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.

Abuse

The BCA Imposes Interim Measures on the Invitation System of the Global Champions Tour and League Showjumping Series

On December 20, 2017, the BCA imposed interim measures on the organizers of the Global Champions Tour ("GCT"), Global Champions League ("GCL"), and International Federation for Equestrian Sports ("FEI," *i.e.*, the international governing body for equestrian sports).[1] The GCT is an annual individual show jumping competition series bringing riders to compete in 15 different rounds worldwide. The GCL, which takes place in parallel to the GCT, is a team show jumping competition series open only to riders who are part of a fee-paying team. Due to the cap imposed on the number of fee-paying teams, opportunities to join a team are limited and often subject to the payment of substantial sums of money.

The measures followed a complaint from a rider and horse stable regarding a Memorandum of Understanding ("MoU") between the organizers of the GCT, GCL, and FEI that would reduce the percentage of GCT invitations sent to riders exclusively on the basis of their ranking from 70% to 30%. The remaining invitations would be sent to riders based on non-sport-related criteria, primarily on their affiliation with a fee-paying team. As a result, the former performance-based criteria would largely be replaced by criteria based on riders' participation in a fee-paying team. The complainants claimed that this would discriminate against riders that are not part of a team and negatively affect their ability to participate in future competitions as well as their ranking, which is the basis for participating in other FEI series as well as for the Olympic Games national selections.

The BCA, based on the *Meca-Medina* case,[2] recalled that purely sport-related rules are still caught by competition law rules. The BCA then assessed whether the two cumulative conditions to grant interim measures were fulfilled, namely that: (i) the MoU *prima facie* constitutes an infringement of competition rules; and (ii) there is a risk of serious and irreparable harm to the applicants.

The BCA held that it is not unreasonable to consider a decrease in invitations based on ranking might infringe competition law. First, it is not prima facie unreasonable to conclude that the FEI holds a dominant position in the market for the organization

[1] BCA, Decision No. ABC-2017-V/M-38 of December 20, 2017, Case No. CONC-V/M-17/0037: *Lisa Nooren et Henk Nooren Handerlsstal SPRL/FEI-GCL-TTB*.

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

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and promotion of international showjumping competitions. The FEI's General Regulations provide that no competition or international series can take place without its agreement and riders taking part in non-authorized competitions cannot participate in an FEI event for six months following any unapproved participation. As a result, the FEI fully controls the access to the relevant market. Second, the reduction in invitations sent to riders exclusively on the basis of their ranking and the differential treatment between those riders and those who are part of a fee-paying team constitute a *prima facie* abuse of dominance that cannot be justified by the sport's specificities.

Regarding the second condition, the BCA found that the applicants proved that they were likely to be subject to serious, imminent, and irreparable harm. The decrease in the invitations sent to riders on the basis of their ranking alone is likely to seriously affect the riders' short-term interests and their careers. In addition, if riders are not able to compete, their stables' economic interests will also be impacted.

The BCA further noted that the MoU could similarly be considered, *prima facie*, a decision made by an association of undertakings that restricts competition—as a result, it concluded that the MoU *prima facie* constituted an infringement of both articles IV.1 and IV.2 CEL, and their Articles 101 and 102 TFEU equivalents.

The interim measures require that, until the closing of the BCA's investigation on the merits, at least 60% of the invitations for GCT's events must be sent to riders on the basis of their official FEI ranking, and should not depend on whether a rider is part of a fee-paying team.

The BCA's decision does not prejudge the final decision on the substance that will be taken after the closing of the investigation regarding a possible infringement.

Policy and Procedure

Government Proposes Draft Act to Guarantee Pricing Freedom of Tourist Accommodation Operators in Contracts Concluded with Online Travel Agencies

On November 23, 2017, the Government presented to the Belgian House of Representatives a draft act guaranteeing pricing freedom of tourist accommodation operators in contracts concluded with online travel agencies ("OTAs").[3] The aim of this draft proposal is to align Belgian legislation in this sector with French, Italian, and German legislation.

While the market for the rental of tourist accommodation through OTAs has grown considerably in the past decade, this has been accompanied by the emergence of potentially anticompetitive practices, such as the imposition of "parity" clauses by OTAs on tourist accommodation operators. These clauses—also called most-favored nation clauses—typically restrict accommodation operators in setting their rental prices, availability of accommodation, and terms and conditions (e.g., meals, cancellation terms, access to facilities, etc.), by requiring them to offer the OTA's clients the same, or better, rates and conditions than those offered to any other client.

The purpose of the draft act is to stimulate competition in the market for the rental of tourist accommodation through OTAs and reduce the imbalance in the economic and contractual relationship between accommodation operators and OTAs.

Article 5 of the draft act provides that tourist accommodation operators have the right to freely set the rental price for accommodation, and that they must be free to offer discounts or price advantages.

[3] Draft Law of November 23, 2017, available at: http://ec.europa.eu/growth/tools-databases/tris/en/search/?trisaction=search.detail&year=2017&num=570.

Article 6 of the draft act provides that any clause in a contract concluded between a tourist accommodation operator and an OTA that is contrary to Article 5 shall be null and void. Furthermore, Article 7 of the draft act provides that the act will apply both to new and existing contracts.

These measures echo competition concerns that have arisen elsewhere in the EU. For example, in 2015 France enacted a measure similar to Article 5 of the draft act in Article L311-5-1 of the Civil Code, guaranteeing the freedom of accommodation operators to offer discounts and price advantages.[4] Earlier in 2015, the French, Italian, and Swedish competition authorities had all found that parity clauses imposed by the OTA Booking.com forcing accommodation operators to match any more advantageous offers made on competing platforms were liable to restrict competition.[5] These competition authorities accepted commitments, which included restrictions on the use of parity clauses.[6] In 2014, the UK Office of Fair Trading had also accepted commitments from Booking.com and Expedia on the removal of a complete prohibition on discounting hotel room rates.[7]

The draft act was notified to the European Commission on December 4, 2017. Starting from the date of notification of the draft, a three-month standstill period during which the Member State cannot adopt the technical regulation will enable the European Commission and Member States to examine the notified text and respond appropriately.[8] The Belgian legislative procedure will resume at the end of the period (March 5, 2018).

New Royal Decree Establishes a Cooperation Framework Between the BCA and the Belgian Energy Regulator

On December 3, 2017, the Belgian Federal Government adopted a royal decree organizing cooperation between the BCA and Commission for Electricity and Gas Regulation ("CREG").[9] This long-awaited decree was finally discussed and adopted in late 2017 after a lengthy process.

According to the BCA and CREG, bilateral exchanges of information and regular concertation between the two institutions are key elements for ensuring well-functioning electricity and natural gas markets, as well as for guaranteeing an efficient interaction between sector-specific regulation and competition law. The decree therefore aims at fostering cooperation between the two regulators, while respecting their respective areas of competence.

The text organizes an annual consultation between the BCA and CREG, during which they will discuss the general state and evolution of the electricity and gas sectors and the application of competition law. The regulators should also discuss the interpretation of general competition law and sector-specific regulation. Finally, the BCA and CREG should follow-up on their cooperation and evaluate it against the relevant regulations.

The decree also describes how the CREG can obtain information on and intervene in formal proceedings conducted by the BCA that affect the electricity and gas sectors. The BCA has first to inform the CREG

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[4] Law No. 2015-990, August 6, 2015, Article 133.

[5] French Competition Authority, Decision No. 15-D-016, on practices implemented by Booking.com BV, Booking.com France SAS, and Booking.com Customer Service France SAS in the online hotel reservations sector, April 21, 2015, paras. 115 et seq.

[6] *Ibid.*, paras. 317 *et seq.*; *Mercato dei servizi turistici-Prenotazioni alberghiere on line* (Case 1779); and Konkurrensverket Decision of April 21, 2015 (Ref. No. 596/2013).

[7] *Online Travel Agents* (Case OFT1514dec), Office of Fair Trading decision of January 31, 2014. However, this decision was quashed on appeal in *Skyscanner v. CMA* [2014] CAT 16. The investigation was reopened on October 28, 2014, and closed on grounds of administrative priorities on September 16, 2015.

[8] Directive (EU) 2015/1535 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, OJ 2015 L 241/1, Articles 5 and 6.

[9] Published in the Belgian Official Gazette on December 15, 2017.

of any problem it notices in the gas and electricity sectors, as well as of any investigations being conducted. The BCA should also keep the CREG informed of any draft decisions being prepared by the auditor in charge of the electricity and gas sectors, as well as of the timeline for its intervention. The BCA will also provide the CREG with access to its case file insofar as it considers it necessary. Finally, the BCA has to notify the CREG when a final decision has been adopted.

The exchanges between the two regulators can cover any useful information, including—in accordance with Article IV.43, paragraph 2 of the CEL—confidential information insofar as it is necessary and proportionate to the accomplishment of their respective missions. Exceptions to this rule are contained in Article 6 of the decree and concern confidential information exchanged through the European Competition Network or obtained in the context of leniency[10] and settlement procedures.[11] The preparatory work of the decree indicates that these exceptions are justified to preserve the efficacy of the leniency and settlement procedures as instruments of competition enforcement.

Brussels Court of Appeal Holds that Paint Distributor Dawn Raid Documents Fall Within the Scope of BCA Investigation

On December 13, 2017, the Brussels Court of Appeal dismissed an appeal by Distripaints NV ("Distripaints") and Novelta NV ("Novelta") challenging the legality of dawn raids conducted in 2011 in the context of an investigation by the BCA into alleged anticompetitive conducts by chemical producer AkzoNobel NV ("AkzoNobel") together with three of its distributors.[12] The investigation was initiated in February 2011 following a complaint from a paint producer alleging that AkzoNobel infringed Articles 101 and 102 TFEU by imposing exclusivity contracts on distributors, exchanging information with them, and engaging in foreclosing practices.

During the BCA's investigation, distributors Distripaints and Novelta contested the relevance of the documents collected by the BCA during the dawn raids it conducted in 2011 at the companies' premises. In 2013, the Auditorate decided to include part of the documents seized in the scope of the investigation. Distripaints and Novelta challenged this measure before the Brussels Court of Appeal, alleging that the BCA had breached their right to due process and insufficiently motivated the qualification of the seized evidence as "in scope."[13] The Brussels Court of Appeal partially rejected their claims in 2014 but, with respect to the in or out of scope character of the seized documents, ordered that Distripaints and Novelta participate in a verification procedure intended to determine the actual scope of the investigation.[14] In the absence of a consensus, the Brussels Court of Appeal would decide.

In February 2015, Distripaints and Novelta reported to the Brussels Court of Appeal that no agreement had emerged from the verification procedure, but argued that the Brussels Court of Appeal should nevertheless consider this process as completed. The Brussels Court of Appeal however did not examine the question before March 2017, when the case was transferred to the newly established Market Court within the Brussels Court of Appeal. The Market Court decided to review the case *ex officio* in the absence of an agreement between Distripaints and Novelta, and the BCA on the qualification of the seized documents. Once the proceedings were

[10] Article IV.46, CEL.

[11] Articles IV.51 to IV.57, CEL.

[12] Brussels Court of Appeal, Case 2013/MR/9, judgment of December 13, 2017.

[13] The BCA had contested the admissibility of the challenge because it did not concern a reviewable "decision" against which an appeal can be made. The Brussels Court of Appeal however considered that a decision by the BCA on the "in scope" or "out of scope" nature of documents seized during dawn raids is capable of affecting the legal position of the undertakings concerned and must therefore be challengeable.

[14] Brussels Court of Appeal, Case 2013/MR/9, judgment of November 26, 2014.

initiated, Distripaints and Novelta requested the Brussels Court of Appeal, among other things, order damages from the BCA for having delayed several steps of the investigation by its inaction, and qualify the seized documents as falling outside the scope of the investigation.

The Brussels Court of Appeal dismissed all Distripaints's and Novelta's claims. The Brussels Court of Appeal first rejected the claim that the BCA was liable for the payment of damages due to its inaction, because Distripaints and Novelta initially did not ask it to pursue its review, but waited until the case was reopened to submit their claims. Relying on European case law,[15] the Brussels Court of Appeal stated that its review should be limited to verifying whether the BCA had correctly motivated the inclusion of each seized document in its investigation. In the absence of sufficient motivation, the documents should be automatically considered as out of scope. The Brussels Court of Appeal held that the BCA had indicated for each document the reasons for its inclusion in the case file. Therefore, the Brussels Court of Appeal concluded that the BCA had respected the principle of protection against arbitrary or disproportionate measures and the right to due process, and ruled that the disputed documents could remain in the case file.

[15] *France Telecom v. Commission* (Case T-340/04) EU:T:2007:81; and *Deutsche Bahn and Others v. Commission* (Joined Cases T-289/11, T-290/11, and T-521/11) EU:T:2013:404.

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").

Horizontal Agreements

Market Court Imposes Fines for a Cartel in the Bus Sector

On December 14, 2017, the Market Court fined several Finnish bus companies,[16] the Finnish Bus and Coach Association (the "Bus and Coach Association"),[17] and travel services provider Oy Matkahuolto Ab ("Matkahuolto")[18] for participation in a cartel.[19] On January 25, 2016, the FCCA had proposed that the Market Court impose €38 million in fines. The Market Court, however, reduced the fines to €1.1 million in total.

In 2009, there was a legislative amendment to open the public transport market to competition during a 10-year transition period in accordance with the EU Regulation on Public Passenger Transport Services by Rail and by Road (1370/2007).[20] According to the FCCA, the key market participants in the bus market tried to jointly prevent the bus markets from opening up and to hinder market access for new competitors.

The Market Court partially agreed with the FCCA's proposal. The Market Court found that the Finnish bus companies, the Bus and Coach Association, and Matkahuolto had restricted competition by excluding new competing bus routes from Matkahuolto's travel services, such as information and ticket sales services, and also by denying freight transport rights to those routes.

