BELGIUM

This section reviews competition law developments under the Act on the Protection of Economic Competition of September 15, 2006 ("APEC"), which is enforced by the Belgian Competition Authority ("BCA"), which comprises the Directorate General for Competition and the Competition Council. The Competition Council itself consists of the College of Competition Prosecutors ("CCP") and the Council stricto sensu (the "Council"). On September 6, 2013, a new Belgian Competition Act (the "Act") entered into force (adopted on April 3, 2013). The Act altered the structure of the BCA such that the BCA now comprises: (i) the President; (ii) the Competition College (consisting of the President and two "assessors" appointed on a case-by-case basis); (iii) the Management Committee (composed of the President, the Prosecutor General, the Chief Economist and the General Legal Counsel); and (iv) the Prosecutor General and its staff of prosecutors. The Competition College functions as the decision-making body, while the Prosecutor General is in charge of investigating alleged restrictive practices and concentrations. All entries in this report are from before September 6, 2013, and as such refer to the old sub-bodies of the BCA.

Unilateral Conduct

Dawn Raids at Loterie Nationale[1]

On July 23, 2013, the CCP conducted dawn raids at the premises of Loterie Nationale, the Belgian incumbent lottery and gambling operator. Loterie Nationale is suspected of having abused its legal monopoly in the market for lotteries and scratch cards to strengthen its position in the sports betting market, which it has only recently entered and where it remains a small player. The investigation may have been provoked by complaints from other sports betting operators.

Possible competition law infringements of Loterie Nationale that are being investigated by the CCP include: (1) cross-subsidization (i.e., Loterie Nationale is alleged to have used its revenues generated in the lottery and scratch card market in which it has a monopoly to subsidize its charging of artificially low prices in the sports betting market); and (2) using information acquired through operations in the market for lotteries and scratch cards to provide itself with an unmerited advantage in the sports betting market. In addition, the CCP is investigating whether Loterie Nationale's agreements with newspaper outlets across Belgium contained unlawful exclusivity clauses with regard to the sale of its football betting product "Scooore."

Loterie Nationale has reacted to the dawn raid by stating that it has acted in conformity with the applicable rules, and cooperated with the authorities "with complete calmness, confidence and transparency."[2]

Horizontal Agreements

No Cartel In The Sector Of Bovine Spongiform Encephalopathy (BSE) Testing

On August 27, 2013, the Council dismissed a claim from the CCP concerning alleged price-fixing and market-sharing agreements in the sector of BSE (commonly known as 'mad cow disease') testing.

Following a leniency application in 2009, the CCP initiated an inquiry into the sector of BSE testing. The inquiry involved all Belgian laboratories active in BSE testing and a large number of slaughterhouses, along with the latter's professional association. The CCP alleged that the laboratories in question colluded to prevent laboratories based in other EU Member States from entering the

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1 Press Release of the Competition Council of July 25, 2013, available at http://economie.fgov.be/en/binaries/20130725_press_release_tcm327-228688.pdf.

2 Loterie Nationale's press release of July 25, 2013, available at http://www.loterie-nationale.be/Images/FR/communiqu%C3%A9%20concurrence_tcm8-13249.pdf.

Belgian market for BSE testing by dividing the market geographically between themselves. The Belgian laboratories were also accused of exchanging commercially sensitive information with the aim of increasing the price of BSE testing in Belgium.

In its decision of August 27, 2013, the Council dismissed the CCP's claim, finding that the laboratories participation in the practices complained of was required for them to adhere to rules established by the Federal Agency for the Safety of the Food Chain ("FASFC"). According to the Council, the BSE laboratories were, under regulation, unable autonomously to determine the price for their services and were therefore unable to compete. Accordingly, even though the laboratories in question exchanged information, this could not have resulted in increased prices. The Council also found that there was no geographic allocation of clients, as the FASFC was the only client of the BSE laboratories. While the test samples were indeed divided between the different laboratories through an allocation of geographic areas, these arrangements were a consequence of the FASFC's decision to allocate all the laboratories an equal share of the BSE tests.

In light of the fact that the laboratories' conduct was the result of state compulsion, the Council concluded that article 2 of APEC and Article 101 TFEU did not apply in this case.

Council Imposes Record Fine In The Cement Sector

On August 30, 2013, the Council imposed fines totaling approximately €14.7 million on three Belgian cement producers (Cimenteries CBR S.A. ("CBR"), Compagnie des ciments belges S.A. ("CCB"), and Holcim (Belgique) S.A. ("Holcim")) and two associations (FEBELCEM and the national center for technical and scientific research for the cement industry CRIC/OCCN), for colluding to restrict access for new entrants to the Belgian cement market. This is the largest fine ever imposed by the BCA for anticompetitive collusion.

In its decision, the Council found that the parties in question acted in a coordinated manner between May 2000 and October 2003 to delay the adoption of standards that make it possible to use ground granulated blast furnace slag ("GGBFS") as a component of ready-mix concrete. GGBFS constitutes a substitute for cement in ready-mix. According to the Council, the Belgian cement producers and FEBELCEM, in cooperation with CRIC/OCCN, had manipulated the standard-setting process relating to the use of GGBFS in ready-mix concrete with the object of delaying the emergence of this product on the market, thereby reinforcing the companies' own positions in the Belgian cement market.

The Council concluded that the practices of the three Belgian cement producers, FEBELCEM, and CRIC/OCCN amounted to an infringement of article 2 of APEC and Article 101 TFEU, and it imposed fines of approximately €6.9 million on CBR, €5.8 million on Holcim, €1.7 million on CCB, €100,000 on FEBELCEM, and €100,000 on CRIC/OCCN. Holcim and FEBELCEM appealed the Council's decision before the Brussels Court of Appeals.

DENMARK

This section reviews competition law developments under the Competition Act Consolidation Act No. 23 of 17 January 2013 (the "Danish Competition Act") enforced by the Danish Competition Council ("DCC"), and the Danish Competition Appeals Tribunal ("DCAT"), assisted by the Danish Competition and Consumer Authority ("DCCA").

Horizontal Agreements

Price Fixing Between Three Danish Driving Schools

On September 11 2013, the Danish City Court in Næstved (the "Court") imposed fines on the owner of a driving school for fixing prices for driving lessons together with the owners of two other driving schools. The owners of the two other driving schools entered into a settlement with the DCCA in the autumn of 2012.

During a period of six weeks in 2011, three driving schools placed an advertisement in a local newspaper announcing a common price for driving lessons at each school.

The owners of two of the driving schools entered into a settlement with the DCCA in the Autumn of 2012, each receiving a fine of DKK 25,000 (approx. €3,333).

One of the owners brought the matter before the Court. The Court found that the placing of a joint advertisement constituted a horizontal agreement that restricted competition between the three driving schools in violation of section 6 of the Danish Competition Act. The Court fined the owner DKK 25,000.

Vertical Agreements

Distributor of Leisure Weapons Pays Fine in Settlement for Resale Price Maintenance

On June 30, 2013, the owner of HG Agencies was fined DKK 40,000 (approx. €5,333) for having engaged in resale price maintenance with respect to one of the company's dealers.

HG Agencies is a Danish distributor of weapons used for leisure purposes (e.g., hunting). In the period March 2012 to May 2013, HG Agencies instructed one of its dealers to use HG Agencies' "indicative prices" as minimum prices for certain products.

The DCCA found HG Agencies had engaged in resale price maintenance contrary to section 6 of the Danish Competition Act.

Due to the fact that HG Agencies was a sole proprietorship, only the owner of the company was fined. On the basis that no fine was imposed on the company, the DCCA increased the fine from the standard DKK 25,000 to DKK 40,000 (approx. €5,333).

When setting the fine, the DCCA took into account the company's turnover, the duration of the infringement and, as a mitigating factor, the fact that the company cooperated with the authority.

Miele A/S, Denmark, Pays Fine in Settlement for Resale Price Maintenance and Prevention of Parallel Imports on White Goods

On July 18 2013, the DCCA fined Miele A/S ("Miele") and two members of its management team for having engaged in resale price maintenance and having blocked parallel imports on at least one occasion.

Miele is one of the major players in the market for home appliances. In 2011, the DCCA conducted a dawn raid of Miele's premises and subsequently referred the matter to the Public Prosecutor for Serious Economic and International Crime (the "Prosecutor").

The DCCA determined that Miele had instructed some of its dealers to raise end-user prices. Furthermore, Miele was held to have prevented parallel imports of Miele's products to Denmark. The duration of the infringements was found to have been approximately one year.

The Prosecutor fined Miele DKK 1.2 million (approx. €161,000) and two individuals from the management DKK 20,000 (approx. €2,700) for the above infringements.

When setting the fines, the Prosecutor took into account that Miele cooperated with the competition authorities.

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.

Policy and Procedure

FCCA to Supervise Neutrality of Competitive Conditions Between Public and Private Sector Business Activities

On September 1, 2013, the FCCA was given the power to investigate and censure public sector entities whose operating models or structures prevent or distort competition. This means that the FCCA can now intervene is many situations where previously a complaint to the European Commission under state aid rules was the only recourse.

The new legislation covers business activities of the state, municipalities, joint municipal authorities, and entities under the control of these bodies. Under the new legislation, unlawful operating models are those which give public sector undertakings an unfair advantage over private actors, (e.g., where extraordinary aid given to public sector undertakings). Unlawful operating structures include conducting business activities as a municipal authority to gain tax benefits or bankruptcy protection. The legislation provides that where it has deemed a public sector entity's operating models or structures are anticompetitive, the FCCA must first attempt to negotiate with the relevant entity a plan to change the unlawful models or structures so as to restore competition neutrality with the private sector. Should negotiation prove ineffective, the FCCA can impose orders on the relevant entity to halt the unlawful activities.

If unlawful operating models are being pursued as part of a municipality's or a joint municipal authority's own activities, and competition neutrality with the private sector can be guaranteed by incorporating the business activities, the law will not be applied before the end of 2014.

