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.

Mergers and Acquisitions

BCA Partially Lifts 20-Year-Old Behavioral Merger Remedies

On May 31, 2017, the BCA lifted merger commitments imposed as part of a 1997 conditional clearance decision approving the creation of the Kinepolis Group ("Kinepolis").[1]

This development constitutes the latest episode of a judicial saga that began in 1997, when the BCA (then the Belgian Competition Council) conditionally approved a transaction that brought together two of the largest movie exhibitors in Belgium to create Kinepolis.[2] At the time, the authority was concerned that, as a result of the merger, Kinepolis would be in a position to secure exclusivity/priority from film distributors. Such arrangements could adversely impact competition in film distribution and exhibition in Belgium, to the detriment of consumers. To remedy this concern, the BCA conditioned the transaction on a set of four behavioral remedies.

Under the first condition, the newly created cinema group was prevented from: (i) demanding or requesting film exclusivity from film distributors; (ii) reserving films distributed by Kinepolis for itself; (iii) demanding or requesting priority from film distributors or ensuring priority for films distributed by Kinepolis; and (iv) favoring films distributed by Kinepolis (*e.g.*, preferred scheduling, run, or screen exhibition terms). Under the second condition, Kinepolis had one year to terminate its existing scheduling agreements with independent movie theater operators, and was prohibited from entering into new ones. The third condition prohibited the group from requesting the regional investment companies involved in the concentration to participate in or support other companies that perform activities competing with those of Kinepolis. Finally, under the fourth condition, the establishment or acquisition of new movie theaters or the substantial expansion, renovation, or replacement of existing ones by Kinepolis were subject to the BCA's prior consent. These commitments were imposed for ten years.

In 2006, Kinepolis requested removal of the conditions, which the BCA approved in a 2007 decision.[3] The decision was however challenged before the Brussels Court of Appeal by the Federation of Belgian Cinemas ("FBC") and rivals UGC and Utopolis. The Brussels Court of Appeal found that the BCA had insufficiently substantiated its finding that market developments had made the 1997 conditions irrelevant. It therefore overturned the decision and referred the matter back to the BCA.[4] The BCA consequently adopted a new decision in October 2008

[1] BCA, Decision No. 17-CC-22 of May 31, 2017.

[2] BCA, Decision No. 97-C/C-25 of November 17, 1997.

[3] Belgian Competition Council, Decision No. 2007-C/C-12 of April 16, 2007.

[4] Brussels Court of Appeal, Judgment No. 2007/MR/2-3-4 of March 18, 2008.

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by which it lifted the third and fourth conditions but upheld the other conditions for three years.[5] This new decision was in turn challenged by the FBC, UGC, and Utopolis in 2009. The Brussels Court of Appeal again found that the BCA did not show that market circumstances justified lifting the conditions, and partially annulled and amended the decision of the BCA in March 2010.[6] As a result, the first and second conditions remained in effect, while the third and fourth conditions were respectively lifted and narrowed. Kinepolis could request to removal of these conditions after three years. Absent such a request, these conditions would be renewed.

On March 31, 2017, Kinepolis applied again for the removal of the remaining conditions. On May 31, 2017, the BCA lifted the restriction imposed on the organic growth of Kinepolis but upheld the remaining remedies. It considered that, given the current structure of the market, the obligation to subject the establishment of new movie theaters to the prior consent of the BCA was no longer justified. The BCA highlighted the radical nature of this remedy as well as the procompetitive effects of the introduction of new cinemas. The BCA also noted that, since 1997, Kinepolis' rivals have become stronger, well-established competitors with a wider geographic presence and benefitted from financial resources comparable or superior to those of Kinepolis. The BCA added that the digitalization of films has also lowered the barriers to entry and expansion because the limitation of copies that are brought into circulation by distributors is no longer an issue.

This partial lift is subject to a two-year transition period designed to avoid possible market disruption and to allow competitors to plan investments and develop viable projects. While Kinepolis will be able to build new movie theaters as of 2019, the remaining remedies still prevent it from: (i) obtaining exclusive or priority movie distribution rights; (ii) entering into scheduling agreements with independent movie theater operators; and (iii) acquiring new movie theaters without prior approval from the BCA.

An appeal lodged against the BCA's decision by Imagix and Euroscoop—two of Kinepolis' smaller rivals—is pending before the Brussels Court of Appeal.

[5] Belgian Competition Council, Decision No. 2008-C/C-52 of October 1, 2008.
[6] Brussels Court of Appeal, Judgment No. 2008/MR/22-23-24 of March 11, 2010.

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").

Abuse

Helsinki Court of Appeal Awards Damages for Abuse of Dominance in the Telecoms Sector

On July 5, 2017, the Helsinki Court of Appeal awarded €90,000 in damages for abuse of dominance in the telecommunications sector to Visual Data Oy ("Visual Data"), a telephone directory provider.[7] This is the first time in Finland that a claimant has obtained damages for an infringement of competition law without relying on a previous infringement decision from any competition authority.

The case concerned a stand-alone damages action by Visual Data. Visual Data had requested access to telephone numbers and similar information held by a group of Finnish telecommunication providers in order to set up a CD-ROM based telephone directory. The telecommunication providers were represented by Suomen Numeropalvelu Oy ("SNOY"), which was responsible for selling the requested information and was the undisputed dominant competitor in the market for the provision of telephone numbers at the time. SNOY had set different prices for the telephone number information depending on the intended purpose of the data. Visual Data claimed that SNOY's price setting method required Visual Data to pay a higher price for the information, preventing Visual Data from publishing its CD-ROM telephone directory.

As background, in 1998, the FCCA had issued an exemption decision under the Finnish competition rules regarding SNOY's pricing practices for the trading of telephone user information. According to the conditions associated with the exemption, the trading of information had to be non-discriminatory and the cost set for the trading needed to be correlated to the actual costs of transferring the information.

In January 2000, Visual Data complained to the FCCA that the conduct of the telecommunication providers and SNOY constituted an abuse of dominance. The FCCA decided not to proceed with the matter, a decision that in 2013 (after numerous appeals) was supported by the SAC. The SAC did not rule on whether the actions had constituted an abuse of dominance or on the potential compensation for damages.

While Visual Data's complaint was being processed, Visual Data initiated damages proceedings against the telecommunications companies and SNOY, claiming they had abused their dominant positions. The damages proceedings were stayed while the administrative proceedings were pending. Visual Data's damages claim failed in the District Court of Helsinki. The Helsinki Court of Appeal, however, ruled in favor of Visual Data. The Helsinki Court of Appeal concluded that SNOY had abused its dominant position contrary to the Act on Competition Restrictions (480/1992, repealed by the Competition Act 948/2011) by not observing the conditions set out by the FCCA in the 1998 exemption decision. The evaluation of the abuse primarily focused on the varied pricing for the information that was to be included in Visual Data's CD-ROM telephone directory. The Helsinki Court of Appeal concluded, referring to the FCCA's exemption conditions, that SNOY's pricing violated the cost correlation requirement.

The Helsinki Court of Appeal concluded that SNOY had engaged in excessive pricing practices in breach of Section 7 of the Act on Competition Restrictions. Visual Data had claimed €3.5 million in damages based on market foreclosure, calculated from the projected market share of Visual Data's planned CD-ROM telephone directory. The Helsinki Court of Appeal found Visual Data's evidence on the amount of harm largely unconvincing and concluded that Visual Data had not proven the amount of the harm it had suffered, but had sufficiently proven the fact of

[7] Helsinki Court of Appeal, judgment 870, July 5, 2017, case S 15/1071.

damage. The Helsinki Court of Appeal awarded Visual Data damages of €90,000.

There are a few noteworthy and relatively uncommon elements to the case. First, this is the first Finnish case in which a court has awarded antitrust damages to a party that was not based on a prior infringement decision by any competition authority. The case shows a willingness by the civil courts to take part in the enforcement of competition legislation, which has traditionally been a task for the administrative courts.

Second, the Helsinki Court of Appeal concluded that SNOY's pricing had been excessive because it was contrary to the FCCA's 1998 exemption decision. Considering the traditional reluctance of courts to interfere with potentially excessive prices (a question that is often otherwise left to market forces), the Helsinki Court of Appeal's decision is somewhat unusual.

Third, the evidence presented in the case was limited. The Helsinki Court of Appeal mostly relied on the fact that SNOY's actions had violated one of the conditions imposed by the FCCA in its exemption decision. This is noteworthy especially because the ruling was a stand-alone case, and not based on a prior infringement decision.

Visual Data has requested leave to appeal to the Supreme Court.

FRANCE

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

Abuse

The FCA Accepts Engie's Commitments to Remedy Abuse of Dominance Concerns in the Energy Sector

On September 7, 2017, the FCA accepted commitments offered by Engie, the French incumbent gas operator, to remedy a possible abuse of dominance in the gas retail market. The case was triggered in October 2015 when the FCA received a complaint from alternative energy supplier Direct Energie, which alleged that Engie had engaged in predatory pricing.[8]

Due to the liberalization of the energy sector, French consumers can either be subject to regulated gas or electricity tariffs, or to unregulated tariffs. Engie, as the incumbent gas operator, has a monopoly over regulated gas tariffs for both residential consumers (individual customers) and non-residential consumers (small professional customers), but also competes with alternative energy suppliers such as Direct Energie to sell electricity through contracts with unregulated tariffs.

The FCA found that: (i) Engie's sales prices for individualized offers to professional customers were likely predatory as they did not take into account certain avoidable costs; and (ii) its sales prices for standardized offers to individual and small professional customers were possibly predatory because Engie had no reliable method to assess their *ex ante* and *ex post* profitability. In light of these concerns, especially regarding individualized offers to small professional customers, the FCA ordered interim measures in May 2016 requiring Engie to set its prices for these offers to better reflect its actual short-term costs.[9]

Furthermore, the FCA found that several clauses included in individual metering and gas service contracts concluded with co-ownership associations[10] raised competitive concerns. The FCA focused on: (i) the excessive length of the contracts (10 years); (ii) the prohibitive cancellation fees charged to the customer in case of early termination; and (iii) clauses prohibiting customers from using alternative energies for heating purposes.

To address the FCA's concerns, Engie agreed to numerous commitments. Regarding its pricing practices, Engie committed to: (i) reinforce the reliability of its *ex ante* and *ex post* profitability analysis by implementing a verifiable cost structure and an internal monitoring process, which requires for instance that prices below the average incremental cost be approved by a person empowered within Engie to do so; (ii) set its prices above the average avoidable cost[11] as identified in its *ex ante* profitability analysis; and (iii) reinforce its employees' competition law training program. Furthermore, with respect to contracts entered into with co-ownership associations, Engie agreed to inform its customers of the possibility to terminate their contracts at no cost following a five-year commitment period, and not to prevent commonhold associations from using alternative energy sources for heating. The commitments were entered into for three years, except for the commitment related to prices offered to individual customers, which will last five years.

Interestingly, the decision was adopted six months after the FCA fined Engie €100 million for non-pricing

[8] FCA, Decision No. 17-D-16 of September 17, 2017, relating to practices implemented by Engie in the energy sector.

