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.

Horizontal Agreements

Infrabel Bid Rigging Cartel

On May 2, 2017, the Auditorate adopted a settlement decision fining five energy companies[1] nearly €1.8 million for their participation in a bid rigging cartel concerning a public tender launched by Infrabel, the Belgian railway infrastructure manager.[2]

In 2008, Infrabel launched a public tender for the delivery and installation of specific switchgear for traction substations (which convert and supply electricity to the railway network) and switching stations (which isolate parts of the network). The selection procedure was organized in three stages. First, Infrabel selected seven suitable candidates amongst the applicants. Second, Infrabel concluded a framework agreement with five energy companies selected on the basis of their "Best and Final Offer." Third, Infrabel issued individual calls for specific orders within the terms and conditions of the framework agreement. The selected companies had to submit their best offer for each call, and the orders were awarded to the lowest bidder.

In 2013, the Auditorate started investigating this public procurement following ABB's leniency application. The investigation revealed that the bidders had agreed to allocate the orders placed by Infrabel amongst themselves. For each call, they exchanged price information and instructions to ensure that the pre-designated participant would present the lowest price and win the tender. The Auditorate found that these practices had started in 2010–2011 and continued until June 2016. The Auditorate notified its objections to the companies in August 2016, and settlement talks began a month later.

The Auditorate granted full immunity from fines to the whistleblower, ABB, and immunity from prosecution to the four natural persons who had requested it. As a result of their leniency applications, Siemens and AEG were granted 50% and 30% fine reductions, respectively. Siemens' fine was, however, further increased to sanction its role as ringleader and ensure the deterrent effect of the fine. Interestingly, the Auditorate also took Infrabel's conduct into account as a mitigating factor for all cartelists. It found that Infrabel had rendered the market excessively transparent, in particular by participating in meetings and sharing strategic information with the undertakings involved. Finally, the companies benefited from a 10% fine reduction in return for acknowledging their participation in the infringement and accepting the

[1] ABB (ABB Ltd and ABB SA), Siemens (Siemens AG and Siemens SA), AEG (Karpimos SA and AEG Belgium SA), Schneider (Schneider Electric SE and Schneider Electric Energy Belgium SA), and Sécheron SA.

[2] BCA, Case CONC-I/O-13/0031; Auditorate, Decision No. ABC-2017-I/O-16-AUD of May 2, 2017.

related sanctions. The fines are final because a settlement decision cannot be appealed.

The BCA adopted this first decision on collusion in a public procurement shortly after publishing a guide[3] raising awareness of bid rigging. This informal guide provides practical examples and advice enabling public authorities to better identify and prevent collusive behavior of suppliers in the context of public procurement. The BCA has stated on several occasions that bid rigging in public procurement constitutes one of its enforcement priorities.[4]

Mergers and Acquisitions

Brussels Court of Appeal Dismisses Alken Maes' Request to Suspend AB InBev Takeover

On June 28, 2017, the Brussels Court of Appeal confirmed the BCA decision rejecting Alken-Maes Brouwerijen N.V.'s ("Alken-Maes") request to suspend the takeover by Anheuser-Busch InBev N.V. ("ABI") of Brouwerij Bosteels N.V. ("Bosteels"), a smaller Belgian brewer.[5]

In September 2016, Alken-Maes, one of ABI's competitors, complained to the BCA regarding ABI's planned acquisition of Bosteels. In parallel, Alken-Maes filed for interim measures with the BCA, requesting the suspension of the acquisition until the decision on the merits of its complaint. Although the intended transaction did not meet the EU nor Belgian merger notification thresholds, Alken-Maes claimed that it should be reviewed under the rules prohibiting abuses of dominance because it would strengthen ABI's established dominant position on the Belgian beer market. More precisely, the acquisition of Bosteels, a small but key market participant, would allow ABI to enter the degustation beer segment and become the only brewer in Belgium offering a portfolio of strong brands covering the different beer segments, thereby allegedly increasing ABI's bargaining power towards pubs and impeding competitors' expansion. On November 21, 2016, the BCA rejected Alken Maes' request for interim measures. Alken Maes appealed this rejection.[6]

The Brussels Court of Appeal upheld the BCA's decision. It held that an acquisition creating a concentration that is not subject to merger control cannot, as such, amount to an abuse of dominance. The Brussels Court of Appeal found that other types of conduct have to accompany the concentration itself in order to lead to an infringement of Article IV.2 CEL and/or Article 102 TFEU. These types of conduct must have restrictive effects on competition that are distinguishable from the effects of the concentration itself, and qualify as a *prima facie* abuse of dominance (rather than being merely potentially abusive). This decision confirms that concentrations that do not meet the notification thresholds will only fall under the abuse of dominance rules in exceptional circumstances.

3 BCA, Collusion in public procurements, A guide for buyers in charge of public procurements, January 31, 2017 ("BCA's Bid Rigging Guide").

4 *E.g.*, in the BCA's 2016 and 2017 priority policy notes of March 23, 2016 and February 21, 2017, respectively, and the foreword to the BCA's Bid Rigging Guide.

5 Brussels Court of Appeal, Judgment No. 2016/MR/2 of June 28, 2017.

6 BCA College, Decision No. BMA-2016-V/M-36 of November 21, 2016.

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

Finnish Government Proposes Temporary Obligation to Notify Mergers in Social and Health Care Sector

On June 15, 2017, the Finnish government put forward a proposal for a temporary amendment to the Finnish Competition Act concerning a wider obligation to notify concentrations to the FCCA for companies providing social and health care services.[7] The proposed new provision would apply to concentrations concluded before January 1, 2019.

According to the proposal, the merger control rules in the Finnish Competition Act would be applicable to all concentrations where at least one party provides customers in Finland with social or health care services, or laboratory or imaging services relating to health care services, regardless of the level of turnover. This means that different vertical and conglomerate concentrations where only one of the parties operates in the field of social and health care services would fall within the scope of the new notification obligation.

There are four exceptions in the proposal. The widened notification obligation would not apply to concentrations: (i) between self-employed persons; (ii) between undertakings selling their services within the same company or group of companies; (iii) where one party is an undertaking selling the services of at most five social and health care professionals; and (iv) where the established company does not operate in the market for social and health care services in Finland.

The aim of the reform is to ensure the functioning of the market and customers' freedom of choice by limiting the concentration of the social and health care sector before a wider social and health care reform, which is being prepared, becomes effective. The aim of the proposal is not to prohibit a significant number of concentrations but to ensure access to information and the possibility to intervene in the few cases where the effects on competition would be considered significant. The proposal would not change the conditions for intervention in or prohibition of concentrations. The proposal would also not affect the so-called one-stop-shop principle according to which the merger control rules of the Finnish Competition Act are not applied if the concentration falls within the scope of the EU Merger Regulation and is therefore handled by the European Commission.

The proposed new rules are intended to enter into force in fall 2017. The Finnish government estimates that a remarkable number of merger control cases will be brought to the FCCA in 2018.

[7] The Government Bill (HE 76/2017 vp) is available on the website of the Finnish Parliament (in Finnish): https://www.eduskunta.fi/FI/vaski/HallituksenEsitys/Documents/HE_76+2017.pdf (last visited July 10, 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").

Horizontal Agreements

The Paris Court of Appeal Significantly Reduces the Fines Imposed by the FCA in the Dairy Products Case

On May 23, 2017, the Paris Court of Appeal partially annulled an FCA decision sanctioning dairy firms on the grounds that the FCA had failed to respect the firms' rights of defense, and reduced the fines by over 30%.[8]

On March 11, 2015, the FCA fined ten dairy firms €192.7 million for exchanging commercially sensitive information on their prices and commercial strategy, and agreeing on the implementation of price increases, volume allocation, and bid-rigging in the market for dairy products sold to retailers under a private label from December 2006 until February 2012. During this time, the parties had reached anticompetitive agreements on three, short-lived occasions.

On appeal, the sanctioned companies argued that the FCA had breached their rights of defense. During the oral hearing before the FCA's *Collège* (*i.e*., the panel that adjudicates the matter), the case handlers presented an analysis of the harm done to the economy that had not been previously communicated to the parties. Subsequently, the parties were granted a very limited right of reply: they could only submit observations on the methodology relied on by the case handlers within only seven working days, and could neither question the quantitative aspects of the analysis nor submit a new economic study. Furthermore, the FCA did not communicate the observations submitted by some of the companies to all the appellants.

The Paris Court of Appeal held that the FCA had violated the parties' rights of defense by not ensuring that they could adequately reply to the new elements presented by the case handlers during the hearing. The Paris Court of Appeal consequently annulled all the fines except one (the appeal formed by *Laiterie Coopérative alsacienne Alsace Lait* was entirely dismissed and the company's €3.6 million fine still stands), and proceeded to determine the fines itself.

The Paris Court of Appeal followed the FCA's fining methodology but imposed a total fine of €131.95 million instead of €192.7 million. Interestingly, the Paris Court of Appeal applied a slightly lower gravity rate than the FCA (15% instead of 16%) as it took the view that retailers' strong buyer power made it uncertain that the goals of the agreement were fulfilled, and pointed out that economic studies only confirmed an overcharge during half of the infringement. Moreover, while the Paris Court of Appeal approved the FCA's decision to impose a single fine for two separate infringements, it noted that the fine was calculated taking into account the duration of the information exchanges, even though the gravity rate was justified by the punctual anticompetitive agreements. The Paris Court of Appeal thus reduced the fines of several companies due to the shorter duration of the more serious practices.

In addition, the Paris Court of Appeal's assessment of individual circumstances was more lenient than the FCA's. In particular, the Paris Court of Appeal reduced the fines of several companies due to their lesser involvement in the practices, and did not impose any fine increase for the size of the infringing companies' group. The Paris Court of Appeal also took greater account of financial difficulties. As a result, six companies obtained fine reductions of more than 25%.

The decision has been appealed before the French Supreme Court.

8 Paris Court of Appeal, May 23, 2017, *Laïta S.A.S et autres*, available at: http://www.autoritedelaconcurrence.fr/doc/ca_yaourts_23mai17.pdf, partially annulling French Competition Authority, Decision No. 15-D-03 of March 11, 2015 regarding practices implemented in the fresh dairy sector, available at: http://www.autoritedelaconcurrence.fr/pdf/avis/15d03.pdf.

Abuse

The FCA Imposes Commitments on the French National Institute for Preventive Archaeological Research

On June 1, 2017, the FCA accepted commitments from the French National Institute for Preventive Archaeological Research ("INRAP") regarding preventive excavation services.[9]

When construction works are likely to cause damage to a site that may contain archaeological remains, French authorities can issue an order requiring that preliminary diagnostic operations be carried out. If the diagnostic operations are conclusive, French authorities may issue a second order requiring the performance of so-called "preventive excavation operations." While diagnostic operations are under the responsibility of a public monopoly shared between INRAP and local authorities accredited by the state, preventive excavation has been open to competition since 2003.

Following a complaint lodged by preventive excavation operators, the FCA analyzed whether INRAP had taken advantage of its public service activities, *i.e.* the conduct of archeological diagnostic operations, to exclude competitors from the market for the provision of preventive excavation services.

In 2015, several preventive excavation operators filed a complaint with the FCA alleging that INRAP took advantage of its monopoly in the diagnostic operations sector to exclude its competitors from the market for the provision of preventive excavation services.

In a preliminary antitrust assessment issued on October 6, 2016, the FCA identified two competitive concerns.

First, the FCA found that, given the lack of functional separation within INRAP, employees had the opportunity to use preferential information gathered thanks to INRAP's public monopoly in the diagnostic operations sector to market INRAP's commercial excavation proposals. By contrast, INRAP's competitors had access to less detailed information, and often at a later stage. The FCA therefore could not exclude that INRAP enjoyed an undue competitive advantage. In particular, the FCA noted that, according to an INRAP internal study, the proportion of work sites for which INRAP had carried out both diagnostic and excavation operations was significant (89%).[10]

Second, the FCA found that INRAP's public financing, combined with the lack of clear separation between its diagnostic and excavation activities, created a risk that INRAP would use the profits generated by diagnostic operations to compensate for predatory or exclusionary prices charged for excavation services.

INRAP offered several commitments to address the FCA's competitive concerns.