FRANCE

This section reviews developments under the 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 Obtains a Reduction in the Amount of MasterCard and Visa Interbank Fees for Payments and Withdrawals

On September 20, 2013, the FCA issued two commitment decisions, pursuant to which Visa and MasterCard have undertaken to reduce interbank fees applicable to payments and withdrawals made using payment cards.

Following a complaint made by the Federation of Commerce and Distribution in February 2009, the FCA launched an investigation into whether the methods by which interbank fees for various payment methods (i.e., checks, bank cards, direct debits and interbank payment orders) were anticompetitive. Over the course of its investigation, the FCA issued a number of fining and commitment decisions. But the investigation was concluded upon the FCA's accepting commitments offered by MasterCard and Visa, pursuant to which MasterCard and Visa committed to reduce their interbank payment fees respectively by 49% and 44%, and their interbank withdrawal fees by 8% and 26% respectively. The commitments will take force on November 1, 2013, for four years.

The FCA's primary concern was that each of Visa and Mastercard had jointly set the fees applicable to their cards with their member banks. The fees in question are those that retailers must pay banks whenever a customer uses a card of Visa or Mastercard, and those charged to card users for using ATMs. The FCA took the preliminary view that the joint setting of interbank payment fees was likely to increase costs for merchants and card-holders. The FCA also raised concerns over MasterCard and Visa's insistence on "honor all cards" clauses in their contracts, which require merchants to accept all MasterCard and Visa cards. The FCA found such clauses to be problematic as they disabled merchants from refusing cards with high interbank fees.

To address the FCA's concerns, MasterCard and Visa submitted preliminary commitment packages, wherein they offered to reduce interbank payment fees for consumer cards. However, initially only MasterCard proposed to reduce interbank withdrawal fees. Following the market test, MasterCard and Visa were required to offer additional reductions of interbank payment fees, and Visa was required to match MasterCard's offer to reduce withdrawal fees. The FCA accepted these commitments, which provide, on average a 0.28% interbank fee for purchases made on consumer cards and a €0.55 interbank fee for withdrawals made on consumer cards.

Both MasterCard and Visa refused to extend their commitments to corporate cards, meaning an FCA investigation into interbank fees for cooperate cards cannot be ruled out.

Merger Control

The FCA Clears the Acquisition of Sole Control over Monoprix by Casino

On July 10, 2013, the FCA cleared the acquisition of sole control by Casino Guichard Perrachon ("Casino") over Monoprix SA ("Monoprix"), subject to commitments, after a Phase II investigation. Casino and Monoprix are two of France's largest food retailers.

This is only the sixth time that the FCA has opened a Phase II investigation. The FCA had previously found, in an advisory opinion of January 2012, that the food retail sector in Paris is highly concentrated, with Casino holding very high market shares. The parties unsuccessfully argued that, given that Casino already held joint control over Monoprix, the transaction would have no effect on competition. The FCA found that Casino and Monoprix positioned themselves as competitors and concluded that the transaction would modify the competitive landscape by depriving Monoprix from its commercial autonomy vis-à-vis Casino.

In its competitive assessment, the FCA identified discrete geographic markets corresponding to catchment areas (with the catchment areas within Paris being smaller than those in its suburbs and further afield). The FCA stressed that catchment areas in Paris have unique characteristics on account of the average size of dwellings in Paris and the fact that consumers in Paris tend to use private vehicles less frequently than those outside of Paris. The FCA determined that the relevant market includes generalist stores such as supermarkets, "*popular*" stores (i.e., stores selling a large number of non-food products, such as Monoprix), hard discount stores, and convenience stores. However, the FCA found that the relevant market does not include specialized food shops or outdoor markets (on account of the products offered and prices charged by such stores).

Furthermore, the FCA excluded distance sales (i.e., online sales) from the relevant markets. In previous decisions concerning the food retail sector, the FCA considered that competition concerns were unlikely to arise in a catchment area where the merged entity (i) holds less than 60% of retail space, and (ii) faces at least three competitors holding at least half of existing stores, are not likely to raise competition concerns. On this basis, the FCA identified 47 catchment areas in Paris where the transaction could raise competition concerns.

The FCA also noted that any anticompetitive effects emerging from the transaction would be exacerbated by the high barriers to entry that characterize the food retail sector in Paris. Outside Paris, the FCA identified three catchment areas where the operation was likely to raise competition concerns.

To address the FCA's concerns, Casino offered to sell 55 stores in Paris and three outside of Paris (or, where applicable, to terminate franchise agreements). The FCA accepted these commitments and cleared the transaction.

Policy and Procedure

The French Supreme Court Recently Published Judgment to Reaffirm the Importance of Attorney-Client Privilege during FCA Inspections

On April 24, 2013, the French Supreme Court issued five rulings outlining the limits of the FCA's power to seize documents over the course of antitrust investigations.[3]

The French Supreme Court has partially quashed five orders of the First President of the Court of Appeals. These orders provided that where the FCA seizes privileged documents but does not do purposefully (and where the FCA subsequently returns such documents), such seizure does not constitute a violation of addressees' defense rights.

The five rulings involved dawn raids in three different sectors that took place between June 2009 and November 2010. Some of the entities targeted by these investigations challenged the dawn raids before the First President of the Paris Court of Appeals arguing that the FCA had seized documents covered by the attorney-client privilege, and that the seizure therefore infringed their rights of defense.

On October 25, 2011 (regarding claims in the thermal insulation and the glasses frames sectors) and on November 15, 2011 (regarding claims in the cardiovascular devices sector), the First President of the Paris Court of Appeals dismissed all the claims. The First President determined that that FCA did not seize privileged documents deliberately and that it would return all the privileged documents to the companies concerned. On this basis, the First President found that the FCA's practice provides sufficient protection to defense rights, and that the relevant seizures were valid. Five companies appealed the orders before the French Supreme Court.

Under French law, communications between the undertaking and its attorneys are covered by legal privilege

[3] Supreme Court, Cases n°12-80336, 12-80331, 12-80346, 12-80335, and 12-80332 of April 24, 2013.

if they concern legal advice or relate to the exercise of rights of defense. Privileged documents cannot be seized by the FCA during dawn raids. In previous cases before the French courts, the FCA argued that it is incapable of isolating privileged documents from non-privileged documents during dawn raids; traditionally, the FCA seized entire mailboxes and returned those documents that were identified as privileged to the relevant undertakings. Until recently, the French Supreme Court considered this practice acceptable.[4]

However, on April 24, 2013, the French Supreme Court made five rulings that the FCA's (and its agents') investigative powers were constrained by applicable privileges. It found that where the FCA seizes privileged documents, such seizures will be annulled. The rulings suggest that only the seizure of privileged documents should have been annulled, and not the seizure of the entire mailboxes containing privileged documents.

[4] *See* e.g., Supreme Court, April 8, 2010, n° 08-87.415.

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 Appeal (Oberlandesgericht Düsseldorf, "DCA") and further to the Federal Court of Justice (Bundesgerichtshof, "FCJ").

Horizontal Agreements

FCO Imposes Further Fines in the Railway Tracks Cartel

On July 11, 2013, the FCO imposed a fine of €10 million on Moravia Steel Deutschland GmbH ("Moravia") for bid rigging with respect to the supply of rails to Deutsche Bahn.[5] The other members of this cartel, ThyssenKrupp, two Voestalpine companies, and Stahlberg Roensch, received fines totaling €124.5 million in July 2012.[6] All these fines were the result of settlement agreements reached between the cartelists and the FCO.

The FCO also imposed fines on railway tracks producers for bid rigging with respect to their supplies to various traffic, and construction companies. This parallel investigation into collusion between railway tracks producers (as against the Deutsche Bahn investigation) was triggered in 2011 by Voestalpine's leniency application. The majority of participants cooperated with the FCO under its leniency program. The FCO determined that cartel members had allocated existing customers among themselves, and had coordinated on prices and quotas when submitting bids to regional traffic and construction companies. All cartel members, save one, cooperated with the FCO to reach settlement agreements; the proceedings against the non-settling producer are ongoing. Pursuant to the settlement agreements, on July 23, 2013, the FCO imposed fines on eight railway manufacturers totaling €97.64 million:[7] ThyssenKrupp GfT Gleistechnik GmbH was fined €88 million; Voestalpine BWG GmbH was fined €6.4 million; Schreck-Mieves was fined €2.0 million; while Holz-Fehlings Gleistechnik und Entsorgung GmbH, Fehlings Narosch Gleistechnik und Entsorgung GmbH, Künstler Bahntechnik GmbH, Heinrich Krug GmbH & Co. KG and Betzler Eisenbahntechnik together received fines amounting to €1.24 million.

To date, the railway tracks cartels have led to fines amounting to €232.14 million. The FCO closely cooperated with the public prosecutor during the investigation, as bid rigging is a criminal offence under German law, for which the individuals involved may face charges. The public prosecutor is currently investigating the natural persons involved on suspicion of collusive tendering.

DCA Suspends FCO's Order for Dissolution of Chemicals Distribution Joint Venture

On July 15, 2013, the DCA temporarily suspended an FCO decision ordering the dissolution by the end of July 2013[8] of CVH Chemie-Vertrieb GmbH & Co. KG ("CVH"). CVH is a joint venture between two companies active in the distribution of chemicals – Brenntag Germany Holding GmbH ("Brenntag") and CG Chemikalien GmbH & Co. KG ("CG").

In November 2012, the FCO found that the operation of CVH violated Section 1 GWB and Article 101 TFEU as it facilitated coordination between its parent companies' market behavior (i.e., the joint venture caused spillover effects).[9] This decision has been appealed. The present

[5] *See* FCO press release of July 11, 2013, available in English on the FCO's website.

[6] *See* National Competition Report July – September 2012, p. 8; *see* also FCO press release of July 5, 2012, available in English on the FCO's website and case summary of December 14, 2012, only available in German on the FCO's website.

[7] *See* FCO press release of July 23, 2013, available in English at the FCO's website, and case summary of September 6, 2013, only available in German on the FCO's website.