[9] FCA, Decision No. 16-MC-01 of May 2,2016, relating to a request for interim measures in the energy sector.

[10] Co-ownership associations are associations of apartment owners with the same building.

[11] Average avoidable costs are used by the FCA to assess the existence of predatory prices and correspond to the fixed and variable costs that could have been avoided if the output subject to the FCA's analysis had not been produced.

abusive practices implemented in the gas supply markets.[12]

Vertical Agreements

The FCA Orders Tereos to Amend its Sugar Beet Supply Contracts

On July 26, 2017, the FCA announced that Tereos committed to amend its beet supply contracts to ensure fair competition in the French sugar beet procurement sector.[13]

In October 2016, Saint-Louis Sucre, the third-largest sugar producer in France, filed a complaint against its competitors Tereos (owner of the Beghin Say brand) and Cristal Union (owner of the Daddy brand), the two largest sugar producers in the French market. Saint-Louis Sucre alleged that in the Picardy region, which represents about 40% of French sugar beet production, Tereos and Cristal Union had signed long-term exclusive contracts with sugar beet growers that prevented the latter from supplying alternative sugar producers.

In France, sugar beet growers typically join a cooperative of sugar producers—like Tereos's cooperative—as partners by acquiring shares. Cooperative partners typically commit to produce a contractually agreed volume of beets that they will then sell to the cooperative. Tereos's cooperative partners had made an initial 10-year commitment.

The French sugar procurement sector is currently opening up to competition due to the abolition of the sugar production quotas on October 1, 2017. However, in March 2016, Tereos offered its cooperative partners the opportunity to deliver a greater amount of their beet production to Tereos for the 2017–2018 production season on terms that the FCA considered as raising competition concerns.

First, Tereos had introduced an additional five-year commitment for its cooperative partners that were willing to increase their production for the 2017–2018 production season. As a result, Tereos' partners were subject to two separate commitment periods, *i.e.*, the initial ten-year commitment covering the usual beet tonnages and the new five-year commitment covering the additional beets. The FCA took the view that Tereos could potentially lock in all its cooperative partners until 2022. Second, the FCA found that Tereos' articles of association did not expressly indicate that cooperative partners could supply part of their beet production to other sugar groups such as Saint-Louis Sucre, which suggested that growers had to sell their production (including their additional beet production) to Tereos on an exclusive basis. Third, Tereos had required cooperative partners that wished to leave the cooperative to give a twelve-month notice period (instead of three), making it even more difficult in practice to exit Tereos.

To address the FCA's competitive concerns, Tereos offered to clearly limit each cooperative partner's supply obligation to the contractual volumes agreed with Tereos, putting an end to their exclusive supply obligation and enabling them to sell their production to other sugar factories at the same time. Tereos also committed to eliminate the dual commitment period, reduce the notice period from twelve to three months, and ensure that Tereos' sector managers receive training in competition law. The FCA considered that a five-year commitment period from Tereos would be sufficient to address the competitive concerns raised by the FCA since Tereos' partners were currently committed to Tereos for a similar or even shorter time.

As for the practices implemented by Cristal Union, the FCA held that they did not raise any competition concerns in light of Cristal Union's small market share (approximately 12% in Picardy).

The FCA Jointly Fines Manufacturer of Dessert Products Materne and its Wholesaler-Importer Sodibel for Implementing an Exclusive Import Agreement in the French Overseas Territories

On July 27, 2017, the FCA found that Materne SAS ("Materne") had granted exclusive import rights to Sodibel, a subsidiary of Etablissements Frédéric

[12] FCA, Decision No. 17-D-06 of March 21, 2017, relating to practices implemented in the gas and electricity sector and energy services.

[13] FCA, Decision No. 17-D-12 of July 26, 2017, relating to practices implemented in the sugar beet procurement sector.

Legros, in violation of Article L. 420-2-1 of the French Commercial Code.[14]

In 2012, to address concerns over a discrepancy between the prices of consumer goods in mainland France and the French Overseas territories, the French government adopted a law aimed at encouraging competition in these territories (the "Lurel Law"). Accordingly, one of the provisions of the Lurel law, now embedded in Article L. 420-2-1 of the French Commercial Code, provides that agreements or concerted practices with the object or effect of granting exclusive import rights to a company or a group of companies are prohibited (unless they can be justified on grounds of economic efficiency) in the following territories: Guadeloupe, Guyana, Martinique, Reunion, Mayotte, Saint Barthélemy, Saint-Martin, Saint-Pierre-et-Miquelon, and Wallis-and-Futuna.

The prohibition, which applies to all agreements irrespective of whether they are written, oral, legal, or *de facto*, entered into force on November 20, 2012. The companies were granted four months, *i.e.*, until March 20, 2013, to modify their contracts in order to comply with the Lurel law.

In the present case, the FCA found that in January 2012 Materne and Sodibel had entered into an exclusive import agreement pursuant to which Materne committed not to supply any distributor other than Sodibel in Réunion, Mayotte, and Mauritius. Conversely, Sodibel undertook not to sell fruit-based dessert products competing with Materne products in the concerned territories. While the agreement was not illegal at the time (as the Lurel Law had not yet come into force), it was concluded for an initial three-year term, and was subject to annual renewal thereafter. Consequently, the parties had infringed the Lurel Law from March 20, 2013 until July 5, 2016, when they signed an amendment modifying Materne's general terms and conditions.

[14] FCA, Decision No. 17-D-14 of July 27, 2017, relating to practices implemented in the overseas consumer product distribution sector.

The FCA found that the practices had prevented wholesalers-importers from effectively competing in the French overseas market for fruit-based dessert products, in particular as Materne is a leading company in the French foodstuff industry, and discouraged price competition on the part of Materne's competitors. Materne and Sodibel (and their parent companies) did not challenge the FCA's objections, agreed to settle the case, and were paid fines of €70,000 and €30,000, respectively.

The decision is the third in a line of cases whereby the FCA sanctioned anticompetitive practices in the French Overseas territories consisting of exclusive import agreements relating to consumer goods.[15]

[15] FCA, Decision No. 16-D-15 of July 6, 2016, relating to practices implemented in the distribution of consumer goods overseas; and FCA, Decision No. 15-D-14 of September 10, 2015, relating to practices implemented by Bolton Solitaire SA, Danone SA, Johnson & Johnson Santé et Beauté France, and Pernod-Ricard in the sector of the distribution of consumer goods in the French overseas territories.

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

FCO Fines Three Manufacturers of Automotive Parts

On April 27 and June 22, 2017, the FCO fined three manufacturers of automotive heat shields, Lydall Gerhardi GmbH & Co. KG ("Lydall"), ElringKlinger Abschirmtechnik (Schweiz) AG ("ElringKlinger"), and Estamp S.A.U. ("Estamp"), approximately €9.6 million for exchanging competitively sensitive information and agreeing on price increases to their common customer VW.[16] The FCO also fined several responsible employees. A fourth manufacturer, Carcoustics International GmbH ("Carcoustics"), received immunity for helping to uncover the cartel by whistle-blowing.

Heat shields are aluminum plates that shield heat emitted by the engine and exhaust tract from other areas of the vehicle (passenger compartment, fuel tank, etc.). The FCO found that, between 2010 and 2011, Lydall, ElringKlinger, Estamp, and Carcoustics had agreed to pass on increased raw material prices to their customer VW. The FCO noted that the agreement was limited to introducing an increase; the specific amount was up to each company. The companies also exchanged information on the state of their negotiations with VW to strengthen their positions in these negotiations. The contacts were mostly bilateral in nature (via phone), but there was also one multilateral meeting between Lydall, Estamp, and Carcoustics.

The FCO eventually settled the case and, for the purposes of calculating the fines, took into account that: (i) VW had buyer power that it exercised during the negotiations; and (ii) all manufacturers had cooperated extensively with the FCO over the course of the investigation. All fining decisions are final.

DCA Reverses Initial Judgment on Cable Network Feed-In Fees

On July 12, 2017, the DCA ruled once again on the termination of a content feed-in and distribution contract between a cable network operator (Kabel Deutschland) and several public broadcasters (ARD and ZDF).[17] The decision follows an FCJ decision quashing the initial DCA judgment and referring the case back to the DCA.[18]

The broadcasters had each terminated their contracts with the cable network operator on the same date, after discussing their intention to do so with the other (independent public) broadcasters. Reversing its initial judgment,[19] the DCA found the termination to be the result of an anticompetitive coordination between the independent public broadcasters. In line with the FCJ's reasoning and established European case law, the DCA relied on the presumption that information exchanged between competitors affects their later market conduct. In the DCA's view, the broadcasters had not adduced any evidence of autonomous behavior to rebut this presumption.[20]

[16] *See* FCO case report of August 18, 2017, case B12-16/13, available in German at: http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2017/B12-16-13.pdf?__blob=publicationFile&v=2; and FCO press release of July 13, 2017, available in English at: http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/13_07_2017_Waermebleche.pdf?__blob=publicationFile&v=3.

[17] *See* DCA judgment of July 12, 2017, case VI-U (Kart) 16/13.

[18] *See* FCJ judgment of April 12, 2016, case KZR 31/14; and National Competition Report, April–June 2016, p. 19.

[19] *See* DCA judgement of May 21, 2014, case VI-U (Kart) 16/13.

[20] The FCJ had referred to decision proposals, protocols, committee decisions, or similar documents as potential means to show an autonomous decision making by each broadcaster.

Consequently, the DCA found the broadcasters' termination of the content feed-in and distribution contracts to be invalid.[21]

The DCA also rejected the broadcasters' other arguments regarding the invalidity of the contracts based on, *inter alia*, an alleged abuse of dominance by the cable network operator. In particular, the DCA found that the cable network operator had not discriminated against the (public) broadcasters in setting the feed-in fees by offering other (private) broadcasters a compensation model for HD-content purchased by end-users. According to the DCA, this compensation was not part of the general feed-in fee. Further, the DCA held that the feed-in fees were not predatory. However, the DCA did not analyze the level of the feed-in fees, but instead found that the terms of the agreement were not the result of the cable network operator having a superior economic position. To the contrary, the DCA found that the parties were mutually dependent.

Finding the content feed-in and distribution contracts to be valid, the DCA ordered the broadcasters to pay the agreed feed-in fees of approximately €3.5 million to the cable network operator.

Abuse

Commercial Ad-Blocking Software Complies with German Competition Law

On August 17, 2017, the Higher Regional Court of Munich ruled against several German online publishers (ProSiebenSat1 (P7S1), RTL Interactive, and Süddeutsche Zeitung) that had sued Eyeo, a provider of ad-blocking software.[22] The publishers appealed a first instance judgment[23] that had rejected their claims for forbearance and damages.

Eyeo offers the free browser plug-in "Adblock plus." This ad-blocking software determines, based on filter lists, the online advertisements that are blocked (blacklist), and the advertisements that are displayed to internet users (whitelist). Ninety percent of Adblock's users do not change the default settings provided by Eyeo. A website can be included in Eyeo's default whitelist if its publisher signs a whitelisting agreement, accepting the obligation to only show unobtrusive ads. Large entities, like the publishers, are only whitelisted for a fee (normally 30% of the additional revenue created by whitelisting), while other entities are generally whitelisted for free if they fulfill Eyeo's whitelisting criteria.