Regarding access to information, INRAP initially offered to: (i) include all the data collected during diagnostic operations in survey reports made available to other excavation operators; and (ii) exclude from its excavation teams employees who had performed diagnostic operations on the same site. However, during the proceedings, French authorities announced the creation of an online platform that would guarantee equal access to information to all excavation operators. In particular, the online platform would publish survey reports following their approval by the relevant authorities. The FCA approved both the creation of the online platform and INRAP's withdrawal of its initial commitments, as the latter were considered insufficient to address the FCA's concerns.

Regarding the risk of cross-subsidies, INRAP offered to: (i) set up an analytical accounting system to separate its diagnostic and excavation activities; (ii) create an accounting tool to compute its margin for each excavation project; and (iii) have its accounts audited annually by an independent expert. The FCA accepted INRAP's commitments and observed that the analytical accounting system would achieve a clear separation of

9 French Competition Authority, Decision No. 17-D-09 of June 1, 2017 relating to practices implemented by the French National Institute for Preventive Archaeological Research, available at: http://www.autoritedelaconcurrence.fr/pdf/avis/17d09.pdf.

10 *See ibid*, para. 96.

INRAP's functions by tracking the resources allocated to each activity.

The FCA's decision is subject to appeal before the Paris Court of Appeal.

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

FCJ Confirms Non-Applicability of Antitrust Law to Agreements Among Statutory Health Insurances

On January 24, 2017, the FCJ confirmed an earlier judgment from the Dresden Court of Appeals[11] holding that antitrust law did not apply to price agreements among statutory health insurances in Germany.[12]

The appellant, a provider of intensive care services, had sought injunctive relief, claiming the exchange of prices for intensive care services between two health insurances constituted an illegal price-fixing agreement.

In accordance with prior decisions by the European Court of Justice's ("ECJ"), the Dresden Court of Appeals found that statutory health insurances did not constitute undertakings within the meaning of antitrust law because, in principle, they did not perform economic activities. In addition, it held that there was no substantial competition among them. Consequently, the Dresden Court of Appeals found that Article 101 Treaty on the Functioning of the European Union ("TFEU") and Section 1 GWB were not applicable.

While the FCJ also concluded that antitrust law was not applicable, it followed a different line of reasoning than the Dresden Court of Appeals. The FCJ found that, according to German social security law, Section 1 GWB applies to certain contracts between service providers and statutory health insurances. However, this is not the case when statutory health insurances are legally obliged to enter into a specific contract. The FCJ found that, in the case at hand, the statutory health insurances were under a "*quasi*-obligation to contract" according to social security law, because they were unable to freely choose their service providers. The FCJ's judgment does not suggest that under no circumstances can statutory health insurances be treated as undertaking within the meaning of antitrust law.

FCO Fines Manufacturers of Industrial Batteries

On March 31 and June 26, 2017, the FCO fined two manufacturers of industrial batteries, Hawker GmbH ("Hawker") and Hoppecke Batterien GmbH & Co. KG ("Hoppecke"), as well as their responsible employees approximately €28 million.[13] The FCO found that Hawker, Hoppecke, and Exide Technologies GmbH ("Exide") had agreed to levy a surcharge as a key price component of their lead batteries. The FCO settled the case and, for the purposes of fine calculation, took into account that Hoppecke had cooperated extensively over the course of the investigation. Exide had triggered the investigation by filing a leniency application and was granted immunity from fines.

The FCO found that since 2004 Hawker, Hoppecke, and Exide introduced a "lead surcharge" on the price of stationary batteries (used, *e.g.*, in emergency power units). The manufacturers passed on price fluctuations of raw material through the surcharge. In 2012, they also agreed to a surcharge on the price of traction batteries (used, *e.g.*, in electric forklifts). The FCO noted that their agreement was limited to the introduction of the surcharge; the amount and method of introduction, however, were up to each company. The companies stopped levying the surcharge when the FCO carried out dawn raids in April 2014.

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11 Dresden Court of Appeals decision of November 26, 2014, case U 6/14 Kart.

12 *See* FCJ judgment of January 24, 2017, case KZR 63/14.

13 *See* FCO case summary of July 24, 2017, available in German at: http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2017/B11-13-13.pdf?__blob=publicationFile&v=2; *see also* FCO press release of June 27, 2017, available in English at: http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/27_06_2017_Industriebatterien.pdf?__blob=publicationFile&v=2.

The FCO's fines on Hoppecke are final. Hawker and the employee from that firm that is involved have appealed the FCO's decision regarding stationary batteries.

€110 Million in Fines Unenforceable Due to "Sausage Gap"

After having already terminated proceedings against two companies of the Zur Mühlen Gruppe in the sausage cartel case in October 2016,[14] on June 26, 2017, the FCO also had to terminate its proceedings against Bell Deutschland Holding GmbH ("Bell"), Marten Vertriebs GmbH & Co. KG ("Marten"), and Sickendiek Fleischwarenfabrik GmbH & Co. KG ("Sickendiek") as a result of internal group restructuring measures taken by each of these companies.[15]

In 2014, the FCO fined 21 sausage manufactures and 33 individuals approximately €338 million for participating in a price-fixing cartel.[16] While 11 sausage manufacturers and 15 individuals settled the case with the FCO with fines totaling around €71 million, the other participants, including the above mentioned companies, appealed the fining decisions. As a result of restructuring measures, the €128 million fine against the two companies of the Zur Mühlen Gruppe and now the €110 million fine against Bell, Marten, and Sickendiek became unenforceable and the FCO had to terminate the fine proceedings. Each of the companies made use of the so-called "sausage gap" (named after this cartel) allowing companies to escape FCO fines by internal restructuring.

This loophole was closed recently by the ninth amendment to the GWB. According to the new provisions, legal responsibility extends to the legal and commercial successor of a company and to its ultimate parent company. As a result, restructuring measures can no longer be used to escape fines.

Abuse

FCJ Rules on the Applicability of Abuse of Dominance Rules with Regard to Energy Base Suppliers

On March 7, 2017, the FCJ rejected an energy supplier's appeal against a decision of the Karlsruhe Court of Appeals (*Oberlandesgericht Karlsruhe*, "KCA").[17] The plaintiff energy supplier had provided the defendant, an end consumer, with off-peak electricity for the defendant's storage heaters and claimed outstanding energy fees. The defendant refused to pay these fees, claiming to have rejected the plaintiff's newly introduced terms for energy supply. Instead, the defendant claimed to have concluded an individual supply agreement with the plaintiff. In the first instance, the Regional Court of Karlsruhe had largely found in favor of the plaintiff, whereas the KCA had acceded to only part of the plaintiff's claims.[18]

In its decision, the FCJ also touched on antitrust-related aspects with respect to the base supply of energy consumers. In particular, the FCJ found that, while a provider of base energy (according to German energy law, regional energy suppliers have an obligation to secure a base supply of energy for all consumers), by law, holds a dominant position with regard to the base supply of energy consumers, it is not restricted from granting different tariffs to different customers. In particular, an energy supplier may differentiate between consumers of base supply and those customer with whom it has concluded individual energy supply agreements (the fees for consumers of base supply are

14 *See* FCO press release of October 19, 2016, available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/19_10_2016_Wurst.html?nn=3591568; *see also* National Competition Report October–December 2016, p. 10.

15 *See* FCO press release of June 26, 2017, available in English at: http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/26_06_2017_Bell_Wurst.pdf?__blob=publicationFile&v=2.

16 *See* FCO, press release of July 15, 2014, available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2014/15_07_2014_Wurst.html?nn=3591568; *see also* National Competition Report July–September 2014, p. 11.

17 *See* FCJ judgment of March 7, 2017, case EnZR 56/15.

18 KCA judgment of November 11, 2015, case 6 U 164/14 Kart.

typically much higher than those of customers with individual supply agreements).

While the FCJ did not see any antitrust-related reasons for rejecting the plaintiff's claims, it ultimately rejected the appeal for other contractual reasons.

Vertical Agreements

DCA Rules that Full Prohibition to Advertise on Price Comparison Websites Is Unlawful

On April 5, 2017,[19] the DCA rejected sporting goods producer Asics's appeal against the FCO's decision of August 27, 2015 regarding certain clauses in its selective distribution system[20] and confirmed that a full prohibition for resellers to advertise on price comparison websites is unlawful.

Asics, the market leader for running shoes in Germany, had established a selective distribution system for its products in 2011, only accepting retailers that fulfill distinct qualitative criteria. Amongst other things, Asics prohibited these retailers from using online price comparison websites such as idealo.de or billiger.de. In its 2015 decision, the FCO found that a general ban against using price comparison websites constituted a restriction of competition by object, arguing that Asics's main purpose was to limit price competition and competition among retailers. In reaction to the FCO's decision, Asics changed the terms of its selective distribution systems, but lodged an appeal with the DCA.

The DCA confirmed the FCO's finding that a general prohibition to use price comparison websites constitutes a restriction of competition by object that cannot be exempted under Article 101(3) TFEU. Citing the ECJ's *Pierre Fabre* judgment,[21] the DCA found that: (i) selective distribution agreements, unless objectively justified, restrict competition by object; and (ii) the same applies for a prohibition to advertise on price comparison websites when this is part of the selective distribution arrangement. According to the DCA, the prohibition does not fall outside the scope of Article 101(1) TFEU pursuant to the ECJ's *Metro* case law,[22] given that the ban against using price comparison websites: (i) does not constitute a qualitative distribution criterion; and (ii) is not essential to protect product quality and brand image. In the DCA's view, the ban limits the number of customers retailers can reach. Further, advertising on price comparison websites and displaying Asics products next to low quality or second-hand products does not impair the brand image, as a reasonable internet user will be able to distinguish price comparison websites from retailers' own online shops.

Finally, the DCA also rejected arguments for an exemption under the Vertical Block Exemption Regulation ("V-BER").[23] In the DCA's view, the prohibition against price comparison websites restricts retailers online sales and therefore constitutes a hardcore restriction of competition in the meaning of Article 4 lit. c V-BER—an understanding that does not differentiate between advertising (which takes place on the price comparison platform) and selling (which, unrestrictedly, takes place on the retailers' separate online shops).

The DCA did not assess whether other clauses that were part of Asics's former selective distribution system (notably the ban of using Google AdWords and the prohibition to sell via online marketplaces) violated competition law.

The DCA did not grant leave for appeal to the FCJ on points of law; Asics's complaint of non-admission against this decision is currently pending with the FCJ.

[19] *See* Düsseldorf Higher Regional Court judgment of April 5, 2017, VI-Kart 13/15.

[20] FCO decision of August 26, 2015, case B2-98/11; *see also* National Competition Report July–September 2015, pp. 9-10.

[21] *Pierre Fabre Dermo-Cosmétique* (Case C-439/09) EU:C:2011:649.

[22] *Metro SB-Großmärkte GmbH & Co. KG* (Case C-26/76) EU:C:1977:167.

[23] Commission Regulation (EU) No. 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ 2010 L 102/1.

DCA Rejects Appeal on Exclusive Purchase Obligation

On May 17, 2017, the DCA held that an eight-year long exclusive supply agreement did not necessarily violate antitrust laws and rejected an appeal because the claimant was not able to provide evidence of appreciable market effects.[24]

The claimant is a supplier of hygienic products and the respondent operates a retirement home. In 2009, the parties agreed on an exclusive supply agreement for 20 sanitary and hygienic products. The respondent, however, only ordered products from the claimant during two months. Subsequent orders were placed to a third-party vendor. The claimant sued the respondent for information on the third party orders and damages. The respondent argued that the agreement violated antitrust laws because it lead to market foreclosure to the disadvantage of the claimant's competitors. In response, the claimant explained that it had a market share of approximately one percent in Germany.

The DCA found that vertical exclusive purchase obligations do not generally violate antitrust regulation and are in principle beneficial for both parties. The supplier's sales are guaranteed and the customer gets favorable conditions and guaranteed supply. Therefore, exclusive purchase obligations only lead to infringement where significant market foreclosure can be found. Potential market foreclosure effects must be examined through market analysis. Relevant factors are the duration of the contractual relationship and the demand covered by the agreement. An additional criteria can be found in the V-BER, which applies if the party's market shares are less than 30%.[25] The DCA found that the respondent did not provide sufficient evidence to evaluate the market situation. Consequently, the DCA rejected the respondent's claim that the agreement violated antitrust laws.