[8] *See* DCA, Decision of July 19, 2013, available in German.

[9] *See* National Competition Report October – December 2012, pp. 11-12.

case concerns the delay of the order pending resolution of this appeal.

The DCA found that the damage that CVH, Brenntag, and CG would suffer from the order's immediate implementation outweighed the public interest at issue. In particular, such implementation would result in the companies irreversibly losing irreversibly many customers and substantial revenues. Given that CVH's creation had been cleared under German merger control rules in 1996, and was only later scrutinized by the FCO in 2008, it found that there was little evidence that immediate enforcement was necessary.

Further, there were, according to the DCA, prima facie concerns over the legality of the FCO's decision. In the DCA's view, the FCO did not produce sufficient evidence in support of its finding that CVH's operation gave rise to spillover effects. The FCO also disregarded the fact that, in 2007, Brenntag blew the whistle on a cartel for which CG was fined.[10] Finally, the DCA considered that reduced competition between CVH and its parents may be justified as an ancillary restraint or as the result of the legitimate exercise of the parents' managerial authority.

Vertical Agreements

German FCO Imposes First Fine for a Vertical Restraint under Its New Fining Guidelines on Wala Heilmittel

On June 31 2013 the FCO imposed a fine of €6.5 million on WALA Heilmittel GmbH ("WALA") and two of its directors. The fines are part of a settlement between the company , two of its directors, and the FCO.[11]

WALA is a producer of herbal medicines and organic cosmetics. After several retailers and consumers had complained that WALA had dictated retail prices (i.e., engaged in resale price maintenance), the FCO initiated an investigation, conducting dawn raids of the company's premises in summer 2009. Over the course of the subsequent proceedings, the FCO found that WALA, starting in at least 2003, imposed multiple unlawful vertical restraints on its retailer customers. By way of example, the FCO found that WALA forced retailers to follow its resale price suggestions. Field service representatives constantly supervised the in-store sales prices of all retailers selling WALA's Dr. Hauschka products. If a retailer undercut the suggested retail price, WALA threatened to cease supply; the FCO received evidence that WALA did in fact follow through with these threats on several occasions. In addition, WALA introduced a new selective distribution system in 2007. In order to be admitted to this system, retailers had to enter into an agreement that obliged them to adhere to prescribed resale prices (so-called "depot contracts"). The contracts also included clauses limiting online sales. Furthermore, the FCO found evidence that WALA had concluded other vertical agreements with certain larger retailers to fix resale prices.

WALA reached a settlement with the FCO, committing itself to revise its selective distribution contracts. Under the terms of the settlement, future depot contracts may not dictate resale prices and must state explicitly that the reference prices are merely suggestions for the retailer. Furthermore, depot contracts must no longer prohibit online sales.

Alongside these measures, the FCO imposed the aforementioned fine. The FCO stated further that in this particular case (the first fine imposed in respect of a vertical infringement since the publication of the new fining guidelines in June 2013), the application of the new guidelines resulted in a lower fine than that which would have resulted from an application of the old guidelines.

Unilateral Conduct

FCO Gives Retailer EDEKA a Warning for Demanding Unjustified Rebates

On July 24, 2013, following a preliminary assessment, the FCO issued a warning to German supermarket group Edeka for demanding rebates from suppliers in connection with its acquisition of retailer Plus in 2009 (so called

[10] *See* National Competition Report October – December 2010, p. 8.

[11] *See* FCO press release of July 31. 2013, available in English on the FCO's website.

"wedding rebates").[12] After its acquisition of Plus, Edeka demanded that around 500 suppliers of products offer it additional rebates as well as better payment terms and purchasing conditions. The FCO acknowledged that negotiations between retailers and manufacturers/producers are often fierce, but found that in the case at hand EDEKA had abused its buyer-power.

Under German competition law, dominant undertakings and undertakings with superior market strength are prohibited from using their market position to request or induce other undertakings to grant them objectively unjustified benefits. The FCO found that the German retail market had become increasingly concentrated over recent years, with the four largest retailers now covering 85% of the market. Edeka, in particular, is a large buyer of branded products.

The FCO found that the "wedding rebates" were objectively unjustified as in some cases they applied retroactively and were not linked to any service offered by Edeka. In addition, Edeka tried to extend the special rebates that Plus had enjoyed before the acquisition to Edeka's complete product range. According to the FCO's investigation, this practice generally deters suppliers from offering special rebates to smaller retailers.

Due to the large number of product markets concerned, the FCO focused its sample investigation on one product market, the market for sparkling wine. The FCO found that four of the largest suppliers of sparkling wine were dependent on Edeka and that Edeka had confronted them with unjustified demands for rebates. Edeka, however, will not have to pay a fine – the purpose of the investigation was to serve a warning to all operators active in the German retail sector. The FCO is also conducting a sector inquiry focusing on the buyer power of various operators in the retail sector, which was initiated in September 2011.

12 *See* FCO press release of July 24, 2013, available in English on the FCO's website.

FCO Issues Statement of Objections to Hotel Booking Portal HRS over Best Price Clause

On July 25, 2013, the FCO issued a second statement of objections to online hotel booking platform Hotel Reservation Service ("HRS"), in which the FCO claims that the so-called Best Price Clause contained in HRS's contracts with hotels violates German and European antitrust law.[13]

Under the contested most-favored nation ("MFN") clause, hotels agreed to always offer their most favorable conditions regarding prices, availability, and booking and cancellation terms for online bookings via HRS and to not offer more favorable conditions for the same booking via other online platforms. In addition, since March 2012 the hotels also undertook not to offer more favorable conditions even in case of direct bookings at their reception.

In February 2012, the FCO issued HRS with a first statement of objections, in which it stated that the MFN clause restricts competition in and entry to the online hotel booking market.[14] With this second statement of objections, the FCO has confirmed these previous findings and set out additional concerns regarding HRS' requirement that partner hotels not offer more favorable conditions for direct bookings.

The FCO noted that MFN clauses similar to that used by HRS are applied by other online platform operators in different sectors and that, consequently, the HRS proceedings would be of importance for a variety of other online platforms.

Amazon Will No Longer Apply its Price Parity Clause

On August 27, 2013, online retailer Amazon Germany notified the FCO about its intention no longer to apply its price parity clause on its online trading platform Amazon

13 *See* FCO press release of July 25, 2013, available in English on the FCO's website.

14 *See* National Competition Report July-September 2012, p. 9; see FCO press release of February 10, 2012, available in English on the FCO's website.

Marketplace ("Marketplace").[15] Under the contested clause, retailers undertook to offer their products at the most favorable price through Amazon Marketplace, as opposed to through online platforms or in their own online shops. After informing the FCO that it would remove the price parity clause, Amazon made the relevant changes to its general terms and conditions for certain classes of retailers. The FCO is now assessing whether Amazon's actions are sufficient to address the FCO's concerns. In particular, the FCO has made it clear that it expects Amazon to refrain from price parity for good.

The FCO initiated proceedings against Amazon in respect of its price parity clause on February 20, 2013, having conducted a survey of thousands of retailers offering their products via Marketplace.[16] The FCO found that use of the price parity clause may restrict competition between online trading platforms and accordingly may violate Section 1 GWB. In particular, the FCO argued that the combination of high Marketplace fees and the MFN clause may result in entry barriers for new platforms and a high price level to the consumers' detriment.

Mergers and Acquisitions

Düsseldorf Court of Appeals Affirms Prohibition of Lenzig Ag's Acquisition Of Its Competitor Kelheim Hygiene Fibres GmbH

On May 15, 2013, the DCA upheld the FCO's prohibition of the proposed acquisition of 90% of the shares of Kelheim Hygiene Fibres GmbH, a supplier of tampon fiber material, by its competitor Lenzig AG.[17]

The parties had appealed the FCO's decision that found that the acquisition would create or strengthen a dominant position on the tampon fiber material market.[18] In particular, the parties had argued that the FCO did not have jurisdiction to assess the transaction because concerned a *de minimis* market whose total size (i.e., sales) in Germany was less than €15 million.[19] The parties argued that, for the purposes of calculating the size of the German tampon fiber market, only the turnover generated through sales to German-domiciled companies should be taken into account, not sales to German-based subsidiaries of companies not domiciled in Germany.

The DCA rejected the parties' claim. It reaffirmed the FCO's view that with respect to determining whether or not a market is *de minimis*, the relevant turnover should be geographically attributed to the place of delivery of the goods or services in question, even if the goods have been ordered by a central purchasing organization located elsewhere. The DCA explained that only this approach can show the competitive impact of the proposed transaction on the German market. This approach is also in line with Article 5 EUMR, as elaborated in the Commission's Consolidated Jurisdictional Notice.[20]

Düsseldorf Court of Appeals Annuls Clearing of Cable Merger

On August 12, 2013, the DCA annulled a decision of the FCO in which it had cleared the acquisition of the cable network operator Kabel Baden-Württemberg GmbH ("Kabel BW") by Liberty Global Europe Holding B.V. ("Liberty").[21]

The merging parties are two of the three largest operators in the German cable network market. Liberty operates via

[15] *See* FCO press release of August 27, 2013, available in English on the FCO's website.

[16] *See* FCO press release of February 20, 2013, available in English on the FCO's website.

[17] *See* DCA, decision of Mai 15, 2013, Case VI – Kart 10/12 (V), available only in German.

[18] *See* National Competition Report October-December 2012, p. 13; *see* also FCO decision of November 22, 2012, Case B3-64/12, available only in German at the FCO's website.

[19] *De minimis* market exemption, Section 35 (2) No. 2 GWB. After the 8th Amendment to the GWB, which entered into force on June 30, 2013, the *de minimis market* exemption is no longer relevant for jurisdictional purposes, but the FCO still cannot prohibit concentrations due to anticompetitive effects on *de minimis* markets.

[20] *See* Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ 2008 C 95/1, para. 198.