The Higher Regional Court of Munich rejected P7S1's claim that Eyeo's behavior constituted an abuse of dominance in the market for whitelisting agreements. Because the publishers' websites were addressed to all Internet users in Germany, the Higher Regional Court of Munich considered access to Internet users in Germany as the relevant market. Since only 20% of all Internet users in Germany used Eyeo's ad-blocker, Eyeo did not hold a dominant position in the relevant market.

The publishers had also alleged a violation of antitrust law, *i.e.*, Article 101 of the Treaty on the Functioning of the European Union ("TFEU") and Section 1 GWB. The Higher Regional Court of Munich held that while the whitelisting agreements restricted competition as they affected the market behavior of publishers, they were vertical agreements between Eyeo and the publishers, which were exempted under Article 3 of the European Commission's Vertical Block Exemption Regulation (Reg. 330/2010) because of Eyeo's low market share in the market for access to Internet users in Germany.

The Higher Regional Court of Munich also held that the whitelisting agreements between Eyeo and the

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[21] The DCA applied the same reasoning to an additional termination notice issued by the broadcasters in 2015. According to the DCA's judgment, the broadcasters still had not sufficiently distanced themselves from the initial coordination dating back more than five years.

[22] The Higher Regional Court of Munich made three parallel decisions against the publishers ProSiebenSat1, RTL Interactive, and Süddeutsche Zeitung. This note will focus on the *ProSiebenSat1* decision: Higher Regional Court of Munich judgment of August 17, 2017, case U 2225/15 Kart (*ProSiebenSat1)*.

[23] Munich Regional Court judgment of May 27, 2015, case 37 O 11673/14 (*ProSiebenSat1)*.

publishers did not result in a hub-and-spoke cartel between publishers. According to the Higher Regional Court of Munich, there was no indication that there were horizontal agreements between publishers to conclude whitelisting agreements with Eyeo to coordinate their market behavior with regard to online ads. One of the arguments considered by the Higher Regional Court of Munich was that the publishers were actually not interested in concluding these whitelisting agreements with Eyeo. This indicated that there was no horizontal coordination between the publishers.

The assessment of the Higher Regional Court of Munich that Eyeo's market behavior complies with German antitrust and copyright law is consistent with a previous judgment of the Higher Regional Court of Cologne in another dispute between a publisher and Eyeo.[24] However, these two judgments reached different conclusions regarding the assessment under the German Act Against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*, "UWG"). The Higher Regional Court of Cologne found that Eyeo's ad-blocking software is legal, but considered that Eyeo's exploitation of its position of economic power over the publishers to unduly influence them to sign a whitelisting agreement constituted an aggressive commercial act under §4a UWG. The Higher Regional Court of Munich likewise considered that the ad-blocking software is legal, but it did not find a violation of §4a UWG. Because the ad-blocking software is legal, the whitelisting agreement may allow the publishers to gain additional revenues—but the implicit threat of losing these additional revenues if they do not sign the whitelisting agreement does not mean that Eyeo is exercising an undue influence over them under §4a UWG.

Both judgments have been appealed to the FCJ, which will ultimately decide this issue.

[24] Higher Regional Court of Cologne judgment of June 24, 2016, case 6 U 149/15.

Vertical Agreements

FCO "Guidance Note" on Vertical Price-Fixing in the Food Retail Sector

On July 12, 2017, the FCO published the final version of its "Guidance Note on the Prohibition of Vertical Price Fixing in the Brick-and-Mortar Food Retail Sector"[25] ("Guidance Note"). The FCO had published a draft of the Guidance Note in early 2017 to promote a dialogue with interested parties.[26] One of the reasons for issuing the Guidance Note was the FCO's proceedings against 27 companies (manufacturers and retailers) in the food retail sector. In these proceedings, which were completed in 2016, the FCO imposed €260.5 million in fines for resale price maintenance ("RPM"), which is a violation of both German and European antitrust law.[27]

The Guidance Note is addressed to companies in the food retail sector, but the general principles set out in the Guidance Note may also apply to vertical relationships in other areas if market conditions are similar to those in the German food retail sector. The German food retail sector features a high degree of concentration on both the manufacturers' and retailers' side. The market share of the four largest, nation-wide retailers amounts to 85%, allowing these retailers to act as "gatekeepers" when granting manufacturers access to consumers. In most product categories, the leading food retailers enjoy a superior negotiating

[25] *See* FCO Guidance Note on the Prohibition of Vertical Price Fixing in the Brick-and-Mortar Food Retail Sector, available in German at: http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Diskussions_Hintergrundpapier/Hinweispapier%20Preisbindung%20im%20Lebensmitteleinzelhandel.pdf?__blob=publicationFile&v=8. The FCO will publish an English translation of the Guidance Note soon. *See also* FCO press release of July 17, 2017, available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/12_07_2017_Vertikale%20Hinweise.html?nn=3591286.

[26] *See* National Competition Report, January–March 2017, p. 11.

[27] *See* FCO press release of December 15, 2016, available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/15_12_2016_Vertikalfall%20Abschluss.html;jsessionid=EF12EE6D6C88F8505992086701E136E0.1_cid371?nn=3591286.

power *vis-à-vis* the manufacturers. For most products, there is only a limited number of manufacturers.

In its Guidance Note, the FCO illustrates six specific types of behavior that may result in illegal RPM. Explicit as well as implicit agreements between manufacturers and retailers regarding fixed or minimum prices are generally inadmissible. Recommended resale prices ("RRP") are generally admissible and these may be communicated by the manufacturer to the retailer. However, the manufacturer must not take measures to enforce these, *e.g.*, by threating to stop supplies to retailers not adhering to the RRP. Quantitative sales planning and campaign planning is generally admissible, unless the manufacturer and retailer also agree on the sales price for the campaign. The same applies to guaranteed profit ranges, granted by the manufacturer, or renegotiations of supply prices. Refusal of supply and termination of supply are generally admissible. However, if the manufacturer recommences supply to the retailer, and the retailers then adhere to the RRP, this may under certain circumstances be considered RPM.[28] Finally, an exchange of market data (sales and sales prices) between manufacturers and retailers must not result in RPM nor price coordination between retailers (hub-and-spoke cartel).

According to the Guidance Note, the FCO will commence fining proceedings in clear cut cases of RPM. Cooperation with the FCO (similar to a leniency application in cartel proceedings) may result in a fine reduction of up to 100%.

FCO Fines two Enterprises for Vertical Price-Fixing in the Fashion Trade Sector

On July 21, 2017, the FCO fined Peek & Cloppenburg KG ("P&C"), a German fashion retailer, and Wellensteyn International GmbH & Co. KG ("Wellensteyn"), a German outerwear manufacturer, €10.9 million for illegal RPM practices.[29] The FCO had initiated proceedings against Wellensteyn and P&C based on complaints, with dawn raids in March 2013.

According to the FCO, Wellensteyn had implemented a strategy to secure retailers' adherence to its desired resale price level. In particular, Wellensteyn had agreements with fashion retailers, according to which the retailers abstained from lowering their resale prices for Wellensteyn products, even towards the end of fashion seasons. Wellensteyn monitored the retailers' adherence by checking resale prices in their stores, and sanctioned retailers that had repeatedly decreased their resale prices below Wellensteyn's desired level by temporarily suspending supply.

The FCO further found that retailers, in particular P&C, had monitored other retailers' resale prices and asked Wellensteyn to take action against undercutting retailers. P&C even pressured Wellensteyn to sanction other retailers. The FCO therefore fined both P&C and Wellensteyn, while no other retailers were fined.

Apart from the mutual RPM practices, the FCO found that Wellensteyn had further infringed German and EU competition law by prohibiting all online sales of its products.[30]

The FCO's fine reflected its settlement with both companies.

[28] *E.g.*, if the manufacturer communicates to the retailer that he wants all retailers to use a new, higher RRP and the retailer communicates that under these circumstances it will adhere to the new RRP. Another example of RPM would be if the manufacturer threatens to stop supplying the retailer if the retailer does not adhere to the RRP and the retailer subsequently adheres to the RRP, without communicating this to the manufacturer.

[29] *See* FCO press release of July 25, 2017, available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/25_07_2017_Wellensteyn_PundC.html?nn=3591568; *see also* FCO case summary of August 8, 2017, available in German at: http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2017/B2-62-16.pdf?__blob=publicationFile&v=2.

[30] According to the FCO, such a full ban of all online sales constituted a hardcore restriction of competition, within the meaning of Article 4(b) of the Commission's VBER.

Mergers and Acquisitions

DCA Dismisses Appeal Against FCO Prohibition Decision of EDEKA/Kaiser's Tengelmann Acquisition

On August 23, 2017, the DCA confirmed the FCO's prohibition of the acquisition of the supermarket chain Kaiser's Tengelmann ("KT") by dismissing an appeal by EDEKA, Netto, and Tengelmann.[31]

In 2015, the FCO had prohibited the acquisition of KT by its competitor EDEKA, the largest food retailer in Germany.[32] The FCO held that the transaction would significantly impede effective competition in several already highly concentrated food retail markets in Berlin, Munich, Upper Bavaria, and North Rhine-Westphalia. However, the acquisition was permitted by a ministerial approval in December 2016[33] and EDEKA finally acquired several KT outlets.[34] Nevertheless, the applicants appealed the prohibition decision. The DCA held that this appeal was admissible as it is a step in preparing a claim for damages caused by the FCO wrongly blocking the acquisition.

However, the DCA upheld the FCO's prohibition decision. First, the DCA rejected the appellants' complaints that the FCO decision was formally unlawful. In particular, it could not find a violation of the appellants' rights of access to file and stressed the FCO's discretion to set short deadlines for comments, considering the FCO's own short assessment period.

As to the merits, the DCA ruled that the merger would have led to EDEKA having a dominant position in at least several parts of Berlin and to a significant impediment to effective competition. The DCA confirmed the FCO's product market definition (comprising full-range retailers, discounters, and organic food supermarkets) and left open whether the local geographic markets comprised entire city districts of Berlin or if they should be more narrowly defined. In any event, EDEKA's market share in Berlin Friedrichshain-Kreuzberg would have increased from 30–35% to 60–65%, significantly exceeding the 40% threshold that implies a single market dominance according to the GWB. In addition, EDEKA would be the clear market leader in that particular market, followed by the discounter LIDL with a market share of 20–25%, while the market share of its closest competitor REWE would be limited (5–10%).

The DCA left open if the requirements for a prohibition were also fulfilled on other sales and procurement markets. Finally, the DCA did not allow an appeal. The appellants may file a non-admission appeal to the FCJ.

