracts. Regarding prevention, in 2016 the CNMC organized 14 courses for approximately 750 officials involved in public tenders. The CNMC has also developed checklists and data collection strategies to boost screening of public tenders and detection of bid-rigging.

85 *CNMC's competition enforcement in 2016 –* Activity report.

86 National Competition Report, April–June 2016, p. 38.

In 2016, three out of the nine CNMC cartel decisions had at least one leniency applicant, a lower proportion than for other competition authorities. This may reflect the maturity of the leniency program, following the surge in leniency applications after its introduction in 2008. Furthermore, it is also a testimony to the fact that the CNMC retains investigative tools beyond the leniency program. The CNMC highlighted that in 2016 it carried out 6 inspections into 20 undertakings. The CNMC also published a notice on inspection proceedings, informing undertakings of the procedures followed by the authority in business premises inspections, and to facilitate these inspections being carried out with the lowest possible costs for all parties concerned.

Only one company, Istobal, was fined for abuse of dominance in 2016, for refusing to supply parts and information to independent technical assistance undertakings in the market for the maintenance of automatic washing machines and for geographically allocating customers.[87] In addition, two early termination agreements were concluded, with the CNMC's policy on abuse striking a relatively conciliatory tone in 2016 compared to other agencies.

Finally, the CNMC imposed fines for failing to comply with previous decisions or procedural obligations in two cases. In the first case, the CNMC fined Urban Science for having supplied incomplete, incorrect, misleading, or false information during the investigation of the car manufacturers cartel. The second noncompliance fine was imposed on several travel agencies for continuing to implement a cartel, this time through a temporary joint venture.[88]

Concentrations. The CNMC received 104 concentration notifications in 2016 (up from 91 in 2015), 54 of which followed the simplified procedure. Out of the 102 transaction examined in 2016, the CNMC cleared 96 in Phase I without commitments, and 5 more were cleared in Phase I with commitments. The notification of the outstanding concentration was withdrawn by the parties.

The CNMC report described three concentrations that had required commitments:

— Just Eat's acquisition of La Nevera Roja combined the two main competitors in the market for online food delivery. However, the CNMC took into account that online food delivery was only a small part of the food delivery market in Spain. To lower barriers of entry in online food delivery, the parties renounced the inclusion exclusivity clauses and exclusivity-inducing fees in their contracts with restaurants.

— The second transaction, *Bimbo/Panrico II*, raised concerns in the packaged ready-sliced bread market, where Bimbo and Panrico were the first and second largest competitors, respectively. This transaction had already been attempted in 2015, when the parties had proposed to divest Panrico's packaged ready-sliced bread business to investment fund Oaktree. This was rejected because Oaktree was incapable of replicating Panrico's role in the market due, among other factors, to its lack of experience in the business. In 2016, the parties proposed a new entrant, Adam Foods, to take over Bimbo's packaged bread (including ready-sliced bread) and bread substitutes businesses. Adam foods was an established leader in the cookies market and was therefore able to effectively take on the divested business.

— Finally, the CNMC report highlighted Gas Natural Fenosa's acquisition of most of Repsol's liquefied petroleum gas ("LPG") points of supply. This transaction mirrored others in the industry where natural gas operators have acquired LPG points of supply to convert them into natural gas points of supply. Gas Natural committed to abstain from marketing its retail services to new customers in the acquired points of supply. This was necessary to prevent an excessive reinforcement of its position in the natural gas retail market, which would have been favored by the expansion of its natural gas network. Even though Gas Natural was obliged by

[87] National Competition Report, July–September 2016, pp. 27–29.

[88] National Competition Report, October–December 2016, pp. 26–27.

regulation to give access to its natural gas distribution network, the CNMC believed that new customers would tend to stay with Gas Natural's retail services for natural gas. The transaction is an example of the CNMC's approach in delineating its regulatory and competition enforcement functions: the authority seems ready to impose commitments in concentration proceedings where previous regulatory measures have not been as effective as anticipated. The CNMC deemed that previous regulatory measures to increase transparency in the installation of new points of supply (so that all retail providers could compete for new customers) had been partly ineffective.