Mergers and Acquisitions

FCO Clears Acquisition of Bördner Group by Remondis

On July 4, 2016, the FCO cleared the proposed acquisition of all shares in Bördner GmbH & Co. KG Besitz- und Verwaltungsgesellschaft, as well as 50% of the shares in B-F Sonderabfall GmbH & Co. KG (together the "Bördner group") by Remondis GmbH & Co. KG, Region Südwest ("Remondis").[26] Although Remondis will further expand its already strong market position in the relevant region through this acquisition, the FCO found that the concentration will not create a significant impediment to effective competition.

Remondis is part of the Rethman group—a global player in logistics and waste management—and offers a wide range of waste management services (including the collection, transshipment, temporary storage, sorting, and recovery of various types of waste) in Germany, including in the geographic regions relevant to the proposed transaction. Similarly, the Bördner group also offers various waste collection and disposal services to public waste management authorities and private clients in some of the same regions as Remondis.

The FCO found that post-merger there will be sufficient competitive pressure from other market participants in all business areas affected by the merger.

With regard to the relevant regional market for the collection of commercial non-hazardous waste, the FCO found that post-transaction the market leader Remondis (market share 20–30%) will continue to face significant competitive pressure from several strong rivals with significant market shares of up to 20%.

24 *See* DCA decision of May 17, 2017, case VI-U (Kart) 10/16.

25 Commission Regulation (EU) No. 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ 2010 L 102/1.

26 *See* FCO press release of July 6, 2016, available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/06_07_2016_Remondis_B%C3%B6rdner.html?nn=3591568, and FCO decision of July 4, 2016, case B4-31/16.

Further, the FCO assessed the acquisition's effects on the regional markets for the collection of household waste, comprising residual waste, organic waste, bulky waste, and waste paper/cardboard/cartons,[27] and found that, despite Remondis's high market shares (ranging between 30%–60% (post-transaction 40–70%) depending on the geographical market definition), the transaction will not lead to the creation or strengthening of a dominant position. This is because these types of waste are usually collected on behalf of public waste management authorities by way of tenders and the existence of effective competition in bidding markets cannot exclusively be assessed on the basis of market shares. According to its standard practice, the FCO therefore analyzed in detail the procurement behavior of local waste management authorities as well as the bidding behavior of disposal companies, and concluded that Remondis's scope of action—despite its position in terms of market shares—will be adequately constrained by competition.

FCO Clears EDEKA/Budnikowsky Joint Purchasing Cooperation

On May 19, 2017, the FCO announced that it does not have any competitive concerns about EDEKA and Budnikowsky establishing a purchasing joint venture.[28]

Budnikowsky, a regional drugstore chain in the Hamburg area, will outsource its procurement, IT, e-commerce, administrative, and logistic activities to a new company in which EDEKA, the largest food retailer in Germany, will have a 25.1% share. In addition, Budnikowsky will purchase food and drugstore products via EDEKA.

The FCO found that the joint venture would not create a significant impediment to effective competition in the affected market for drugstore products. On the nationwide upstream procurement market for drugstore products, the joint venture would not lead to a harmful concentration of buyer power. First, the companies' combined market share does not exceed the safe harbor threshold of 15% set out in the European Commission's Horizontal Guidelines.[29] Further, the increment in market share brought by Budnikowsky is negligible.

The regional downstream market comprises the sale of drugstore products by both drugstores and food retailers, who also offer a selection of drugstore products. In Hamburg, EDEKA and Budnikowsky achieve a market share of around 40% with regard to drugstore articles, as Budnikowsky is the regional market leader with a market share of 30–35%. However, Budnikowsky lost considerable market shares over the past few years due to increasing competition from its closest competitors dm and Rossmann, who—as nationwide market leaders—benefit from cost advantages in procurement. The FCO expects that the cooperation with EDEKA will neutralize these cost disadvantages and foster competition between the drugstore chains.

Glass Microsphere Manufacturers Withdraw Merger Notification

On May 24, 2017, Potters Industries LLC ("Potters"), a glass microsphere manufacturer, withdrew its notification of the proposed acquisition of its competitor Sovitec Mondial S.A. ("Sovitec") following a Phase II investigation in which the FCO raised serious concerns about the impact of the merger.[30]

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[27] The FCO defined a separate product market for the collection of residual waste and organic waste and ultimately left open whether the collection of bulky waste and waste paper/cardboard/cartons constitute distinct product markets respectively.

[28] *See* FCO press release of May 19, 2017, available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/19_05_2017_Edeka_Budni.html;jsessionid=BBF4987A6D573F197BF82889AAAE1FA8.1_cid362?nn=3599398 and FCO case summary of May 19, 2017, available in German at: http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Fusionskontrolle/2017/B2-25-17.pdf?__blob=publicationFile&v=2.

[29] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2011 OJ C 11/1.

[30] *See* FCO press release of May 31, 2017, available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/31_05_2017_Potters_Sovitec.html; and FCO case summary of May 31, 2017, available in German at: http://www.bundeskartellamt.de/

The parties' businesses overlap in the production of solid glass microspheres. Made from recycled glass, these retroreflective microspheres are used as abrasives for surface treatment, additives in the plastic processing industry, and for highway safety marking. The FCO's market test indicated that there is a separate market for solid glass microspheres in the EEA (instead of a wider market for all microspheres) because switching between solid glass microspheres and microspheres made out of other materials would require a lengthy adjustment process for customers.

Based on this market definition, Potters and Sovitec would have a combined market share of approximately 60% in the EEA, while the market shares of the remaining competitors are significantly lower. In addition, the parties are each other's closest competitors, the production capacities of the parties' competitors are limited, and new entries are not to be expected in the future due to customers' high quality requirements. Therefore, the FCO found that the merger would significantly impede effective competition. The FCO also rejected narrower market definitions, *inter alia*, because only a combined assessment of all of these narrower markets would have fully captured the effects of the transaction. Such narrower markets would have been "de minimis markets" (market volume of less than €15 million in the last calendar year in Germany) within the meaning of the GWB. According to the GWB, the FCO cannot prohibit a merger if its effects are limited to de minimis markets.

As a result of the FCO's concerns, the parties withdrew their notification.

FCO Publishes Guidance on Remedies in Merger Control

On May 30, 2017, the FCO published its Guidance on Remedies in Merger Control (the "Guidance"),[31] explaining the criteria for its assessment of remedy proposals and conditional merger clearance decisions. Under German law, conditional clearance is only an option following an in-depth (Phase II) review—as opposed to EU merger review, in which conditional clearance is also possible in Phase I. The German Phase II period generally expires four months after a transaction has been notified to the FCO, but offering a remedy proposal will push this deadline back one month.

The Guidance is based on the principle that a commitment has to be suitable and necessary to completely remedy the competitive harm identified in the FCO's investigation in a timely manner. The FCO states that it has a clear preference for divestments and does not deem behavioral remedies to be as effective.

In the FCO's view, only divestments bring a lasting, structural change to the market. A divestment package has to consist of an existing, stand-alone business equipped with all the necessary resources to compete effectively and on a permanent basis. The FCO makes clear that it will accept a carve-out (such as divestments of a branch or a production site) only in exceptional cases. Further, the FCO is critical of divestment packages combining assets of both the purchaser and the target company (so-called "mix-and-match"), because this often raises questions as to whether the divestment business will be viable and competitive in the future.

The Guidance also sets out the FCO's criteria for a suitable purchaser. It has to be capable and must have the incentive to successfully operate the divestment business in competition with the merging parties. Also, the divestiture to the purchaser must not create other competition problems. According to the Guidance, the divestment business typically has to be sold to a single purchaser. The FCO also stresses its general preference for an up-front buyer: under this approach, a transaction, which has already been cleared by the FCO, can only be implemented once a divestment business has been sold and possibly even transferred to a suitable

SharedDocs/Entscheidung/DE/Fallberichte/Fusionskontrolle/2017/B1-34-17.pdf?__blob=publicationFile&v=3.

[31] *See* FCO Guidance on Remedies in Merger Control, May 30, 2017, available in English at: http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Guidance%20on%20Remedies%20in%20Merger%20Control.pdf?__blob=publicationFile&v=3.

purchaser that has been approved by the FCO. In some cases, if it is unclear whether a suitable buyer is available, the parties may want to sell (and possibly already transfer) the divestment business even before the FCO issues a decision (so-called "fix-it-first solution"). The FCO, however, warns that a restructuring of the target company may infringe the parties' standstill obligation.

While, in the FCO's view, behavioral remedies may in certain cases be appropriate, they usually do not sufficiently address competitive concerns. The Guidance also refers to a provision of the GWB, pursuant to which a remedy must not subject the parties' conduct to continued monitoring. In particular, the Guidance rejects so-called "Chinese walls" as a suitable remedy, because the FCO cannot effectively monitor their practical implementation, in particular within a group of companies. That said, the FCO has accepted behavioral remedies in the past, such as the divestment of take-off and landing slots at airports, termination of exclusive distribution agreements, or granting access to infrastructure or IP licenses.

Finally, the Guidance calls upon the parties to fully cooperate with the FCO from the outset and to submit remedy proposals (based on the FCO's model texts) at an early stage to find a mutually acceptable solution.

Policy and Procedure

Higher Regional Court of Thuringia Approves Lump Sum Cartel Damages Clause and Applies Broad Interpretation of Statute of Limitation Governing Cartel Damages Claims

On February 22, 2017,[32] the Higher Regional Court of Thuringia awarded a regional public transport company that operates in Thuringia cartel damages, as part of a series of decisions in the rail cartel ("*Schienenkartell*").

The members of the rail cartel had established an elaborate system of collusion and related arrangements forming a supply cartel in the rail manufacturing sector for several years, harming various transport companies, including Deutsche Bahn AG and several local and regional transport companies. The cartel proceedings were concluded when the FCO fined the cartel members in 2013.[33] The present court decision concerns a follow-on damages claim brought by a public transport company against Schreck-Mieves GmbH in the aftermath of the FCO's 2013 decision.

After affirming the binding effect of the FCO's decision regarding the existence of the cartel and Schreck-Mieves GmbH's participation in it, the Higher Regional Court of Thuringia decided that the binding effect does not encompass cartel damages, let alone the extent of the asserted damages. But referencing *prima facie* evidence resulting from the typically harmful nature of a cartel, the Higher Regional Court of Thuringia accepted that the cartel had caused damages—a presumption Schreck-Mieves GmbH had not successfully rebutted.

The Higher Regional Court of Thuringia then turned to determining the quantum of damages. It held that in a follow-on damages proceeding an aggrieved party can invoke a standard business term included in its supply conditions that stipulates a lump sum damage of 15% of the invoiced amount, where a supplier is liable for an antitrust infringement. The Higher Regional Court of Thuringia approved the clause used by the aggrieved party, holding that it is valid under German standard business terms law. In particular, the Higher Regional Court of Thuringia reasoned that the clause was admissible because it allowed the cartel member to prove lower actual damages. Therefore, the Higher Regional Court of Thuringia considered a lump sum rate of 15% to be reasonable. Finally, the Higher Regional Court of Thuringia applied the statute of limitation to the damages claim, tolling the limitation period even though the claim had arisen prior to the entry into force of today's limitation rules. Consequently, the Higher Regional Court of Thuringia denied a limitation of the claim. Because the

32 Higher Regional Court of Thuringia decision of February 22, 2017, case 2 U 583/15 Kart.

33 *See* FCO press release of July 23, 2013, available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/23_07_2013_Schienen.html?nn=3591568.

interpretation of the statute of limitations has been disputed by several German courts,[34] the Higher Regional Court of Thuringia allowed a further appeal to the FCJ.

FCO Concludes Sector Inquiry into the Sub-metering Market and Raises Competitive Concerns

In May 2017, the FCO published the results of its sector inquiry into the sub-metering market[35] and recommended several measures to foster competition in the provision of sub-metering services.[36]

Sub-metering services cover the consumption-based metering and billing of costs for heating and water supplied to individual housing units within buildings as well as the provision of the necessary metering equipment such as heat cost allocators or water and heat meters. In 2014, the volume of turnover achieved from sub-metering in Germany was approximately €1.47 billion.