The Finnish bus companies, the Bus and Coach Association, and Matkahuolto pleaded that the legal situation was unclear during the transition period. The Market Court dismissed this argument. The Market Court found that the cartel sought to prevent or, at least, delay the opening of the market to competition, as well as to maintain the market status quo. The conduct lasted from December 2010 to September 2012 for travel services and from December 2010 to December 2015 for freight transport rights.

The Market Court, however, rejected the FCCA's arguments that the Finnish bus companies, the Bus and Coach Association, and Matkahuolto had been guilty of prohibited restrictions on competition in the context of negotiations and discussions related to the Bus and Coach Association's advocacy work, which sought to influence the content of the new legislation. The Market Court also concluded that negotiations on the initiative of public authorities and related efforts to reconcile traffic had not restricted competition. Furthermore, the Market Court did not see Matkahuolto's renewed service agreement as a restriction on competition.

The fines imposed by the Market Court were considerably below the FCCA's proposal. Each bus company as well as the Bus and Coach Association

[16] J. Vainion Liikenne Oy, Jyväskylän Liikenne Oy, Koiviston Auto Oy, Koskilinjat Oy, Kuopion Liikenne Oy, Porvoon Liikenne Oy- Borgå Trafik Ab, Satakunnan Liikenne Oy, Metsäpietilä Oy, Länsilinjat Oy, Oy Pohjolan Liikenne Ab and VR-Yhtymä Oy, Pohjolan Turistiauto Oy, Koillismaan Turistiauto Oy, Antti Kangas Oy, Savon Turistiauto Oy, Savonlinja Oy, Linja-Karjala Oy, Vauhti-Vaunu Oy, Autolinjat Oy, Etelä-Suomen Linjaliikenne Oy, SL-Autoyhtymä Oy, and Väinö Paunu Oy ("the Finnish Bus companies").

[17] The Bus and Coach Association is a professional bus traffic interest group with approximately 330 member bus companies.

[18] Matkahuolto is a bus service and marketing company maintaining several nationwide systems, such as a bus station network, timetable information, ticket service, and packet delivery.

[19] Market Court, Judgment MAO:781/17, December 14, 2017, Cases 2016/42 and 2016/96.

[20] Regulation (EC) No. 1370/2007 of the European Parliament and of the Council on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos. 1191/69 and 1107/70, OJ 2007 L 315/1.

and Matkahuolto were fined €100,000 each, in total €1.1 million. Because the cartel was found to be a restriction by object, the FCCA was not required to prove the restriction had any effects. The Market Court still stated, however, that, when calculating the fine, the actual significance and effects of the competition restriction must be taken into account. The Market Court found that the FCCA had failed to prove many of its allegations, and the restriction was not as serious as the FCCA claimed.

The FCCA has filed an appeal to the Supreme Administrative Court. Consequently, the Market Court's ruling is not yet final.

FRANCE

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

Horizontal Agreements

The FCA Fines Leading Manufacturers of Floor Coverings for Price Increase Coordination and Exchange of Commercially Sensitive Information Following the New Settlement Procedure

On October 18, 2017, following an investigation triggered by the French Ministry of Economy in 2011, the FCA found that Forbo Holding AG ("Forbo"), Gerflor SAS ("Gerflor"), Tarkett S.A. ("Tarkett"), and the SFEC, a trade association, had participated in several anticompetitive horizontal practices in the floor coverings sector.[21] After dawn raids were conducted by the FCA at the premises of Forbo, Gerflor, Tarkett, and the SFEC in March 2013, Forbo and Tarkett filed for leniency in April and May 2013.

Forbo and Tarkett subsequently entered into the settlement procedure and did not dispute the three infringements alleged by the FCA.

First, the FCA found that from 2001–2011 the three manufacturers participated in a single, complex, and continuous infringement in the floor coverings market through: (i) price-fixing; (ii) price increase coordination; and (iii) exchanges of recent and individualized information on sales volumes and average selling prices per product category.

Second, the FCA found that, in the context of the SFEC meetings, the manufacturers implemented from either 1990 or 1992 until 2013 a concerted practice consisting of exchanges of commercially sensitive information on their sales per product category as well as market trends. The FCA found that Forbo, Tarkett, and Gerflor were the only undertakings that had participated in a continuous and active manner.

Third, the FCA found that the three manufacturers coordinated their environmental communication initiatives, together with the SFEC, by agreeing to share with the public information on the environmental performance of their products only in an aggregated format and not for each manufacturer. The FCA considered that these practices prevented competition based on environmental criteria and further prevented any technical or environmental innovation of the manufacturers' products.

As Forbo and Tarkett agreed to settle the case, the FCA imposed a lump-sum fine and did not follow the methodology used in its 2011 fining guidelines. Interestingly, the FCA took into account Forbo's and Tarkett's leniency applications as individualized circumstances and refused to consider their proposal to implement or improve compliance programs. The FCA explained that the implementation of compliance programs should not warrant fine reductions when it comes to particularly serious infringements such as agreements and information exchanges on future prices and commercial policy.

The FCA fined Tarkett and Forbo €165 million and €75 million, respectively. Gerflor and the SFEC were fined €62 million and €300,000, respectively.

Abuse

The FCA Accepts Schneider Electric's Commitments to Remedy Abuse of Dominance Concerns in the *Electrical Equipment Maintenance Sector*

On May 17, 2016, the FCA opened, on its own initiative, an investigation into abusive practices implemented by Schneider Electric SE ("Schneider Electric"), the main manufacturer of medium- and

[21] French Competition Authority, Decision No. 17-D-20 of October 18, 2017, relating to practices implemented in the floor coverings sector.

low-voltage electrical distribution equipment in France.[22]

Schneider Electric also provides maintenance services on electrical distribution equipment, along with subsidiaries of other manufacturers (such as GE Alstom, ABB Group, or Siemens AG) as well as independent facility managers, electrical installers, and other third-party maintenance providers.

The FCA found that the supply and maintenance of electrical distribution equipment constituted separate markets. The FCA identified: (i) potential primary markets for the supply of medium- and low-voltage electrical distribution equipment; (ii) secondary markets for the supply of spare parts for Schneider Electric's equipment, on which Schneider Electric was likely to hold a dominant position; and (iii) potential secondary markets for maintenance services on Schneider Electric's equipment.

The FCA raised competitive concerns that Schneider Electric abused its dominant position by refusing to sell a significant number of its spare parts, which were necessary for the maintenance of its equipment, unless customers agreed to have Schneider Electric's own employees perform the associated maintenance services.

Schneider Electric argued that this restriction aimed at ensuring the safety of users and protecting its business model, in particular its brand image, know-how, and the expertise of its technicians. However, the FCA found that Schneider Electric's policy was not necessary to achieve these objectives and was likely to constitute abusive tying. The FCA explained that Schneider Electric's policy could prevent other maintenance providers from carrying out a full range of maintenance services on Schneider Electric's equipment, which represent between 60–70% of equipment sales in France. Schneider Electric's policy was also likely to deprive customers of possibly cheaper and higher-quality services.

To remedy the FCA's concerns, Schneider Electric offered to sell certain spare parts, which were previously only available to its own technicians, to third-party maintenance providers, provided that they undertake mandatory trainings from Schneider Electric.

Under these commitments, all third-party maintenance providers can receive appropriate trainings from Schneider Electric and purchase spare parts on the condition that: (i) their technicians meet specific educational and experience requirements; and (ii) the maintenance providers comply with a number of training obligations. In particular, maintenance providers must ensure that their technicians carry out a minimum number of maintenance operations (one operation every six months) and must send out proof of these interventions through a dedicated portal.

Following a market test in June 2017, Schneider Electric amended its commitments to better frame the pricing of the training modules offered, guarantee the confidentiality of business information exchanged when verifying the frequency of the third parties' maintenance interventions, and clarify the scope of the spare parts concerned. The commitments, along with monitoring obligations, are for five years.

Policy & Procedure

The FCA Fines Brenntag for Obstructing its Investigation in the Chemical Distribution Sector

From 2008–2012, the FCA conducted an investigation against Brenntag N.V. ("Brenntag") in the French chemical distribution sector following several complaints from competitors about exclusivities granted to Brenntag by suppliers of chemical commodities and specialties.

The FCA issued several requests for information to Brenntag to define the relevant markets in the chemical distribution sector, assess the existence of the exclusive rights granted to Brenntag, and

[22] French Competition Authority, Decision No. 17-D-21 of November 9, 2017, relating to practices implemented in the medium- and low-voltage electrical distribution equipment maintenance sector.

estimate the market shares covered by such exclusive rights. The information requested from Brenntag related to turnover data per product category from 1998–2013 and other information regarding the exclusivities granted by Brenntag's suppliers.

On December 21, 2017, the FCA found that Brenntag obstructed the FCA's investigation by failing to cooperate.[23]

First, Brenntag provided incomplete, imprecise, and out-of-time information despite the FCA sending several reminders. In particular, Brenntag provided turnover figures only for 2011–2013 with almost a three-year delay and claimed that the information was not available for the remaining years. Brenntag was also unable to explain the methodology used for the 2011–2013 figures.

Second, Brenntag refused to provide information and documents that had been requested by the FCA several times. Brenntag claimed that the requests were disproportionate for the purposes of the investigation. The FCA rejected Brenntag's claims and recalled that companies have an obligation to cooperate actively and loyally with the FCA's investigation services.

The FCA fined Brenntag €30 million by applying Article L. 464-2, paragraph V of the French Commercial Code for the first time since it was enacted in 2008. Under this provision, the FCA may fine a company up to 1% of its global turnover when this company obstructs an investigation, for instance by providing incomplete or incorrect information or by disclosing incomplete or truncated documents. The FCA further indicated in its decision that negligence or passivity was sufficient to qualify as an obstruction.

When determining the fine, the FCA did not apply its fining guidelines but took into account several factors, namely the impact of Brenntag's obstruction on the FCA's investigation, size of Brenntag's group, and necessity to ensure a sufficient deterrent effect.

This is the first decision in which the FCA imposed a significant fine for obstructing its investigation.

[23] French Competition Authority, Decision No. 17-D-27 of December 21, 2017, regarding obstruction practices implemented by Brenntag.

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").

Fining Policy

DCA Increases Fines for Price-Fixing on Wallpaper Manufacturers to Over €19 Million

On October 12, 2017, the DCA rejected the appeals of two wallpaper manufactures (A.S. Création Tapeten AG ("Création") and Marburger Tapetenfabrik J.B. Schaefer GmbH & Co. KG ("Marburger")) against the FCO's fining decision of February 25, 2014[24] and increased the fines for both undertakings.[25]

In 2014, the FCO had fined four wallpaper manufacturers, the trade association Verband der Deutschen Tapetenindustrie e.V. ("VDT"), and several individuals for two cases of price-fixing. The undertakings had agreed on specific price increases for wallpaper in Germany at VDT meetings. The first time, in 2005, they agreed on an increase of approximately 5–6% as of March 1, 2006; the second time, in April 2007, they agreed on an increase of approximately 5% as of January 1, 2008. The VDT managing director at the time played a prominent role, by providing the information about forthcoming price increases from market leader Création to all VDT members.

The DCA confirmed the €75,000 fine for VDT, but increased Création's fines from €10.5 million to €13.9 million and Marburger's fines from €3.8 million to €5.5 million. While the DCA did not evaluate the conduct differently, it applied a different fining methodology than the FCO. The FCO took the turnover affected by the anticompetitive behavior as the basis for calculating the fine. The DCA followed the FCJ's *Grey Cement* decision[26] and relied on the companies' worldwide turnover. Given that the infringement did not affect sales outside of Germany, the FCO's approach led to a lower fine. The difference in fining methodology has a significant practical impact, given that undertakings will not appeal the FCO decisions, even if they have valid legal arguments, to avoid the possibility of a higher fine by the DCA. After the FCJ issued it *Grey Cement* decision, many undertakings withdrew their pending appeals against FCO fining decisions.

Abuse

FCO Prohibits Exclusive Contracts Between CTS Eventim and Event Organizers/Advance Booking Offices

On December 4, 2017, the FCO issued a decision prohibiting CTS Eventim AG & Co. KGaA ("CTS"), Germany's largest ticketing system provider and ticket seller, from using certain exclusivity clauses in its contracts with event organizers and ticket booking offices.[27] CTS operates the consumer ticket shop "eventim.de" and provides ticketing services to entertainment event organizers and advance booking offices. CTS also organizes live entertainment events. Pursuant to the various types of past and current CTS sales clauses, which are under the FCO's investigation since the initiation of

[24] *See* FCO press release of February 25, 2014, available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2014/25_02_2014_Tapeten.html?nn=4135984.

[25] *See* DCA press release 32/2017 of October 12, 2017, case V-2 Kart 1-3/17, available in German at: http://www.olg-duesseldorf.nrw.de/behoerde/presse/Presse_aktuell/20171012_PM_Tapetenhersteller-verurteilt/index.php.

[26] FCJ judgment of February 26, 2013, case KRB 20/12.

[27] *See* FCO press release of November 23, 2017, available in English at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/23_11_2017_CTS_Four_Artists.html?nn=3591568.

proceedings in 2014, CTS's contractors must sell their tickets exclusively or to a considerable extent through CTS's ticket sales system.

The FCO found that CTS is active on a national multisided market. CTS sells 60–70% of all tickets distributed through ticketing services in Germany. Concluding that CTS holds a dominant position in relation to both event organizers and booking offices, the FCO decided that the exclusivity clauses constitute an abuse of dominance by substantially impairing the positions of other ticket system providers, event organizers, and booking offices. The FCO's decision is in particular based on indirect network effects—a criterion for dominance on (multisided) platform markets that was recently also added to the catalogue of criteria to assess dominance in the GWB (2017, 9th Amendment to the GWB). As a provider in a two-sided online-sales market offering a "matching platform," CTS benefits from such network effects *vis-à-vis* ticket buyers on the one side and event organizers and booking offices on the other: with an increasing number of event organizers using CTS's ticketing system. Thus, the position toward booking offices and consumers becomes more attractive, and vice-versa. The FCO also based its decision on, *inter alia*, CTS's better access to relevant market data than its competitors and a low level of willingness of its contract partners to change the platform, noting that the indirect network effects beneficial to CTS are not sufficiently outweighed by the availability of a parallel use of several platforms ("multi-homing").