The CNMC report mentioned other transactions reviewed during the year, and stressed in particular the importance of appropriately analyzing some features of the digital economy, including the prevalence of two-sided markets and limited substitutability of online services with respect to traditional services. The CNMC emphasized, however, that competitive pressure by traditional services on online services had been taken into account in the transactions reviewed throughout the year, as was the potential for growth of the new online intermediation markets.

The CNMC also insisted on its commitment to a rigorous enforcement of the notification thresholds. The authority noted that two of the transactions reviewed in the digital economy had been reviewed at the CNMC's own initiative . In those cases, the parties had relied on wide market definitions, with which the CNMC disagreed, to conclude that no notification was required. The CNMC report also referred to DG Competition's sector inquiry into e-commerce, as well as the ECN's coordination on parity clauses used by online travel agencies, whereby no new actions would be initiated by a national competition authority for one year while the effects of previously adopted commitments in certain jurisdictions were verified. The CNMC noted that the terms used by the main online platforms in Spain had been reviewed to ensure that they complied with competition law rules.

Finally, the CNMC report covered some areas that the CNMC had specifically decided to focus on during the past year. Among these, the CNMC mentioned its coordinating role in enforcing the commitments resulting from the *Telefonica/DTS* concentration. The CNMC conducted cost calculations and coordinated cost sharing arrangements affecting the wholesale football channels offered by Telefónica to other competitors. Furthermore, in May 2016, the CNMC published a report on the rules for the sale of football broadcasting rights by La Liga and monitored its subsequent implementation.

SWITZERLAND

This section reviews competition law developments under the Federal Act of 1995 on Cartels and Other Restraints of Competition (the "Competition Act") amended as of April 1, 2004, which is enforced by the Federal Competition Commission ("FCC").

Horizontal Agreements

FCC Launches Investigation into Tractor Spare Parts Sector

On March 13 2017, the FCC launched an investigation against Bucher-Landtechnik AG and its affiliated companies ("Bucher-Landtechnik") for possible illicit agreements in the distribution of spare parts for New Holland, Case IH, and Steyr tractors.[89] A search was carried out at Bucher-Landtechnik.

The FCC initiated the investigation on the basis of evidence that Bucher-Landtechnik interfered with parallel imports by making the supply of tractor spare parts dependent on the sale of tractors of the corresponding brands. Moreover, according to other indications, Bucher-Landtechnik may have imposed restrictions on its dealers on their sales territory.

FCC Fines HCI Solutions for Abuse of Dominance in Electronic Medical Information Market

On March 21, 2017, the FCC announced that it closed its investigation into the marketing of electronic medical information and fined HCI Solutions AG ("HCI Solutions") (a subsidiary of Galenica Group) approximately CHF 4.5 million.[90]

The FCC concluded that HCI Solutions abused its dominant position in the field of commercialization of electronic medical information in Switzerland by preventing competitors from entering the market. First, since 2012 HCI Solutions has systematically introduced clauses in its contracts with software companies operating in Switzerland that prevented the use of competitor's data banks. Therefore other suppliers were not able to establish themselves in the market. Second, HCI Solutions offered the integration of pharmaceutical companies' medical information into their databases only when tied with several additional services, effectively closing the market to other suppliers of such services.

In Switzerland, electronic medical information is used by wholesalers, hospitals, pharmacists, doctors, and drugstores for the distribution, delivery, and invoicing of authorized medicines. Digital access to this information is essential for the functioning of the market. Distributors and, consequently, patients access to medicines may be hampered in the absence of this information.

Mergers and Acquisitions

FCC Opens In-Depth Investigation into Ticketcorner and Starticket Merger

On February 13, 2017, the FCC announced that it would carry out an in-depth examination of the proposed merger between Ticketcorner SA and Starticket SA.[91]

Ticketcorner and Starticket intend to offer their services together in the market. Ticketcorner is a subsidiary of Ticketcorner Holding, which is partially owned by CTS-Eventim group and Ringier group; Starticket is owned by Tamedia SA.

Following a preliminary examination, the FCC has found evidence that this transaction could create or strengthen a dominant position, in particular in the markets for the distribution of tickets to third parties and ticketing software solutions offered to organizers for their own sales.