The FCO found that the supply-side of the market for sub-metering of heating and water costs is highly concentrated and dominated by a few, large companies, with market leaders Techem and Ista accounting for 50–60% of the market, and the top five competitors accounting for 70–80% of the market. The FCO concluded that there are strong indications of the existence of an uncompetitive oligopoly consisting of the two market leaders and possibly some or all of the next three largest providers.

In particular, the FCO identified the following competitive concerns:

First, switching between providers generally involves high costs and is difficult due to long contract periods and technical hurdles.

Second, the lack of interoperability between the meter systems and the low level of comparability of prices and quality of the offered services also make it difficult to switch providers. However, recent legislative intervention has triggered a general development towards more interoperable systems, which could make switching easier in the future and which the FCO is following closely.

Third, the costs of sub-metering are generally borne by the lessee, but the choice and commissioning of the sub-metering service are made by the lessor.

Fourth, and related to the previous concern, price sensitivity on the demand-side is weak. The FCO found that this is partly due to the fact that the consumers have to bear most of the costs of sub-metering without themselves being the contractual partner of the sub-metering provider. The property owners are usually the contractual partners who then pass the costs on to their lessees. In addition, sub-metering costs are to some extent non-transparent or difficult for consumers to assess because they only appear in aggregated form in the statement of utility costs.

The FCO has proposed the following legislative measures to remove the obstacles to competition mentioned above: (i) improvement of interoperability of meters; (ii) standardization of calibration periods and service life of meters; and (iii) improved transparency for lessees through information rights and obligation to tender. The FCO stressed that it will closely scrutinize any contemplated concentrations in the sub-metering market going forward.

FCO Creates New Decision Division

On June 8, 2017, the ninth Amendment to the GWB entered into force. The amendment, *inter alia*, gives the FCO consumer protection competences (*e.g.*, the FCO can launch sector inquiries in cases where it suspects severe consumer law violations or if significant, permanent, or repeated violations affecting multiple consumers are perceived). These measures are not directed towards individual companies; instead, entire sectors are investigated to analyze specific market conditions. The FCO has previously launched similar

34 The Higher Regional Court of Karlsruhe decided differently in 2016: decision of November 9, 2016, case 6 U 204/15 Kart (2).

35 The sector inquiry had been initiated in July 2015.

36 A German version of the report is available at: https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Sektoruntersuchungen/Sektoruntersuchung%20Submetering.pdf?__blob=publicationFile&v=3.

investigations regarding antitrust infringements, *e.g.*, in the petrol stations, district heating, milk, and sub-metering service markets. Furthermore, the FCO, may act as *amicus curiae* in court proceedings relating to such infringements, allowing it to deliver statements to the court, direct the courts attention to certain facts and evidence, and question parties, witnesses, and surveyors.

In this context, the FCO has created a new Decision Division for consumer protection, which will be headed by Prof. Dr. Carsten Becker.[37]

FCO Publishes Annual Report 2016 and Activity Report 2015/2016

On June 28, 2017, the FCO published its 2015/2016 Activity Report[38] and its 2016 Annual Report,[39] which provide an overview of the FCO's activities as well as current changes in legislation. The key aspects are summarized below.

The FCO has concluded several cases in the digital economy in the past few years. In particular, the FCO declared "best price" clauses used by online platform providers, including Amazon and several hotel booking portals, unlawful. The best price clauses prohibited suppliers from offering products or services on more favorable terms than found elsewhere. Continuing its focus on the digital economy, the FCO has opened proceedings against online ticket seller CTS Eventim and Facebook. Merger control proceedings regarding online dating and real estate also related to the digital economy. According to the FCO's press release, the most recent amendments to the GWB create legal certainty for the digital economy "because well-proved criteria used in the assessment of markets and market positions in the internet have been incorporated into the law." In addition, the introduction of the purchase price threshold will enable the FCO to review acquisitions of valuable "start-ups," including in the digital economy, that do not yet generate significant turnover.

Overall, the FCO received 1,229 merger notifications in 2016. It carried out in depth ("Phase II") investigations for 10 transactions. Four of those transactions were cleared unconditionally, one was cleared subject to conditions, and four were withdrawn by the parties (with one transaction pending). Furthermore, the FCO closed 42 abuse of dominance cases, opened 15 new proceedings, and is currently conducting four sector inquiries.

Regarding its cartel prosecution activities, the FCO imposed approximately € 125 million in fines in seven (horizontal and vertical) cartel cases in 2016. The FCO received 59 new leniency applications and opened several new cases. Going forward, the FCO expects to fully use its fining ability because of the legislative closing of the so-called "sausage-gap," which allowed enterprises to escape fines by internal restructuring.

In addition, the FCO gained additional competencies as a result of the recent amendments to the GWB, in particular to conduct sector inquiries and act as *amicus curiae* in consumer protection cases. Further, the FCO will be in charge of the register for competition in public procurement, listing serious violations that may disqualify companies from the award of public contracts.

DCA Approves Tender Model with "No Single Buyer" Rule for Media Rights to Bundesliga Matches

On June 24, 2017, the DCA upheld the FCO's decision[40] to approve several commitments made by the German Football League ("DFL") and the German League Association ("Ligaverband") with regard to awarding media rights for first- and second-division

37 *See* FCO press release of June 12, 2017, available in English at: http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/12_06_2017_Abteilung%20V.pdf?__blob=publicationFile&v=3.

38 FCO Activity Report 2015/2016, available in German at: http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Taetigkeitsberichte/Bundeskartellamt - Tätigkeitsbericht 2015_2016.html. *See also* FCO press release of June 28, 2017, available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/28_06_2017_TB_und_JB.html?nn=3591568.

39 FCO Annual Report 2016, available in German at: http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Jahresbericht/Jahresbericht_2016.html.

40 *See* FCO decision of April 11, 2016, case B6-32/15.

football league games.[41] The DCA rejected an appeal brought by the German pay-TV broadcaster Sky Deutschland GmbH (“Sky”) as inadmissible.

Under the pre-2016/2017 tender model, which according to the FCO violated Article 101 TFEU and Section 1 GWB, Sky used to be a quasi-monopolist that acquired all live media rights. Following the FCO’s commitment decision, the new tender model for the football seasons until 2020/2021 includes a “no single buyer” rule to strengthen innovative competition. As a result of these amendments, a second pay-TV broadcaster, Eurosport GmbH (owned and operated by Discovery Communications Inc.), has been able to acquire a portion of the live media rights (for 45 games). With its appeal, Sky—which obtained the live media rights for all other games—tried to challenge the “no single buyer” rule.

The DCA rejected Sky’s appeal for lack of standing. In particular, the DCA held that the FCO’s decision neither violates Sky’s rights nor individually concerns Sky. The FCO’s commitment decision was addressed only to the DFL and Ligaverband, which had to change their tender model. Even if one were to consider the implementation of the new tender model by the DFL and Ligaverband to be of relevance (which, in the DCA’s view, it was not), Sky would not have established that any of its rights were violated, nor that it was directly and individually affected by the commitment decision (this is the legal standard). Implementing the new tender model did not violate Sky’s rights but was geared towards opening up the relevant market and fostering competition between TV broadcasters. Although Sky argued that it is now impossible to offer “consistent and uniform” live broadcasting for all first- and second-division football league games to its subscribers, the DCA rejected this argument for lack of substance (in the DCA’s view, viable offers still seem possible). Besides, all acquirers of live media rights would potentially face the same rule. Further, Sky had no right to be the sole buyer of the live media rights for all games. To infer a right to a quasi-monopoly from competition law would be contrary to the very objective of competition law. Finally, given that Sky had not been an addressee of the commitment decision and that the “no single buyer” rule potentially affected all buyers of media rights, it did not concern Sky individually.

Interestingly, in an *obiter dictum*,[42] the DCA raised the question of whether the “no single buyer” rule itself is sufficient to secure innovative competition. The DCA suggested that a more thorough review by the FCO in the context of post-2020/2021 tenders might lead to a more critical appraisal of the tender model and even more restrictive rules, in particular with respect to the centralized marketing of all media rights for all first- and second-division football league games by the DFL.

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41 *See* DCA judgment of June 24, 2017, case VI-Kart 6/16 (V).

42 An *obiter dictum* is something that was said by a judge in a decision that is not essential to the decision and does not form part of the *ratio decidendi*, *i.e.*, the rationale for the decision. In German law, an *obiter dictum* does not have any precedential value.

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").

Mergers and Acquisitions

The HCC Cleared in Phase II Proceedings the Acquisition of a Supermarket Chain on the Verge of Bankruptcy Following Commitments Undertaken by the Acquiring Party

On January 26, 2017, the HCC cleared the acquisition by Sklavenitis, the second largest supermarket chain in Greece, of the Marinopoulos supermarket chain, an undertaking of similar size with 800 shops in Greece. Marinopoulos was on the verge of bankruptcy.[43] Post-acquisition, Sklavenitis would become the largest supermarket chain, with a share between 25–35%, leaving the previous largest supermarket chain, AB Vasilopoulos, in second place with a market share of around 20-30%.

The HCC examined the parties' and their competitors' shares in various geographic areas. It found that the notified transaction would not create a dominant entity nor create barriers to entry in the retail market of supermarket products because a considerable number of competitors were active in the market and had the same advantages as Sklavenitis. However, high shares would emerge in some geographic areas. Also, in certain cases suppliers were found to be heavily dependent on Marinopoulos.

To address these concerns, Sklavenitis proposed behavioral and structural commitments, which were accepted by the Commission.

First, for three years, Sklavenitis will continue its agreements with both its own and Marinopoulos's suppliers. Demand from the post-merger entity will represent around 22% of the suppliers' total sales. This commitment would cease to apply in certain specified cases.

Second, Sklavenitis and the new entity undertook to sell 22 shops in Crete and the wider Athens (Attica) area within nine months to address the concern that the post-merger entity would have high shares in these areas.

Third, Sklavenitis would appoint a Trustee, approved by the HCC, to implement the above commitments.

The HCC Cleared in Phase I Proceedings a Conglomerate Merger Between a Snacks Producer and a Cold Meat Producer

On February 1, 2017, the HCC cleared the acquisition of Nikas, which is active in cold meat and cheese products, by Chipita, a producer of sweet and salted snacks and chocolate products.[44] Following an examination of the relevant markets, the HCC decided that there were no affected markets and no supplier-customer relationship between the two parties, nor were there indications that such a relationship could emerge. Moreover, Nikas and Chipita were not active in neighbouring markets as the products were not complementary nor were they purchased by the same group of consumers for the same final use.

The HCC cleared the transaction on the grounds that, although Chipita had significant market shares, it was unlikely that it would proceed to combined sales because: (i) the products were not complementary; (ii) supermarkets had alternative cold meat and cheese products suppliers given the existence of strong competitors; (iii) competitors in the crude meat market could deploy effective counter strategies to react to any foreclosure attempts; and (iv) private label products played an important role in the market.

[43] HCC, Decision No. 637/2017 *Sklavenitis/Marinopoulos*.

[44] HCC, Decision No. 638/2017 *Chipita/Nikas*.

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").

Fining Policy

The Council of State Clarifies the Principles for Setting Antitrust Fines in Bid-Rigging Cases

On June 21, 2017,[45] the Council of State overturned part of TAR Lazio judgment[46] against Siman S.r.l. ("Siman"). The Council of State quashed the portion of the TAR Lazio's judgment that approved the ICA's fine on Siman for entering an anticompetitive agreement in breach of Article 101 TFEU.[47]

The ICA found that Siman had taken part in a bid-rigging scheme affecting public tenders for the removal of asbestos from Italian naval vessels at the dockyards of Taranto, La Spezia, and Augusta. The TAR Lazio found that the ICA had brought clear and precise evidence of the infringement, and confirmed the ICA's decision in full.

The Council of State confirmed the antitrust infringement, but revised the fine for Siman, providing additional guidance on how the ICA should apply its Fining Guidelines.[48]

To determine the fine, the ICA first calculated a base amount[49] equal to 15% of the value of Siman's sales, this amount is designed to reflect the alleged "gravity" of Siman's infringement. The ICA then added 15% to the base amount as an "entry fee."[50] Finally, the ICA added an additional 15% considering that Siman's alleged leadership role qualified as an aggravating circumstance.[51]

The Council of State found that the approach used by the ICA were illegitimate.