Policy and Procedure

DCA Rejects Booking.com's Second Application for Interim Relief

On May 31 2017, the DCA rejected Booking.com's application to suspend the FCO's December 2015 decision .[35] The decision prohibits so called narrow "best price clauses" that prevented hotels from offering better prices on their own websites than on Booking.com.[36] Booking.com had already applied for interim relief once before in May 2016. The DCA had rejected the first application, finding that Booking.com had failed to establish serious doubts regarding the legality of the FCO's decision.[37]

In January 2017, the DCA ordered investigations into whether a "best price clause" is economically necessary for the operation of a hotel booking platform. If this necessity exists, the clause could be justified as an "ancillary restraint." This suggested that the DCA might consider narrow "best price clauses" compatible with competition law.

[31] *See* DCA judgment of August 23, 2017, case VI-Kart 5/16 (V).
[32] *See* National Competition Report, January–March 2015, p. 15.
[33] *See* National Competition Report, January–March 2016, p. 15.
[34] *See* National Competition Report, October–December 2016, p. 14.

[35] DCA judgment of May 31, 2017, case VI – Kart 2/17 (V).
[36] FCO decision of December 22, 2015, case B9-121/13.
[37] *See* National Competition Report, July–September 2016, p. 10; and DCA judgment of May 4, 2016, case VI – Kart 1/16 (V).

Booking.com based its second application for interim relief mainly on the new argument of ancillary restraints. Still, the DCA rejected the second application. The DCA held that it is entitled to only conduct a brief summary review of the merits of the case when considering interim relief applications . Booking.com could therefore not submit arguments that had arisen only during the DCA's thorough analysis of the law and the facts of the case in the course of the normal, non-preliminary proceedings.

The DCA's decision shows that applications for interim relief during the later stages of a trial will most likely not be successful, particularly if an early, first application has already been rejected.

Regional Court of Dortmund Rules on Temporal Application of the 2005 Rules on the Suspension of the Limitation Period by the Initiation of Cartel Proceedings

On June 28, 2017, the Regional Court of Dortmund found the 2005 rules on the suspension of the limitation period by the initiation of cartel proceedings to be applicable to cartel damages claims that arose prior to 2005.[38]

In 2013, the FCO found that several rail manufacturers had infringed competition law from 2001 through 2011 by fixing prices and allocating customers. Subsequently, the plaintiff, a local public transportation company, filed a damages action before the Regional Court of Dortmund in 2014.

While the Regional Court of Dortmund has not yet ruled on the damages, it has now issued an interim judgment finding the defendant principally liable. The Regional Court of Dortmund had to decide whether the rules regarding the suspension of the limitation period by the initiation of cartel proceedings by the FCO (or the European Commission)—that were only introduced by the seventh amendment to the GWB, which came into force on July 1, 2005—are applicable to so-called "old cases" (*i.e.*, cases in which (parts of) a cartel infringement took place prior to July 2005).

In this respect, the Regional Court of Dortmund followed a 2015 decision by the DCA[39] according to which the 2005 rules on suspension should apply to "old cases" if: (i) the alleged claims were not time-barred in July 2005; and (ii) the European Commission's or FCO's decision was not final and legally binding in July 2005. Given the seventh amendment's lack of specific rules on temporal application, the Regional Court of Dortmund instead turned to general conflict of laws principles. It found that, as long as alleged damages claims are not yet time-barred, neither a plaintiff nor an infringer can legitimately expect that a running statutory limitation period will not be altered by the legislator to their detriment, *i.e.*, shortened or extended. In the Regional Court of Dortmund's view, this understanding is in line with the general EU law principle of effectiveness.

The decision is in stark contrast with decisions by other German courts, namely the Higher Regional Court of Karlsruhe[40] and Regional Court of Mannheim[41] which, in 2016 and 2017 respectively, ruled against the 2005 rules of suspension's application to "old cases." Several parallel cases are currently pending before the FCJ. The forthcoming decisions, expected in mid-2018, are expected to bring much-needed clarification to this controversial—and often pivotal—question.

FCO Terminates Investigation into ATM Withdrawal Fees

On July 24, 2017, the FCO concluded its investigation spanning several years into the fees German banks charge to customers of third-party banks for

[38] Regional Court of Dortmund judgment of June 28, 2017, case 8 O 25/16 (Kart).

[39] *See* Düsseldorf Court of Appeals judgment of February 18, 2015, case VI-U (Kart) 3/14; *see also* CGSH Alert Memo of April 20, 2015 and National Competition Report, January–March 2015, p. 19.

[40] Higher Regional Court of Karlsruhe judgment of November 9, 2016, case 6 U 204/15 Kart (2); and Higher Regional Court of Karlsruhe judgment of March 10, 2016, case 6 U 59/15 (Kart.).

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

withdrawing cash from one of their ATMs.[42] The FCO found that no regulatory intervention was warranted. Over the past decades, four different ATM networks have emerged in Germany. Consumers can generally withdraw cash free of charge from an ATM that belongs to their bank or their bank's network. However, if a customer withdraws cash from an ATM belonging to another network, they will usually be charged a fee of three to five euros.[43] Following consumer complaints, the FCO analyzed whether the agreements forming the German ATM system were anticompetitive and led to excessive fees.

The FCO drew three conclusions from its investigation. First, the FCO found that ATM providers are sufficiently transparent when it comes to informing customers of third-party banks of the fees they will have to pay for a cash withdrawal. The transparency ATM providers offer today enables consumers, in the FCO's view, to compare prices and to select an ATM based on an informed decision.

Second, the FCO noted that the ATM networks were competing against one another and had to be open to new members. In particular, they must not discriminate against potential new members. The FCO stressed that it would keep an eye on the conditions ATM networks apply for the admission of future new members.

Third, the FCO highlighted that ATM providers were generally free to determine the fee they charge to customers of third-party banks. However, in a geographic market where only one network is present, these fees must not reach a level that would be considered abusive, *i.e.*, excessively high without justification (such as high maintenance costs or low usage frequency).

The FCO concluded that regulatory intervention was not warranted. It will, however, continue to review potentially abusive fees on a case-by-case basis. The FCO finally noted that the number of bank branches and ATMs was declining in rural areas, which made it particularly difficult for consumers living in such areas to obtain cash. The FCO was concerned that it would exacerbate the situation for consumers if it imposed too low a cap on the fee banks could charge to customers of third-party banks for cash withdrawals, because banks may no longer be willing to maintain ATMs in rural areas.

FCO Concludes Sector Inquiry into Cement and Ready-Mix Concrete Sector

On July 24, 2017, the FCO published the final report of its sector inquiry into the cement and ready-mix concrete ("RMX") sector that had been initiated in late 2013.[44] The FCO revealed a set of competition concerns, such as structural interlocks and a high degree of market transparency.

Cement is used as a precursor in the production of concrete, while ready-mix concrete covers liquid concrete carried to construction sites to cure there. Annual domestic revenues in this sector amount to €5 billion and the sector employs approximately 17,000 people. In the past, companies in this sector have been subject to cartel proceedings both at the national and European level. In 2003, the FCO fined companies participating in a cartel in the cement sector €660 million.[45]

[42] *See* FCO case summary of September 8, 2017, cases B4-13/10 and B4-117/15, available in German at: http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Missbrauchsaufsicht/2017/B4-13-10,%20B4-117-15.pdf?__blob=publicationFile&v=2; *see also* FCO press release of September 15, 2017, available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/15_09_2017_Fremdgebuehren_Geldautomaten.html.

[43] While the German credit institutions had agreed on a maximum fee for cash withdrawals in the past, ATM providers are today free to determine the fee they charge to customers of third-party banks.

[44] FCO Report on its Sector Inquiry into the Cement and Ready-Mix Concrete Sector, available in German at: http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Sektoruntersuchungen/Sektoruntersuchung%20Zement%20und%20Transportbeton.pdf?__blob=publicationFile&v=4.

[45] *See* FCO press release of April 14, 2003, available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2003/14_04_2003_Bu%C3%9Fgeld_Zementkartell_eng.html?nn=3591568.

As regards the characteristics of the respective markets, the analysis showed that both areas comprise mature and homogenous types of products within stable markets. Room for innovation is limited and barriers to entry are high (in the cement markets) or at least significant (in the RMX markets). Additionally, the FCO's analysis revealed considerable regional price differences due to highly concentrated high-price regions in which only one or two competitors are active.

The FCO's analysis set out three priority horizontal issues in these sectors: (i) potentially anticompetitive joint ventures; (ii) supply associations that might replace these joint ventures; and (iii) comprehensive market information systems including price increase announcements. As regards unilateral conduct, the analysis also revealed mechanisms for deterring and sanctioning, such as predatory pricing.

The FCO held that cooperation in a joint venture must be considered a restriction of competition in cases in which the companies concerned act as at least potential competitors. As a result of the inquiry, 24 potentially problematic joint ventures were at least partly dissolved without formal intervention by the FCO. Remaining problematic joint ventures will be further examined and—if necessary—the FCO will intervene.

As regards its future policy, the FCO stressed the companies' obligation to self-evaluate their cooperation in supply associations. These associations may not be used to replace the dissolved joint ventures and eliminate competition between competitors, but only to enable smaller companies to participate in projects that exceed their individual capacity. Additionally, the FCO reserves the right to further monitor and examine the market information system operated by the Federal Association of the German ready-mixed concrete industry (*Bundesverband der Deutschen Transportbetonindustrie*) and the practice to send out generic price increase letters. Both practices further increase the already high degree of transparency in the market and raise substantial competition concerns.

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").

Vertical Agreements

The Hellenic Competition Commission Imposes Heavy Fines on the Greek Colgate-Palmolive Companies and their U.S.-Based Parent Company for Restricting Customers from Selling Products from Parallel Imports

In July 2017, the HCC concluded its *ex officio* investigation launched in 2005 into the market for detergents and house cleaning products.[46] The HCC's General Directorate of Competition carried out extensive investigations (*in situ* investigations, requests for information, etc.) into the Colgate-Palmolive ("C-P") group of companies in Greece and their customers, namely, supermarkets, cash & carry, and wholesale companies. The evidence showed that customers were restricted from selling parallel import C-P products and that this restriction applied not only to detergents but also to other C-P products (cosmetics, personal health care products, etc.). A statement of objections was issued in July 2014 following a multi-faceted procedure to determine the scope of the restriction.

The HCC found that the Greek C-P companies had restricted their customers from selling parallel import C-P products from 1999–2008, infringing Article 1 of the Competition Act and Article 101 TFEU. Furthermore, due to the dominant position held by C-P in the market for window cleaning products in Greece with its product AZAX, it had also infringed Article 2 of the Competition Act and Article 102 TFEU. The restriction was implemented through a clause explicitly prohibiting parallel imports being included in C-P's contracts with its customers.

These actions were found to be part of an overall scheme to restrict parallel imports to Greece from other countries, especially Italy. Prices were considerably higher in Greece than Italy, so Greek supermarkets had an interest to import to reduce their purchasing costs, and C-P had an interest to restrict parallel imports to maintain the higher retail prices in the Greek market. The parent Colgate-Palmolive Company was found to have actively participated in this plan and was held jointly and severally liable with the Greek entities.