[21] *See* DCA, decision of August 14, 2013, Case VI-Kart 1/12 (V), available in German.

its subsidiary Unitymedia in North Rhine-Westphalia and Hesse, while Kabel BW operates in Baden-Württemberg. Liberty had notified the FCO of its acquisition of Kabel BW for €3.2 billion in 2009.

Originally, the FCO had imposed onerous conditions on the acquisition after an unusually long and intense evaluation period.[22] The FCO determined that the transaction would have negatively impacted the retail TV services market ("*Gestattungsmarkt*"), where contracts with owners of large premises with many housing units are concluded, and on the so-called feed-in market ("*Einspeisemarkt*"), where cable network operators offer feed-in services to TV channels.

More specifically, the conditions imposed by the FCO required that Liberty would grant special termination rights in respect of large contracts for retail TV services and that it would end its encryption of digital free TV programs. Further, Liberty undertook to dispense with various exclusivity clauses as well as rights to dismantle household cable connections and ownership claims after a certain time period. In the FCO's view, these conditions effectively addressed the competition concerns arising from the transaction.[23]

The DCA reversed the FCO's clearance decision, thereby halting the transaction following appeals lodged by two of Liberty's competitors, Deutsche Telekom and NetCologne. The DCA determined that the FCO was incorrect in finding that the conditions attached to transaction eliminated all relevant competition concerns. In particular, the DCA found that, but for the merger, Kable BW would likely have become a strong competitor of Liberty, and that this lost potential competition was not addressed by the conditions.

Further, the DCA defined the relevant market differently than the FCO. The DCA criticized the FCO for separately evaluating the effects of the transaction on contracts for single dwelling units ("*Einzelnutzerverträge*") and on contracts for multiple dwelling units ("*Mehrnutzerverträge*"). According to the Court, sales in respect of both types of dwelling fall within the same market, given that there is marketing or pricing strategies do not differ between the two customer groups. Furthermore, DCA found this market to be regional in scope as opposed to national (the FCO had viewed the relevant submarkets as national in scope). Although taking a different take on market definition to the FCO, the DCA found, as did the FCO, that Liberty held a dominant position.

Finally, the Court found that the special termination rights provided for by the FCO's conditions did not improve the position of Liberty's competitors. The DCA noted that, contrary to the FCO's expectations at the time of the clearance, most users had not used the termination rights and switched providers following the FCO's decisions; the Court determined that users have little incentive to do so.

Liberty has appealed the DCA's decision to the German Federal Supreme Court.[24] Should the DCA's decision be affirmed by the Supreme Court, the FCO will have to evaluate whether the merger can be cleared subject to even stricter constraints. If the FCO prohibits the merger, Liberty and Kabel BW will have to reverse all steps taken to implement the merger. It should be noted that a new FCO decision would take place against a changed competitive background, given that the merger between Vodafone and Kabel Deutschland GmbH was cleared by the European Commission on September 20, 2013.

[22] *See* National Competition Report October-December 2011, p. 11.

[23] The decision is one of several decisions of the FCO in the cable sector. *See*, e.g., FCO decision of February 22, 2013, Case B7 – 70/12 (prohibition of Kabel Deutschland Holding AG and Tele Columbus GmbH merger); FCO decision of April 3, 2008, Case B7 – 200/07 (clearance of Kabel Deutschland and Orion merger), *see* National Competition Report April-June 2008, p. 8; FCO decision of June 20, 2005, Case B7 – 22/05 (clearance of Iesy (Apollo) and Ish merger); FCO decision of June 21, 2005, Case B7 – 38/05 (clearance of TeleColumbus (BC Partners) and Ish merger). All decisions are available in German at the FCO's website.

[24] The DCA did not permit to appeal, however the parties are entitled to apply for permission of appeal with the German Federal Supreme Court.

Asklepios Abandons Plan To Acquire Shares of Rhön-Klinikum Despite (Conditional) Clearance

On July 30, 2013, the FCO announced that Asklepios Kliniken Verwaltungsgesellschaft mbH ("Asklepios") no longer intends to comply with the condition for clearance of its acquisition of shares of Rhön-Klinikum AG ("Rhön"). As a result, Asklepios' planned acquisition of 10.1% of the shares of Rhön is now prohibited.[25] The transaction, which was notified to the FCO in August 2012, would have allowed Asklepios, *inter alia*, to block the acquisition of Rhön by another undertaking (pursuant to Rhön's statutes), but not to exercise joint control over Rhön. In its decision of March 14, 2013,[26] the FCO had cleared the transaction on the condition that Asklepios sold a hospital and a medical treatment center in the Goslar area (Harz region, near Hanover) to an independent hospital operator.[27]

In July 2013, Asklepios announced that it no longer intends to fulfill this condition. Yet, there is no official statement from Asklepios as to the reasons for its decision. Consequently, the conditional clearance has turned into a prohibition. According to the FCO this is the first time that a company has chosen not to comply with its own commitments so as to change a clearance decision into a prohibition.

On previous occasions, competitors and suppliers of Rhön had tried either to acquire Rhön or to prevent its acquisition. Whereas a planned acquisition by Fresenius in 2012 was blocked by Asklepios and B. Braun acting together as minority shareholders, on October 10, 2013 the FCO cleared a transaction allowing B. Braun (which is not operating any hospitals in Germany) to raise its Rhön shares from 5% to 25%. With this B. Braun would be able to prevent the acquisition of Rhön by Fresenius unilaterally, even if the threshold for veto rights in Rhön's statutes should be raised from 10% to 25%.[28] Yet, on September 13, 2013, Fresenius announced that it intends to buy the majority of Rhön's hospitals. As this operation will be an asset deal (not a share deal) it does not require shareholder support. This transaction still has to be cleared either by the FCO or by the European Commission. Although the thresholds of Article 1 (2) EUMR will likely be met,[29] the FCO may make a request to the European Commission to have the case referred to the FCO, on the basis that the transaction will primarily affect the German market.

Policy and Procedure

FCO Launched Its Market Transparency Unit for Fuels

On September 12, 2013, the FCO launched. together with four private consumer information service providers,[30] the public test phase for its Market Transparency Unit for Fuels ("MTU"). This service will enable consumers to compare fuel prices for petrol stations in Germany in real time.[31] The test phase will end on December 1, 2013. The FCO sought the establishment of the MTU's following its sector inquiry into competition in German fuel markets, which indicated that prices of petrol stations in Germany moved in

25 *See* FCO press release of July 30, 2013, available in English at the FCO's website.

26 *See* FCO decision of March 14, 2013, Case B 3 – 86101 – Fa – 132/12, available in German at the FCO's website.

27 There are a number of transactions in the hospital sector which the FCO blocked or cleared only after substantial commitments, *see,* e.g., National Competition Reports January-March 2005, p. 7; April-June 2005, p. 6; April-June 2006, p. 7 *et seq*.; April-June 2007, p. 14 *et seq*. On the other hand, the FCO only recently cleared two hospital mergers despite significant combined market shares, see National Competition Report April-June 2013 p. 13 *et seq*.

28 The corresponding amendment of the statutes of Rhön is currently subject to proceedings before the district court of Nürnberg-Fürth.

29 Fresenius alone had an annual turnover in 2012 of € 19.3 billion (40% of this in Europe), while Rhön's annual turnover in 2012 amounted to € 2.9 billion.

30 These service providers are for a start: ADAC, Clever-Tanken, Mehr-Tanken, and Spritpreismonitor. Further consumer information service providers have already been authorized and will soon start operating.

31 *See* FCO press release of September 12, 2013, available in English at the FCO's website. The FCO already established the Market Transparency Unit for Fuels in April 1, 2013; during the last month, it set up the IT system (together with the Federal Highway Research Institute (*BASt*) by using its existing Mobility Data Marketplace, a platform that collects and distributes traffic data for different purposes, *see* FCO press releases, of April 23, 2013, May 28, 2013, and August 12, 2013, available in English at the FCO's website.

parallel in certain circumstances (e.g., consolidated fuel price increases before the weekend or public holidays).[32]

As of August 31, 2013, each of the approximately 14,500 petrol stations in Germany[33] are obligated by law to report its fuel prices for all petrol types (Super E5, SuperE10, Diesel) separately in real time (within five minutes) to the MTU.[34] The MTU will pass on the fuel prices in minute intervals to the private consumer information service providers. Consumers can then inform themselves via mobile apps or the service providers' internet pages about the current fuel prices in their surrounding or along travel routes in Germany so that they can opt for purchasing the least expensive fuel.

Dortmund Regional Court Refers To ECJ Questions on the Scope of Forum Shopping In Follow-On Damages Actions

On April 29, 2013, the Dortmund Regional Court decided to stay its follow-on damage claims proceedings concerning the hydrogen peroxide cartel and referred several questions regarding the scope of forum shopping in follow-on damages actions to the European Court of Justice ("ECJ") for preliminary ruling. The court proceedings began in March 2006, when CDC Hydrogen Peroxide SA ("CDC"), a private firm which purchases and enforces cartel damage claims, filed a law suit against six chemical companies.[35] According to the European Commission decision of May 3, 2006, the six defendants participated in the EEA-wide hydrogen peroxide cartel between 1994 and 2000.[36]

Only one of the defendants, Degussa AG, is domiciled in Germany.[37] In September 2009, CDC withdrew its action with regard to Degussa, the German anchor defendant, after CDC had settled with Degussa. Several defendants subsequently contested the Dortmund Regional Court's jurisdiction. In this respect, the court referred three questions regarding the interpretation of the Brussels Regulation, i.e., Regulation No 44/2001,[38] to the ECJ.

First, the Regional Court asked the ECJ whether it is expedient within the meaning of Article 6(1) Brussels Regulation to try follow-on damage claims against a number of cartelists together before a court in an EU member state where only one of the cartelists is domiciled. According to Article 6(1), a concentration of jurisdiction is possible provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments. The question arose as the non-German based defendants' cartel infringements cover time periods and geographic areas different from those of Degussa. According to the court, however, a close connection would likely exist, if the cartelists were jointly and severally liable for the continuous infringement of Article 101 TFEU.