First, according to the Council of State, the ICA must provide evidence of "prejudice" to the functioning of the market in order to ascertain the "gravity" of the situation. In this case, the ICA did not provide any proof of the infringement's economic impact in the market (in terms of higher prices for the contracting authorities).

Second, the Council of State found that the ICA had erred in finding that Siman's leadership role qualified as an aggravating circumstance. Such a qualification cannot be inferred simply because Siman was the coordinator of a temporary consortium of undertakings. The ICA should have instead taken into account Siman's behavior and its anticompetitive aim.

Finally, with regard to the proportionality principle, the Council of State concluded that the ICA had erred in the calculation of the value of sales used for the base amount of the fine. For one of the tenders in question, the ICA had correctly taken into account the value of the tender and split it among the parties of the temporary consortium according to their participation shares as defined in the tender offer. However, for the other tenders, the parties had not defined their stake in the tender offer. For these tenders, the ICA had wrongfully used the same shares of the work performed for the first tender to calculate the respective value for the other sales. Furthermore, the calls for tender stated that the contracting authority could request that the winner of the tender perform only part of the work awarded. For this reason, according to the Council of State, the ICA should not have taken into account the overall value of the tenders (as stated in the calls for tender), but rather

45 Council of State, judgment of June 21, 2017, *Siman and ICA* (Judgment No. 3057).

46 TAR Lazio, judgment of July 25, 2016, *Siman and ICA* (Judgment No. 8504).

47 ICA, decision of November 18, 2015, *Military Dockyards* (Case No. I782).

48 ICA, Resolution No. 25152 of 22 October 2014, *Linee Guida sulla modalità di applicazione dei criteri di quantificazione delle sanzioni amministrative pecuniarie irrogate dall'Autorità in applicazione dell'articolo 15, comma 1, della legge n. 287/90* (Guidelines on the method of setting fines imposed by the Authority pursuant to Article 15(1) of Law No. 287/90) ("Fining Guidelines").

49 *See* Fining Guidelines, paras. 8–9.

50 *See* Fining Guidelines, para. 17.

51 *See* Fining Guidelines, paras. 20–21.

the value of the work actually performed by the parties upon request of the contracting authority (which was smaller than the entire work covered by the call for tender).

The Council of State reduced Siman's fine by 70%.

Abuse

The Council of State Endorses the ICA's Choice to Pursue a Complaint with a Recommendation, not a Decision

On April 12, 2017,[52] the Council of State quashed the TAR Lazio's decision ("Second Decision")[53] that found that the ICA had failed to comply with a previous TAR Lazio decision ("First Decision").[54]

In 2013, Valoritalia Srl ("Valoritalia") filed a complaint with the ICA, alleging that the Chambers of Commerce of Rome, Taranto, and Sassari (together, the "Chambers") abused their dominant position in the market for the certification of quality wines. The ICA closed the file without finding an infringement. Valoritalia brought an appeal before the TAR Lazio, eventually resulting in the First Decision. The First Decision annulled the ICA's decision to close the file for failure to state the underlying reasons, and ordered the ICA to re-open the file.

The ICA carried out a new informal investigation (*pre-istruttoria*), at the end of which it issued a recommendation[55] addressed to the Minister of Agriculture, the Minister of Economic Development, the Union of the Chambers of Commerce, and other administrative and political bodies urging them to open up the market for the certification of quality wines. Finding this outcome to be insufficient, Valoritalia appealed the recommendation before the TAR Lazio. In the Second Decision, the TAR Lazio found that the informal investigation and recommendation did not comply with the First Decision. The TAR Lazio also appointed a special commissioner (*commissario ad acta*) to resume the investigation into the Chambers' alleged abuse.[56]

On an appeal brought by the ICA against the Second Decision, the Council of State recognized that, in fact, the ICA did comply with the First Decision.

The Council of State clarified that the ICA's activity had to be assessed exclusively in light of the specific obligations in the First Decision. The Council of State found that the First Decision was unequivocal as to the annulment of the ICA's decision to close the file and the obligation to re-open it, but the First Decision did not require the ICA to start a formal investigation nor to find an infringement.

The Council of State found that the ICA had exactly and efficiently fulfilled its obligations under the First Decision. According to the Council of State, a recommendation is one of the options available to the ICA to contest anticompetitive behaviors. The recommendation was not inadequate or ineffective, as argued by Valoritalia. On the contrary, given that the competitive concerns were caused by the legal framework in the market, a recommendation was the most effective solution.

The Council of State annulled the Second Decision. Consequently, the appointment of the special commissioner became void and ICA's Chambers Case was dropped.

52 Council of State, judgment of April 12, 2017, *ICA and Valoritalia* (Judgment No. 1708).

53 TAR Lazio, judgment of July 5, 2016, *Valoritalia and ICA* (Judgment No. 7732).

54 TAR Lazio, judgment of September 9, 2015, *Valoritalia and ICA* (Judgment No. 11132).

55 ICA, recommendation of March 17, 2016, *Designation of origin and geographical indication in the wine industry* (Case No. AS1265).

56 On October 17, 2016, the special commissioner opened ICA Case No. A501, *Chambers of Commerce-Market for the certification of quality wines*.

NETHERLANDS

This section reviews developments under the Competition Act of January 1, 1998 (the "Competition Act"),[57] which is enforced by the Netherlands Authority for Consumers and Market (Autoriteit Consument & Markt, "ACM").[58]

Abuse

ACM Imposes Highest-Ever Abuse of Dominance Fine on Dutch Railway Operator

On May 22, 2017, the ACM fined Dutch railway operator Nederlandse Spoorwegen ("NS") a record-breaking €41 million for an abuse of dominance in the market for passenger transport on the main rail network in the Netherlands.[59] The ACM found that, in a 2014 tender for concessions to operate the regional train and bus transportation network in the province of Limburg for 15 years, NS intended to secure an exclusive concession, considering network sharing to be a threat.

The ACM found a competition law violation on two grounds. First, NS submitted a loss-making bid for the 2014 tender through its subsidiary Abellio. As a result, competitors could not match or surpass NS's bid without incurring losses themselves, even if they operated as efficiently as NS. Accordingly, the ACM concluded that NS had engaged in predatory pricing.

The second violation consisted of several related behaviors. NS obtained confidential information from a former director of rival operator Veolia[60] who was indirectly working for NS. NS also passed on confidential information about its competitors Veolia and Arriva to Abellio. The ACM also found that NS deliberately hindered competitors' access to certain services and facilities at NS train stations by imposing unreasonable conditions, delaying the negotiation process, limiting access to the main rail network, and refusing to provide precise and reliable information.

The €41 million fine is the highest fine the ACM imposed to date on a single undertaking. The amount of the fine and the ACM's low track record in abuse of dominance cases[61] make this a landmark case. The ACM refrained from fining NS's former and current CEOs, because there was insufficient evidence that they had exerted factual leadership over the infringements. NS and the Dutch Ministry of Finance, as NS's shareholder, have announced that they will appeal the decision.

Vertical Agreements

CBL's Minimum Standards for Preventing the Sale of Alcohol and Tobacco to Underage Customers Do not Constitute a Restriction by Object

On April 4, 2017, the Hague Court of Appeal dismissed a claim that Dutch supermarket trade association Centraal Bureau Levensmiddelhandel ("CBL") and its member Jumbo infringed Article 6 of the Competition Act by setting minimum standards to prevent the sale of alcohol and tobacco to underage customers.[62]

To improve compliance with the prohibition of selling alcohol and tobacco to minors, the CBL, which represents approximately 95% of Dutch supermarkets, launched and committed to a campaign and code governing the implementation of legal age verification requirements for the sale of alcohol and tobacco in the Netherlands (the "Code"). The Code provided minimum standards for the responsible sale of alcohol and tobacco, including a step-by-step description of the age verification process by supermarket cashiers.

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

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

[59] Case n 16.0691.31 (*Nederlandse Spoorwegen*), ACM decision of May 22, 2017.

[60] At the time of the 2014 tender, Veolia was the incumbent operator in Limburg.

[61] The highest ACM fine in an abuse of dominance case until now was €30 million in 2004 (Case n 2910 (*Interpay*), ACM decision of April 28, 2004), which was subsequently annulled on administrative appeal.

[62] The Hague Court of Appeal, Judgments of April 4, 2017, ECLI:NL:GHDHA:2017:794 and ECLI:NL:GHDHA:2017:795.

Hollandsche Exploitatiemaatschappij B.V. ("HEM"), which had independently developed the so-called "Ageviewer" system for remote age verification based on live video streaming, brought a civil case. In line with HEM's claims, the Hague District Court found that the Code required/assumed on-site age verification by cashiers in a way that could not be reconciled with alternative age verification systems such as Ageviewers. Despite CBL's and Jumbo's argument that the minimum standards committed to by the CBL membership left room for the use of alternative age verification systems, the Hague District Court concluded that the industry's self-regulation restricted competition by object. Without ruling on the quantification of damages suffered by HEM, the Hague District Court found CBL and Jumbo liable for an infringement of Article 6 of the Competition Act.[63]

In line with EU case law,[64] the Hague Court of Appeal reiterated that the concept of "restriction by object" must be interpreted narrowly. The Hague Court of Appeal observed that CBL's campaign and Code allowed supermarkets to implement chain-specific requirements on top of the Code's minimum standards and did not prevent them from using remote verification systems. Moreover, the Hague Court of Appeal noted that several of CBL's member supermarket chains had either experimented with HEM's system or had contemplated introducing it, but chose to abandon or refrain from it due to the high associated costs and unpopularity with customers. The Hague Court of Appeal concluded that HEM did not make it sufficiently plausible that CBL's minimum standards necessarily precluded the use of remote verification systems. It therefore annulled the Hague District Court's judgment.

[63] The Hague District Court, Judgment of March 9, 2016, ECLI:NL:RBDHA:2016:2480.

[64] *Groupement des cartes bancaires v. Commission* (Case C-67/13 P) EU:C:2014:2204.

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 Spanish High Court Clarified the Rule Governing the CNMC's Ability to Fine Individuals

On April 20, 2017, the Spanish High Court, in the context of an appeal against a CNMC decision, delivered a judgment that for the first time sheds some light on the interpretation of Article 63(2) LDC related to the imposition of fines on individuals who participate in a cartel.[65]

On June 30, 2016, the CNMC issued a decision finding that several railway equipment producers had participated in a cartel in the railway detour and ancillary equipment sector by engaging in market-sharing and price-fixing, and exchanging commercially sensitive information. The companies involved had systematically created temporal joint ventures ("*Uniones Temporales de Empresas*") to jointly bid for public contracts. The CNMC fined four railway equipment producers and nine of their representatives and directors over €5.5 million.[66]

The managing director of one of the infringing companies, who had been fined €10,450, challenged the CNMC decision before the Spanish High Court, arguing that the CNMC's broad interpretation of Article 63(2) LDC was in breach of the principle of legality.

Article 63(2) LDC enshrines the possibility to fine legal representatives or members of managing bodies who have participated in the agreements or decisions up to €60,000. The appellant argued that: (i) he was not a legal representative within the meaning of Article 63(2) LDC; and (ii) the concept of an "agreement or decision" as provided in Article 63(2) LDC could not be equated with an anticompetitive agreement itself but only with an agreement of the board of directors.

The Spanish High Court held that the term "legal representative" within the meaning of Article 63(2) LDC covers only legal representatives as established according to Spanish company law, that is, representatives instituted by express provision of the law (such as the sole director of a limited liability company). This did not include voluntary representatives, who have typically been awarded representation powers by an act of the company, and usually have their powers limited to specific areas. Therefore, the Spanish High Court concluded that the appellant could not be held liable as a legal representative, even though he may have effectively intervened in the anticompetitive agreements as a voluntary representative of the infringing company. However, the appellant could still be held liable as a member of a managing body who intervened in the agreement or decision.

As to the interpretation of the term "managing bodies," the Spanish High Court found that, in view of the diverse names generally given to managing and governing bodies of different entities, the legislator had chosen in Article 63(2) LDC to refer to a "managing body"—a concept that lacks a legal definition—to include all of them, so long as they fulfill certain requirements of autonomy and decision-making capacity. Furthermore, the Spanish High Court noted that a factual analysis should be conducted to determine whether a given body (individual or collegiate) has intervened in the anticompetitive agreement. This analysis should not be hindered by formalisms related to the appointment or by differences in the terminology used by each legal person. Because the appellant was the managing director and president of the board of directors of the infringing company, it was sufficiently proved that he was a managing body that had intervened in the anticompetitive agreements.