The FCO ordered CTS to allow, through amendments to its current contracts, its contract partners that are bound by an at least two-year contract term to sell a minimum of 20% of their annual ticket volumes through third-party ticketing services. The FCO applied numerical thresholds, holding that a "sufficient liberalization of the market" were to be expected by its order.

FCO Issues Preliminary Assessment of its Facebook Proceedings

On December 19, 2017, the FCO provided its case assessment with Facebook Inc. and its Irish and German subsidiaries ("Facebook")[28] after having commenced proceedings against Facebook in March 2016.[29] It preliminarily concluded that Facebook abuses its dominant position in the German market for social networks.

In the FCO's view, the market for social networks encompasses not only Facebook but also smaller services such as Google+ and a few German social networks. As the size of a social network is important to users, the FCO considers substitutability between the various social networks to be limited. Interestingly, the FCO deems professional networks such as LinkedIn and Xing, messaging services like WhatsApp and Snapchat, and other social media such as Twitter and YouTube to be complementary from a user's perspective and therefore outside of the relevant market. Given that most German users use Facebook to connect with their friends and acquaintances in Germany, the FCO defines the market for social networks as national.

With a market share of about 90% and approximately 23 million daily users in Germany, the FCO considers Facebook dominant in the relevant market. Direct and indirect network effects as well as lock-in effects make switching difficult for users and further entrench Facebook's position. Multi-homing is limited. These effects, combined with Facebook's unmatched user database, result in

[28] *See* FCO press release of December 19, 2016, available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/19_12_2017_Facebook.html?nn=3599398. A "background paper" is available in English at: http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/2017/Hintergrundpapier_Facebook.html;jsessionid=99DE391F3B90D1D3CA618431FFD3E4A2.2_cid371?nn=3599398.

[29] *See* National Competition Report, January–March 2016, pp. 12–13.

high barriers to entry: typically, competitors with similar advertising-financed offerings will only be successful once they have gathered a critical mass of users because this is required to attract more advertisers.

The FCO takes the preliminary view that Facebook abuses its dominant position by imposing exploitative business terms on its users. Users can only join Facebook's network once they have agreed to Facebook collecting user data from third-party sources and combining them with the user's Facebook account. Such third-party sources include Facebook's platforms Instagram and WhatsApp, but also millions of (third-party) websites and apps that are linked to Facebook (*e.g.*, sites with an embedded "like" button).[30] The FCO argues that users are typically not aware of the extent to which Facebook collects their data outside of its core service, yet they may only use Facebook once they have consented to these terms. Given the lack of alternative comparable social networks, users can only agree to an extensive data collection or refrain from using Facebook entirely. The FCO considers Facebook's business terms to be inappropriate in this respect and contrary to principles of data privacy law. The FCO also questions whether a user can validly consent to Facebook's business terms at all.

Importantly, the FCO has not analyzed Facebook's conduct with respect to data it generates through user interaction "on Facebook" and explicitly leaves open with respect to such data whether there is any conduct that would give rise to competition or data privacy concerns.

Facebook now has the opportunity to comment on this preliminary assessment and provide proposals on how to remedy the situation. The FCO does not expect to render a final decision before mid-2018.

[30] Users usually do not even have to click on such buttons to trigger a data exchange with Facebook.

FCO Conducts Investigation Regarding the Restriction of Athlete Sponsorship Through the Application of By-Law 3 to Rule 40 of the Olympic Charter

On December 21, 2017, the FCO announced that is currently conducting a market test with regard to commitments made in the context of the FCO's investigation into whether the restriction of the advertising activities of athletes and their (potential) sponsors during the Olympic Games as a result of By-law 3 to Rule 40 of the Olympic Charter ("Rule 40") by the German National Olympic Committee ("DOSB") and International Olympic Committee ("IOC") violates competition law.[31]

According to Rule 40, no competitor, coach, trainer, or other official of the team participating in the Olympic Games may permit the use of its person, name, image, or athletic performances during the Olympic Games for advertising purposes without prior approval. This rule applies as of the ninth day prior to the opening of the Olympic Games until the third day after the closing celebration (the so-called frozen period).

Prior to the 2016 Olympic Games in Rio de Janeiro, the option of a special exemption was provided to athletes for the first time, which permitted them to conduct advertising activities during the frozen period. The possibility for German athletes to obtain an exceptional permission for advertising campaigns was subject to various restrictions under the relevant DOSB Guidelines for the 2016 Olympic Games.

In the FCO's view, these may have been too restrictive. During the course of the proceedings the DOSB and IOC were prepared to relax the prohibition of advertising under Rule 40 for national applications. These can be found in the revised

[31] *See* FCO press release of December 21, 2017, available in English at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/21_12_2017_DOSB_IOC.html?nn=3591568.

DOSB Guidelines[32] and relate in particular to: (i) the deletion of the previous restrictive submission deadlines; (ii) the introduction of a processing period and an assumption of approval if no negative decision is made by the end of the period; (iii) the indefinite permission of so-called generic advertising; (iv) the indefinite permission of generic salutations or congratulatory messages by sponsors to the athletes; and (v) the athletes' entitlement to share or retweet official Olympic content in social media, including appreciative remarks to sponsors. Moreover, the list of so-called Olympic-related terms that are not permitted to be used during the frozen period in advertising measures was reduced to just a few terms. In agreement with the FCO, the revised DOSB Guidelines will be applied by the DOSB during the 2018 Winter Games.

The FCO is currently market testing the revised DOSB Guidelines with athletes and their (potential) sponsors to determine whether the potential competitive concerns would be alleviated. The DOSB and IOC have already signaled their agreement to declare the application of the revised DOSB Guidelines to be binding for Germany through 2022.

Vertical Agreements

FCJ Overrules Higher Regional Court of Celle in Resale Price Maintenance Case

On October 17, 2017, the FCJ ruled that Almased Wellness GmbH ("Almased") had violated German competition law by agreeing with pharmacies on a minimum resale price for its weight loss drink "Almased Vitalkost." [33] The FCJ overturned the second instance decision of the Higher Regional Court of Celle [34] and confirmed the first instance judgment by the Hanover Regional Court.[35]

Almased had offered pharmacies a special discount of 30% on the product's purchase price if they agreed to present the weight loss drinks in a proper way and not to underhdxzcut a price of €15.95 per box. The offer was limited to 90 units per pharmacy and was available from February–December 2014.

In its first instance judgment, the Hanover Regional Court had upheld the action brought by a German trade association committed to the protection of fair competition and found that setting a minimum resale price was an illegal vertical restriction of competition pursuant to Section 1 GWB and Article 101 TFEU. In contrast, the Higher Regional Court of Celle as the appellate court ruled that Almased's offer did not have an appreciable effect on competition because of its limitation in terms of time and quantity.

The FCJ rejected the argument of the Higher Regional Court of Celle by referring to established case law of the European Court of Justice stating that restrictions by object are *per se* illegal, *i.e.*, they constitute an appreciable restriction of competition by their nature and independent of any concrete effects they may have. [36] Minimum resale price agreements constitute restrictions by object according to case law. This is in line with the vertical block exemption ("VBER"), [37] which lists such agreements as hardcore restrictions that cannot benefit from the VBER.

[32] The original version of the guidelines is available in German at: https://cdn.dosb.de/alter_Datenbestand/Bilder_allgemein/Veranstaltungen/Rio_2016/Regel40_OlympischeCharta_Rio2016.pdf. The new, provisional version is available in German at: https://cdn.dosb.de/user_upload/Olympische_Spiele/PyeongChang_2018/PyeongChang_Rule40_OlympischeCharta_PC2018_20122017.pdf.

[33] FCJ judgment of October 17, 2017, case KZR 59/16.

[34] *See* National Competition Report, April–June 2016, p. 18; and Higher Regional Court of Celle judgment of April 7, 2016, case 13 U 124/15 (Kart).

[35] *See* National Competition Report, October–December 2015, p. 13; and Hanover Regional Court, judgment of August 25, 2015, case 18 O 91/15.

[36] *Expedia* (Case C-226/11) EU:C:2012:795.

[37] Regulation No. 330/2010 of April 20, 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.

Regardless of whether Almased's offer to German pharmacies affected trade between Member States, to meet the conditions of Article 101 TFEU, the FCJ held that at least the requirements of Section 1 GWB were fulfilled. The appreciability requirement was met because the decisive factor is not the offer's effect on a single pharmacy but on all pharmacies in Germany, which were targeted by the offer. Even a limitation on 90 units would equate to 1.8 million potential units and the offer lasted almost one year. Therefore, the FCJ concluded that the offer's effect on competition was—irrespective of its character as a restriction by object—appreciable and it was illegal pursuant to Section 1 GWB.

Mergers and Acquisitions

FCO Clears Reacquisition of Brand Names from Mondelez

On October 16, 2017, the FCO issued a clearance decision, allowing The Kraft Heinz Company ("Kraft Heinz") to terminate licenses to use the brand names "Kraft" and "Bull's Eye" in Europe that it had previously licensed to Mondelez International ("Mondelez") and to acquire further related assets such as domain rights.[38]

As a result of the break-up of the original Kraft Foods in 2012, two separate companies were created, Kraft Foods and Mondelez. While the new Kraft Foods continued the former Kraft Food's North American grocery business, Mondelez specialized in snack foods. As part of this process, Mondelez acquired the license rights to use the "Kraft Ketchup" brand name in Germany and other countries for 10 years. After the merger between Kraft Foods and Heinz in 2015, Kraft Foods and Mondelez agreed to reduce the terms of these license rights.

While the FCO found that Kraft would expand its position as leading manufacturer of ketchup in Germany, with a market share exceeding 30%, it still cleared the transaction, because it found that Kraft Foods will continue to face sufficient competitive pressure from other manufacturers. The FCO emphasized in particular the strong position of certain regional manufacturers and that food retailers were actively using alternative suppliers.

FCJ Rules on the Consequences of Gun-Jumping under the 7th Amendment to the GWB

On October 17, 2017, the FCJ confirmed[39] a judgment of the Frankfurt Court of Appeals[40] that found "gun jumping," *i.e.*, closing a transaction without merger control clearance by the FCO, only renders the underlying share transfer provisionally invalid under German contract law. If the notification is filed later and the FCO finds no anticompetitive concerns, the underlying share transfer becomes valid retroactively.

The issue arose in the context of a director's liability lawsuit. In 2006, the majority shareholder of a German limited liability company had acquired its 75% shareholding and did not file the required merger notification to the FCO. In 2009, the company's shareholders assembly, controlled by the majority shareholder, voted to file a director's liability lawsuit against the company's former directors. In 2011, the majority shareholder ultimately notified its acquisition of the shareholding to the FCO, which "cleared"[41] the transaction.

The defendants argued that the share transfer in 2006 was invalid under the GWB, given that the majority shareholder had "jumped the gun." They further argued that they could unilaterally revoke the share

[38] *See* FCO press release of October 16, 2017, available in English at: http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2017/16_10_2017_Kraft_Mondelez.pdf;jsessionid=E09F76D59E7B2F24DDB1BBDDA110EDE2.1_cid362?__blob=publicationFile&v=2.

[39] FCJ judgment of October 17, 2017, case KZR 24/15.

[40] Frankfurt Court of Appeals judgment of May 12, 2015, case 11 U 71/13.

[41] Technically, in case the parties file the notification after the parties have closed the merger, the FCO will formally initiate proceedings with a view to dissolve the merger. If the FCO does not find competitive concerns, it will terminate the dissolution proceedings.

transfer due to its invalidity. The majority shareholder's vote at the shareholders' assembly would be void and the company's lawsuit inadmissible. The FCJ held that the violation of the filing requirements in 2006 had only made the share transfer provisionally invalid, but the FCO's clearance in 2011 made the transfer retroactively valid. Since the 8th amendment to the GWB, which came into force in July 2013, the GWB expressly states that the termination of dissolution proceedings makes the underlying transactions retroactively valid under German civil law. The FCJ confirmed that this principle also applies under the 7th amendment to the GWB, in force since July 2005. It would be disproportionate to consider a share transfer permanently invalid for formal reasons if the concentration was later cleared by the FCO due to lack of competitive concerns.

The FCJ further confirmed that the provisional invalidity of a share transfer due to "gun jumping" does not give the other party a right of unilateral revocation under contract law. The judgment is a welcome clarification of the consequences of "gun jumping" under German civil law and increases legal certainty.

FCO Closes Investigation Regarding the Withdrawal of Appeals Against the Ministerial Approval of the EDEKA/Tengelmann Merger

On November 16, 2017, the FCO closed its proceedings concerning potential infringements of competition law within the context of the withdrawal of appeals against the ministerial authorization granted to EDEKA/Tengelmann.[42]

Earlier, the FCO had blocked the proposed acquisition of supermarket chain Kaiser's Tengelmann ("Tengelmann") by EDEKA in March 2015.[43] Subsequently, the Minister for Economic Affairs authorized the transaction in March 2016 by way of a "ministerial authorization."[44] Markant, Norma, and Rewe had originally appealed the ministerial approval and successfully applied for an interim injunction. In July 2016, the DCA suspended the ministerial approval.[45] EDEKA, Tengelmann, and the Minister for Economic Affairs appealed the DCA's decision.

However, in October and November 2016, Markant, Norma, and Rewe each entered into settlements with EDEKA and withdrew their appeal. In return, EDEKA agreed to: (i) pay a monetary compensation to Norma and Markant; (ii) transfer 11 stores of EDEKA's discounter Netto to Norma; and (iii) transfer 67 former Tengelmann stores mainly situated in Berlin to Rewe.