As CDC withdrew its action with regard to Degussa, the Court asked if a withdrawal of an action must be taken into account when examining whether the claims are "closely connected" within the meaning of Article 6(1) and if German jurisdiction would have been obtained fraudulently provided that the settlement between CDC and Degussa had only been delayed in order to establish jurisdiction in Germany.

The Court's second question relates to Article 5(3) Brussels Regulation, according to which a person domiciled in one member state may be sued in matters relating to tort in the place where the harmful event occurred. As established by

32 *See* for more details National Competition Report April-June 2011, p. 10, and National Competition Report July-September 2009, p. 7 *et seq*.

33 With the exception of fuel stations that qualify for a *de minimis* or hardship clause. The *de minimis* clause applies if the petrol station's turnover did not exceed 750 cubic meter in the previous calendar year.

34 *See* FCO press release of August 20, 2013, available in English at the FCO's website and FCO press release of August 30, 2013, only available in German at the FCO's website.

35 *See* Dortmund Regional Court, decision of April 4, 2013, Case 13 O (Kart) 23/09, available in German.

36 *See Hydrogen Peroxide and Perborate*l (Case COMP/F/38.620), decision of May 3, 2006.

37 As a whistleblower, Degussa had received full immunity under the Commission's leniency program.

38 Regulation No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001 L 12/1 ("the Brussels Regulation").

the ECJ, this covers both the place where the damage occurred and the place of the event giving rise to the damage.[39] For EEA-wide cartels, which affect customers throughout the EEA, this would increase the scope for forum shopping significantly. Therefore, the court asked whether this principle also applies with regard to follow-on cartel damages actions.

Finally, the court asked whether the requirement of effective enforcement of Article 101 TFEU might preclude the application of Article 23(1) Brussels Regulation, according to which arbitration and jurisdiction clauses are exclusive, and consequently prevail over Article 5(3) and 6(1). Part of the contracts between the defendants and their customers contained such arbitration clauses that prevented the plaintiffs from forum shopping.

FCJ Refers Questions Concerning the Internal Contribution Between Companies That Are Jointly and Severally Liable for a Cartel Fine to the ECJ

By court order of July 9, 2013, the German Federal Court of Justice ("FCJ") submitted a number of questions to the European Court of Justice for preliminary ruling. The questions concern compensation as between companies that are jointly and severally liable for a fine imposed by the Commission for a violation of EU-antitrust law.

If the Commission finds a number of legally independent companies to represent a single economic unit, it is able to impose only one single fine for which all of these companies are jointly and severally liable – even if only one of the companies has actually been involved in an infringement. If one of these companies pays either the full amount of the fine or at least part of it, the question of internal compensation between the legal entities may arise. This is especially the case if the affiliation between the previously incorporated companies brakes up in the aftermath of the fine.

In the present case, two lower courts rejected the plaintiff`s claim for compensation. In its decision, the Munich Court of Appeal found that the internal relationship of parties that have been found jointly and severally liable for a Commission fine is subject to German private law. On this reasoning it rejected the claim for reasons of equity. By contrast, the European General Court ("EGC") found the internal relationship to be subject solely to European regulations, and that in imposing fines, the European Commission is required to rule conclusively on how the fine is to be distributed within the infringing single economic entity. If the Commission does not include sufficiently explicit provisions, the internal distribution shall be deemed to be evenly divided among the legal different entities.

The FCJ does not doubt the basic competence of the EU institution to establish conclusive rules concerning the principle of joint and several liability but it is in doubt whether the EU legislator has actually already done this. The questions now referred to the ECJ thus focus thus focus on the legal nature of the internal relationship as well as the role of the European Commission and the national courts in determining the internal distribution.

39 *See eDate Advertising GmbH* (Cases C-509/09 and C-161/10) 2011 ECR I-10269, para. 41.

GREECE

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

Horizontal Agreements

The HCC (by its decision no 561/VIII/2013) fines on the Hellenic Building Constructors' Association in respect of a horizontal agreement aimed at preventing competition in the real estate market.

The HCC has determined that the Hellenic Building Constructors' Association (the "HBCA") infringed article 1 of the Competition Act by restricting production and distribution of its members and indirectly fixing prices of real estate property. The decision of the HCC followed an investigation launched by the HCC in response to press reports that alleged property prices in certain areas in Greece were unnaturally high, as well as to an announcement of the HBCA wherein it urged its members not to construct new buildings unless they had previously sold 70% of their stock.

The HCC conducted a dawn raid of the HBCA offices, during which it seized multiple documents (e.g., correspondence, meeting minutes), which indicated that the HBCA had urged its members to refrain from: (i) lowering the sale prices of their existing unsold properties; competing amongst themselves with respect to how much ownership of land they offer to land owners (in return for developing the land); and (ii) initiating new projects unless 70% or more of their existing properties had already been sold. The HCC determined that the HBCA's actions had led to an artificial limitation of supply and increase in prices in the private real estate sector. The HCC noted that property prices in Athens rose by 1.8% on average per annum in the period 2002-2011, and that these increases could not put down (as least solely) to reduced demand.

According to the HCC, the documents seized indicated that the HBCA had engaged in a "coordinated, long term and strategic effort" to create a uniform business and trading policy for its members. The HCC stressed that healthy competition in the real estate sector could only obtain where decisions on supply are made independently by HBCA members, and not in any way directed by the HBCA itself. The HCC fined the HBCA €18,394 (a relatively small fine) and ordered the HBCA to halt all infringing activities. In this regard, the HBCA was also ordered to state explicitly to its members in writing that decisions on production, distribution, and pricing must be taken freely and individually.

IRELAND

This section reviews developments concerning the Irish Competition Act 2002, which is enforced by the Irish Competition Authority (the "ICA") and the Irish Courts.

Policy and Procedure

The Irish Competition Authority (ICA) Opens Public Consultation on Its Draft Revised Merger Guidelines.

On September 13, 2013, the ICA published a draft of its new Merger Guidelines. The current guidelines were published on December 16, 2002, and will be replaced by the new guidelines following the ICA's review of consultation responses.

The new guidelines represent a move to a more holistic and less rigid procedure for merger review. The use of the *small but significant and non-transitory increase in price* test (the "SSNIP" test) has been de-emphasized as a key indicator of a product market to an ancillary test limited "in practice due to the absence of actual price data." The new guidelines further emphasize that the market definition is an important tool, but "not an end in itself," and allows the ICA to be flexible in how comprehensive a definition is made.

Another significant change in the guidelines is the ICA's use of the Herfindahl-Hirschman Index (HHI). The HHI is a general measure of market concentration used by the ICA to gauge how closely to scrutinize concentrations. Though both the current and proposed guidelines note that the HHI thresholds do not establish fixed safe harbors, the new guidelines update the HHI values for concentration to align with those in the United States. THey also remove the previous "Zone" system in favor of fixed market and delta thresholds for determining the level of concentration.

The guidelines also place greater emphasis on the equal importance of theories of harm other than unilateral and co-ordinated effects. The EC's guidelines on non-horizontal mergers[40] have been incorporated into the guidance, as have examples of conduct that the ICA has encountered in the decade since the current guidelines were published. In addition, "maverick" firms and the failing firm defence are given more complete treatement, and guidance on how the ICA will treat evidence of efficiencies has been updated.

Notably absent from the new guidelines is any guidance on remedies. In its initial consultation on reform published on December 3, 2010, the ICA had suggested the inclusion of guidance on the availability of behavioral and structural remedies, along with examples of both.

More generally, the new guidelines represent an update which incorporates a decade of practice by the ICA, and lessons learned from other jurisdictions and the International Competition Network's best practices. The deadline for public responses to the consultation is October 25, 2013.

[40] European Commission Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ 2008 C 265/07.

ITALY

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

Sector Inquiry into the Modern Distribution Sector

On October 27, 2010, the ICA launched an inquiry into the retail sector (Grande Distribuzione Organizzata, GDO), with a view to better understand and analyze both existing horizontal relationships among large retailers and negotiation dynamics between the latter and suppliers. The relevant report was published by the ICA on July 24, 2013.

The sector inquiry was launched on October 27, 2010. It focused on two aspects: (i) the horizontal relationships among large retailers; and (ii) the negotiation dynamics between these retailers and suppliers.[41]

The inquiry was predominantly carried out through hearings and questionnaires addressed to market players as well as to the relevant food associations. In this context, the ICA also cooperated with the *ISMEA - Istituto di Servizi per il Mercato Agricolo Alimentare*.[42]

Market concentration. The ICA found that market concentration in the Italian retail industry is lower than in other EU Member States. The two main distribution chains (Coopitalia and Conad) hold market shares of 15% and 11%, respectively. Their five closest competitors hold market shares between 5% and 10%. Local markets, at the provincial level, however, tend to be much more concentrated because of the non-uniform distribution of large retailers throughout the Italian territory. In certain provinces, leading distribution chains hold market shares above 50-60%.

Forms of horizontal aggregation. The ICA analyzed the different forms of aggregation among larger retailers, such as franchising, buying groups, consortia, etc. According to the ICA, these aggregations may have a negative impact in terms of efficiency, in particular by reducing large retailers' incentives to compete with each other.

In this context, the ICA noted that these forms of alliance: (i) account for about 80% of the whole national modern distribution market in terms of sales; and (ii) reinforce individual market positions of relevant players (in many provinces, two top buying groups hold a combined market share of 70-80%).

The inquiry further concluded that these forms of aggregation could result in increased transparency of the supply terms and conditions applied by different large retailers. Aggregation could also facilitate the exchange of sensitive information.

Vertical relationships with suppliers. The ICA reviewed the current negotiation practices between buying groups and other forms of alliance among large retailers, on the one hand, and suppliers, on the other hand. It noted that these practices have not entirely replaced individual negotiations between individual large retailers and suppliers. In particular it showed that there were two levels of negotiation, which resulted in higher complexity and costs.