[65] Case 1573/2017, judgment of the Spanish High Court of April 20, 2017.

[66] *Infraestructuras Ferroviarias* (Case S/0519/14), CNMC decision of June 30, 2016.

This judgment provides guidance on the interpretation of Article 63(2) LDC. The Spanish High Court has restricted the CNMC's previous interpretation of "legal representatives" to a stricter definition, excluding voluntary representatives. The Spanish High Court did, however, validate an extremely broad interpretation of the term "managing body."

The Spanish Supreme Court Clarified the Rules Governing Competition Law Infringements Carried Out Within a Joint Venture

On April 20, 2017, the Spanish Supreme Court overturned two Spanish High Court judgments annulling a CNC decision to fine several manufacturers of paper envelopes for their participation in a cartel.[67]

On October 15, 2012, the CNC found that six manufacturers of paper envelopes had entered into collusive arrangements for the export of paper envelopes to the Middle East, Cyprus, Greece, and Malta.[68] The manufacturers involved had established a joint venture to export their products to certain markets in the Middle East. According to the CNC, the joint venture in question was not a full-functioning entity within the meaning of Regulation (EC) No. 139/2004, but rather a company whose only activity was the export of a small proportion of the paper envelopes manufactured by the participating companies. Therefore, the CNC concluded that the joint venture only served as a mechanism for price-fixing and market-sharing. The CNC fined the six manufacturers of paper envelopes €3.7 million in total.

Two of the addressees of the CNC decision, namely Adveo Group International, S.A. ("Adveo Group") and Printeos, S.A. ("Printeos"), challenged the decision before the Spanish High Court. They claimed that the CNC had erred in finding that their actions restricted competition by object and that such actions resulted in an appreciable effect on competition within the internal market.

In its judgments of June 23 and 25, 2014,[69] the Spanish High Court stressed that the fact that an entity is of a purely instrumental nature does not amount to a *per se* infringement of competition. Further, the Spanish High Court stressed that the requirements laid down in Regulation (EC) No. 139/2004 are not relevant when establishing whether a collusive practice is taking place, but only to determine whether an undertaking that is a party to a merger is autonomous and independent. The Spanish High Court found that the joint venture created by the manufacturers of paper envelopes was in principle a legitimate entity that had allowed its members to effectively enter a new market.

In addition, as regards the qualification of the joint venture's activities, the Spanish High Court held that the activities undertaken by the joint venture did not result in a restriction of competition within the internal market because: (i) these activities basically covered non-EEA countries and involved envelopes having a different size than the one predominantly used in EEA countries; and (ii) the envelopes exported to the Middle East represented only 0.1% of the EU paper envelopes market, and the combined exports to Cyprus, Greece, and Malta (three EEA countries) represented only 0.01%.

On April 20, 2017, the Spanish Supreme Court reversed the rulings of the Spanish High Court. The Spanish Supreme Court found that, despite the joint venture being created to promote the export of paper envelopes, it acted as a cartel, where its members coordinated their actions with the objective of sharing the market and fixing prices. Furthermore, the Spanish Supreme Court held that the entity's purely instrumental nature was only relevant when establishing whether the individual members of the joint venture (rather than the joint

67 Case 2750/2014, judgment of the Spanish Supreme Court of April 20, 2017; and Case 3251/2014, judgment of the Spanish Supreme Court of April 20, 2017.

68 *Exportación de Sobres* (Case S/0318/10), CNC decision of October 15, 2012.

69 Case 700/2012, judgment of the Spanish High Court of June 23, 2014; and Case 697/2012, judgment of the Spanish High Court of June 25, 2014.

venture itself) were directly responsible for the anticompetitive practices committed within the entity.

The Spanish Supreme Court also held that the cartel had an appreciable effect on competition within the internal market as exports by the joint venture represented 100% of the Spanish paper envelopes exports to the countries concerned. As a result, the Spanish Supreme Court found that the practices undertaken by the six members of the joint venture were contrary to Spanish and EU competition law, and confirmed the fine imposed by the CNC.

These judgments are particularly relevant as they provide further clarity on when activities undertaken within a joint venture can be considered anticompetitive practices by the Spanish courts and competition authorities.

Abuse

The CNMC Fined Nokia for Margin Squeeze

On June 8, 2017, the CNMC fined Nokia Solutions and Networks Spain, S.L ("Nokia") €1.74 million for infringing Article 2 LDC and Article 102 TFEU. The CNMC found that Nokia had abused its dominant position by engaging in a margin squeeze concerning the maintenance and renewal of the GSM-R telecommunication network in Spain's main railway lines, a service awarded as part of a public contract.[70]

On July 2014, ADIF (the State-owned railway network operator) issued a tender for the maintenance and evolution of several communications technologies in its railway network, including the GSM-R network. The contract included both ordinary maintenance services and specific investments related to renewal of equipment to keep the technologies updated.

At the time the tender was launched, 85% of the GSM-R network in Spain had been installed by Nokia and the remaining 15% by Kapsch Carriercom España, S.L.U ("Kapsch"). Before 2014, each of these two undertakings was responsible for the maintenance of its own installed network and equipment. In the context of the tender, ADIF required the tenderers to demonstrate their technical capability for the contract by obtaining a commitment letter from the manufacturer of the already installed network and equipment guaranteeing any necessary technical assistance. Alternatively, the tenderers could opt for substituting the equipment installed by other companies with their own equipment, at no additional cost for ADIF.

Both Nokia and Kapsch participated in the tender. However, on October 1, 2014, Kapsch withdrew from the tender because it was unable to submit a competitive bid. Consequently, in December 2014, the contract was awarded to Nokia.

In May 2015, Kapsch lodged a complaint before the CNMC arguing that Nokia had abused its dominant position by setting high and discriminatory wholesale prices for network technical support services, which resulted in its exclusion from the tender.

The CNMC found that Nokia had engaged in margin squeeze, which is prohibited under European and national competition rules. After applying the "as efficient competitor test," which assumes a potential competitor having the same costs as the undertaking in a dominant position, the CNMC found that Nokia had fixed a very high wholesale price in the upstream market for the supply of technical support and spare parts to assist in the maintenance of GSM-R (in the economic offer presented to its only potential rival, Kapsch) while, at the same time, it had charged competitive retail prices in the down-stream market for the maintenance of GSM-R facilities. As a result of this behavior, Nokia charged wholesale and retail prices that had the effect of excluding its only rival in the downstream market for the maintenance of GSM-R network facilities in Spain.

The case is one of a series of enforcement actions recently undertaken by the CNMC in bidding markets, which have been identified by the CNMC as a priority area.

[70] *Nokia* (Case S/DC/0557/15), CNMC decision of June 8, 2017.

Policy and Procedure

The Spanish Constitutional Court Declares Key Provisions of Law 20/2013 on the Guarantee of Market Unity to Be Unconstitutional

On June 22, 2017, the Spanish Constitutional Court declared unconstitutional several provisions of Law 20/2013 on the Guarantee of Market Unity ("Law 20/2013")[71] related to the automatic mutual recognition of administrative licenses between regions and the automatic suspension of the effects of any regulations or administrative acts adopted at regional level that have been contested by the CNMC.[72] Law 20/2013 had been challenged before the Spanish Constitutional Court by the Catalan Parliament on the grounds that it violates the self-government rights of the region of Catalonia under the constitution and the Statute of Autonomy of Catalonia.

Law 20/2013 was approved to achieve two different goals: (i) to guarantee, the unity of the national market (particularly by removing any obstacle to the free movement of goods and to the freedom of establishment); and (ii) to reduce the administrative burdens derived from the territorial organization of the state.

Law 20/2013 establishes a single license system according to which any license for an economic activity granted to a market participant by a regional or local entity should be automatically recognized by all other regions. Law 20/2013 also identified the situations in which regions may impose administrative requirements, such as authorizations or licenses. Finally, Law 20/2013 empowered the CNMC to preemptively suspend (by bringing an action before the Spanish High Court) any regulations or administrative acts adopted at regional or local level that may infringe the free movement of goods and/or the freedom of establishment.

Regarding the single license system, the Spanish Constitutional Court recalled the European Court of Justice's case law on mutual recognition in the internal market, in particular the *Cassis de Dijon* ruling.[73] Based on this case law, the Spanish Constitutional Court found that each region should be able to reject access to an economic operator established in another region if the level of protection offered in the receiving region is substantially different. Otherwise, a region could be "forced to accept, within its territory, a plurality of foreign policies."[74] According to the Spanish Constitutional Court, the single license system was in breach of the principle of territoriality and the rights of the Spanish regions enshrined in the constitution. The Spanish Constitutional Court declared the single license system as a whole to be unconstitutional.

Regarding the Spanish regions' ability to set administrative requirements, the Spanish Constitutional Court considered that, contrary to the Catalan Parliament's argument, Law 20/2013 did not prevent the region from regulating economic activities as it only established the common criteria to be followed when exercising administrative powers. The Spanish Constitutional Court upheld these provisions, finding that they fell under the state's responsibility for basis legislation and general planning and coordination of economic activity.[75]

On the CNMC's enhanced procedural powers, the Spanish Constitutional Court noted that the constitution specifically enables the central government to suspend the effects of any regulations or administrative acts adopted at regional or local level by bringing an action before the Spanish Constitutional Court. The Spanish Constitutional Court found that no other authority, including the CNMC, should have the capacity to suspend *ex lege* the implementation of a regulation adopted by a region and therefore declared the

[71] Law 20/2013, of December 9, on the Guarantee of Market Unity (*Ley 20/2013, de 9 de diciembre, de garantía de la unidad de mercado*).

[72] Case 79/2017, judgment of the Spanish Constitutional Court of June 22, 2017.

[73] *Rewe v. Bundesmonopolverwaltung Für Branntwein* (Case C-120/78) EU:C:1979:42. *See* also, *Commission v. France* (Case C-188/84) EU:C:1986:43, para. 16.

[74] Case 79/2017, judgment of the Spanish Constitutional Court of June 22, 2017, para. 13.

[75] Article 149.1.13 of the Spanish Constitution.

procedural privilege granted to the CNMC unconstitutional.

Following this judgment, the status of economic operators that have activities outside of their home region on the basis of the single license system is unclear. The Spanish Constitutional Court concluded that the Spanish legislature needs to amend the legal provisions that were found unconstitutional.[76] Meanwhile, it is expected that each region will issue guidelines on mutual recognition of licenses. The judgment reduces the CNMC's capabilities to promote competition when regional regulations are concerned.

[76] Case 79/2017, judgment of Spanish Constitutional Court of June 22, 2017, para. 14.

SWEDEN

This section reviews developments concerning the Swedish Competition Act 2008, which is enforced by the Swedish Competition Authority ("SCA"), the Swedish Patent and Market Court, and the Patent and Market Court of Appeal.

Abuse

The Patent and Market Court Upholds Swedish Competition Authority Claim Against Snus Producer

On February 8, 2017, the Patent and Market Court issued its judgment in the claim brought by the SCA against Swedish Match North Europe AB ("Swedish Match").[77] The SCA claimed that Swedish Match's snus[78] fridges labeling system was an abuse of dominance in breach of the Swedish Competition Act.

The sale of snus to customers in Sweden takes place through resellers that stock snus in fridges provided by producers. These fridges normally contain snus products from different competing suppliers as most resellers only have one fridge in their store. The behavior in question concerned the labeling system implemented by Swedish Match on its own fridges. In 2012, Swedish Match required competitors that stocked their snus products in Swedish Match fridges to change their labels in compliance with particular templates. If the competitors' labels did not comply with these requirements, their labels were replaced by generic grey labels substantially restricting their size and color and the pricing information that could be shown.

The Patent and Market Court found that Swedish Match was the dominant producer of snus in Sweden both by volume and revenue, with a strong focus on more expensive, high-tier snus. Furthermore, the Patent and Market Court also found a majority of other snus producers relied on Swedish Match fridges to supply their products to resellers. Evidence showed that mid- and low-tier snus had gained greater market shares in recent years, with the emergence of several competitors focusing solely on cheaper low-tier snus.