More specifically, the HCC found that 21 separate contracts concluded between the Greek C-P companies and their Greek customers contained clauses restricting parallel imports. If this clause was not respected, customers would be deprived of the discounts provided in their contracts. This sanction led to a reduction of customers' revenues of between 15–25% for detergents and 23–35% for window cleaning products.

According to the HCC, there was indisputable evidence of central planning. The Greek C-P companies had undertaken special actions to restrict parallel imports (*e.g.*, special promotions were granted to customers known to sell imported products from other countries, on-site inspections were carried out to verify the reduction of imports), and there was systematic communication and coordination between C-P Italy, the European Division, and the U.S.-based parent company on the issue of parallel imports in Greece. The European Division had expressed the need to become "more aggressive" in dealing with parallel imports and to maintain a closer cooperation with C-P Italy. There was continuous monitoring of parallel imports by the Greek C-P companies focusing on the value of imported products, country of origin (mainly from Italy), type of stores supplied with parallel imports (usually small, traditional points of sale), and specific products that were the object of such imports. Parallel imports were considered a "threat" to the Greek C-P companies. Meetings were held between officials of C-P Greece and C-P Italy to address the matter and extensive communications were exchanged.

[46] HCC Decision No. 610/2015.

The HCC reaffirmed that the restriction of parallel imports is a restriction of competition by object, which is prohibited as it leads to the compartmentalization of national markets. This was evident due to the explicitness of the contractual clause. In this context, the HCC rejected C-P's argument that the contractual clause was misinterpreted by the HCC because it did not aim to restrict parallel imports but to establish an obligation of exclusive sourcing, which is not a per se restriction of competition.

The supermarkets/customers of C-P argued that they had no intention of infringing competition rules and did not know they were committing an infringement, especially because the contractual clause in some of the contracts imposed a justified restriction against selling products originating from parallel imports that were not compliant with Greek legal requirements (in terms of labeling, registrations, etc.). The HCC rejected these arguments on the grounds that the absence of an anticompetitive intention or knowledge is irrelevant. What is important in assessing the infringement is the content and objective purpose of the agreement.

The most interesting part of this decision relates to parental liability because, until this case, the HCC had not clearly set out its position regarding the attribution liability for illegal acts of a subsidiary to its parent company. The HCC stated that it has discretion, and not an obligation, to attribute such liability and that so far it has been very careful in doing so. The principle of the single economic entity is not a sufficient basis for attributing liability to the parent for an infringement committed by the subsidiary. On the contrary, such attribution must be established on an adequate number of facts that clearly demonstrate the lack of autonomy of the subsidiary on the basis of its organizational, economic, and legal relations with the parent. Such assessment must be effected on a case-by-case basis. This is in compliance with the notion of personal liability. Only if the evidence proves that the parent had a direct involvement and knowledge, and therefore an active participation in the infringement, will the HCC attribute liability to the parent company. In the present case, the HCC decided that the evidence justified such attribution, however, the decision was not unanimous as two members dissented.

The HCC fined the Greek C-P companies and the U.S.-based parent company, which was held jointly and severally liable, approximately €8.6 million for infringing Article 1 of the Competition Act and Article 81 TFEU and €747,000 for infringing Article 2 of the Competition Act and Article 82 TFEU. Five customers of the Greek C-P entities with contracts including the infringing clause were fined €1,900 to €470.000.

The HCC also fined the Greek C-P companies an additional €400,000 for supplying incorrect information during the investigation on at least two occasions. In one instance, the Greek C-P companies had submitted a "model" contract with their customers that was, in fact, considerably different from the actually signed contracts, as it did not contain the contractual clause on parallel imports at issue. When the HCC investigated C-P's customers' agreements it obtained copies of the agreements that included the contractual clause. This is the first time the HCC has imposed a considerable fine for the supply of incorrect information

ITALY

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

Horizontal Agreements

The ICA Fines the Major Italian Cement Companies and their Trade Association AITEC for an Article 101 TFEU Violation

On July 25, 2017,[47] the ICA fined Italcementi S.p.A., Buzzi Unicem S.p.A., Colacem S.p.A., Cementir S.p.A., Sacci in liquidazione S.r.l., Cementirossi S.p.A., Holcim (Italia) S.p.A., Barbetti S.p.A., Cementeria di Monselice S.p.A., Cementizillo S.p.A., Cal.me S.p.A, Cementi Moccia S.p.A, TSC S.r.l, and the cement companies trade association AITEC over €184 million for their participation in a cartel in violation of Article 101 TFEU.

According to the ICA, the parties coordinated their commercial behavior to increase the prices and stability of their market shares in cement sales, at least from June 2011 through January 2016.

This price coordination was achieved through a series of practices aimed at: (i) artificially increasing the transparency of the parties' pricing decisions (price increases and discount reductions) by exchanging this information directly among competitors and/or conveying these decisions to customers with the expectation that they would be circulated to competitors; (ii) adapting their respective decisions based on the information gathered; and (iii) monitoring the actual implementation of the ensuing price alignment. The stability of the cartel (as well as of the respective market shares) was ensured through a systematic exchange of sensitive information, carried out with the active support of AITEC.

The ICA found evidence (in particular, internal documentation) that the price increases (and related communications to customers) were discussed, and to some extent jointly determined, within the trade association AITEC. The ICA also found that, contrary to the parties statements, receiving the communications of future price increases before their effective application was not in the customers' interest.

According to the ICA, after achieving a price alignment, the parties put in place a system to monitor whether it was respected. The ICA found evidence of: (i) direct contacts between the parties aimed at achieving this goal; and (ii) target market shares being monitored, especially through AITEC. In particular, the ICA noted that AITEC's monthly statistics on volumes were the main tool used by the parties to monitor their market shares.

The ICA concluded that the parties were all part of the single and continuous infringement described above and that, in light of the seriousness of the infringement of Article 101 TFEU, it qualified as a restriction by object. Nevertheless it also carried out an analysis of the effects of the practices.

Abuse

The TAR Lazio Upholds the ICA's Decision to Fine Aspen for Charging Excessive Prices for Oncological Drugs

On July 26, 2017,[48] the TAR Lazio upheld the decision of the ICA to fine Aspen Pharma Trading Ltd., Aspen Italia s.r.l., Aspen Pharma Ireland Ltd., and Aspen Pharmacare Holdings Ltd. (together "Aspen") over €5 million for charging excessive prices in violation of Article 102(a) TFEU.[49]

According to the ICA,[50] Aspen abused its dominant position in the markets for drugs containing the active substances melphalan, chlorambucil, thioguanine, and

[47] ICA, Decision of July 25, 2017, Case No. I793, *Aumento prezzi cemento*.

[48] TAR Lazio, Judgment of July 26, 2017, No. 12806.

[49] ICA, Decision of September 29, 2016, Case No. A480, *Incremento prezzo farmaci Aspen*.

[50] For a more detailed description of the case, *see* National Competition Quarterly Report, October–December 2016, pp. 20–22.

mercaptopurine. The ICA held that, by adopting an extremely aggressive negotiation strategy when renegotiating prices with the Italian Medicines Agency ("AIFA"), Aspen obtained an excessive and unjustified price increase of between 300% and 1500% for the oncological drugs Leukeran, Alkeran, Purinethol, and Thioguanine (the so-called "Cosmos").[51]

Aspen challenged the ICA's decision both on procedural and substantial grounds.

As for the substantial arguments, Aspen submitted that the ICA erred both in its definition of the relevant product markets and in its assessment of Aspen's dominance.

Aspen argued that the ICA should have defined the relevant product markets according to the Anatomical Therapeutic Chemical ("ATC") classification system, an approach to market definition commonly used by European competition authorities when assessing pharmaceutical products.[52] However, the TAR Lazio found that the ICA did not manifestly err in its market definition by not using the ATC classification system. Even though the ATC classification system provides a useful indication of the possible markets, the ICA was not legally bound to use it. Therefore, it rightly considered markets to be narrower and defined separate relevant product markets for each active ingredient on the basis of other elements that were relevant in the specific case, such as the inelasticity of demand and competitive pressure exercised by other market players. The TAR Lazio also confirmed that the ICA's assessment of Aspen's dominance was correct. Aspen virtually holds a 100% market share and there is no effective and potential competition in the relevant markets.

Furthermore, Aspen argued that the ICA misrepresented the facts of the case when it held that Aspen's complex negotiation strategy constituted an abuse of the company's renegotiation rights. According to Aspen, the three different categories of contested conduct were legitimate, given that Aspen has the right to: (i) renegotiate the prices for Cosmos drugs; (ii) demand AIFA approve a new categorization for the same drugs; and (iii) withdraw the drugs from the market, although only for a limited period, pursuant to the sector-specific regulation.

The TAR Lazio did not contest the legitimacy of Aspen's conducts, taken separately. However, it noted that the ICA met the relevant standard of proof by providing convincing evidence of the intention of the undertaking to misuse its rights to abuse its dominant position (this being the "*quid pluris*",[53] in the words of the TAR Lazio).

Aspen also contested the ICA's assessment of whether the Italian Cosmos prices, resulting from the renegotiation with AIFA, were excessive. The TAR Lazio held that the ICA had rightly applied the two limbs of the *United Brands* test.

The ICA first carried out a price-cost comparison by applying two different methodologies (the cost-plus and the gross margin contribution methodologies) and in both cases concluded that Aspen's prices were well above production costs. Moreover, the TAR Lazio held that the ICA provided evidence that the prices charged by Aspen were unfair given that the discrepancy between the costs of production and the revenues realized could not be otherwise justified. The ICA considered the prices currently charged by Aspen and those recently applied and found that there were no plausible economic justifications for the price increase (and that Aspen never submitted any).

As for the procedural arguments, Aspen put forward two main pleas. First, Aspen submitted that the ICA had breached its procedural rights by relying on the

[51] Cosmos drugs are patent-expired, life-saving, irreplaceable drugs for the treatment of oncohematological patients, especially children and elderly people. In 2009, Aspen entered the Italian Cosmos market, acquiring the business from GlaxoSmithKline ("GSK"), and is currently the only drug-maker authorized to market Cosmos drugs in Italy.

[52] In the ATC classification system, the drugs are divided into different groups according to the organ or system on which they act and their chemical, pharmacological, and therapeutic properties.

[53] Additional element.

assistance of Ireland's Competition and Consumer Protection Commission to carry out unannounced inspections, which Aspen argued was not authorized to conduct them. Second, Aspen argued that its rights of defense were also violated because the ICA introduced the theory of harm based on excessive pricing only at the oral hearing stage of its investigation, giving it insufficient time to respond.

With reference to the first procedural argument, the TAR Lazio held that the search and seizure operations carried out by Ireland's Competition and Consumer Protection Commission were in compliance with European regulations governing the cooperation of European competition authorities and that it could not determine if there was a breach of procedural rules in other countries. As for the plea that the ICA introduced the theory of harm based on excessive pricing only at the oral hearing, the TAR Lazio held that the ICA had issued Aspen with a second statement of objections and the contested conduct still qualified as an abuse of dominance. Therefore, the TAR Lazio held that no breach of Aspen's rights of defense occurred.