The ICA also stressed that supply agreements tend to be complex and unclear (i.e., the supply period is not clearly identified; contracts are subject to unilateral changes by large retailers and they are sometimes concluded verbally; and, economic terms of the contracts are ambiguous). A number of suppliers also claimed that they had been subject to unfair payment terms and punitive initiatives by

41 At the EU level, similar issues have been recently discussed in: (i) the EESC Opinion on The current state of commercial relations between food suppliers and the large retail sector, OJ 2013 C 133/16; and (ii) the Commission's Green Paper on unfair trading practices in the business-to-business food and non-food supply chain in Europe, COM(2013) 37 final of January 31, 2013. The European Commission has also set up a High Level Forum for a Better Functioning Food Supply Chain to implement a roadmap of initiatives to improve the competitiveness of the agro-food industry.

42 ISMEA is an Italian public entity active in supporting agriculture and food markets.

large retailers such as total (or partial) "delisting" of products or illegitimate worsening of contract terms.

The sector inquiry also scrutinized large retailers' "trade spending." This practice consists in requesting suppliers to contribute to larger retailers' distribution costs, through upfront access payments (like slotting allowances, pay-to-stay fees, listing fees, etc.). There is often no clear commercial justification for these payments which, however, represent an important cost item for suppliers (i.e., up to 40% of the entire economic value of supply contracts).

Conclusions. The ICA has identified two main possible courses of action: (i) the prevention of further concentration on the market through a more effective merger control mechanism as well as an appropriate application of antitrust rules concerning horizontal anticompetitive agreements to certain forms of alliance among large retailers; (ii) possible investigations with respect to potential abuses of dominant position by large retailers (e.g., trade spending practices). With regard to the latter, however, the ICA highlighted that dominance requires a very complex assessment, which cannot be limited to market shares, but must consider other qualitative factors.

It should be noted that the ICA may now exercise its supervisory powers against unfair practices in the food supply chain, in order to address potential concerns arising from contractual practices encouraged by large retailers' purchasing policies.[43] This does not represent a mere duplication of the ICA's powers under antitrust rules, but it will cover situations where an imbalance exists between the seller/buyer that does not result in a clear abuse of dominance.

ICA'S Communication on the Assessment of the Merger Control Thresholds

The ICA published a communication aimed at clarifying determinations under the second merger control threshold under Article 16, para. 1, of Law No. 287/1990 regarding newly-created joint ventures and mergers.

According to Article 16(1) of Law No. 287/1990 (as amended by Law No. 27 of March 24, 2012), a concentration requires prior notification to the ICA when, in the last fiscal year: (i) the combined aggregate turnover in Italy of all the undertakings concerned exceeds €482 million, and (ii) the target's aggregate turnover in Italy exceeds €48 million. From January 1, 2013, a concentration is reportable in Italy only when both the above turnover thresholds are met.

The ICA's communication of August 5, 2013, has clarified how to apply the second turnover threshold in connection with newly set-up joint ventures and mergers.[44]

For a newly created joint venture, the ICA considers that the target's turnover should be calculated taking into account the value of contributions made by the acquirers at the time of incorporating the joint venture. These contributions should be deducted from the parents' turnover. Subsequent contributions, which do not exceed the threshold individually, shall be considered as part of a single transaction, provided that they are made within two years from the establishment of the new joint venture. It is up to the notifying undertakings to assess whether, because of subsequent contributions, the second threshold set forth in Article 16(1) is exceeded and the transaction becomes notifiable.

As regards mergers, the ICA has clarified that: (a) in case of a merger by acquisition ("*fusione per incorporazione*"), the target's turnover is the turnover of the merged company; (ii) in case of a merger of equals ("*fusione in senso stretto*"), the target's turnover is the turnover generated by the assets that will merge, i.e., the combined turnovers of the undertakings concerned.

[43] *See* Article 62 of Law No. 1/2012 concerning "Disciplina delle relazioni commerciali in materia di cessione di prodotti agricoli e agroalimentari".

[44] ICA Communication of August 5, 2013, Bulletin No. 31/2013

THE NETHERLANDS

This section reviews developments under the Competition Act of January 1, 1998 (the "Competition Act"),[45] which is enforced by the Netherlands Authority for Consumers and Market (Autoriteit Consument & Markt, "ACM").[46]

Private Damages

Arnhem-Leeuwarden Appeals Court Puts Damage Calculation In Switchgear Cartel on Hold

On September 10, 2013, the Arnhem-Leeuwarden Court of Appeals (the "Appeals Court") rejected a request for calculation of damages in the switchgear cartel for which ABB was held liable in an earlier judgment by the Arnhem District Court (the "District Court").[47] On appeal, the Court held that it was unreasonable for damages to be calculated during the course of an appeal against the District Court's finding of liability. In its reasoning, the Appeals Court paid particular attention to the District Court's reliance on a calculation of damages report prepared by Tennet's economist. The Appeals Court held that as the report had been introduced in the proceedings at a very late stage, ABB had not been in a position to rebut the economic findings in the report. The Appeals Court subsequently found it unreasonably burdensome on ABB to commence proceedings for damage calculation, given its inability to defend itself adequately.

Amsterdam Appeals Court Orders Private Damages Claim To Continue Despite Ongoing EU Proceedings

On September 24, 2013, the Amsterdam Court of Appeals (the "Court") overturned a prior judgment by the district court (March 7, 2012) in which it suspended a damages claim against KLM, Air-France and other members of an air-cargo cartel until a final rule is issued by the EU courts in ongoing proceedings.[48]

As in a decision earlier this year given by the Hague District Court,[49] the Court cited *Masterfoods*,[50] in which national judges were given a margin of appreciation to decide whether to suspend a case in anticipation of a final ruling by the EU courts, or to raise a prejudicial question.

According to the Court's interpretation, suspension of national proceedings is only required if questions of fact or law depend on the validity of the Commission's decision, and there is reasonable doubt regarding this validity. The Court put forward three requirements that parties should meet when requesting a suspension of national proceedings:

(i) parties have appealed the Commission decision in a timely manner;

(ii) parties have reasonable objections against the Commission decision in proceedings before the EU courts; and

(iii) the parties' must present their points of defense from EU court proceedings so that a national judge can assess whether the parties' arguments are materially impacted by the Commission's decision.

According to the Court, it can only suspend proceedings if the party seeking the suspension can reasonably comply with these prior requirements. They should at least be capable of providing the relevant material to substantiate such a request as there would be no reason to doubt the validity of a Commission decision without adequate information. Ultimately, the judge will weigh both parties' legitimate interests and ultimately determine whether suspending proceedings is proportional in each case.

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[45] Decisions of the ACM can be found at www.acm.nl, case-law can be found at www.rechtspraak.nl.

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

[47] Arnhem-Leeuwarden Appeals Court, Judgment of September 10, 2013, ECLI:NL:GHARL:2013:6653; Arnhem District Court, Judgment of January 16, 2013, ECLI:NL:RBONE:2013:BZ0403. The Arnhem District Court judgment was discussed in CGSH National Competition Quarterly Report January-March 2013.

[48] Amsterdam Court of Appeals, Judgment of 24 September 2013, ECLI:NL:GHAMS:2013:3013.

[49] The Hague District Court, Judgment of May 1, 2013, ECLI:NL:RBDHA:2013:CA1870.

[50] Masterfoods (Case C-344/98) 2000 ECR I-11369, para 57.

As requirements (ii) and (iii) had not been met by KLM in current proceedings, no judge would be able to justify suspending proceedings. Therefore, the Court overturned the district court's decision, and referred the case back to it.

Abuse of Dominance

Oost-Brabant District Court Rules Category Management Agreement Between Mars and Petrol Stations May Restrict Competition

On August 7, 2013, the Oost-Brabant District Court (the "Court") required a more thorough investigation of sales data for candy bars in order to determine whether Mars Nederland BV ("Mars") breached competition rules by offering a bonus system to petrol stations for product placement.[51]

Nestlé Nederland BV ("Nestlé") initiated proceedings against Mars under (i) art. 102 TFEU and/or article 24 of the Competition Act or abusing its dominant position by foreclosing access to prominent display space, and (ii) art. 101 TFEU and/or art. 6 Mw by entering into category management agreements with individual petrol stations. Nestlé argued that in order to compete with Mars it would have to offer a similar deal, which it could not afford to do due to its much smaller market share. Mars argued that its increased sales from better product placement offset the losses incurred by offering bonuses. On July 29, 2011, the 's-Hertogenbosch District Court ordered Mars to stop the expansion of its bonus program to any new petrol stations.[52]

Nestlé reopened proceedings against Mars for renewing certain contracts in 2012 in breach of the earlier court decision. The Court held that an equally efficient competitor could not effectively compete with Mars, given a smaller market share. At current volumes, Nestlé would not be able to cover variable cost nor realistically win back market share in the long run. Mars argued that it only offered its bonus programs to privately owned petrol stations and that the agreements would not have an appreciable effect on competition. The Court considered the agreement to be an effects-based infringement and ultimately held that an *appreciable* restriction of competition must be proven. The Court ruled that it could not adequately examine the alleged infringement until an expert economic report was produced by the plaintiff proving that it had suffered a substantial loss in market share.

ACM Dismisses Complaint by Brinks Nederland B.V against Geldservice Nederland B.V

On September 4, 2013, the ACM dismissed a complaint by Brinks Nederland B.V ("Brinks") that a joint venture created by the largest Dutch banks, Geldservice Nederland B.V ("GSN") would restrict competition by creating a dominant position in the market for cash handling.[53] The ACM also dismissed the claim that GSN would breach competition rules by creating an incentive to coordinate banks' behavior on the downstream market for Cash-in-Transit ("CIT") services to retailers and consumers. The ACM considered that GSN convincingly argued that expected efficiencies stemming from their cooperation would offset any competition concerns.

Brinks provides armored transportation, cash logistics and security related services to financial institutions, government agencies and other undertakings. GSN is a joint venture set up by ABN AMRO N.V, ING Bank N.V and Cooperatieve Centrale Raiffeisen-Boerenleenbank B.A (Rabobank) and is active in cash handling and CIT services to its member banks. Brinks filed a complaint on September 4, 2012, alleging that by their collective operation of cash handling services and collectively purchasing CIT services through GSN, the banks infringed competition law.