The examination must be carried out within a period of four months

[89] FCC press release, March 15, 2017, available in German at: https://www.newsd.admin.ch/newsd/message/attachments/47555.pdf.

[90] FCC press release, March 21, 2017, available in French at: https://www.weko.admin.ch/weko/fr/home/actualites/communiques-de-presse/nsb-news.msg-id-66055.html.

[91] FCC press release, February 13, 2017, available in French at: https://www.weko.admin.ch/weko/fr/home/actualites/communiques-de-presse/nsb-news.msg-id-65586.html.

Policy and Procedure

FCC Publishes Annual Report

On April 10, 2017, the FCC published its 2016 annual report.[92]

In 2016, the FCC made some significant decisions to guarantee free competition and open markets. The investigations that were completed included both complex, time-consuming proceedings and smaller cases across a broad range of sectors, which should act as a deterrent and establish the wide field of application of the Competition Act. In line with the FCC's longstanding priorities, in 2016 the focus was on hard horizontal cartels, market foreclosures, and abuse of dominance.

In 2016, the FCC conducted investigations into the widest range of sectors of the Swiss economy yet. In particular, the FCC intervened in the construction, financial markets, health care, media and communication, consumer goods, retail trade, watch, and automotive sectors. The diversity of industries affected by competition law proceedings is a clear indication of the comprehensive scope of the Competition Act. Special arrangements for specific sectors, as demanded in various political proposals, contradict the general character of the Competition Act.

In its June 28, 2016 landmark decision in the Gaba/Elmex case, the Federal Supreme Court settled two fundamental issues of major importance to the future application of the Competition Act by the FCC and the courts. The Federal Supreme Court provided answers to long disputed questions. It clarified how the seriousness of restraints of competition should be assessed and whether direct sanctions may also be imposed in the case of hardcore agreements affecting competition that do not entirely eliminate effective competition, but nonetheless cause considerable harm. The related judgment will facilitate FCC proceedings against hardcore horizontal cartels as well as price-fixing agreements and market foreclosure in distribution agreements, because the FCC will no longer have to prove the implementation and effects of such agreements in each individual case on the basis of quantitative criteria. The Federal Supreme Court, however, did not prohibit such agreements per se—they may still be justified on grounds of economic efficiency, provided the statutory presumption that competition will eliminated can be rebutted.

In 2016, the competition authorities also conducted a detailed examination of the digitalization of the economy and related competition law issues, both in the form of a theoretical appraisal and analysis of the matter and by studying specific cases. According to the FCC, assessing the developments in the digital economy is complicated: the digital economy offers opportunities, but also harbors risks for competition. Misjudgments can lead to regulations that obstruct competition rather than provide a level playing field. The competition authorities are confronting these new challenges and taking account of the changing conditions and characteristics of new business models. Innovative business models are highly desirable, but the competition authorities will issue warnings if it identifies risks to competition, and intervene if competition is restricted.

92 FCC Annual Report 2016, available in English at: https://www.weko.admin.ch/weko/en/home/comco/annual-reports.html.

UNITED KINGDOM

This section reviews developments under the Competition Act 1998, and the Enterprise Act 2002, which are enforced by the Competition and Markets Authority (the "CMA").

Horizontal Agreements

CMA Fines Modeling Agencies and Trade Association for Coordinating Prices

On December 16, 2016, the CMA fined five modeling agencies,[93] and their trade association the Association of Model Agents ("AMA"), a total of £1.5 million for colluding on prices for modeling services between April 2013 and March 2015 in breach of Chapter I of the Competition Act 1998 and Article 101(1) TFEU.[94]

The CMA found that the agencies had entered into agreements and concerted practices with the object of coordinating their commercial and pricing behavior through systematic alerts circulated by the AMA. The agencies were found to have exchanged and discussed prices, agreed to fix minimum prices, and to have taken a common approach to pricing during negotiations of contracts with customers. The CMA further found that the AMA had played an essential role in facilitating this coordination, and that the agencies and AMA were in regular contact through emails.