The Patent and Market Court found that labels on snus fridges are an important means of competition in the market. The labels are one of the primary channels through which producers market their product to consumers, to the extent that no other means of marketing could offset the labeling restrictions. The Patent and Market Court then found that several of Swedish Match's low-price competitors either had their fridge labels unilaterally changed in multiple reseller stores to comply with Swedish Match's new standards without their knowledge or were given an unreasonably short time to design new labels.

Subsequently, the Patent and Market Court considered whether Swedish Match's new labeling system was part of an anticompetitive strategy. Relying on internal documents, it was clear that Swedish Match intended to remove all pricing information from labels, in particular for low-price snus, and any flashy or colorful labels so as to reduce consumer attention. The Patent and Market Court directly referenced Swedish Match statements providing that "hurrying the harmonization of all labels in our fridges to our standard is of great importance" and "no [low-price]-shouting [on] our fridges."

The Patent and Market Court then assessed whether Swedish Match's behavior had any anticompetitive effects in the market. Swedish Match argued that its new labeling system did not have anticompetitive effects in neither the short- or long-term because its low-price competitors continued to gain market shares. The Patent and Market Court, however, found that the economic analysis provided by Swedish Match was unclear in its methodology and insufficient to support its argument. Similarly, the Patent and Market Court found that the SCA had not met its required burden to demonstrate that the labeling system had anticompetitive effects.

77 Patent and Market Court judgment of February 8, 2017 (PMT 16822-14).

78 Snus is a Swedish moist tobacco powder, usually stored in fridges, and placed under the upper lip for extended periods.

Nevertheless, following its review, the Patent and Market Court reiterated that either potential anticompetitive effects or behavior with an anticompetitive purpose is sufficient to find an infringement. Notably, the SCA, and in turn the Patent and Market Court, relied heavily on internal Swedish Match documents that detailed the underlying anticompetitive purpose of its labeling scheme. Moreover, the Patent and Market Court rejected Swedish Match's contention that having organized and harmonized labels on their snus fridges was an objective justification for their behavior, as they could have achieved this goal by less restrictive means.

The Patent and Market Court held that Swedish Match had engaged in an overall strategy to limit the visibility and marketing opportunities of its competitors relying on Swedish Match fridges at reseller stores through its new labeling requirements.

The Patent and Market Court concluded that Swedish Match introduced its new labeling system to restrict competition and strengthen its own position in the market by forcing competitors wanting to supply snus through its fridges to adopt bland, restrictive labels to discourage consumers from noticing and purchasing cheaper snus. Swedish Match was fined SEK 37.98 million for its abusive behavior in violation of the Swedish Competition Act.

Swedish Court of Appeal Overturns Stockholm District Court Private Damages Award

On June 29, 2017, the Svea Court of Appeals issued its judgment in the appeals brought by both Yarps and Telia against the Stockholm District Court's judgment of March 7, 2016.[79] The Stockholm District Court had found Telia liable for damages as a result of its margin squeeze on the wholesale market for asymmetric digital subscriber line ("ADSL") services in Sweden. Telia appealed the judgment in its entirety whilst Yarps sought more damages.

In 2004, the SCA brought an enforcement action against Telia Company AB ("Telia," then known as TeliaSonera) for an alleged abuse of dominance. On April 12, 2013, following the referral for a preliminary ruling to the European Court of Justice,[80] the Market Court fined Telia SEK 35 million for margin squeeze, refusal to supply, and discriminatory treatment in the market for ADSL broadband in Sweden.[81] A subsequent private damages action was brought by Spray Network Aktiebolag ("Spray"), later inherited by Yarps Network Services AB ("Yarps"), seeking damages as a result of Telia's anticompetitive behavior.

The Svea Court of Appeals focused its assessment on Telia's alleged margin squeeze from February 2002 to January 2003. The Svea Court of Appeals found that the market definition established in the damages action by the Stockholm District Court at first instance was too broad, having included both ADSL and high-speed broadband. As there had only been instances of customers switching from ADSL to high-speed broadband and no customers switching from high-speed broadband to ADSL, the Svea Court of Appeals excluded high-speed broadband from the market definition.

Telia is the Swedish telecom incumbent, owning the necessary infrastructure across Sweden and having direct access to its own network. Yarps argued that Telia had implemented a series of price increases for third parties wanting to use its ADSL network in Sweden, which is a required input for third parties to provide an ADSL internet connection to their customers. Yarps claimed that a Long Run Average Incremental Cost ("LRAIC")-adjusted margin of SEK 80 per customer per month was required for a third party to use Telia's ADSL services profitably. However, relying on the LRAIC analysis used by the Market Court in 2013, the Svea Court of Appeals found that a much lower SEK 30 per customer per month was sufficient. At no point during the alleged abuse were Telia's prices such that Spray's margins fell below SEK 30 per customer per

[79] Svea Court of Appeals judgment of June 29, 2017 (T-2673-16).

[80] *TeliaSonera Sverige* (Case C-52/09) EU:C:2011:83.

[81] Market Court judgment of April 12, 2013 (MD 2013:5).

month. Consequently, the Svea Court of Appeals dismissed this argument.

Yarps further submitted that despite the lower LRAIC-adjusted margin, Telia's ADSL network constituted an essential input to serve its customers. The Svea Court of Appeals rejected this argument, finding that several other technologies provided broadband network access in direct competition to Telia's ADSL network across Sweden, in particular Local Loop Unbundling, Local Area Network, and Cable-TV; therefore Yarps (formerly Spray) had multiple substitutable alternatives.

Separately, the Svea Court of Appeals also found that the increases in prices charged by Telia for access to its ADSL network were not designed as an anticompetitive scheme. The internal documents provided by Telia demonstrated that the prices for its ADSL services were initially insufficient to cover its costs and subsequent increases in prices were rationally justified decisions. This was further supported by Swedish broadband market reports on the state of internet access at the time.

The Svea Court of Appeals held that Yarps was unable to show any actual effect on Spray specifically in the market for wholesale ADSL services, despite a clear finding of Telia's anticompetitive behavior by the Market Court in 2013. As a result, the damages imposed on Telia at first instance were annulled in its entirety and Yarps was ordered to pay Telia SEK 19.9 million in litigation costs.

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"). The FCC's decisions are appealable to the Federal Administrative Tribunal (the "Tribunal") and, ultimately, to the Swiss Supreme Court.

Horizontal Agreements

FCC Fines Husqvarna for Illegal Price-Fixing Agreements in the Lawnmower Market

On June 1, 2017, the FCC fined Husqvarna Switzerland Ltd. ("Husqvarna") and its affiliated companies CHF 656,667 as part of a settlement. According to its press release,[82] the FCC found that Husqvarna had entered into illegal vertical price-fixing agreements with its resellers for the distribution of lawnmowers between 2009 and 2015.

Husqvarna immediately filed for leniency upon the initiation of the investigation, and its cooperation resulted in a significant fine reduction. Husqvarna agreed to refrain from price-fixing and imposing minimum resale prices on its resellers as part of the settlement agreement.

Abuse

FCC Launches Investigation into Ice Hockey Broadcasting

On May 30, 2017, the FCC launched an investigation against UPC Switzerland LLC ("UPC") for possible abuse of dominance regarding the live pay-TV broadcasting of ice hockey championship games for the 2017/18 season.

According to FCC's press release,[83] the investigation is based on evidence that the five-year exclusive broadcasting rights of the major Swiss ice hockey championship games granted in 2016 by the Swiss Ice Hockey Federation to UPC could have created a dominant position, which UPC could have abused.

The FCC will investigate if UPC illegally prevented competing TV platform operators, in particular operators that do not broadcast through cable TV, from broadcasting ice hockey games.

Vertical Agreements

FCC Notice Regarding the Legal Treatment of Vertical Agreements

On May 22, 2017, the FCC revised its notice regarding the approach to vertical agreements in light of the Swiss Supreme Court's Gaba/Elmex judgment. [84]

On June 28, 2016, the Swiss Supreme Court rendered a landmark judgment in the Gaba/Elmex case that tightened the standards of application of Swiss competition law for horizontal and vertical agreements.[85]

The Gaba/Elmex judgment addresses the meaning of "significant restriction" of competition under the Competition Act. According to Article 5(1) of the Competition Act, agreements are prohibited if they eliminate or, without justification, significantly restrict competition in a certain market. Because, in most cases, competition is not completely eliminated and justifications do not exist, the meaning of "significant restriction" of competition is crucial. When assessing the legality of an agreement, the FCC previously considered both qualitative criteria (the subject matter of the agreement) and quantitative criteria (*e.g.*, the parties' market shares and the impact on competition).

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82 FCC press release, June 1, 2017, available in French at: https://www.weko.admin.ch/weko/fr/home/actualites/communiques-de-presse/nsb-news.msg-id-66909.html.

83 FCC press release, May 30, 2017, available in French at: https://www.weko.admin.ch/weko/fr/home/actualites/communiques-de-presse/nsb-news.msg-id-66876.html.

84 FCC revised notice regarding the legal treatment of vertical agreements, May 22, 2017, available in French at: https://www.weko.admin.ch/weko/fr/home/documentation/communications---notes-explicatives.html.

85 Swiss Supreme Court press release, June 28, 2016, available in French at: http://www.bger.ch/fr/press-news-2c_180_2014-t.pdf.

For an agreement to be illegal both qualitative and quantitative elements (and, in particular, an actual negative effect on competition) were required. Agreements considered especially detrimental due to their subject matter, however, required less quantitative evidence.

The Swiss Supreme Court assessed the "elements of significance" requirement. According to the Swiss Supreme Court, the elements of significance function as a *de minimis* clause. The judgment makes reference to the criteria of appreciability in the EU, but leaves open what the threshold for the *de minimis* clause is. The Swiss Supreme Court concluded that agreements considered to be especially detrimental to competition (Article 5(3) and (4) of the Competition Act) already meet the necessary threshold under the elements of significance requirement. The Swiss Supreme Court identified agreements on price-fixing, quantity limitation, allocation of markets (geographically or according to trading partners; Article 5(3) of the Competition Act), minimum or fixed resale prices, and absolute territorial protection (Article 5(4) of the Competition Act) as especially detrimental to competition. Following the Gaba/Elmex judgment, these agreements may be subject to fines regardless of the parties' market shares or their actual effect on competition in the relevant market. In cases where the presumption can be rebutted, a party has the possibility to justify the agreement based on economic efficiency.

In the FCC's updated notice on vertical agreements, the FCC redefines active and passive sales and specifies in which cases the establishment of a minimum or fixed resale price is presumed to eliminate effective competition. In addition, the notice clarifies that suppliers can impose or recommend maximum resale prices if this does not amount to a fixed or minimum resale price as a result of pressure from, or incentives offered by, any of the parties.

The updated notice provides that vertical agreements that are presumed to eliminate effective competition following the Gaba/Elmex case are now considered as particularly harmful based on their very existence and regardless of their actual effect on competition.

Mergers and Acquisitions

FCC Prohibits Merger in Ticketing Market

On May 23, 2017, the FCC prohibited the proposed merger between Ticketcorner SA ("Ticketcorner") and Starticket SA ("Starticket").

According to the its press release,[86] the FCC examined the ticketing software market, in which it found no competition concerns, and the primary ticketing market, in which it found that Ticketcorner was already dominant and, post-merger, the new entity could eliminate effective competition. Furthermore, as both parties are owned by media groups (Ticketcorner is owned by Ringier and Starticket by Tamedia), the FCC was also concerned about possible conglomerate effects.

Having reviewed the positions of current and potential competitors and the impact of innovative technologies in the market, the FCC found that there would not be sufficient competitive pressure on the new entity after the merger. Because there were no proposed, adequate commitments to address the competition concerns, the FCC prohibited the merger.

[86] FCC press release, May 23, 2017, available in English at: https://www.weko.admin.ch/weko/en/home/latest-news/press-releases/nsb-news.msg-id-66814.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").