Brinks argued that as banks are the primary customers of cash handling services, all other players would be unable

51 Oost-Brabant District Court, Judgment of August 7, 2013, ECLI:NL:RBOBR:2013:4356.

52 's-Hertogenbosch District Court, Judgment of July 29, 2011, ECLI:NL:RBSHE:2011:BR3488.

53 Case 7512/37 (Brinks Nederland B.V – Geldservice Nederland B.V), ACM decision of June 3, 2013.

to compete on the market. Additionally, Brinks argued that GSN's practice of including cash handling services in general banking packages could effectively raise prices as GSN's member banks were bound to it by an exclusive service contract. Brinks also contended that by collectively tendering for cash transportation services through GSN, banks would have the incentive to use their buyer power to secure excessively low prices from suppliers.

The ACM concluded that on the market for *cash handling* services, no restriction for competition could be assumed as the banks were only 'insourcing' their own demand and corporate clients could still choose to be serviced by third parties such as Brinks.

On the market for *CIT services*, the ACM considered that banks could collectively exert buyer power through GSN and limit possible competition on the downstream market, depending on the design of the tender procedure. However, under art 6(3) Mw/101(3) TFEU the ACM held that significant efficiencies stemming from reducing the duplication of servicing routes would be enough to offset any competition concerns. In addition GSN argued convincingly that it would be in its best interest to assure the existence of enough downstream players in order to secure low prices, and to ensure continuity and innovation in the market. The ACM was therefore convinced that GSN would arrange its tendering procedure in such a way as to ensure continued competition in this market.

Policy and Procedure

ACM Strategy: Promotion of Chances and Choices for Companies and Consumers

On September 20, 2013 the ACM published its final strategy incorporating comments received for its draft strategy published earlier.[54] The final strategy, which is in line with the draft, reiterates the ACM's effect-based approach focusing on the market- or consumer-problems underlying competition issues. Amongst other departments, the ACM will have two sectorial directorates: (i) the Energy Directorate which will focus on energy and tap water; and (ii) the Telecom, Transportation and Post Directorate which will focus on the areas previously governed by the OPTA and the NMa's Transportation Department. These sectorial directorates will also monitor any potential abuses of dominance in the respective sectors. Additionally, there will be a general Competition Directorate dealing with mergers, cartels and abuse of dominance (outside the sectors covered by the sectorial directorates).

Guidelines on (Anonymous) Informants, Fine Calculation and Leniency

The ACM published its new guidelines on (anonymous) informants (*Werkwijze (anonieme) informanten*) in line with the previous, now replaced, guidelines.[55] Additionally, the ACM reorganized its guidelines on fine calculation and leniency by integrating these in one set of guidelines (*Beleidsregels van de Minister van Economische Zaken voor het opleggen van bestuurlijke boetes door de ACM*) without substantive changes.[56]

[54] Available at https://www.acm.nl/nl/publicaties/publicatie/11991/Strategie-Autoriteit-Consument-en-Markt/. The draft strategy was discussed in CGSH National Competition Quarterly Report January-March 2013.

[55] Available at https://www.acm.nl/nl/publicaties/publicatie/11684/Werkwijze-anonieme-informanten/.

[56] Available at https://www.acm.nl/nl/publicaties/publicatie/11888/Beleidsregels-voor-boetes-en-clementie-samengevoegd/.

SPAIN

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

Horizontal Agreements

The CNC Imposed Fines of More Than €5 Million on Club De Variedades Vegetales Protegidas, Carpa Dorada and Nador Cott

On September 21, 2011, the Investigation Division of the CNC opened formal proceedings to investigate whether Carpa Dorada, S.L. and the Club de Variedades Vegetales Protegidas ("CVVP") had engaged in anti-competitive practices consisting of unjustifiably restricting the freedom to sell Nadorcott tangerines. The proceedings were subsequently extended to cover Nador Cott Protection S.A.R.L ("Nador Cott Protection"). In its decision of July 4, 2013, the CNC Council found that there was sufficient proof that the companies subject to the proceedings had participated in a cartel between 2004 and 2011, in violation of the LDC.

As regard the companies involved, Carpa Dorada, S.L. holds an exclusive license to exploit Nadorcott tangerines in Spain and Portugal. The CVVP is a non-profit association of farmers and sellers dedicated to the development and promotion of the Nadorcott plant variety as well as of other protected varieties. Nador Cott Protection is a limited liability company established in France holding the EC protection license on Nadorcott tangerines.

Firstly, the CNC Council determined that the agreements at issue did not fall within the scope of application of the EU Regulation on Community plant variety rights and as such were fully subject to strictures of competition law.[57] The CNC thus concluded that the companies had engaged in anticompetitive conduct, comprising: (i) the implementation of an identification system carried out through the signing of exploitation licenses; and (ii) the introduction of additional and supplementary controls associated with that system, according to which producers and sellers of Nadorcott tangerines were forced to accept restrictions on their distribution channels and to assume obligations to supply information. The CNC Council refused to exempt the agreements from the application of Article 1 of the LDC under either the *de minimis* rule or pursuant to the terms of the EU Technology Transfer Agreements Regulation.[58]

The CNC Council imposed a €83,147 fine on Nadorcott Protection S.A.R.L, a €5,426 fine on Carpa Dorada S.L. and a €4,974,027 fine on Club de Variedades Vegetales Protegidas. In its Decision, the CNC Council also called on those three entities to cease engaging in the infringing conduct at issue (i.e., to eliminate the identified restrictions on the sale of the fruit and to refrain from introducing comparable restrictions in the future).

The CNC Imposed Fines of Over €35 Million on Several Companies and Associations in the Car Rental Market

On January 12, 2012, the Investigation Division of the CNC opened a formal investigation into the market for car rental services for possible price fixing and coordination with respect to specific trading conditions by different companies and associations.

On July 30, 2013, the Council of the CNC issued a Resolution in which it found that a number of car rental service providers had engaged in a single continuous infringement (lasting from May 2005 to October 2011) of Article 1 of the LDC, through implementing a number of anticompetitive agreements. While the CNC Council deemed the relevant market to be national in scope, the infringements mainly concerned Mediterranean Spain, due to the higher level of tourism, and therefor car rentals, in this region. The infringing agreements provided for: price fixing over an array of car rental products and services; and

57 Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights, OJ 1994 L 227.

58 Council Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, OJ 2004 L 123.

(ii) commercial arrangements, namely the length and timing of the low, mid and high seasons, the prices and conditions for use of "extra" services such as baby seats, out-of-hours return, second drivers, and airport pick-up. The CNC Council found that through these agreements, the parties concerned eliminated uncertainty with respect to the most important competitive variables in a substantial portion of the Spanish car rental market.

In view of the infringements, the Council of the CNC imposed fines on 19 parties ranging from €100,000 to over €15 million.

The CNC Approved the Acquisition of Sole Control by Distribuciones Generales Boyacá over a Series of Companies Active in the Newspaper and Magazine Distribution Sector

On August 26, 2013, the CNC Council approved the acquisition of sole control by Distribuciones Generales Boyacá, S.L., ("Boyacá") of a number of companies active in the newspaper and magazine distribution sector. Boyacá purchased shares formerly held by the Prisa Group and the Unidad Editorial Group.

As a result of the concentration, Boyacá controls or has a stake in all the main newspaper and magazine distribution networks in Spain.

The concentration was cleared subject to commitments regarding, notably, the relationship between Boyacá and editors, wholesale distributors, and sales outlets.

First, as regards the relationship between Boyacá and editors, Boyacá undertook to amend its exclusive distribution agreements with the Prisa Group and the Unidad Editorial Group, limiting their duration to five years, abolishing penalties for non-renewal, eliminating preferential clauses and limiting the scope of such agreements to products which are currently distributed, excluding future products. In addition, Boyacá committed not to alter the terms of its current contracts with editors for a five-year period, and to offer its services to all other editors with whom it did not yet have contractual relationships under equivalent terms, during the same period.

Second, as concerns the relationship between Boyacá and wholesale distributors, Boyacá undertook not to alter the terms of its current contracts with wholesale distributors for the regional distribution of periodic publications for a five-year period. With regard to future clients, Boyacá committed to provide its services to all wholesale distributors, including those of daily newspapers, magazines and collectibles, under transparent, objectively justifiable, and non-discriminatory terms.

Third, as regards the relationship between Boyacá and sales outlets, Boyacá again undertook not to alter the terms of its current contracts for a five-year period. However, Boyacá will be able to make the necessary contractual adjustments in order to provide more efficient services, without affecting the ordinary functioning of the sales points during normal opening hours. With regard to future contracts, Boyacá committed to provide its services to all sales points under transparent, objectively justifiable, and non-discriminatory terms. Finally, Boyacá proposed commitments with the aim of passing on certain efficiencies deriving from the concentration to sales outlets.

The commitments will remain in force for five years. A monitoring trustee will be appointed to ensure compliance with the commitments.

SWEDEN

Mergers and Acquisitions

The SCA Clears Acquisition in the Computer Components Retail Sector

On August 2, 2013, following an in-depth investigation, the SCA unconditionally cleared the acquisition of sole control of Webhallen Sverige AB ("Webhallen") by Komplett AS ("Komplett"). Both undertakings are active in the retail of household electronic goods and, in addition, Komplett is active in the distribution of household electronic goods to other resellers.

The SCA found a horizontal overlap between the parties' activities with regard to the retail of computers, computer components and computer accessories. However, given the more limited number of market players in the computer components retailing sector, the SCA suggested that the relevant market could be defined more narrowly as the retail sale of computer components to consumers on the Internet and in brick-and-mortar shops. Ultimately, the product market definition was left open. The geographic market was defined as covering the whole of Sweden.