The TAR Lazio Reduces the ICA's Fine on E.S.TR.A. for Abuse of Dominance in the Gas Distribution Sector

On August 1, 2017,[54] the TAR Lazio partially upheld appeals brought by E.S.TR.A. Reti Gas s.r.l and E.S.TR.A. S.p.A. (together, "E.S.TR.A.") against the ICA's decision in Case No. A435.[55] The ICA found that had infringed Article 102 TFEU, and fined E.S.TR.A. €276,132 for abusing its dominance in the market for gas distribution, by taking part in exclusionary practices aimed at hindering a tender for gas distribution in the Municipality of Prato. E.S.TR.A. is active in gas distribution in various municipalities in Tuscany and is considered dominant in the relevant local market for gas distribution as it is the only undertaking authorized to distribute gas in the Municipality of Prato, enjoying a legal monopoly.

According to the ICA, E.S.TR.A. had initially refused, and then delayed, providing the contracting authority with the information required for a tender for gas distribution in the Municipality of Prato. Without such information the call for tender would not have been competitive and competitors could not have participated on equal terms with E.S.TR.A..

On appeal, E.S.TR.A. argued that the ICA should not qualify a behavior that has been considered lawful by an administrative court as anticompetitive. According to E.S.TR.A. , its decision not to provide the relevant information was based on a judgment of the Regional Administrative Court of Tuscany ("TAR Toscana"), which had already rejected the claim of the Municipality of Prato against E.S.TR.A.'s refusal to provide the relevant information. The TAR Lazio dismissed this argument, citing settled case law according to which the conduct of an undertaking that is in line with sector-specific regulations does not necessarily mean that conduct is legitimate under competition law rules.

However, the TAR Lazio partially upheld E.S.TR.A.'s argument that the fine should have been re-determined by virtue of the factual and legal background characterizing the abuse as well as in light of the period when the abusive conduct took place. In particular, the TAR Lazio noted that shortly before the call for tenders, the Italian rules on tenders were amended so as to require tenders to cover geographic areas that include more than one municipality. In light of this amendment, it was uncertain whether the call for tenders by the Municipality, which was limited to its own territory, was legitimate. The TAR Lazio noted this as an *obiter dictum*, and held that the fine should have been re-determined excluding a three-month period between the reform of the legal provisions concerning tenders and regularization of the call for tenders by the municipality, and in light of the plausible illegitimacy of the call for tenders launched by the Municipality of Prato, there are doubts as to whether E.S.TR.A., for that period, was conscious of

[54] TAR Lazio, Judgments of August 1, 2017, Nos. 9140 and 9141.

[55] ICA, Decision of January 25, 2012, Case No. A435, *Comune di Prato-Estra Reti Gas*.

the illegitimacy of their decision not to provide the relevant information.

The TAR Lazio referred the decision back to the ICA to reduce the fine, in line with the criteria set forth in the judgment.

NETHERLANDS

This section reviews developments under the Competition Act of January 1, 1998 (the "Competition Act"),[56] which is enforced by the Netherlands Authority for Consumers and Market (Autoriteit Consument & Markt, "ACM").[57]

Horizontal Agreements

ACM Fines Importers of Forklift Truck Batteries for Price-Fixing

On June 30, 2017,[58] the ACM fined seven importers of forklift truck batteries and their trade association BMWT approximately €17.5 million for engaging in a price-fixing cartel and exchanging competitively sensitive information between 2004 and 2013.

To protect their margins, the importers and BMWT (specifically, the part of the trade association dedicated to traction batteries) agreed to use a "lead surcharge," incorporating fluctuations in the price of the metal directly and transparently into the retail price of batteries. The lead surcharge was listed as a separate entry on invoices, and became a fixed component of the retail price. The importers and BMWT also agreed not to grant any discounts on the lead surcharge and to inform their clients accordingly. Depending on lead price fluctuations, the lead surcharge accounted for approximately 10–30% of the retail price of batteries. In support of these arrangements, every quarter one of the importers would share with the others via BMWT a lead surcharge list specifying per battery type the lead surcharge for the next quarter.[59]

BMWT and five importers acknowledged the infringement and obtained a 10% fine reduction in settlement proceedings on top of leniency discounts. Two other importers did not acknowledge the infringement and were fined separately in regular proceedings.

CBb Annuls ACM Fines in Foreclosure Auctions Case

On July 3, 2017,[60] the Dutch Trade and Industry Appeals Tribunal ("CBb") annulled the ACM's 2011 and 2013 fines[61] imposed on 79 real estate traders for manipulation of foreclosure auctions between 2000 and 2009. According to the ACM, traders colluded and jointly organized bids to keep property prices at the initial bidding phase of foreclosure auctions ("initial auctions") artificially low to make a profit at the next "after-auctions" stage. The ACM's fines varied from €1,000 to €383,000 and amounted to approximately €6.4 million.

On first appeal, the Rotterdam District Court upheld the ACM's decisions but lowered the respective fines, acknowledging the severe financial conditions of certain traders and that the reasonable time between the ACM issuing a statement of objections and rendering a judgment was exceeded.[62]

On further appeal, the CBb annulled the ACM's decisions and the Rotterdam District Court's judgments, rejecting their finding of a single and continuous infringement. According to the CBb, the ACM did not prove that the traders' joint bidding

[56] Decisions of the ACM are available at: www.acm.nl; case law is available at: www.rechtspraak.nl.

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

[58] *Vorkheftrucks*, Case n° 7615, ACM decisions of June 30, 2017.

[59] The ACM also investigated other areas of BMWT besides traction batteries in relation to exchange of competitively sensitive information, but did not establish any competition law infringements.

[60] Trade and Industry Appeals Tribunal, Judgment of July 3, 2017, ECLI:NL:CBB:2017:204.

[61] *Executieveilingen*, Case n° 6538, ACM decisions of December 13, 2011 and January 7, 2013.

[62] Rotterdam District Court, Judgment of December 18, 2014, ECLI:NL:RBROT:2014:10173; and Rotterdam District Court, Judgments of April 7, 2016, ECLI:NL:RBROT:2016: 2165, ECLI:NL:RBROT:2016: 2211, ECLI:NL:RBROT:2016: 2201, ECLI:NL:RBROT:2016: 2189, ECLI:NL:RBROT:2016: 2172, ECLI:NL:RBROT:2016: 2186, ECLI:NL:RBROT:2016: 2196, ECLI:NL:RBROT:2016: 2173, ECLI:NL:RBROT:2016: 2181, ECLI:NL:RBROT:2016: 2192, ECLI:NL:RBROT:2016: 2190, ECLI:NL:RBROT:2016: 2185, ECLI:NL:RBROT:2016: 2179, and ECLI:NL:RBROT:2016: 2171.

during the 2,300 initial auctions was always aimed at obtaining a lower price at these initial auctions or at colluding in after-auctions. The CBb further held that even in the approximately 200 cases where the ACM found that joint bidding in the initial auctions led to collusion in after-auctions—which the CBb considered an infringement of competition law—the ACM had failed to establish the existence of a single and continuous infringement. The CBb found this to constitute a fundamental error of assessment, and that the ACM had ample opportunity to correct it.

Therefore, and because the necessary further analysis of evidence to establish a single and continuous infringement (in those 200 cases) would take considerable time (resulting in a violation of the right to a fair trial within a reasonable time pursuant to Article 6 of the European Convention on Human Rights), the CBb decided to definitively settle the matter itself—and annulled the ACM's decisions and the Rotterdam District Court's judgments. The CBb is the court of last instance and its judgment is irrevocable.

Policy and Procedure

Curaçao Competition Act Entered into Force on September 1, 2017

On September 1, 2017, the Curaçao Competition Act (*Landsverordening inzake concurrentie*, "CCA") entered into force.[63] With a few exceptions listed below, the CCA is largely in line with Dutch and European competition rules.

Cartels. Article 3.1 CCA is modeled on the Dutch and European cartel prohibitions, and is limited to the market of Curaçao. Any agreements between undertakings, decisions by associations of undertakings, or concerted practices listed in this article are prohibited and automatically void, unless the combined market share of the (associations of) undertakings involved is 30% or less in any of the relevant markets (*de minimis* exception). Moreover, the Fair Trade Authority Curaçao ("FTAC") may grant individual exemptions if the economic and/or technical benefits of agreements/decisions/concerted practices outweigh their anticompetitive effects and benefit consumers. However, exemptions cannot be invoked if competing undertakings engage in hardcore cartel infringements (*i.e.*, setting prices or sales conditions, bid rigging, limiting/controlling production or sales, and market sharing).

Abuse of dominance. Article 4.1 CCA prohibits abuse of dominance. According to the CCA, a market share of 60% or more always indicates a dominant position, and the FTAC may impose measures on dominant undertakings to prevent abuse.

Mergers. Article 5.2 CCA stipulates that a transaction needs to be notified if in the previous calendar year: (i) the combined worldwide turnover of the undertakings involved exceeded ANG 125 million (approximately €60 million); and (ii) at least two undertakings involved achieved a turnover of at least ANG 15 million (approximately €7 million) in Curaçao. Additionally, a transaction needs to be notified if it would result in (or reinforce) a combined market share of 30% or more. Failure to notify may result in a fine of ANG 1 million (approximately €480,000) or 1% of the undertaking's annual turnover, whichever is higher, but the CCA does not provide a system of merger approval. For now, the FTAC merely aims to monitor mergers and their effects, and only after a few years will it reassess whether to introduce an approval system.

Moreover, the CCA lays down the FTAC's other powers, such as fining undertakings that infringe competition rules up to ANG 1 million (approximately €480,000) or 10% of their annual turnover (whichever is higher), or imposing penalty payments.

[63] The national decree (*Landsbesluit*) approving the CCA was passed on April 11, 2017.

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")).

Abuse

The CNMC Agreed with the Commitments Proposed by IMS Health

On July 13, 2017, the Council of the CNMC accepted the proposal of the Competition Directorate of the CNMC to terminate, by means of commitments, the procedure regarding an alleged abuse of dominance by IMS Health, S.A. ("IMS Health") in the Spanish market for sales tracking data of pharmaceutical products.[64]

IMS Health enters into contracts with different companies active in the healthcare industry, such as wholesalers and pharmacies, to obtain data used as an input for the preparation of market studies. IMS Health's contracts with wholesalers of pharmaceutical products in Spain included a so-called "multiple supply clause" that would apply if a particular wholesaler decides to supply information to a competitor of IMS Health. Specifically, according to the multiple supply clause: (i) the wholesaler must notify its decision to supply a competitor to IMS Health in advance (prior notification clause); (ii) IMS Health is entitled to early termination of the contract (early termination clause); (iii) if IMS Health does not terminate the contract early, the price paid to by the wholesaler will be reduced (price reduction clause); and (iv) the wholesaler is required to supply IMS Health with the information covered by the agreement on the same terms as it is supplied to IMS Health's competitors (most favored nation ("MFN") clause).