Intellectual Property and Licensing

Unwired Planet v. Huawei: A Landmark Judgment on FRAND Licensing

On April 5, 2017, the UK High Court decided on a patent infringement case regarding Unwired Planet International Ltd. ("Unwired Planet") and Hauwei Technologies Co. Ltd. ("Hauwei").[87] In 2009, Huawei acquired a license to Ericsson's telecommunications patents, which included patents declared as essential (Standard Essential Patents, or "SEPs") for 2G, 3G, and 4G wireless communication standards developed under the European Telecommunications Standards Institute ("ETSI"). The Ericsson-Huawei license expired at the end of 2012. In 2013, Ericsson transferred some of its patents to Unwired Planet, including some SEPs that Ericsson had licensed to Huawei under the expired agreement. Unwired Planet and Huawei failed to reach an agreement on potential licensing arrangements and Unwired Planet issued patent infringement proceedings in the UK and Germany against Huawei, Samsung, and Google, and against HTC in Germany. Google and Samsung settled the claims against them, leaving Huawei as the only UK defendant. The UK High Court found that two of the asserted patents were both valid and essential (a finding that is currently under appeal).

U.S. courts have held that a fair, reasonable, and non-discriminatory ("FRAND") commitment to a standards-setting organization creates contractual obligations that can be enforced against the patent owner.[88] In Europe, by contrast, courts and competition authorities have largely refrained from taking a position on whether a FRAND commitment can be enforced as a matter of contract law and have instead relied on competition law as a means of enforcing FRAND commitments against right-holders. The UK High Court in *Unwired Planet v. Huawei* held that ETSI FRAND commitments could be enforced under contract law, concluding that, when a right-holder gives a FRAND commitment to ETSI, a contract is formed between ETSI and the right-holder. The contract can be relied upon and enforced by third parties, such as implementers, that are not party to the contract and may not even be ETSI members.[89]

A consequence of the UK High Court's findings on enforceability is that there can only be one "true" set of FRAND terms in any given circumstance. It would be unclear how an implementer could bring an action for breach of contract and how the UK High Court could resolve the dispute unless the parties agreed to accept whatever rate the UK High Court chose in the exercise of its discretion.

This finding appears to have implications for the validity of existing contracts under competition law. Under Article 102, the criteria for deciding whether SEP licensing conduct is an abuse of dominance are whether the license terms offered by the IPR holder are FRAND. If only a single set of terms can be FRAND, then every agreed license in the industry would be at risk of being contrary to competition law and being unwound. The UK High Court resolved this difficulty by finding that FRAND has a different meaning under competition law than under the IPR holder's commitment to ETSI. Article 102 condemns excessive pricing that would have to be substantially more than the "true" FRAND rate. There may thus be a range of FRAND rates for the purposes of applying Article 102, but there is a single true FRAND rate for the purposes of enforcing the IPR holder's contract with ETSI.

The UK High Court found that FRAND is not only a description of a set of license terms, but also the process by which the terms are agreed. Both SEP holders and implementers have an obligation by contract to "take a

87 *Unwired Planet v. Huawei* [2017] EWHC 711 (Pat), ("*Unwired Planet v. Huawei*").

88 *See, e.g.*, *Microsoft, Corp. v. Motorola, Inc.*, No. 14-35393 (9th Cir. 2015).

89 The UK High Court found that the enforcement of this contract would not necessarily result in compelling the intellectual property right ("IPR") holder to grant a license but, rather, in refusing to grant relief for patent infringement.

FRAND approach to negotiation,"[90] which seems to equate to negotiating in good faith. Even if an opening offered rate is higher than the "true" FRAND rate, that does not mean that a patentee has failed to take a FRAND approach any more than the converse could be said about an implementer. Extreme offers and taking an intransigent approach that prejudice negotiations. however, will not be considered FRAND.

The UK High Court found that Unwired Planet had not abused its dominant position, that Huawei had sufficient notice of the need to license Unwired Planet's patents, and that both Unwired Planet and Huawei negotiated in good faith. Huawei claimed Unwired Planet abused its dominant position through: (i) premature litigation; (ii) excessive pricing; and (iii) bundling/tying SEPs and non-SEPs.

Huawei argued that Unwired Planet failed to follow the conditions laid down by the European Court of Justice in *Huawei v. ZTE*[91] before seeking an injunction. The European Court of Justice set out a series of steps that include: (i) alerting the infringer by setting out the relevant SEP and specifying how it has been infringed; and (ii) presenting a written offer after the implementer has expressed its willingness to conclude a license on FRAND terms. The UK High Court acknowledged that Unwired Planet did not comply with these steps. It noted, however, that Huawei also did not show unqualified willingness to take a FRAND license, because it was only willing to take a UK license (rather than a worldwide license) for SEPs that had been established as valid and infringed. In a novel reading of *Huawei v. ZTE*, the UK High Court found that the European Court of Justice did not seek to draw a "bright line" whereby any deviation from the conditions set out necessarily amounts to an abuse of dominance. Rather, the UK High Court found that the European Court of Justice held that bringing an injunction claim requires "some kind of prior notice," but what amounts to sufficient notice will depend on the circumstances of the case.

Huawei argued that Unwired Planet's licensing offers greatly exceeded FRAND, and thus involved an attempt to impose an unfair selling price. The UK High Court found that Unwired Planet's offers were just a step in good faith negotiations, and only an offer which is so far above FRAND as to disrupt or prejudice negotiations would infringe Article 102.

Huawei further argued that to bundle SEPs with non-SEPs amounted to unlawful bundling or tying, including because this makes it difficult to tell whether an SEP owner is complying with its FRAND commitment, and because it eliminates competition between non-SEP technologies. The UK High Court agreed that an SEP owner subject to a FRAND commitment could not insist on a license that bundles SEPs and non-SEPs, but found that it was not an abuse to make a first offer that puts the two together.

The UK High Court took a top-down approach to patent valuation alongside an examination of comparable licences regarding the methodology for setting FRAND royalty and non-discrimination ("ND") obligation within FRAND. The top-down approach consists of two steps: (i) assessing the value of a standard by reference to the aggregate royalty a licensee would need to pay to implement the relevant standard; and (ii) calculating the share of value attributable to Unwired Planet's SEPs. The UK High Court relied principally on a royalty rate calculated by reference to comparable licenses. It then used elements of the top-down approach to adjust or sense-check that figure. The UK High Court also acknowledged that royalty rates set by courts in previous cases could provide persuasive precedents. As a result of applying the above methodology, the UK High Court specified certain fixed rates of benchmark royalty rates as FRAND.

A novel question before the UK High Court was whether the ND obligation within FRAND entitles a licensee to a lower rate than the benchmark rate because that lower rate had been granted to another, similarly situated licensee (Samsung in this case). The UK High Court rejected such a "hard-edged" ND obligation

90 *See Unwired Planet v. Huawei*, para. 163.

91 *Huawei Technologies* (Case C-170/13) EU:C:2015:477.

under FRAND, and ruled that the difference in royalty rate must lead to a distortion of competition between the two comparable licensees.[92]

Regarding the territorial scope of the license, Huawei was willing to take a license limited to Unwired Planet's UK portfolio, whereas Unwired Planet was prepared to offer only a worldwide license. The UK High Court held that Unwired Planet was entitled to insist on a worldwide license given that its portfolio was sufficiently large and wide in geographical scope. Even though a willing licensee and licensor may choose to proceed on a worldwide basis, such an approach would still fall short of being FRAND if it would amount to unlawful bundling or tying under competition law. The UK High Court concluded that, given the prevalence of worldwide licenses and of assessment based on patent families, this type of tying did not foreclose competition.

Mergers and Acquisitions

Government Intervenes in Hytera/Sepura Merger on National Security Grounds

On April 10, 2017, the Secretary of State for Business, Energy and Industrial Strategy issued a public interest intervention notice in the proposed acquisition by Hytera Communications Corporation Ltd. ("Hytera") of Sepura plc. ("Sepura"), on the grounds that national security may be relevant to the consideration of the merger.[93]

Hytera is a Chinese-based global manufacturer and supplier of Professional Mobile Radio ("PMR") communications systems to the public sector and commercial customers. Sepura is a UK-based supplier of PMR systems. Hytera and Sepura, along with Motorola, are the three main suppliers of Trunking and Terrestrial Trunked Radio ("TETRA"), the technology used by the UK emergency services communication infrastructure.

Under section 42 of the Enterprise Act 2002, the Secretary of State has the power to issue an intervention notice to the CMA if he believes that one or more public interest considerations may be relevant to a merger. The specified public interest considerations are : (i) national security; (ii) media plurality; and (iii) maintaining the stability of the UK financial system. Provision is made in the Enterprise Act for the addition of further public interests. Once an intervention notice has been issued, the CMA must report to the Secretary of State on competition issues, stating whether it would, if it were not a public interest case, refer the merger to Phase II. The CMA may also give its recommendations on the public interest consideration(s). The Secretary of State may then decide to make a reference for a Phase II investigation as a result of either both the public interest consideration(s) and a substantial lessening of competition or solely on the basis of public interest. In determining whether to make such a reference, the Secretary of State is required to accept the CMA's findings on competition issues.

In assessing possible competition issues arising from the Hytera/Sepura merger, the CMA considered that the only possibly relevant theory of harm was in relation to horizontal effects: whether the loss of a competitive constraint between Hytera and Sepura would result in increased prices and/or reduced quality of TETRA devices. The CMA took a cautious approach by assessing the competitive impact of each type of TETRA device separately and concluded that the merger would not result in a substantial lessening of competition in any market in the UK. In reaching this conclusion, it considered, *inter alia*, the Home Office's intention to ensure that more than one supplier would remain accredited to supply TETRA devices, the existence of other suppliers that would be able to enter the market or expand supply, and low barriers to entry or expansion.

The CMA nevertheless received representations from the Home Office and two third parties raising national security concerns. The Home Office highlighted the need to protect sensitive information and technology,

92 *See Unwired Planet v. Huawei*, paras. 501–503.

93 CMA, Hytera/Sepura: Public Interest Intervention Notice, April 10, 2017, available at: https://www.gov.uk/cma-cases/hytera-sepura-public-interest-intervention-notice.

and to maintain UK capabilities in radio communications for emergency services. In particular, the work of the UK emergency services is central to the protection of public safety and relies on the availability of functioning and maintained radio devices. The Home Office was also concerned about security in relation to company processes and premises, IT systems, and personnel. The CMA noted in its report that it had no reason to doubt any of these representations and, consistent with its Phase I role, it provided no advice on the national security public interest considerations.

In light of the CMA's report, the Secretary of State considered that he had the power to refer the transaction to Phase II. On May 12, 2017, the Secretary of State decided to accept undertakings in lieu of a reference, following advice from the Home Office. The undertakings comprise the following commitments:

1. An undertaking to implement enhanced controls to protect sensitive information and technology from unauthorized access. In particular, Sepura must maintain the following security controls required by the Home Office: (i) one member of the board must be a British Citizen with appropriate security clearance; (ii) only personnel with security clearance will have access to a secure area; and (iii) the person responsible for overseeing compliance with security requirements must be a British Citizen.
2. An undertaking to allow government agencies, such as the Home Office, the Ministry of Defence, and GCHQ, access to premises and information to enable auditing of compliance with the security requirements.
3. Sepura must continue to repair and maintain UK TETRA devices for as long as required by the Home Office, and the capability to provide these services must continue to be directly controlled by a company incorporated in the UK under the laws of England.

The Secretary of State's intervention comes in the wake of recent indications from the Government that it plans to intervene in mergers more often on public interest grounds. For example, as part of her campaign to be prime minister, Theresa May stated that "[a] proper industrial strategy wouldn't automatically stop the sale of British firms to foreign ones, but it should be capable of stepping in to defend a sector that is as important as pharmaceuticals is to Britain" (in the context of Pfizer's attempts to buy AstraZeneca). Further, after the Government's agreement with EDF regarding the Hinkley Point nuclear project, it announced that "[t]here will be reforms to the Government's approach to the ownership and control of critical infrastructure to ensure that the full implications of foreign ownership are scrutinized for the purposes of national security."

Following this, the CMA published a paper drawing attention to the relevant considerations that should be borne in mind when deciding whether to make any changes to the public interest intervention regime. In particular, it highlighted the importance of the UK's reputation for being open to business and remaining attractive to foreign investment.

Whether any legislative changes will be made is not yet clear and will likely depend on the outcome of Brexit negotiations. Nonetheless, intervention on national security grounds in Hytera/Sepura demonstrates that the Government is aware of the impact foreign ownership might have on the public interest in the UK and is ready to act to remedy any such impact where necessary.

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