The CMA found that the AMA's alerts to the agencies almost invariably referred to specific customers, although the majority did not contain explicit prices. The alerts were instead intended to signal to all AMA members whether the fees proposed by customers were "appropriate" and, in some cases, urged members to either reject an offer or insist on higher fees. In particular, the AMA's alerts to its wider membership contained information on the fees and other terms and conditions offered by particular customers for modeling assignments. This aided the alignment of the modeling agencies' policies by allowing them to resist any downward pressure on pricing (*i.e.*, to set minimum prices or to refuse to supply modeling services at a particular price) during negotiations with customers.

The CMA concluded that the agencies and the AMA should have known or reasonably foreseen that these communications were capable of allowing them to coordinate their conduct, and that such coordination was not compatible with the parties' obligations to act independently in the market. A number of the agencies and the AMA contended that the aim of these alerts and communications was to protect the interest of the models and prevent them from being inadequately remunerated for their services. The parties submitted that this exchange of information served the legitimate social objective of ensuring that AMA members were paid an appropriate fee. The CMA rejected this argument, and concluded that a legitimate social objective does not preclude activities from amounting to a restriction of competition and, in any event, the extent of the parties' activities in this instance went beyond what was objectively necessary and proportionate for achieving their stated aim. In assessing fines, the CMA imposed a minimal penalty of just £2,500 on the AMA due to its low turnover, and rejected an appeal for a reduction by FM Models due to its ongoing liquidation.

CMA Fines Galvanized Steel Tank Manufacturers for Cartel and Information Exchange

On December 19, 2016, the CMA issued two separate decisions relating to the galvanized steel tanks cartel[95] and information exchange[96] that breached the Chapter I prohibition of the Competition Act 1998 and Article 101 TFEU. The investigation followed a criminal proceeding against senior management of the companies under investigation that resulted in two acquittals and one guilty plea.[97]

Following a settlement in March 2016, the CMA found that four suppliers had formed a cartel in the

93 FM Models, Models 1, Premier, Storm, and Viva.

94 *Conduct in the modelling sector* (Case CE/9859-14), CMA decision of December 16, 2016.

95 *Galvanized steel tanks for water storage – main cartel infringement* (Case CE/9691/12), CMA decision of December 19, 2016.

96 *Galvanized steel tanks for water storage – information exchange infringement* (Case CE/9691/12), CMA decision of December 19, 2016.

97 *See* National Competition Report, April–June 2015, p. 37.

market for cylindrical galvanized steel tanks in the UK ("CGSTs") between April 2005 and November 2012.[98] The infringement took the form of price-fixing, bid rigging, and market sharing by way of customer allocation, with the companies involved setting benchmark prices for a range of tanks, which were used to calculate maximum price discounts to be offered to customers of another cartelist. These arrangements were concluded and reaffirmed in frequent meetings and bilateral exchanges concerning particular bids.

The CMA found that the practices were a hardcore restriction of competition by object, and consequently imposed fines of £2.6 million. CST was granted immunity under the CMA's leniency policy. Franklin Hodge Industries Ltd also received a 30% discount as a successful leniency applicant.

In a separate infringement decision, the CMA also found that three of the four parties to the cartel (Franklin Hodge Industries, Galglass, and KW Supplies) and another galvanized steel tank supplier (Balmoral Tanks Ltd) had exchanged commercially sensitive information on current and future pricing intentions at meetings secretly recorded by the CMA. The information provided was comprised of both generic and contract-specific information, in the form of price bands and prices quoted for specific contracts relating to two types of CGSTs. The CMA found that this information exchange reduced uncertainty among suppliers about CGST pricing intentions.

The CMA concluded that the information exchange constituted a concerted practice, which was a restriction of competition by object in relation to the supply of CGSTs in the UK. Balmoral Tanks Ltd was fined £130,000 for participating in the unlawful information exchange.[99] No additional penalty was imposed on the three other suppliers involved in both the cartel and information exchange, because the duration of the cartel covered the period of the information exchange and the CMA's fine for the former covered both infringements.

CLEARY GOTTLIEB

98 In the case of one supplier, CST Industries (UK) Ltd and its parent company CST Industries Inc. (together, "CST"), participation continued until May 2012.

99 The level of Balmoral's fine reflects several factors, notably Balmoral's refusal to join the cartel, the pro-competitive effect of its market entry, and its significant cooperation in the CMA's civil and related criminal investigation.

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