The FCO held that these agreements did not go beyond what was necessary to resolve the pending dispute and were lawful. EDEKA, Markant, Norma, and Rewe did not agree on their future market behavior, but only on the appellants' procedural behavior concerning an appeal against a specific decision. In particular, the settlement agreements were not similar to "pay-for-delay" settlements that restrict potential competitors' market entry.[46] Furthermore, the divestments of Tengelmann and Netto stores to Rewe and Norma were subject to merger control proceedings,[47] in which the FCO analyzed the structural effects. Any potentially anticompetitive effects would be analyzed in these proceedings. According to the FCO, the understanding between the parties regarding the allocation of the stores does not meet the legal definition of a restriction of competition.

FCO Prohibits Merger Between CTS Eventim and Four Artists

On November 23, 2017, the FCO prohibited the acquisition of a majority stake in Konzert and Veranstaltungsagentur Four Artists ("Four Artists")

[42] FCO decision of November 16, 2017, case B2-31/17.
[43] *See* National Competition Report, January–March 2015, p. 15.
[44] *See* National Competition Report, January–March 2016, p. 15.
[45] *See* National Competition Report, July–September 2016, p. 10.
[46] *See, e.g.*, *Lundbeck v. Commission* (Case T-472/13) EU:T:2016:449.
[47] *See* National Competition Report, October–December 2016, p. 14.

by CTS.[48] Four Artists organizes and markets concerts for several internationally known artists. CTS operates the largest ticketing system in Germany, providing ticketing services to event organizers and advance ticket offices. In addition, it sells tickets directly to end consumers through its own "eventim.de" online store and organizes events, such as concert tours and festivals, itself.

According to the FCO, CTS already enjoys a very strong market position based on its ticketing system and online shop. The FCO determined sales via ticketing systems (which constitute a "platform market"), such as CTS's, are indispensable for both event organizers and ticket offices, as they provide event organizers with a wide customer outreach and ticket offices with access to more events. Given that CTS accounts for 60–70% of all ticket sales via ticketing systems in Germany, the FCO found that event organizers and advance ticket offices depend on CTS. In addition, the FCO considered that CTS's market position is further strengthened because it operates its own online shop and organizes many events itself—tying large ticket quotas exclusively to its ticketing system.

The FCO concluded that the acquisition of Four Artists would further strengthen CTS's dominance *vis-à-vis* other event organizers and advance booking offices. The FCO determined that the integration of Four Artists would tie additional ticket quotas of 500,000 to 1 million tickets to its ticketing system.

FCO Clears Acquisition of Majority of Limited Partnership Interests and Sole Control of CSALP by Airbus

On December 5, 2017, the FCO cleared the acquisition of 50.01% of the interests and sole control of the C Series Aircraft Limited Partnership ("CSALP")—a subsidiary of Bombardier Inc. ("Bombardier")—by Airbus SE ("Airbus").[49]

Airbus is a commercial aircraft manufacturer that is active in space and defense. Its Airbus commercial aircraft unit focuses on the manufacturing of commercial aircraft with more than 150 seats with a portfolio of various types and sizes of aircraft, from the single-aisle A320 family to the double-deck A380.

The Canadian company Bombardier is active in the manufacturing and sale of trains and airplanes. Bombardier's aircraft portfolio includes both large commercial aircraft (the C Series jetliners manufactured by CSALP) and smaller regional aircraft. Its subsidiary CSALP, the target, is a limited partnership between Bombardier and IQ (the investment branch of the Québec Government). CSALP's activities are limited to the design, manufacture, and sale of the C Series single-aisle aircraft family with 100–150 seats (the smaller CS100 and larger CS300). Two other major manufacturers are active in the market for single-aisle aircraft: the U.S.-based Boeing Company ("Boeing") (with a focus on larger single-aisle aircraft, like Airbus) and the Brazil-based company Embraer S.A. ("Embraer").

Although CSALP never generated any revenues in Germany, the transaction triggered a notification obligation with the FCO because Bombardier will retain an interest of more than 25% in CSALP. Therefore, Bombardier's revenues had to be considered when determining whether the German merger control thresholds were met.

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[48] *See* FCO press release of December 23, 2017, available in English at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/23_11_2017_CTS_Four_Artists.html?nn=3591568.

[49] *See* FCO's case report of January 16, 2018, case B9-165/17, available in German at: http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Fusionskontrolle/2018/B9-165-17.pdf?__blob=publicationFile&v=1; *see also* FCO press release of December 6, 2017, available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/06_12_2017_Airbus_Bombardier.html?nn=3591568.

The FCO determined Airbus's acquisition of CSALP would not significantly impede competition, neither in the market for all single-aisle aircraft nor in the smaller market for aircraft with a seat capacity of only 100–150 seats that, according to the market survey, airlines and aircraft manufacturers consider as a separate product market. Airbus and Boeing are by far the leading manufacturers in an overall market including all single-aisle aircraft, and CSALP and Embraer are negligible competitors in this overall market. By contrast, in a narrower market for aircraft with 100–150 seats, CSALP and Embraer are the leading manufacturers while Airbus and Boeing are only minor competitors. Airbus and CSALP were not considered close competitors.

The FCO also found that aircraft with a seat capacity of between 100–150 seats are of minor importance for both European and, especially, German airlines. Given the low sales of less than €15 million in Germany in the last business year, the market for aircraft with 100–150 seats constitutes a *de minimis* market, which means that this market was not relevant for the competitive analysis of the FCO.

Policy and Procedure

Guidelines on the Administrative Proceeding Governing Ministerial Authorizations

On October 27, 2017, the Federal Ministry for Economic Affairs and Energy issued its Guidelines on the Administrative Proceeding for Ministerial Authorizations.[50] These guidelines are a reaction to the highly controversial ministerial authorization granted by the Minister in the context of the *EDEKA/Kaiser's Tengelmann* merger and a subsequent court decision that the authorization was unlawful.[51]

The Ministry's guidelines provide a comprehensive overview of the entire course of the administrative proceedings governing ministerial authorizations. They do not deal with the substantive requirements for such authorizations. The guidelines include instructions to the Ministry, such as the requirement to carry out a careful documentation of the entire proceeding. Pursuant to the guidelines, the Ministry may have informal discussions with concerned parties even prior to the initiation of an authorization proceeding. However, the Ministry must document such informal talks and record in the case file the participants and contents of such discussions once an application for ministerial authorization has been filed.

Finally, an applicant may propose commitments to the Ministry during the proceeding to overcome potential obstacles to the granting of the authorization. The Ministry will then share the proposed commitments with all parties concerned and the Monopolies Commission (an independent advisory body) for consultation. The Monopolies Commission is involved throughout the entire authorization proceeding, in particular by way of an opinion on the merger, which the Ministry shall seek from the Monopolies Commission. In the event the Ministry deviates in its authorization decision from the Monopolies Commission's opinion, it has to justify this in writing.

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[50] The guidelines are available in German at: https://www.bmwi.de/Redaktion/DE/Downloads/B/bekanntmachung-der-leitlinien-fuer-das-verwaltungsverfahren-zur-entscheidung-ueber-die-erteilung-einer-ministererlaubnis.pdf?__blob=publicationFile&v=4.

[51] *See* National Competition Report, October–December 2016, p. 14.

GREECE

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

Horizontal Agreements

The Hellenic Competition Commission Fines Distributors of Expensive, High Quality Cosmetics for Colluding to Set Maximum Discounts Granted to Retail Shops during the Sales Periods

On October 19, 2017, the HCC published the findings of its investigation in the wholesale and retail market of high-end cosmetics (hereinafter, "cosmetics"), for 2004–2013.[52] The investigation was launched following a complaint submitted in 2006 by the Greek company Notos Com Holdings S.A. ("Notos Com"), a distributor and retail company in the cosmetics sector, against five Greek distributors[53] regarding an alleged infringement of Article 1 of the Competition Act, the equivalent of Article 101 TFEU.

According to the complaint, retail shops normally sold the cosmetics to consumers at a 30% discount on their nominal price, while during the winter and summer sales discounts would reach up to 50%. This additional discount to the consumers was partially financed (up to 10%) from the distribution companies by virtue of a credit note or on-invoice discount to the retailers, while the other 10% was granted by the retailers. Just before the 2006 January winter sales, Notos Com, in its capacity as a retailer, announced that it would offer consumers, through its own network of shops, a 60% discount on cosmetics that it imported and distributed, instead of 50%. In parallel, Notos Com, as a distributor, offered a 20% discount on its brands of cosmetics (instead of the 10% that Notos Com and the other five distribution companies offered until then) to all other retail shops so that they too could pass on the benefit of the increased discount to the consumers. According to Notos Com, each one of the five distributors reacted separately to this announcement by claiming that the 60% discount offered by Notos Com shops on its brands was in breach of their existing arrangement. Moreover, the reaction was coordinated because: (i) they all informed Notos Com that they would not finance the 10% discount in relation to their brands sold in Notos Com retail shops, while they would continue to do so regarding the other retail shops in Greece; and (ii), they all announced that they would withdraw from the Notos Com retail shops the beauty consultants that supported their brands through specialized advice to consumers (such support constituting an indispensable element to the sales of cosmetics).

The HCC defined the relevant product market as the wholesale market of high quality, expensive cosmetics (without further division into submarkets (e.g., perfumes, maquillage products, hair products, etc.)) because, from the demand side, retail companies purchase to a certain extent the whole range of cosmetics to cover the various needs of their customers. Also, from the supply side, the importers/distributors tend to procure the entire range of their brands of cosmetics to cover the needs of their customers, *i.e.*, the retail shops.

Regarding market shares, the analysis showed that the wholesale cosmetics market is an oligopolistic market, consisting of Notos Com and the other five distributors, all together covering almost 100% of the market. From 2003 to 2013, Estee Lauder Hellas occupied the first position with shares from 25–45%, followed by Notos Com with shares from 15–35% and the other four with shares ranging from 5–25%.

Following a detailed analysis of all the evidence collected, the HCC found that all six distributors had put in place a horizontal agreement or/and concerted practice fixing the level of discounts to retailers

[52] HCC Decision No. 646/2017.
[53] Estee Lauder Hellas, Parfums Christian Dior Hellas, L'Oreal Produits de Luxe Hellas, Gerolymatos Aebe, and Sarantis Aebe.

during sales. This agreement had a vertical aspect in that each of the five distributors implemented the above agreement with respect to Notos Com, which, in its capacity as a retailer, applied this agreed discount. This implied that Notos Com ability to determine the retail prices it would charge to the consumers from its network of shops was limited. So, when Notos Com decided to exceed the agreed maximum discount (50%), the other five distributors reacted strongly and in a coordinated manner, which, according to the HCC, was additional evidence of a cartel. Faced with the coordinated retaliation from the five distributors that withdrew their beauty consultants and refrained from supporting 10% of the discount, Notos Com was forced to restore the discount offered in its shops to consumers for its own brands to 50%.

Finally, the HCC found that the six distributors fixing the retail prices of their products sold by other retailers in the market was an additional vertical aspect of the cartel. In particular, recommended retail pricelists were exchanged between the distributors and retailers, which the latter were called to apply. In addition, on occasion the retailers' margin was essentially determined by the distributors. The six distributors representing almost 100% of the cosmetics market with powerful brands suggested that it was unlikely that the retailers would refrain from implementing the recommended retail prices.

A number of dissenting views were expressed from members of the HCC regarding the participation of Notos Com in the horizontal collusion and also regarding when each of the undertakings' involvement began. The HCC eventually decided that Notos Com had participated in the infringement but deserved a fine reduction because the cartel was revealed and sanctioned due to its complaint. Regarding the period of the infringement, the HCC decided that the cartel began on January 1, 2005 (one year before the January 2006 winter sales that triggered the complaint) and lasted until July, August, or September 2006, depending on the undertaking. The HCC fined Estee Lauder Hellas €5.3 million, Parfums Christian Dior Hellas €1.7 million, L'Oreal Produits de Luxe Hellas €2.6 million, Sarantis Aebe €1.9 million, Gerolymatos Aebe €2.9 million, and Notos Com €4 million.

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 Accounting "Big Four" for Bid-Rigging in a Tender for the Provision of Technical Assistance to the Public Administration in the Management of EU Structural Funds

On October 18, 2017,[54] the ICA fined the Italian branches of the "big four" accounting firms (the "big four") [55] €23 million for coordinating their participation in a tender procedure for the procurement of support and technical assistance services to audit authorities in the framework of programs co-financed by the EU.

The nine-lot tender, launched in March 2015 by the Italian government procurement body Consip SpA ("Consip"), was worth €66.5 million. The big four were assigned only five of the nine lots; other bidders won the remaining four.

This case marks yet another example of the ICA's recent focus on collusion in public tender procedures.[56]

The investigation was prompted by Consip reporting an anomalous pattern in the big four's bids to the ICA. In particular, Consip noted that the big four's most competitive bids were not for the same lots. In a "chessboard-like" fashion, for each lot in turn, only one of the big four submitted a meaningfully competitive bid (with a discount of approximately 30%), whereas the remaining participants submitted offers with discounts between 10–15% (characterized by the ICA as "supporting" bids).

The ICA found contemporaneous evidence of contacts between the big four, including e-mail correspondence and meetings. These contacts occurred after the tender had been announced, but before the publication of the call for tender (*i.e.*, before the big four knew the number of lots and their value). The big four explicitly acknowledged their participation in these meetings but claimed that they had a legitimate purpose.

The big four's alternative justification for their conduct was threefold: (i) the lots for which high-discount bids were submitted were chosen according to each of the big four's historic presence in a given territory; (ii) the meetings could be explained by potential issues of conflicts of interest with regard to previously awarded or future tenders; and (iii) discrepancies between the big four's bids in a given lot followed the different costs (*e.g.*, travel expenses) that each had to bear to provide the relevant services.

The ICA was not convinced by the alternative explanations. Nor did the ICA take into

[54] ICA, decision of October 18, 2017, *Servizi di Supporto e Assistenza Tecnica alla PA nei Programmi Cofinanziati dall'UE* (Case No. I796).