Health Market Research España, S.L. ("HMR") filed a complaint before the CNMC against IMS Health for an alleged violation of Articles 2 LDC and 102 TFEU. HMR argued that IMS Health's contracts with wholesalers were likely to be *de iure* or *de facto* exclusive. Subsequently, HMR filed a second complaint against IMS Health (and also against several wholesalers and software houses controlled by such wholesalers) for an alleged violation of Articles 1 and 2 LCD and 101 and 102 TFEU. HMR claimed that IMS Health, several wholesalers, and software houses controlled by the wholesalers concluded contracts that prevented the HMR from accessing both wholesale and retail data.

On December 16, 2015, the Competition Directorate initiated an infringement procedure against IMS Health for an alleged abuse of dominance in the market for the supply of information on sales data for the pharmaceutical industry through the establishment of contractual conditions that hindered and/or prevented the entry of new competitors in the market. Following a submission by IMS Health, the CNMC rejected HMR's second complaint.

On September 1, 2016, the Competition Directorate issued a Statement of Objections, which concluded that the system designed by IMS Health with its wholesalers was abusive and restrictive of competition, and thus incompatible with Articles 2 LDC and 102 TFEU.

On October 14, 2016, following a request by IMS Health, the Competition Directorate began the commitments procedure. IMS Health agreed to remove certain provisions from its contracts with wholesalers, and, in particular, to discontinue the application of all clauses (*i.e.,* prior notification clause, early termination clause, and MFN clause) of the multiple supply clause except the price reduction clause, for which it agreed not to increase the applied percentages. Regarding the price reduction clause, IMS Health committed to transform the current percentages into maximum percentages, and to treat the price paid to wholesalers, which would be reduced in the event of multiple supply or direct competition

[64] *Estudios de Mercado Industria Farmacéutica* (Expte. S/DC/0567/15), CNMC decision of July 13, 2017.

with IMS Health, as non-retroactive. Finally, IMS Health offered to suspend the implementation of the clauses in question as of the date on which the decision to initiate the settlement procedure was adopted.

The Council of the CNMC found that the commitments proposed by IMS Health were adequate and sufficient to immediately solve the competition concerns identified. According to the Council, the commitments would guarantee equal access to the market for the preparation and sales of market studies based on the information of pharmaceutical product sales without unduly limiting IMS Health's ability to compete on the merits.

The Spanish High Court Overturned a CNMC €120 Million Fine Imposed on Telefónica, Vodafone, And Orange for Abuse in the Wholesale Telephone Short Messaging Markets

In several judgments delivered in September 2017,[65] the Spanish High Court overturned fines imposed on Telefónica Móviles de España, S.A.U. ("TME"), Vodafone España, S.A.U. ("Vodafone"), and France Telecom España, S.A. ("Orange") for an alleged collective abuse of dominance in the telephone short messaging markets.

The CNC decision. On December 19, 2012,[66] the CNC fined TME, Vodafone, and Orange €46,490,000, €43,525,000, and €29,950,000, respectively, for abuse of dominance in the market for short text and multimedia messages sent via mobile telephones (text messages ("SMS") and multimedia messages ("MMS"), together "short messages").

According to the CNC, TME, Vodafone, and Orange maintained a collectively dominant position in the wholesale network access and origination market for short messages in Spain, and a monopoly for the provision of short messages termination services in their respective networks.

[65] Case 3555/2017, Spanish High Court judgment of September 1, 2017; Case 3556/2017, Spanish High Court judgment of September 4, 2017; and Case 3564/2017, Spanish High Court judgment of September 1, 2017.

[66] *Mensajes Cortos* (Expte. S/0248/10), CNMC decision of December 19, 2012.

The CNC found that TME, Vodafone, and Orange had abused their dominant position by charging excessive prices in the termination market for short messages to Mobile Virtual Network Operators ("MVNOs"), which use the companies' networks to provide short messages retail services to their clients. This led to foreclosure of MVNOs in the provision of retail text services and mobile services more generally.

The CNC held that the foreclosure effects of the anticompetitive conduct in the market for text message termination services was aggravated by TME's, Vodafone's, and Orange's pricing policies in the wholesale network access and origination market for short messages, where they were deemed collectively dominant by the CNC. In this regard, the CNC noted that the high access and origination prices applied by TME, Vodafone, and Orange contributed to maintaining higher prices for termination services related to short messages, and to strengthening barriers to entry and expansion for mobile operators.

The final result of the overall behavior of TME, Vodafone, and Orange was diminished network access and interoperability between different networks.

The Spanish High Court judgments. The Spanish High Court held that the CNC did not demonstrate the existence of individual dominant positions by TME, Vodafone, and Orange in the wholesale market for the provision of SMS and MMS termination services in their respective networks. Crucially, the Spanish High Court found that the CNC had failed to show that there was a wholesale market for SMS termination distinct from the voice market, and also questioned the CNC's analysis leading to the finding of TME's, Vodafone's, and Orange's dominant positions over their own network.

With regard to a possible separate voice market, the Spanish High Court found that the CNC had not addressed TME, Vodafone, and Orange's argument on the existence of a global multimedia services market, nor had it sufficiently rebutted or explained the correlation between price reductions for calls and lower use of text messages.

Further, the Spanish High Court determined that there had been a lack of motivation because of the absence of up-to-date market analysis by the CNC, which had adopted the analysis and conclusions of the Spanish telecommunications regulatory authority, performed in a different context—the Significant Market Power assessment required under the telecoms regulatory framework—and at a different time.

Finally, the Spanish High Court found that the CNC had failed to take into account the argument submitted by TME, Vodafone, and Orange that, although they were the only providers of SMS and MMS termination services in their respective networks, this did not automatically entail that they effectively held a dominant position in a theoretical market for such services. Specifically, TME, Vodafone, and Orange argued that downstream operators could obtain better prices through bilateral negotiations and possibly through the implied threat of regulatory enforcement in case of interconnection refusal. The CNC had failed to examine these arguments in sufficient detail.

As TME's, Vodafone's, and Orange's individual dominant positions in the termination services market for each of their networks had not been properly ascertained, the judgment did not discuss the allegedly abusive conduct or TME, Vodafone, and Orange's possible joint dominant position in the markets for access and origination services related to short messages, or whether the prices charged could be abusive.

The Spanish High Court upheld the appeal, annulling the CNC's decision.

Vertical Agreements

The Spanish High Court Annulled a €25.78 Million Fine Imposed on Telefónica for Including Permanence Clauses in Contracts with SMEs

On July 31, 2017, the Spanish High Court annulled a €25.78 million fine imposed on Telefónica Móviles de España ("TME") for an infringement of Articles 1 LDC and 101 TFEU.[67] On October 29, 2014, the CNMC[68] had fined TME €25,784,341 for infringing Articles 1 LDC and 101 TFEU by including permanence clauses in special contracts with small and medium-sized enterprises ("SMEs"). In particular, the CNMC had found that some of the clauses in these contracts had restrictive effects on competition because they unreasonably limited the ability of TME's customers to change operators by substantially increasing the costs to change. These increased costs had prevented other operators, such as MVNOs from competing for these customers.

"SME Special Premium Contracts," which had been in force since 2006, were special contracts offered to SMEs with rate discounts and initial duration periods of 12, 18, or 24 months. The permanence commitment and discount scheme were automatically renewed at the end of the contract, unless a customer expressed an intention to terminate the contract with one month's notice. If the SME did not comply with its permanence obligations, it was obliged to return the value of its previous discounts.

The Spanish High Court accepted TME's argument that these contracts did not constitute a vertical restriction because SMEs are not part of the mobile telecommunications supply chain, but rather final consumers of mobile telecommunications services, indistinguishable in economic terms from any other final consumers. In this regard, the Spanish High Court noted that SMEs contract mobile communications services for final consumption and do not resell these services nor input them into another product.

The Spanish High Court also found that, in any event, the scheme was not a restriction of competition because the discounts offered were based on competitive economic criteria designed to maximize the efficiency of TME's infrastructure network, adapting to the different type of customers in the

[67] Case 3441/2017, Spanish High Court judgment of July 31, 2017.

[68] *Contratos de Permanencia* (Expte. S/0422/12), CNMC decision of October 29, 2014.

market, and avoiding free riding by certain customers. The Spanish High Court further concluded that penalty clauses in these contracts were an appropriate and proportional way to guarantee fulfillment of the permanence commitments by customers that benefit from discounts in exchange for that permanence commitment.

The Spanish High Court also stated that the fact that TME's market share was above the 30% threshold established in the Block Exemption Regulation[69] does not create a presumption of anticompetitive behavior by TME, finding that the CNMC had failed to prove the clauses restrictive effects during the administrative proceedings.

Finally, the Spanish High Court concluded that the alleged anticompetitive scheme benefitted consumers by offering lower prices, only affected a small portion of the market, and did not prevent customers from switching between operators or create barriers to entry for MVNOs.

As a result, the Spanish High Court upheld the appeal. The judgment can be appealed before the Spanish Supreme Court.

[69] Commission Regulation No. 330/2010 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, Article 3(1).

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.

Mergers and Acquisitions

The SCA Receives New Decision-Making Powers

On October 25, 2017, the Swedish Parliament passed a bill granting the SCA greater decision-making powers regarding notified mergers in Sweden.[70] The legislative amendments will enter into force on January 1, 2018.

Under the prior regime, the SCA was unable to prohibit mergers, having to bring an action before the courts to block a transaction. The amendments to the Swedish merger control regime shift the decision-making powers at first instance from the courts to the SCA. This gives rise to several changes, including the possibility for the SCA to independently prolong Phase II proceedings without merging parties' consent. Furthermore, it has been clarified that the two-year limit in which a final merger decision must be issued applies to the SCA's decision (court proceedings can take an additional nine months). A prohibition will have immediate effect, unless otherwise decided by the SCA. The SCA's decision can be appealed to the Patent and Market Court.

The SCA retains its authority to order the notification of a merger that falls below the applicable thresholds in Sweden on the basis of "particular reasons." Such an order may be issued up to two years after the transaction. Concentrations notified after January 1, 2018 will fall under the new regime.

[70] *See* Swedish Parliament, Protokoll 2017/18:23, October 25, 2017.

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

The FCC Concludes that Building and Engineering Companies Had Colluded on Tenders

On July 13, 2017, the FCC found that, in over 100 tenders between 2004 and 2012, building and engineering companies in Münstertal (Canton Graubünden) had colluded on prices, and collectively agreed on which company the tenders should be awarded to.[71] The FCC found that these agreements were unlawful restrictions of competition in violation of the Competition Act.

The FCC concluded that Foffa Conrad LC, Hohenegger LC, and other (now liquidated) companies had illegally shared their positions regarding building projects. The companies would designate which one should be awarded the tender and the other companies would submit higher bids. The local building companies association originally managed the collaboration, but eventually the companies began to reach agreements on their own.

The FCC decided not to impose any sanctions. One company received immunity as it notified the FCC of the cartel and cooperated with the investigation. The second company was not fined because it also cooperated, and it had filed for bankruptcy.

This case is part of a broader investigation in Canton Graubünden that comprises of 10 cases involving more than 40 companies. The remaining investigations are nearing completion. The FCC will decide on the smaller cases later in 2017 and, by the end of 2017, the concerned companies in the larger cases should be given draft decisions.