[55] In particular: Deloitte & Touche SpA and Deloitte Consulting Srl (together, "Deloitte"); Ernst & Young SpA and Ernst & Young Financial Business Advisors SpA (together, "EY"); KPMG SpA and KPMG Advisory SpA (together, "KPMG"); and PricewaterhouseCoopers SpA and PricewaterhouseCoopers Advisory SpA (together, "PWC"). A fifth firm, Meridiana Italia Srl, was part of the proceedings but was not fined. Three additional firms (Lattanzio Advisory SpA, IT Audit Scarl, and Cogea Srl) were raided during the initial phase of the investigation.

[56] *See* ICA handbook on public tenders, October 26, 2013; and ICA memorandum of understanding signed with the Italian anti-bribery and corruption authority, December 11, 2014. *See also* ICA, decision of December 22, 2015, *Gara Consip Servizi di Pulizia nelle Scuole* (Case No. I785) and ICA, decision of March 21, 2017, *Gara Consip FM4- Accordi tra i Principali Operatori del Facility Management* (Case No. I808).

consideration the timing of the big four's meetings with respect to the call for tender.

Regarding the €23 million fine, applying its Notice of October 22, 2014, No. 25152 ("ICA Fining Guidelines"), [57] the ICA fined EY €8.5 million, KPMG €7.6 million, Deloitte €5.9 million, and PWC €1.5 million. The ICA calculated the fines by applying the maximum basic amount possible (30% of the sales of products to which the infringement related)[58] and adding to that the maximum entry fee possible (25% of the above-mentioned sales).[59]

This fining decision may appear unusually harsh in light of the effects of the infringement (as mentioned, the big four's bids were successful in only five of the nine lots). However, this case also provides an example of the ICA's readiness to grant a fine discount (in the form of a mitigating circumstance) [60] to undertakings that provide evidence of proactive efforts to revisit and update their antitrust compliance program *after* an investigation has commenced, but *before* a statement of objections is issued. [61] In this respect, EY, Deloitte, and PWC each obtained a 5% fine discount.

Fining Policy

The Council of State Clarifies How the ICA Fining Guidelines Apply to Single-Product Companies, Confirming a TAR Lazio Judgment Upholding an ICA Decision Against Two Cartels in the Concrete Sector in the Friuli-Venezia Giulia Region

On December 12, 2017, the Council of State confirmed [62] a 2016 ruling of the TAR Lazio upholding the ICA's first application of the ICA Fining Guidelines in connection with two cartels in the concrete sector in the Friuli-Venezia Giulia Region.[63]

The Council of State decision is of particular significance because, *inter alia*, it analyses how the ICA Fining Guidelines should be applied to single-product companies, whose overall turnover may be largely derived from sales made under anticompetitive agreements.

Under the ICA Fining Guidelines, conduct aimed at fixing prices and allocating customers are subject to a fine of a basic amount of between 15–30% of the sales of products to which the infringement is related,[64] due to the particularly serious and secret nature of these antitrust violations.

In the case concerned, the ICA applied the minimum percentage (15%) applicable to these infringements. However, because the investigated undertakings [65] were single-product companies (*i.e.*, the value of the relevant sales coincided with their total turnover), the application of this percentage already brought

[57] *See* ICA, Notice of October 22, 2014, No. 25152 *Linee Guida sulla modalità di applicazione dei criteri di quantificazione delle sanzioni amministrative pecuniarie irrogate dall'Autorità in applicazione dell'articolo 15, comma 1, della legge n. 287/90*.
[58] ICA Fining Guidelines, §§ 11–14.
[59] ICA Fining Guidelines, § 17.
[60] ICA Fining Guidelines, § 23.
[61] *See*, *inter alia*, ICA, decision of June 8, 2016, *Accordo tra Operatori del Settore Vending* (Case No. I783); ICA, decision of December 21, 2016, *Gare Ossigenoterapia e Ventiloterapia* (Case No. I792); and ICA, decision of July 25, 2017, *Aumento Prezzi Cemento* (Case No. I793).

[62] Council of State, judgments of December 12, 2017 (Judgment Nos. 5997–5998).
[63] For a more detailed description of the facts of the case and of the judgment of the TAR Lazio, see National Competition Report, April–June 2016, pp. 31–32 and National Competition Report, January–March 2015, pp. 20–21.
[64] ICA Fining Guidelines, §§ 11–14.
[65] General Beton Triveneta s.p.a., Calcestruzzi Zillo s.p.a., Friulana Calcestruzzi s.p.a., SuperBeton s.p.a., Cobeton S.p.A. (later changed its name to Cobeton s.r.l.), Calcestruzzi s.p.a., La Nuova Calcestruzzi S.r.l., Calcestruzzi Trieste Nord Est s.r.l., Concrete Nordest S.r.l., Intermodale s.r.l., and Nord Est Logistica s.r.l.

the fine beyond the statutory ceiling of 10% of the total annual turnover (set out in Article 15 of Law No. 287/90). As a result, their fine was reduced to 10% of the total annual turnover, resulting in a fine of almost €12.5 million for the eight concrete undertakings.

The undertakings argued that the ICA's application of the ICA Fining Guidelines to single-product companies automatically leads to the imposition of the highest applicable fine (10% of the total turnover), regardless of the severity of the infringement and any mitigating circumstances. The undertakings asserted that, due to their punitive nature, antitrust fines should be subject to the general principles of criminal law. In particular, they must be tailored to reflect the gravity of the offense and comply with the principle of legal certainty. The undertakings alleged that the ICA's application of the ICA Fining Guidelines was incompatible with Law No. 689/81 on administrative penalties, which provides additional criteria to evaluate undertakings' conduct, such as the severity of the infringement, the undertaking's attempts to remove or mitigate the infringement's consequences, the undertakings' specific characteristics, and the undertaking's economic conditions.

The Council of State, upholding the reasoning of the TAR Lazio, dismissed the undertakings' arguments. In particular, the Council of State confirmed that the ICA had not erred in its application of the minimum percentage (15%) applicable to the "very serious" antitrust infringements of restrictions of competition "by object."

The Council of State did not consider that the investigated undertakings were single-product companies (and the value of their relevant sales coincided with their overall turnover) as a relevant ground of appeal. It reasoned that the ICA Fining Guidelines do not provide any additional and different criteria for evaluating the conduct of single-product companies involved in a horizontal agreement. Therefore, the ICA should not depart from the 15% minimum fine only because single-product companies are involved. The single-product nature of the concerned companies entailed that the fine was set at the highest applicable level, in light of the statutory ceiling of 10% of the total annual turnover.

The Council of State stated that antitrust fines should be tailored with a view to the deterrence goal of competition law and irrespective of the single-product nature of the undertakings involved. In particular, the Council of State found that the ICA had not infringed the principle of proportionality and non-retroactivity of administrative fines. The Council of State found that the automatic reduction of the maximum applicable fine to 10% of the overall turnover is a particularly beneficial provision for single-product companies. The general correspondence between the relevant sales and total turnover will likely trigger, for these companies, an almost automatic reduction of the applicable fine to 10% of their turnover.

The Council of State also dismissed the pleas that the ICA had not considered the following circumstances relevant (which could have resulted in a reduction in the fine): (i) that the undertakings had made losses during the previous financial years; (ii) the general economic crisis in the concrete sector; (iii) the undertakings' "inability to pay"; (iv) their cooperation outside the framework of the leniency programs; (v) the undertakings' proactive steps to redress their behavior and comply with the law; and (vi) the implementation of antitrust compliance programs.

Finally, the Council of State recalled that the ICA Fining Guidelines codify previous case law and decision practice in relation to antitrust fine calculation issues.

Abuse

The ICA Fines Vodafone Italia and Telecom Italia for Margin Squeeze in the Upstream Market for Wholesale SMS Termination Services, with Effects in the Downstream Market for Retail SMS Bulk Services

On December 13, 2017,[66] the ICA found that both Vodafone Italia SpA ("Vodafone") and Telecom Italia SpA and its subsidiary Telecom Italia Sparkle SpA (together, "Telecom Italia"), abused their respective dominant positions in the upstream market for SMS termination services to hinder as-efficient competitors from competing in the downstream bulk SMS markets.

SMS termination is a wholesale service provided by mobile network operators ("MNOs"), comprising the delivery of an SMS to a client within an MNO's network.[67] The SMS termination service is required when an SMS is sent by a final consumer in one network and is received by a final consumer in another network. An operator in the first network (the originating operator) must purchase the wholesale SMS termination services from the MNO in the second network (the destination operator, or destination MNO). Only the MNO can deliver an SMS to a given final consumer within its network.

With the retail SMS bulk service, large companies (e.g., banks) may send an SMS to a high number of clients (e.g., notifying them that a credit card is being charged). The service comprises the origination of the message from the sender and the transportation to the network of the destination MNO. The destination MNO manages the SMS termination. The retail SMS bulk service may be provided by the MNO itself, by other licensed operators ("OLOs"),68 or by SMS aggregators.69

After establishing that Vodafone and Telecom Italia, as MNOs, hold a dominant position in the market for SMS termination services in their respective networks, the ICA analyzed Vodafone's and Telecom Italia's conduct.

The ICA established that Vodafone: (i) had charged its internal divisions lower tariffs for the provision of the SMS termination service (€0 to 0.5 cents per SMS) than it applied to OLOs (€2.3 to 2.6 cents per SMS), these tariffs were not replicable by an as-efficient competitor; and (ii) had provided OLOs with interconnection services of a lower quality and higher cost than it reserved for the interconnection between itself and other MNOs.

This conduct resulted in Vodafone being able to attract large companies and SMS aggregators with offers (often coupled with retroactive rebates and long-term exclusivity) for the retail SMS bulk service that could not be matched by OLOs.

The ICA concluded that Vodafone had engaged in internal-external discrimination, of both an economic and technical nature, frustrating infrastructure investments and foreclosing as-efficient competitors from the retail SMS bulk service market. The ICA fined Vodafone €5.8 million.

Concerning Telecom Italia, the ICA found that, like Vodafone, Telecom Italia had applied lower tariffs to its internal divisions. Moreover, the ICA assessed the bids that Telecom Italia presented in recent tenders launched by large potential clients, and observed that Telecom Italia's offers were below the

[66] ICA, decision of December 13, 2017, *Vodafone-SMS Informativi Aziendali* (Case No. A500A); and ICA, decision of December 13, 2017, *Telecom Italia-SMS Informativi Aziendali* (Case No. A500B).

[67] MNOs are vertically integrated, so-called "infrastructured" operators (*i.e.*, operators holding their own network), active both in the upstream market for SMS termination services and the downstream bulk SMS markets. Telecom Italia (via TIM), Vodafone, and Wind Tre are Italy's MNOs.

[68] OLOs are operators specialized in the retail SMS bulk service, holding the necessary infrastructure (but not the network itself).

[69] SMS aggregators are operators with a lesser degree of infrastructure, which purchase traffic from MNOs and resell it. SMS aggregators are only active in the downstream bulk SMS markets.

"critical threshold," *i.e.*, below the cost of termination.

The ICA concluded that Telecom Italia had engaged in an economic margin squeeze, aimed at excluding OLOs from the market for retail SMS bulk services. The ICA's conclusion was further corroborated because Telecom Italia had won all but one of the above-mentioned tenders and certain competitors were forced to bid at a loss. The ICA fined Telecom Italia €3.7 million.

Policy and Procedure

The Court of Rome Rules in Favor of Pfizer in the Framework of a Follow-On Action Based on the Xalatan Case, Shedding Light on Antitrust Private Enforcement Issues Following the Implementation of the EU Antitrust Damages Directive

In January 2012, the ICA found that Pfizer Italia Srl ("Pfizer") had abused its dominant position in the market for a glaucoma treatment based on the active ingredient Latanoprost (marketed by Pfizer as Xalatan) through a complex legal strategy.[70]

This abusive strategy aimed at delaying generic companies' entry into the market was implemented by Pfizer through several attempts to fraudulently extend its active ingredient patent coverage until 2011, including by lodging a divisional patent application with the European Patent Office ("EPO"). At the same time, Pfizer Italia had started legal and administrative actions against competing generics producers before national courts.

While the TAR Lazio annulled the ICA's decision and fine of approximately €11 million,[71] in February 2014, the Council of State upheld the ICA's appeal confirming the ICA's initial decision and fine.[72] In particular, the Council of State dismissed Pfizer's arguments on the full compliance of its divisional patent application with intellectual property ("IP") law and its underlying rationale of protecting extensive R&D investments.

Following the Council of State's judgment, the Italian Ministries of Health and of Economics and Finance ("Italian Ministries") brought a follow-on action against Pfizer before the Court of Rome claiming damages of approximately €14 million for the Italian National Health System due to the abusive conduct ascertained by the ICA.

In July 2017, the Court of Rome rejected the Italian Ministries' damages claim.[73]

First, it found that a company's exercise of its IP rights is presumed to be lawful insofar as its legitimate protection purposes are not distorted. It concluded that IP protection is actually pro-competitive as long as its aim is to make R&D activities profitable. The Court of Rome also found that Pfizer's application for a divisional patent, together with its other administrative actions, were not part of an exclusionary strategy because they had legitimate legal and/or economic rationales. The Court of Rome's judgment.

Second, regarding the alleged abuse of dominance through a complex vexatious litigation strategy, it recalled established EU case law, which requires two cumulative conditions to be met to consider a legal action as abusive. In particular: "(i) the action cannot reasonably be considered as an attempt to establish the rights of the undertaking concerned and can therefore only serve to harass the opposite party and (ii) it is conceived in the framework of a plan whose goal is to eliminate competition."[74] These conditions must be interpreted restrictively.

In reaching its conclusion, the Court of Rome did not apply Article 7 of Legislative Decree

[70] ICA, decision of January 11, 2012, *Ratiopharm/Pfizer* (Case No. A431).
[71] TAR Lazio, judgment of September 2, 2012, No. 7467.
[72] Council of State, judgment of February 12, 2014, No. 693.

[73] Tribunale di Roma, judgment of July 24, 2017, *Ministry of Health v. Pfizer Italia Srl* (Judgment No. 15020).
[74] *Agria Polska and Others v. Commission* (Case T-480/15) EU:T:2017:339.

No. 3/2017[75]—which only came into effect after the court proceedings—and which allows a court to treat the ICA's final prohibition decision as binding as regards to the nature of the infringement as well as its material and territorial scope. Additionally, it confirmed the necessity for the claimant to prove under all circumstances two elements: (i) the causal relationship between the alleged damage and the infringement of competition law; and (ii) the damage.

The Court of Rome found that the Italian Ministries had submitted inadequate evidence to corroborate their allegations. In particular, they had failed to prove both the damage and causal link between the infringement and damage. Moreover, the existence of the antitrust infringement itself was questionable because, after the ICA's decision, the EPO's Technical Board of Appeal, overturning the previous decision of the Opposition Division, confirmed the validity of Pfizer's divisional patent application. The Court of Rome's judgment is therefore inconsistent with the ICA's decision, and may likely be appealed.

[75] Legislative Decree No. 3 of January 19, 2017 implementing Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ 2014 L 349/1 (the "EU Antitrust Damages Directive").

NETHERLANDS

This section reviews developments under the Competition Act of January 1, 1998 (the "Competition Act"), [76] *which is enforced by the Netherlands Authority for Consumers and Market (Autoriteit Consument & Markt, "ACM").*[77]

Horizontal Agreements

CBb Confirms that Cover Pricing Is a By-Object Restriction, But Further Lowers Fine in Construction Cartel

On October 12, 2017, the Dutch Trade and Industry Appeals Tribunal ("CBb") further lowered the fines imposed on demolition companies in the region of Rotterdam for cover pricing—submitting bids in tenders that are not expected to be successful.[78] In its 2013 fining decision, the ACM erroneously applied a gravity multiplier for bid-rigging—agreeing in advance which firm will win the bid.[79]

In November 2015, the Rotterdam District Court found that cover pricing is a less serious infringement than bid-rigging because, unlike the latter, it does not eliminate competition altogether.[80] Therefore, it concluded that the ACM's gravity multiplier of 1.75 was too high and lowered it to 1.5 (the lowest possible multiplier for "very serious" infringements). Even though this resulted in lower fines, the demolition companies appealed to the CBb disputing the ACM's and Rotterdam District Court's finding that their behavior amounted to a restriction of competition by object.

The CBb rejected this claim. It noted that undertakings need to independently determine how to react to a request for tender in which they are not interested. If they engage in cover pricing, they are at an advantage compared to other undertakings. This frustrates competition and can drive prices up. According to the CBb, the ACM and Rotterdam District Court correctly concluded that the companies' behavior had such a negative effect on the tenders in question that it can be considered as having the object to restrict competition. However, unlike the ACM and Rotterdam District Court, the CBb qualified cover pricing "only" as a *serious* infringement that needs to be clearly distinguished from *very serious* infringements such as bid-rigging. It therefore further lowered the gravity multiplier from 1.5 to 1, which resulted in even lower fines for the appellants.

Policy and Procedure

The Hague District Court Determines that ACM May Copy Data from Mobile Phones During Dawn Raids

On November 22, 2017, the Hague District Court dismissed a company's request for an injunction against the ACM copying data[81] from mobile phones of six of its employees during a dawn raid.[82] The company contended that copying and reviewing/perusing this data would violate the right to privacy laid down in Article 8 ECHR, all the more because the legal basis for copying the data (Article 5:17 of the Dutch General Administrative Law Act) is limited to business data.

The ACM announced that it would follow the procedure laid down in its Digital Inspection Guidelines introduced in 2014 (*ACM Werkwijze voor onderzoek in digitale gegevens 2014*). These guidelines set out that, after having obtained the digital data, the ACM must submit an overview and

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

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

[78] Trade and Industry Appeals Tribunal, Judgment of October 12, 2017, ECLI:NL:CBB:2017:325.

[79] Cases 7400, 7401, and 7403 (*Sloopbedrijven*), ACM decisions of May 24, 2013.

[80] Rotterdam District Court, Judgment of November 26, 2015, ECLI:NL:RBROT:2015:8610.

[81] With the exception of video and audio files as well as ringtones, the ACM made full copies of the data.

[82] The Hague District Court, Judgment of November 22, 2017, ECLI:NL:RBDHA:2017:14150.

specify each file individually, resulting in a so-called "secured data set" (*veilliggestelde dataset*). The ACM will then, within a reasonable period, assess whether the data falls within the scope of the investigation resulting in a so-called "within-scope data set" (*binnen de reikwijdte dataset*). The ACM's forensic IT specialists carry out this assessment by running search terms over the data at the ACM's premises. As this procedure is automated, the ACM does not qualify it as "a perusal" (*inzien*), meaning that neither the investigated company nor its legal representatives are allowed to be present. Presence is only permitted when the ACM peruses the actual data. After removal of personal and legally privileged data, which the company must request in writing, the ACM is left with a so-called "investigation data set" (*onderzoeksdataset*). This dataset must be made available to the company pursuant to the procedures of Dutch administrative law.

The Hague District Court noted that the ACM used its powers of investigation in accordance with the law. Due to the size/amount of data on the six mobile phones, the ACM was not able to carry out a selection—separate personal data from business data—during the dawn raid. According to the Hague District Court, the interest of the investigation outweighed the individuals' right to privacy, especially given that the ACM's Digital Inspection Guidelines provide sufficient safeguards for the protection of personal data. Unlike legal privilege claims, which are assessed by an independent designated ACM official, personal data claims are assessed by the lead officer of the investigation. However, the Hague District Court held that the possibility that this may occur does not justify granting the company's request for an injunction.

SPAIN

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

Horizontal Agreements

Spanish High Court Annuls CNMC Decision and €15 Million Fine Imposed on Waste Management Company Valoriza (Group Sacyr) and Others for Not Providing an Adequate Market Definition and Not Having Demonstrated the Existence of a Single and Continuous Infringement

In January 2015, the CNMC fined 39 companies and 3 associations active in several areas related to urban waste management, including paper recycling and urban cleaning, €98 million.[83] The CNMC considered that from 2000 to 2013 the companies operated a market-sharing cartel and coordinated their commercial strategies relating to public tenders in many regions. The CNMC considered the companies responsible for a single and continuous infringement of Article 1 LDC.

Large companies like Urbaser (ACS), Valoriza (Sacyr), Cespa (Ferrovial), and Saica recieved the highest individual fines, amounting to almost three-fourths of the total fine. Companies appealed the decision before the Spanish High Court (Audiencia Nacional).

On December 28, 2017, the Spanish High Court rendered its judgment in an appeal brought by Valoriza (Sacyr).[84]

The Spanish High Court noted that, according to EU case law, three conditions must be met to establish participation in a single and continuous infringement, namely an overall plan pursuing a common objective, a willing contribution of the undertaking to that plan, and its awareness of the offending conduct of the other participants (showing that the undertaking knew or could have reasonably known about the behavior of the other participants, and it was prepared to assume the risk of an infringement).

In the view of the Spanish High Court, the CNMC had not demonstrated that these criteria were met. More specifically, the Spanish High Court found that the CNMC’s definitions of the markets to which the alleged single and continuous infringement related were ambiguous. The CNMC had not been able to delineate the exact product markets covered by the collusive agreement, but it referred instead to broad sectors of activity within urban waste management and broad geographic areas. The CNMC had acknowledged the difficulty in defining a specific product market for the infringement, which, in the view of the Spanish High Court, demonstrated that the participants in the infringement could not have known about the other participants’ behavior, hence it could not be found that they took part in a single and continuous infringement. Absent a clear definition of the market affected by the infringement, the CNMC had not shown the required connection between the infringing companies or that they pursued common objectives and the same overall plan.

The Spanish High Court found that it had not been demonstrated that the company participated in a single and continuous infringement, and it annulled the CNMC decision and Valoriza’s fine. The Spanish High Court mentioned that Valoriza’s behavior may have infringed the prohibition of anticompetitive agreements, but this was not discussed in the judgment. Valoriza’s behavior could in any event not be described as a single and continuous infringement.

Also on December 28, 2017, the Spanish High Court, relying on similar arguments, upheld appeals

[83] Case S/0429/12, *Residuos*, decision of the Council of the CNMC of January 8, 2015.
[84] Case 120/2015, judgment of the Spanish High Court of December 28, 2017.

by other addressees of the CNMC decision. The CNMC announced its intention to appeal these rulings before the Spanish Supreme Court.

Vertical Agreements

The Spanish Supreme Court and the CNMC Rule on Aspects of the CNMC's Powers of Investigation

In October and November 2017, the Spanish Supreme Court delivered two judgments and, in October 2017, the CNMC issued a decision clarifying the CNMC's powers of investigation, including the level of detail and information that is required by judges scrutinizing administrative investigation orders for dawn raids.

On November 22, 2017, the Spanish Supreme Court issued its judgment concerning a dawn raid carried out in the context of a cartel investigation.[85] The judicial warrant purportedly sanctioning the dawn raid had only authorized the entry into the premises located at the specific address of the undertaking under investigation, on the grounds that it was the parent company's (Grupo Lactalis, SA) premises. However, the warrant did not include the entry into the group subsidiaries' premises, which had only generically been requested by the CNMC, in so far as the subsidiaries' addresses had not been specified in the CNMC's investigation order. The court order expressly indicated that no addresses other than the one specifically mentioned in the CNMC's investigation order could be searched.

Subsequently, dawn raids took place both at the parent's and certain subsidiaries' premises that were located in the same address.

The Spanish Supreme Court held that the dawn raid had been lawful because, in light of the principle of a single undertaking, the authorization had to be interpreted as applying to both the parent and subsidiaries, so long as the specific premises being accessed were covered by the judicial warrant, without it being necessary for the CNMC's investigation order to specify each subsidiary being raided.

On October 31, 2017, the Spanish Supreme Court confirmed the decision by lower courts not to grant a warrant for a dawn raid, triggered by a leniency application, on *Sociedad Española de Montajes Industriales* ("SEMI") on the grounds that the CNMC had not provided any individualized evidence with regard to SEMI's purported participation in the practices described in the investigation order.[86]

The Spanish Supreme Court rejected the CNMC's allegation that the individualized evidence had been obtained from a leniency applicant, and that this precluded it from presenting this evidence to the judge. The judgment noted that the CNMC Leniency Notice[87] established a mechanism for the authority to share with the court information provided by a leniency applicant, ensuring its confidentiality, when required by the judicial body.

On October 26, 2017, the Council of the CNMC examined and confirmed an investigation order for a dawn raid on Philip Morris, S.L. ("Philip Morris") and dismissed Philip Morris's allegations that the CNMC had embarked on a fishing expedition based on an investigation order that was too generic and lacking any preliminary evidence of a possible infringement.[88] Philip Morris also argued that the search terms used by the authorities in this dawn raid were comparatively more generic than the ones used in dawn raids on other competitors.

The Council of the CNMC held that the investigation order had been sufficiently detailed and the search terms used during the inspection were merely a tool at the authorities' disposal and were

[85] Case 4194/2017, judgment of the Spanish Supreme Court of November 22, 2017.

[86] Case 4102/2017, judgment of the Spanish Supreme Court of October 31, 2017.

[87] Notice of the National Competition Commission on the Leniency Program of June 19, 2013, para. 75.

[88] Case R/AJ/056/17, *Philip Morris*, decision of the Council of the CNMC of October 26, 2017.

appropriate in the context of a search for preliminary evidence.

The decision therefore held that the investigation order and subsequent dawn raid had been lawful. The investigation order included a description of the alleged practices and an indication of the potentially affected markets, but it did not include individualized evidence involving Phillip Morris in the cartel.

These judgments and decisions shed some light on the level of detail that is required of investigation orders under Spanish law, but also point to a possible discrepancy between the more stringent approach of the Spanish Supreme Court, which required some individualized evidence of involvement in the practices being investigated, and the CNMC's laxer application of the standard in arguably comparable circumstances.

Spanish Supreme Court Confirms Prevalence of Antitrust Rule Over Broadcasting Regulations in Commercial Dispute

On May 2, 2006, Spanish premier football league club Real Zaragoza S.A.D. ("Real Zaragoza") and broadcaster Mediaproduccion S.L.U. ("Mediapro") signed a contract whereby Mediapro was granted the right to broadcast Real Zaragoza matches on an exclusive basis for five sporting seasons (the "Real Zaragoza agreement"). In August 2007, the agreement was extended for an additional season, to a total of six. The duration was conditional on Real Zaragoza staying in the first division of the league.[89]

On March 31, 2010, the Spanish Parliament enacted the General Law of Audiovisual Communication,[90] which introduced a compulsory maximum duration of four years for agreements granting exclusive football broadcasting rights in force at that time.

On April 14, 2010, the CNC, in its landmark *Football Clubs* decision,[91] declared that broadcasting exclusivity agreements signed between a number of football clubs and Mediapro and Sogecable, including the Real Zaragoza agreement, were contrary to the prohibition of anticompetitive agreements contained in Article 1 LDC and Article 101 TFEU if they had a duration of more than three seasons.

Following the *Football Clubs* decision, Real Zaragoza gave notice to Mediapro that the contract had been resolved pursuant to the decision of the CNC, and offered to negotiate a new contract in conformity with competition law, notably with a three-year maximum duration as established by the *Football Clubs* decision. Mediapro, in turn, contended that the four-year maximum duration contained in the General Law of Audiovisual Communication was applicable and should be adhered to in a renewed contract.[92]

A long and intricate dispute followed, lasting almost a decade, with one party litigating against the other in a multitude of civil and commercial courts. This was compounded, amongst other factors, by: (i) Real Zaragoza's signing an agreement with Mediapro's competitor DTS[93] for the exclusive broadcasting of league seasons that Real Zaragoza considered not to be exclusively assigned to Mediapro; (ii) Mediapro's bankruptcy proceedings; and (iii) Real Zaragoza's relegation to the second division of the football league division, which effectively extended the overall duration of the original agreement with Mediapro, when litigation had already started.