Abuse

The FCC Decided Not to Issue Interim Measures in Ice Hockey Broadcasting Investigation

On July 12, 2017, following a request made by Swisscom, the FCC decided not to order interim measures in the investigation regarding live broadcasting of ice hockey on Pay-TV because the necessary conditions to impose interim measures were not met.[72]

In May 2017, the FCC launched in investigation into whether UPC Switzerland LLC committed an abuse of dominance by illegally preventing competing TV platform operators, especially operators that do not broadcast through the cable network, from broadcasting ice hockey.

The FCC can order interim measures if they are necessary to prevent harm that may be difficult to remedy occurring before the close of an investigation.

The FCC found that UPC's conduct would not sustainably and permanently affect the market structure, despite indications of anticompetitive behavior by UPC. The FCC concluded that if UPC's conduct were to be prohibited at the end of its investigation, affected companies could win back their lost customers through quality offers and services.

Mergers and Acquisitions

The FCC Approves Hospital Merger

On September 28, 2017, the FCC approved the merger between the University Hospital of Basel and the Cantonal Hospital of Basel-Country finding that the merger will not eliminate effective competition.[73] The

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[71] FCC press release, July 13, 2017, available in French, Italian, and German at: https://www.weko.admin.ch/weko/fr/home/actualites/communiques-de-presse/nsb-news.msg-id-67514.html.

[72] FCC press release, July 12, 2017, available in French, Italian, and German at: https://www.weko.admin.ch/weko/fr/home/actualites/communiques-de-presse/nsb-news.msg-id-67503.html.

[73] FCC press release, September 28, 2017, available in French, Italian, and German at:

merger was decided by the Basel-City's and Basel-Country's canton governments.

On July 14, 2017, the FCC launched an in-depth investigation of the merger following the results of a preliminary examination suggesting that the proposed merger may create or strengthen a dominant position in the hospital facilities market, especially for hospital care covered by basic and supplementary insurance plans.[74]

Following the in-depth investigation, the FCC concluded that the new hospital group will be dominant in the market of acute hospital care covered by basic and supplementary insurance plans in Basel. However, the merger will not eliminate effective competition. Therefore, the conditions for the FCC to prohibit the merger (or impose remedies) were not met.

https://www.weko.admin.ch/weko/fr/home/actualites/communiques-de-presse/nsb-news.msg-id-68248.html.

[74] FCC press release, July 11, 2017, available in French, Italian, and German at: https://www.weko.admin.ch/weko/fr/home/actualites/communiques-de-presse/nsb-news.msg-id-67494.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").

Vertical Agreements

CAT Declines Certification of Collective Proceedings Against MasterCard

On July 21, 2017, the Competition Appeal Tribunal (the "CAT") dismissed an application for a collective proceedings order ("CPO")[75] in an action arising from the European Commission's 2007 *MasterCard* decision finding.[76] The Commission found that MasterCard, through fixing the intra-EEA fallback multilateral interchange fee that acquiring banks must pay issuing banks whenever a MasterCard was used in transactions, effectively set the minimum amount that merchants must pay their acquiring banks for such transactions.

Since October 2015, collective proceedings may be brought on an opt-out or opt-in basis before the CAT. Any person seeking to bring a collective proceedings must first seek a CPO from the CAT. In determining whether to issue a CPO, the CAT must be satisfied that: (i) it is "just and reasonable" for a person to be authorized as class representative; and (ii) the claims are eligible for inclusion in collective proceedings.

On September 8, 2016, Walter Merricks, a former Chief Ombudsman of the Financial Ombudsman Service, issued a CPO application purportedly on behalf of all U.K. residents who purchased from merchants that accepted MasterCard between May 22, 1992 and June 21, 2008 and sought to be authorized as class representative.

MasterCard objected to Merricks' authorization as class representative on the basis that Merricks would not be able to pay MasterCard's recoverable costs if ordered to do so.

Under the Competition Act 1998, the CAT "may" order all or part of the undistributed damages to be paid to the class representative "in respect of all or part of the costs or expenses incurred by the representative in connection with the proceedings."[77] Merricks had entered into an agreement with a third-party funder (the "Funder") under which, in consideration of its funding the proceedings, Merricks would use his "best endeavours" to ensure that the Funder receive the undistributed damages.

While the CAT held that the Funder's fee could constituted "costs or expenses," the CAT agreed with MasterCard that the terms of the funding agreement did not impose upon Merricks an obligation to pay the Funder's fee. As such, there would be no "incurred liability" for which the CAT could order payment of the undistributed damages to the Funder and the Funder would therefore likely terminate the funding agreement, leaving Merricks unable to pay MasterCard's recoverable losses.

The CAT nevertheless allowed Merricks to amend the funding agreement. Rather than "best endeavours," the proposed amendments obliged Merricks to pay the Funder the amount the CAT ordered to be payable to Merricks. The CAT considered that such conditional liability was sufficient to satisfy the statutory requirement of "incurred liability."

The CAT therefore rejected MasterCard's objection to Merrick's suitability to be authorized as class representative.

Regarding the eligibility for inclusion in collective proceedings, the CAT assessed whether the claims: (i) raised common issues; and (ii) were suitable for collective proceedings.[78]

As for the commonality requirement, the CAT noted that, for each business from which proposed class

[75] *Merricks v. Mastercard Inc* [2017] CAT 16, judgment of July 21, 2017.

[76] *MasterCard* (Case COMP/34.579), *EuroCommerce* (Case COMP/36.518), *Commercial Cards* (Case COMP/38.580), Commission decision of December 19, 2007. MasterCard's appeals against the Commission's decision to both the General Court and the Court of Justice were unsuccessful.

[77] Competition Act 1998, section 47C(5)–(6).

[78] Competition Act 1998, section 47B(6).

members bought goods and/or services, it would have to assess the extent to which the businesses passed on any overcharges. Given that the level of pass-through was likely to vary significantly between different kinds of goods and services, such assessment could not meaningfully constitute a common issue among all class members. Nevertheless, the CAT noted that there was no requirement that all the significant issues should be common issues and declined to reject the CPO application on this basis alone.

As for the suitability requirement, the CAT assessed whether: (i) the claims were suitable for an aggregate award of damages; and (ii) there was a reasonable and practicable means of calculating individual losses of class members for the purposes of distributing the damages.

First, although the CAT accepted that Merricks' proposed methodology for estimating total loss by calculating a weighted average pass-through percentage reflecting the different levels of pass-through in different sectors may be sound in theory, the CAT was not satisfied that there would be sufficient data available for the proposed methodology to be applied on a "sufficiently sound basis."

Second, the CAT found that Merricks' proposed methodology for the distribution of damages, whereby the total damages would be divided on an equal, *per capita* basis among all class members for each year, would be against the governing principle of compensation for breach of competition law.

In particular, the proposed distribution method made no attempt to approximate for: (i) individuals' levels of expenditure; (ii) businesses from whom the individuals bought goods and/or services; and (iii) the mix of products and/or services that the individuals purchased.

The CAT therefore held that Merricks had failed to establish that the claims were suitable for collective proceedings and dismissed the CPO application.

Merricks is seeking permission to appeal against the CAT's judgment before both the Court of Appeal and the Administrative Court, after the CAT refused permission to appeal, ruling that it had no jurisdiction to grant an appeal against a decision to reject a CPO application.

Market Investigations

CMA Launches Market Investigation into Investment Consultants

On September 14, 2017, the Financial Conduct Authority ("FCA") referred the investment consultancy market to the CMA for a market investigation.[79] The investigation will focus on the supply and acquisition of investment consultancy services and fiduciary management services to and by institutional investors and employers in the U.K.

The FCA can carry out Market Studies and make Market Investigation References to the CMA under the Enterprise Act 2002. The FCA also can carry out Market Studies under its financial regulation powers, contained in the Financial Services and Markets Act 2000. In practice, the FCA has tended to use its financial regulatory powers when carrying out Market Studies, although any reference to the CMA must be made using its competition law powers and having allowed sufficient time for consultation on its proposed decision.

The FCA can make a Market Investigation Reference if it has reasonable grounds to suspect that any features of a financial services market prevent, restrict, or distort competition. This is the first time the FCA has made a Market Investigation Reference since acquiring the power to do so in April 2015.

The decision to make a Market Investigation Reference followed a Market Study concluded in June 2017 that the FCA had carried out into the U.K. asset management sector. The Market Study considered:

- Whether investors find it difficult to monitor asset managers and ensure they are getting value for their money;

[79] Investment consultants market investigation, information available at: https://www.gov.uk/cma-cases/investment-consultants-market-investigation.

— Whether asset managers have the incentive and ability to effectively control costs incurred on behalf of investors; and

— The role of investment consultants and whether there are potential conflicts of interest in the provision of both advice and asset management services.

In relation to investment consultants, the FCA wanted to understand how institutional investors procure and use asset management services, and how asset managers compete.

In its Market Study Report, the FCA identified a number of features of the investment consultancy market that might result in an adverse effect on competition:

— A weak demand side, with pension trustees relying heavily on investment consultants but having limited ability to assess the quality of their advice or compare services, resulting in low switching rates.

— Relatively high levels of concentration and relatively stable market shares, with the three largest firms together holding between 50–80% market share.

— Barriers to expansion restricting smaller, newer consultants from developing their businesses.

— Vertically integrated business models creating conflicts of interest.

Following publication of the FCA's provisional decision in November 2016, the three largest investment consultants (Aon Hewitt, Mercer, and Willis Towers Watson) submitted a package of undertakings designed to address the FCA's concerns. The FCA consulted on these proposed remedies but ultimately decided they were insufficient.

The FCA also considered whether it could impose appropriate remedies using its own regulatory powers rather than referring the market to the CMA. It concluded that a Market Investigation would be more appropriate, including because elements of investment consultancy services do not currently fall within the FCA's regulatory purview, and because the FCA does not have the power to impose structural remedies (*e.g.*, requiring divestments), which could be needed to remedy its concerns about vertical integration and conflicts of interest.

The CMA will now have 18 months to investigate the market and publish a Final Report. The investigation will be carried out by an Inquiry Group of independent CMA Panel Members, who will decide whether any features of the market (including those identified by the FCA) result in an adverse effect on competition and, if so, what remedies to impose or recommend.

The CMA published an Issues Statement on September 21, 2017,[80] setting out the scope of its investigation and theories of harm it intends to consider. They fall into three broad areas:

— Whether difficulties in customers' ability to assess, compare, and switch investment consultants mean investment consultants have little incentive to compete for customers;

— Whether conflicts of interest on the part of investment consultants reduce the quality and/or value for money of services provided to customers; and

— Whether barriers to entry and expansion mean there are fewer challengers to put pressure on the established investment consultants to be competitive, which leads to worse outcomes for customers.

The CMA expects to publish a Provisional Findings Report in July 2018. The deadline for publishing its Final Report is March 13, 2019.

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[80] Investment consultants market investigation, Issues Statement, available at: https://assets.publishing.service.gov.uk/media/59c376f7ed915d408c10d131/investment-consultancy-market-investigation-issues-statement.pdf.

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