[89] In case of relegation from the first division, the contract would be suspended, for as long as Real Zaragoza remained relegated. This happened during the 2008–2009 season, when Real Zaragoza played in the second division.

[90] Law 7/2010 of March 31, 2010, available at: https://www.boe.es/buscar/pdf/2010/BOE-A-2010-5292-consolidado.pdf.

[91] Resolution Expte. S/0006/07, AVS, Mediapro, Sogecable y Clubs de Fútbol de 1ª y 2ª División, available at: https://www.cnmc.es/sites/default/files/34944_0.pdf.

[92] Mediapro also contended that the *Football Clubs* decision was purely provisional, as it had been appealed before the National High Court.

[93] Distribuidora de Televisión Digital S.A.

On November 3, 2017, the Spanish Supreme Court dismissed an appeal lodged by Mediapro, finding that the contract for the exclusive assignment of broadcasting rights through the Real Zaragoza agreement was contrary to Article 1 LDC and Article 101 TFEU and consequently null and void, insofar as it had a duration of more than three seasons.[94] In its judgement, the Spanish Supreme Court noted that the three-season duration limit set out in the *Football Clubs* decision remained the applicable competition law standard in this case, even if the General Law of Audiovisual Communication might have adopted a four-seasons maximum duration.

[94] Case 2670/2014, judgment of the Spanish Supreme Court of November 3, 2017.

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.

Horizontal Agreements

The Patent and Market Court of Appeal Dismisses SCA Appeal

On November 29, 2017, the Patent and Market Court of Appeal dismissed the appeal[95] brought by the SCA against the Stockholm City Court judgment of May 16, 2016,[96] dismissing the complaint brought by the SCA regarding non-compete clauses entered into between removal companies.

The SCA alleged that Alfa Quality Moving AB ("Alfa") had entered into anticompetitive non-compete clauses with NFB Transport Systems AB ("NFB") and ICM Kungsholms AB (now Vänrun AB ("Vänrun")), respectively, as part of Alfa's acquisition of the international portion of Vänrun's and NFB's removal businesses.

Alfa acquired NFB's international removal business in 2006, followed by Vänrun's international removal business in 2010. The non-compete clauses stipulated that neither NFB nor Vänrun could establish an international removal business for five years, and could only maintain their domestic operations. None of the transactions were reportable to the SCA.

The European Commission's Notice on restrictions directly related and necessary to a concentration ("European Commission notice on ancillary restraints"),[97] provides that a non-compete clause that includes the transfer of goodwill is justified for up to two years, or three years if both goodwill and know-how is included.[98] Relying on the European Commission notice on ancillary restraints, the SCA argued before the Stockholm City Court that the non-compete clauses went beyond acceptable ancillary restraints because they exceeded two years and, therefore, contravened the Swedish Competition Act.

In its appeal, the SCA once again did not allege that the content of the non-compete clauses were objectionable, but rather that their excessive duration made them anticompetitive. The Patent and Market Court of Appeal noted that non-compete clauses included in a merger are not automatically anticompetitive, but clauses longer than objectively required cannot be considered as ancillary to the transaction. In particular, the period provided for in the European Commission notice on ancillary restraints is not binding but, instead is a period under which the companies concerned are protected in the event of a European Commission review of the clause. Moreover, the European Commission's guidance did not provide for whether the present non-compete clause should be considered an ancillary restraint despite its five-year duration.

The Patent and Market Court of Appeal analyzed whether the non-compete clause was anticompetitive by object. It noted that the most important criteria was whether the agreement sufficiently harmed competition, to the extent that there is no need to look at its effects. In this instance, however, there was no reciprocity between the parties' commitments. The clause was such that both NFB and Vänrun had only agreed not to compete with Alfa in the market for international removals, but there was no such restriction where both NFB and Vänrun were most active, namely, domestic removals.

The Patent and Market Court of Appeal held that, in practice, a non-compete clause could, depending on

[95] Patent and Market Court of Appeal judgment of November 29, 2017 (PMT 7498-16).

[96] Stockholm City Court judgment of May 16, 2016 (T 10057-14).

[97] Commission Notice on restrictions directly related and necessary to concentrations, OJ 2005 C 56/24.

[98] European Commission notice on ancillary restraints, point 20.

the circumstances, be valid for five years or longer, but the duration after which the restraint infringes competition law must be assessed following a review of its effects. As the SCA had not alleged the content of the non-compete clause to be anticompetitive by object and had not undertaken an analysis of its effects, the Patent and Market Court of Appeal dismissed the appeal. It ordered the SCA to pay Alfa's, NFB's, and Vänrun's legal costs.

SWITZERLAND

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

Horizontal Agreements

Swiss Supreme Court Reverses Federal Administrative Court Judgments on Price-Fixing

On October 9, 2017, the Swiss Supreme Court reversed two judgements in which the Federal Administrative Court had found that the FCC had not proven a price agreement.[99] The Swiss Supreme Court held that the *in dubio pro reo*[100] principle was not applicable in the cases at hand and that horizontal price agreements normally constitute a significant restriction of competition.

In 2010, the FCC fined several undertakings on the ground that they had taken part in price agreements in 2006–2007. In 2014, the Federal Administrative Court annulled the fines. It found that the FCC had not established whether the price increases had been induced by information exchanges between Swiss subsidiaries or by a decision of their European parent undertakings. The Federal Administrative Court held that using missing evidence to the disadvantage of the appealing undertakings violated the *in dubio pro reo* principle, however the Swiss Supreme Court annulled these judgments.

The Swiss Supreme Court first held that the *in dubio pro reo* principle is applicable only after the Federal Administrative Court has investigated all relevant facts. The Federal Administrative Court should have gathered more evidence, having full authority on both the facts and merits. It could not confine itself to noting that the FCC had not enquired into all the relevant facts. As a consequence, the Swiss Supreme Court ordered further investigations.

[99] Federal Administrative Court judgements 2C_1016/2014 and 2C_1017/2014,October 9, 2017.
[100] When in doubt, for the accused.

The Swiss Supreme Court added that, as a matter of principle, price agreements between competitors restrict competition in a significant way. This means that, according to the Swiss Supreme Court, horizontal price agreements are, as a matter of principle, unlawful unless they can be justified by economic efficiency.

The Swiss Supreme Court finally found that a decision of European parent undertakings to increase prices would not preclude a horizontal agreement between the Swiss subsidiaries. It held that the decisive point is whether the Swiss undertakings reached an agreement to fix prices.

FCC Reaches Settlement Agreement in Sheet Metal Industry

On November 3, 2017, the FCC closed its investigation into price agreements in the sheet metal industry by reaching a settlement agreement with the involved undertakings[101] for CHF 8 million.[102]

The FCC found that between 2004 and 2016 nine sheet metal undertakings reached agreements on supplements charged to clients and minimal prices and that they also collectively decided to increase prices on a regular basis.

The FCC noted that the agreements on supplements related to raw materials, zinc quotation, and additional transport costs. A first supplement, set from 2010 to 2015 at 10–15% of the base price, was charged to every client. Also when the undertakings transported the materials they would change an additional 10%. The FCC found that these

[101] GALVASWISS AG, Epos Verzinkerei AG Däniken, Schweizerische Drahtziegelfabrik AG, Zinctec AG, Verzinkerei Lenzburg AG, Verzinkerei Oberuzwil AG, Verzinkerei Unterlunkhofen AG, Verzinkerei Wattenwil AG, Verzinkerei Wettingen AG, Verzinkerei Wollerau AG, and Zinguerie-Sablage-Métallisation SA (ZSM).
[102] FCC press release, November 3, 2017, available in French, Italian, and German at: https://www.weko.admin.ch/weko/fr/home/actualites/communiques-de-presse/nsb-news.msg-id-68652.html.

horizontal price agreements were severe infringements of the Competition Act.

The investigation, which was launch in 2016, was ended quickly due to the cooperation of the undertakings in the settlement procedure. The settlement agreement sets clear guidelines for future behaviors.

Federal Administrative Court Annuls FCC Decision Against Door Fittings Distributor

On November 14, 2017, the Federal Administrative Court found that taking part in a meeting with competitors where prices are discussed does not constitute a concerted practice. On those grounds, the Federal Administrative Court annulled a fine issued by the FCC.

Immer AG ("Immer"), a distributor of door fittings, took part in a meeting in which its competitors reached an agreement on wholesale margins. Immer indicated that was not aware that prices would be discussed during that meeting, had no knowledge of the calculations that had been made, and could not keep up with the discussion. Following the meeting, Immer reconsidered its prices but did not change them.

The FCC fined Immer because it did not dissociate itself from the price discussions and did not inform the authorities that such a meeting had taken place.

The Federal Administrative Court annulled this decision. It found that no agreement nor concerted practice had been established. According to the Federal Administrative Court, for an agreement to exist, an implied statement of commitment to an agreement is necessary and silently attending one meeting does not constitute such a statement. The Federal Administrative Court held that Immer did not want to enter into the price agreement. Other topics were discussed during the meeting in question and the meeting invitation did not as such represent an offer to agree on prices. In this respect, the Federal Administrative Court applied the regular standard of proof. It held that the complexity of the economic facts and lack of empirically verifiable data did not justify the use of a lower standard of proof.

The Federal Administrative Court then examined whether Immer had engaged in a concerted practice, which would require: (i) collusion; (ii) market conduct complying with that collusion; and (iii) a causal link between the collusion and market conduct. The Federal Administrative Court found there had been collusion, as Immer had reviewed its prices after obtaining information on prices from its competitors. It ruled out, however, the second condition (market conduct complying with the collusion) as Immer did not modify its prices after the meeting. Finally, the Federal Administrative Court raised the issue of whether the presumption of a causal link between the collusion and market conduct according to EU competition law conforms to the presumption of innocence, but eventually did not answer that question.

FCC Fines Building Undertakings for Rigging Tenders

On December 21, 2017, the FCC fined several building undertakings[103] for rigging tenders relating to individual building and engineering projects in the Canton of Graubünden between 2008 and 2012. The undertakings had reached price agreements and designated which one should be awarded the tender.

The FCC closed six investigations into agreements relating to eight building and engineering projects in Engadine valued between CHF 80,000 and CHF 6 million. Two of the projects were launched by public entities (the Engadine Commune and the Canton of Graubünden), while the other six were launch by private owners.[104]

[103] Bezzola Denoth AG, Foffa Conrad AG, Implenia Schweiz AG, METTLER PRADER AG, ZINDEL GRUPPE AG, Crestageo AG, D. Martinelli AG, Lazzarini AG, Broggi Lenatti AG, P. Lenatti AG (Hochbau und Tiefbau), René Hohenegger Sarl, and Nicol. Hartmann & Cie. AG.

[104] FCC press release, December 12, 2017, available in French, Italian, and German at:

The FCC found that the building undertakings entered into illegal agreements in which they designated the company that would be awarded the tender, allowing the others to either submit higher offers or not participate. One agreement was awarded to an outside company not involved in the agreement that submitted a more competitive bid.

The FCC fined the undertakings a total of CHF 1 million (up to CHF 400,000 per agreement) based on project value and seriousness of the infringement.

These investigations are part of 10 FCC investigations into about 40 undertakings launched in 2012 in Graubünden. The first decision was made in July 2017. Decisions in the remaining investigations are expected in 2018.

Abuse

FCC Fines Swiss Post for Abuse of Dominance

On December 18, 2017, the FCC fined Swiss Post CHF 22.6 million for abuse of dominance in the market for postal shipping of more than 50 grams with an address sent in bulk. Swiss Post hindered its competitor Quickmail and discriminated against some customers.[105]

Swiss Post generally grants special conditions to clients incurring more than CHF 100,000 per year in postal costs (contractual clients). The discounts offered were often lower than the ones set in its price systems. The FCC found that Swiss Post discriminated against clients by treating contractual clients with similar characteristics differently. As a consequence, some clients paid higher prices than others. The FCC found that clients: (i) had been subject to unfair conditions; and (ii) had paid too much to Swiss Post.

Swiss Post had also introduced an additional discount through its price system that rewarded clients reaching or going beyond a certain monthly turnover and sanctioned clients that did not reach an agreed upon monthly turnover. The FCC held that this price system was not transparent and deprived them of the possibility to transfer some of their shipping to the competitor Quickmail.

FCC Fines Naxoo for Abuse of Dominance

On December 19, 2017, the FCC fined Naxoo SA ("Naxoo") (previously 022 Télégenève SA) CHF 3.6 million for abuse of dominance in the market for connection to the cable network in Geneva.[106]

The FCC found that Naxoo, which holds a dominant position in the market for connections to the cable network in its area of operations (principally Geneva), imposed unfair commercial conditions in the contracts relating to the connection of buildings to the cable network and limited the opportunities of third parties. The FCC found that building networks could not freely use their internal networks. Naxoo claimed exclusive use of buildings internal networks, which are necessary for the cable network to reach the final customers, by imposing unfair commercial conditions when connecting buildings to the cable network and therefore preventing building owners from installing other systems on their internal networks (such as collective satellite systems). The FCC held that manufacturers and suppliers of other connection systems had been hindered and technological evolution had been impaired. The FCC also held that final consumers had been prevented from accessing other telecommunication services, which are complementary, and from entering into competition with the cable network.

https://www.weko.admin.ch/weko/fr/home/actualites/communiques-de-presse/nsb-news.msg-id-69339.html.

[105] FCC press release, December 18, 2017, available in French, Italian, and German at: https://www.weko.admin.ch/weko/fr/home/actualites/communiques-de-presse/nsb-news.msg-id-69262.html.

[106] FCC press release, December 19, 2017, available in French, Italian, and German at: https://www.weko.admin.ch/weko/fr/home/actualites/communiques-de-presse/nsb-news.msg-id-69285.html.

Vertical Agreements

Swiss Supreme Court Rejects BMW Appeal

On October 24, 2017, the Swiss Supreme Court rejected the appeal of BMW AG ("BMW") regarding a CHF 157 million fine issued by the FCC in 2012. The Swiss Supreme Court held that the export ban agreed on by BMW and its authorized dealers concerning new vehicles for countries outside of the EEA (including Switzerland) is an unlawful territorial agreement that can be sanctioned.[107]

In 2010, the FCC launched an investigation into BMW. Several sources had reported it was impossible to acquire a new BMW or MINI vehicle from outside of Switzerland. In 2012, the FCC found that BMW and its authorized dealers had entered into an export ban forbidding the export of new vehicles in countries outside the EEA, constituting an unlawful agreement affecting competition. The FCC fined BMW CHF 157 million. BMW appealed to the Federal Administrative Court, which rejected the claim.

The Competition Act applies to infringements that occur abroad but have effects in Switzerland. The agreement in this case concerned territorial partitioning, which the Swiss Supreme Court had already held constitutes significant restrictions of competition according to Article 5 of the Competition Act.[108] It is sufficient for the agreement to potentially affect competition. As a consequence, it is not necessary to analyze its concrete effects on competition.

According to the Competition Act, the territorial agreement in question would be permitted if it could be justified by economic efficiency. The Swiss Supreme Court found that BMW did not put forward such efficiency grounds. According to the Swiss Supreme Court, the export ban implemented by BMW since 2003 in its distribution contracts was invalid.

Federal Administrative Court Finds that Adherence to Recommended Resale Prices Does Not Necessarily Constitute a Concerted Vertical Practice

On December 19, 2017, the Federal Administrative Court ruled that adherence to recommended resale prices does not necessarily constitute a concerted vertical practice and annulled a fine issued by the FCC against Bayer (Schweiz) AG ("Bayer"), Eli Lilly (Suisse) SA ("Eli Lilly"), and Pfizer AG ("Pfizer").[109]

Bayer, Eli Lilly, and Pfizer issued recommended resale prices for prescription medications that are not covered by the mandatory basic health insurance. Bayer, Eli Lilly, and Pfizer did not pressure market participants, nor did they propose incentives for them to adhere and comply with the recommended resale prices.

Previously, on November 2, 2017, the FCC had found that these recommended resale prices constituted a concerted vertical practice, because more than 80% of the pharmacies sold the concerning prescription medications at the recommended prices. The FCC also considered that the pharmacies maintained a market-wide cartel that had been dissolved in 2000 by adhering to the recommended resale prices. Finally, the FCC argued that Bayer, Eli Lilly, Pfizer, and the pharmacies were benefiting from the recommended resale prices.

The Federal Administrative Court annulled the FCC's decision and fines. The Federal Administrative Court noted that the FCC had failed to prove the alleged 80% adherence rate. Referring to EU competition law, the Federal Administrative Court held that the mere adherence to recommended resale prices does not constitute a concerted vertical practice. It found that the recommended resale

[107] Swiss Supreme Court judgment 2C_63/2016, October 24, 2017.

[108] Swiss Supreme Court judgment BGE 143 II 297. June 28, 2016.

[109] Federal Administrative Court judgments B-843_2015, B-844_2015 and B-846_2015, December 19, 2017.

prices were representing maximum resale prices, which did not unduly restrict the pharmacies when setting the medication prices. As a consequence, the Federal Administrative Court found that the recommended resale prices were not restricting competition in a way that was unlawful under Swiss competition law.

UNITED KINGDOM

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

Horizontal Agreements

CMA Accepts Binding Commitments Offered by Showman's Guild of Great Britain

On October 26, 2017, the CMA accepted binding commitments from the Showman's Guild of Great Britain (the "Guild") and closed its investigation into whether Chapter 1 of the Competition Act 1998 had been infringed by the rules of the Guild. The members of the Guild voted in favor of the proposed changes on January 26, 2018. The changes are aimed at giving more choice and variety, improving the quality of rides and attractions, and giving landowners (often local councils) more power to decide who runs fairs in their area and to intervene in underperforming fairs.

The Guild's function is "to protect the interests of its members – travelling showmen who gain their livelihoods by attending fairs."[110] The Guild is the largest association of travelling showmen in the UK; its members make up 90% of all active showmen, and organize 90% of all fairs. After launching a formal investigation in December 2015, the CMA issued a statement of objections on December 21, 2016 setting out its provisional view that the rules of the Guild infringed the Chapter 1 prohibition.

The travelling fairs sector is steeped in tradition and is highly influenced by the rules of the Guild (which are only made available to members). Certain of these rules derive from the fact that a showman does not acquire property law rights in the land on which fairs are held, and that "without access [to land], the showman has nowhere to install his equipment for the purposes of providing services to the public and earning money."[111] The Guild has sought to address this issue by creating a form of protected right to the ground for holding a fair, or ground within a fair, called an "established right," and a mechanism for allocating such rights between members. The Guild has other rules that offer additional protection to members with established rights, restricting competition from other members and non-members.

The CMA found the rules of the Guild constitute a decision by an association of undertakings, the members all being actual or potential competitors. The following rules were provisionally found to be restrictive of competition:

The membership rule. A showman seeking membership in the Guild needed support from a proposer and seconder (who must be members). The assessment of applications was not based on an exhaustive list of objective or transparent criteria and rejection could not be appealed. Proposers, seconders, and those assessing the application might not take an objective view on applications and, given that they are all actual or potential competitors, they might even have reason to discriminate against applicants.

The non-members rule. Members of the Guild (whether fair organizers or amusement operators) were prevented from letting ground to, or taking ground from, non-members. In combination with the membership rule, the non-members rule protects incumbent members from the threat of competitive pressure—if non-members cannot join the Guild they are prevented from competing with members for ground at existing Guild fairs (90% of the market).

The established rights rule. Members of the Guild who had organized or provided amusements at a fair for two years were granted rights to do the same the following year on an exclusive basis. The holder of an established right could maintain this right forever, so long as they continued to comply with the rules of the Guild. Holders of established rights were

[110] CMA decision to accept commitments, *Showman's Guild: suspected anti-competitive practices*, Case 50243, para. 2.11.

[111] *Ibid,* para. 3.7.

allowed to transfer their rights (subject to approval of a committee of members) or apply to have them preserved for up to seven years if the right holder was unable to attend (again subject to approval by a committee of members).

The established rights rule protected incumbent members by preventing other members of the Guild from competing to take ground at existing Guild fairs. The CMA was concerned that this rule prevented landowners and fair organizers from replacing poorly performing fair organizers and amusement operators with showmen offering a more attractive service. Moreover, the transfer of established rights to a member who might offer a more attractive service could be blocked by the committee of members (comprising actual or potential competitors), preventing improvements in the service.

The time and distance rule. Members were prevented from organizing or attending fairs that took place within two miles of an existing Guild fair for four weeks before until twenty-two days after its opening. Certain regional sections of the Guild extended the distance and/or time periods further for their regions. The CMA accepted that existing fairs merited some protection from rivals, to prevent free-riding on the reputation and investment of the existing fair, but found the restrictions in place gave undue protection to incumbent members.

The CMA concluded that the following commitments would address these competition concerns:

The membership rule. The requirement for a proposer and seconder will be removed and applications will be refused only on certain transparent, objective, and non-discriminatory grounds. Further, reasons must be given for rejecting any application and an appeal can be made to an independent tribunal.

The non-members rule. Members will not be prevented from taking ground at fairs organized by non-members unless the non-member is a former member who has been expelled from the Guild for criminal convictions, unruly behavior, conduct falling below the standards expected of showmen dealing with the public, or non-payment of Guild fines. Further, members will not be prevented from letting ground to non-members unless they have unspent criminal convictions, have fallen short of the standards expected of showmen, have been expelled from the Guild on certain specific grounds, or the landowner expressly requests that the fair is an "all Guild" fair.

The established rights rule. Incumbent fair organizers or amusement operators can be replaced by landowners on the grounds of the incumbent's poor performance. The standard of performance will be assessed by the landowner, but any decision can be appealed to the Guild's appeal tribunal, with decisions taken by an independent barrister. In addition, the transfer of established rights can now only be vetoed by the committee of members if it falls within a list of acceptable reasons. The circumstances under which an established right can be preserved have also been reduced significantly.

The time and distance rule. The rule will be limited to one mile and the regional sections will no longer have the ability to extend the distance or time period.

The Guild has committed to ensure that an up-to-date copy of its rules will be published on its website from March 2018.

CMA Fines Laundry Companies £1.71m for Market Sharing

On December 14, 2017, the CMA fined two laundry companies £1.71 million for market sharing.[112]

Micronclean Limited ("Micronclean") and Berendsen Cleanroom Services Limited ("Berendsen") provide specialist cleanroom laundry services to customers with operations in sterile environments, such as pharmaceutical companies

[112] CMA infringement decision of December 14, 2017, Cleanroom laundry services and products: anti-competitive agreement, Case 50283.

and manufacturers of medical devices and micro-electronics. The companies had been trading under the Micronclean brand since the 1980s pursuant to a joint venture agreement. In May 2012, they also entered into reciprocal trademark license arrangements. The CMA found that these arrangements constituted an unlawful agreement to not compete.

The 2012 agreement described a geographic line traced broadly from London to Anglesey. Under the terms of the agreement, Micronclean served customers north of the line, while Berendsen served customers to the south. Micronclean and Berendsen had exclusive rights to use the "Micronclean" trademark in their respective territories and had also agreed not to compete for the business of a number of specific customers.

Micronclean and Berendsen implemented the territorial and customer allocation provisions by exchanging maps and customer lists and referring customer enquiries.

The CMA found that this arrangement infringed the Chapter 1 Prohibition of the Competition Act 1998 by object for the duration of the trademark licenses (which were terminated in February 2016, when the joint venture was also disbanded). The CMA also considered whether the wider context of the joint venture or any benefits flowing from it were sufficient for the market-sharing arrangements to qualify for exemption from the Chapter 1 Prohibition. It concluded that exemption did not apply because Micronclean and Berendsen had not been able to demonstrate that the restrictions were objectively necessary to the operation of the joint venture.

The CMA fined Micronclean £510,118 and Berendsen £1,197,956.

The case came to the CMA's attention in the context of two related merger reviews.

Mergers and Acquisitions

CMA Clears Merger Between JustEat and Hungryhouse Following Phase II Investigation

On November 16, 2017, the CMA concluded its Phase II investigation into the proposed acquisition by JustEat of Hungryhouse, ruling that the deal would not lead to a substantial lessening of competition ("SLC") in the market for food ordering and delivery services.[113]

JustEat and Hungryhouse are online and mobile app-based platforms that provide food ordering services in the UK. The two companies operate within a wider market for food ordering, take-away, and/or delivery services, which comprises three distinct business models.

The first business model (adopted by both JustEat and Hungryhouse) involves a platform that connects restaurants to customers. Through an app or website, customers browse and compare restaurant menus (including prices and reviews), order online, and pay online or in cash on delivery. The restaurants participating in the marketplace pay the operator (JustEat or Hungryhouse) a fee as a percentage of the order value, and arrange delivery of the food to the customer directly.

The second business model combines food ordering with logistics services. In this model, competitors like Deliveroo, UberEATS, and Amazon Restaurants provide customers access to restaurants through a website or mobile app, and also arrange the delivery of food to customers. The vertical integration of ordering and delivery gives suppliers greater control over the reliability and speed of delivery. Together with JustEat and Hungryhouse, these food and delivery service providers form part of what the CMA has called the "food ordering marketplace."

A third business model has been adopted by a number of restaurant chains, including Domino's, Papa John's, and Pizza Hut. Customers order food

[113] *JustEat/Hungry House*, Final Report of November 16, 2017.

from the restaurant directly, and the restaurant itself arranges delivery.

Relevant markets. The CMA found that online food ordering and delivery platforms, like JustEat and Hungryhouse, operate in a "two-sided" market, serving two sets of customers: restaurants and consumers. The attractiveness of the platform to one set of customers depends on the participation of the other, and *vice versa*.

The CMA held that these online ordering platforms compete in the same market as ordering and logistics specialists, like Deliveroo and UberEATS, given the degree of demand-side substitutability between the two. This substitutability applied equally to restaurants (which can and, in some cases, do list on both platform types) and consumers (who choose between restaurant options on both platform types with low switching costs).

In considering the relevant geographic market, the CMA held that the scope of JustEat's and Hungryhouse's activities was national, but that there were nevertheless local competition aspects. The CMA noted that: (i) prices and fees charged by online platforms to restaurants are determined nationally; (ii) marketing activities are conducted on a nationwide level; and (iii) the scalability of the platform business model enables operators to expand into new regions quickly and efficiently. The CMA held that the local factors relevant in defining geographic scope (*e.g.*, consumer demand for delivery from local restaurants, restaurant availability across regions, and platform availability) were nevertheless relevant in the competitive assessment of the proposed merger.

Counterfactual. In assessing the likely scenario absent the merger, the CMA noted that Hungryhouse was operating at a loss and was reliant on its parent company, Delivery Hero, for financial support. The CMA also took into consideration Hungryhouse's recent profit figures and forecasts, in addition to evidence of its expansion plans in 2017. In light of the fast growing nature of the market and its short planning horizon, the CMA held that Hungryhouse would likely remain in the market—at least for one year.

Competitive effects. The CMA held that JustEat and Hungryhouse were competing for customers in terms of the quality of service they provide, choice of restaurants they offered to consumers, prices they charged, and marketing opportunities they offered to restaurants. In assessing the degree of competition between the two operators, however, the CMA concluded that Hungryhouse posed only a minor competitive constraint to JustEat. Taking into account Hungryhouse's precarious financial position, as well as the uncertain outcome of its anticipated strategic initiatives, the company was in an overall weak market position.

The CMA found that the market for online food order and delivery services was dynamic and evolving. JustEat and Hungryhouse faced strong competition from integrated platforms like Deliveroo and UberEATS—both of which posed a greater competitive constraint on JustEat than Hungryhouse. In local areas where the vertically integrated platforms were not present, there was sufficient competition from direct order and takeaway restaurants.

On this basis, the CMA cleared the proposed merger unconditionally.

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