First, the SCA considered the effects of the proposed transaction at the retail level, where the parties' combined post-merger market share was 25 to 40%. The SCA found that the post-merger entity would have very limited ability and incentive to increase prices. This finding was based on the following considerations: (i) computer components are homogeneous products, retailers offer a relatively similar product range and, as a result, consumers regard the different retailers as easily substitutable; (ii) while the parties were found to be close competitors, they also face competition from a large number of other players; (iii) market transparency and consumer awareness result in low margins, which in turn is a sign of strong competition on the market; and (iv) there are no legal or technical barriers that hinder entry into or expansion on the market.

Second, the SCA considered the vertical effects of the proposed transaction taking into account Komplett's upstream activities in distribution. It found that, contrary to the concerns expressed by some market players, Komplett's bargaining power vis-à-vis manufacturers and distributors would not increase significantly post-merger and raise costs for competitors, in light of Webhallen's relatively small purchasing volume from distributors. A distributor, which, as a result of the merger, loses Webhallen as a customer would still have several retailers to sell to. On the contrary, the SCA stated that the increase of bargaining power post-merger may lead to a decrease of production costs and lower prices for the benefit of customers.

The SCA concluded that the transaction would not significantly hinder the existence or development of effective competition in computer components in Sweden.

ASSA Abandons Its Planned Acquisition of Prokey Following the SCA's Court Application to Block the Deal

On September 19, 2013, ASSA ABLOY AB ("ASSA"), a Swedish lock manufacturer and wholesale distributor, decided to abandon its planned acquisition of Prokey AB ("Prokey"), a Swedish lock wholesale distributor, following the SCA's application to block the transaction.

As previously reported, ASSA's acquisition of Prokey did not meet the mandatory merger notification thresholds for Sweden.[59] However, the SCA ordered ASSA to notify its planned transaction to enable the SCA to review the transaction.

On July 12, 2013, following its in-depth review of the transaction, the SCA requested the Stockholm District Court to prohibit the acquisition. According to the SCA, the proposed acquisition would significantly impede effective competition in the wholesale market for security products for locksmiths in Sweden, in which ASSA already held a dominant position through its wholly-owned subsidiary Copiax. In particular, the SCA estimated that Copiax's market share amounted to around 80-90%. The SCA found that Copiax and Prokey are each other's closest

[59] For more information, please see NCR Q1, p. 43.

competitors. Therefore, the SCA concluded that post-merger ASSA would have the power and the incentive to increase the price for Copiax's and Prokey's customers. The SCA further argued that the transaction would enable ASSA to leverage its position in the upstream-market for the manufacturing of locks by offering less favorable conditions for competing lock manufacturers, which sell their products through Copiax and Prokey.

Following ASSA's announcement that it will not proceed with the proposed acquisition of Prokey, the SCA withdrew its summons application requesting the Stockholm District Court to prohibit the merger. In its press release, the SCA stated that it had achieved its objective to prohibit the anti-competitive transaction to the benefit of consumers.

The SCA Clears Two Acquisitions in the Pension Sector Following In-Depth Investigation

On September 9, 2013, following an in-depth investigation opened in June 2013, the SCA cleared unconditionally the acquisition of SPP Liv Pensionstjänst AB ("SPP") and a life insurance portfolio also administered by SPP by KPA Pensionsservice AB ("KPA").

KPA voluntarily filed the planned acquisition pursuant to Chapter 4 Sec. 7 of the Act, which enables concentration to be filed voluntarily where only one of the two cumulative thresholds are met (in this case, KPA's turnover in Sweden greatly exceeded the SEK one billion threshold set out in Chapter 4 Sec. 6 point 1, but SPP's turnover in Sweden was below the SEK 200 million threshold set out in Chapter 4 Sec. 6 point 2).

The SCA found the relevant market to be the procured administration of collectively agreed occupational municipal pensions in Sweden, in which the parties' activities overlapped.

The SCA characterized the relevant market as highly concentrated. Pre-merger, KPA had a dominant position in the market, with a market share close to 80%. The SCA noted that the transaction would further strengthen KPA's dominant position and result in only two operators remaining in the market, extinguishing the competitive pressure that KPA and SPP have exerted on each other. The SCA also noted that the municipalities exercised limited buyer power and that the barriers to entry to the relevant market were high. The SCA therefore concluded that the transaction was liable to impede significantly the existence or development of effective competition in the relevant market.

In their defense, the parties argued that in the absence of the transaction, SPP would exit the market. The SCA's investigation confirmed the absence of objective conditions for SPP to continue its operations in the relevant market. The SCA also found that, apart from KPA, no alternative buyers of SPP existed. The SCA therefore concluded that the elimination of SPP and the resulting further concentration of the market were not merger specific effects. On the contrary, the SCA found that the transaction may enhance KPA's service efficiencies and result in benefits for its clients. Ultimately, the SCA held that the negative merger specific impact on competition was very limited and, therefore, the concentration was not considered liable to significantly impede the existence or development of effective competition in Sweden as a whole or in a substantial part thereof.

SWITZERLAND

This section reviews competition law developments under the Federal Act of 1995 on Cartels and Other Restraints of Competition (the "Competition Act") amended as of April 1, 2004, which is enforced by the Federal Competition Commission ("FCC"). The FCC's decisions are appealable to the Federal Administrative Tribunal (the "Tribunal").

Horizontal Agreements

FCC's Investigation into Exchange Rates Applied By Banks

The FCC has launched a preliminary investigation into exchange rates applied by certain banking institutions. According to its press release of October 4, 2013,[60] the FCC has been made aware of possible unlawful agreements between banks aimed at fixing the exchange rates for several currencies.

The FCC is already in contact with the Swiss Financial Market Supervisory Authority (FINMA). The identity of the relevant parties is not yet known.

Unilateral Conduct

FCC's Investigation Against Swisscom In the High Speed Internet Sector

On July 19, 2013, the FCC launched an investigation against Swisscom AG and Swisscom (Switzerland) AG. According to the Commission, there are indications that Swisscom may have abused its dominant position in the market for the provision of high speed internet services, through manipulating bids offered by rival service providers.

Swisscom and two other communication service providers submitted bids in response to tenders issued by La Poste for the high speed interconnection of La Poste's subsidiaries in Switzerland. The other communication services providers had to use the intermediary services of Swisscom in order to submit their bids to La Poste. There are indications that the prices charged by Swisscom for these intermediary services were too high, such that the other two communication service providers were unable to bid competitively and Swisscom was awarded the tender. The FCC believes that Swisscom may be dominant in the provision of high-speed internet services, and accordingly has launched an investigation to determine whether its pricing of intermediary services represented an abuse of dominance.[61]

FCC's Investigation into the Pricing System Applied by La Poste

On July 18, 2013, the FCC launched an investigation to examine the pricing system applied by La Poste to commercial clients. The preliminary investigation has indicated that La Post may be unlawfully restraining competition in the mail shipping sector. The investigation aims to determine whether La Poste's pricing system renders its services unavailable to certain clients, and whether La Poste discriminates or disadvantages certain clients through other means. The FCC believes that La Poste may be dominant in the market for mail shipping for commercial clients.[62]

Commission's Investigation into the Stringed Instruments Sector

On July 3, 2013, the FCC launched an investigation into possible anticompetitive conduct by Musik Olar AG in the stringed instruments sector. On July 4, 2013, searches were conducted by the investigating bodies at the company's premises. The FCC suspects that Musik Olar has engaged in resale price maintenance with respect to the distribution of stringed instruments. The FCC's Secretariat stated in a press release[63] that Musik Olar AG has systematically pressured its resellers to alter their pricing and discount policies. The FCC has indicated that

60 http://www.weko.admin.ch/aktuell/00163/index.html?lang=fr (last visited October 7, 2013).

61 http://www.weko.admin.ch/aktuell/00163/index.html?lang=fr (last visited October 7, 2013).

62 http://www.weko.admin.ch/aktuell/00163/index.html?lang=fr (last visited October 7, 2013).

63 http://www.weko.admin.ch/aktuell/00163/index.html?lang=fr (last visited October 7, 2013)

other distributors may also have engaged in resale price maintenance.

Commission Fines Construction Companies In the Canton of Zurich

On June 18, 2013, the FCC announced sanctions for a total amount of half a million francs against construction companies in Zürich who, between 2006 and 2009, had reached an agreement on prices on around thirty offers thus determining which companies would win the tender.

The investigation of the Commission was opened in 2009 following searches, at the same time as the one concerning canton Argovie.[64] It showed that approximately thirty submission offers were made with agreements between construction companies concerning prices, in both public and private tender processes to determine which company would be awarded the contract. The volume of submissions affected amounted to approximately CHF 13 million.

The Commission determined the amount of the fines based, among other things, on the amount generated by the submissions for which the companies were awarded the contracts. The Commission took into account the gravity of the restrictions to competition as well as the number of participations in rigged submissions. Fines range from CHF 3,000 to CHF 124,000. The case against several participants (KIBAG Bauleistungen AG, Marti AG, Bauunternehmung and STRABAG AG) was filed as no evidence of misconduct was established. In a decision dated April 22, 2013, the Commission decided to forego any sanctions against one of the companies on the basis of its leniency program.

The fight against submission cartels is a priority for the Commission. Such cartels are particularly harmful to the economy and are therefore to be considered as serious violations of competition law. Other investigations in the same area are currently ongoing, concerning road works and civil engineering in cantons Grisons and St. Gall. Alongside these proceedings, the Commission is working in collaboration with the cantons and the Confederation to raise their awareness of competition law issues.

64 http://www.weko.admin.ch/aktuell/00163/index.html?lang=fr (last visited October 7, 2013)

UNITED KINGDOM

This section reviews developments under the Competition Act 1998 and the Enterprise Act 2002, which are enforced by the Office of Fair Trading ("OFT"), the Competition Commission ("CC"), and the Competition Appeal Tribunal ("CAT").

CMA Receives Government Guidance and Publishes Mission Statement

On October 1, 2013, the UK Department for Business, Innovation and Skills published a non-binding ministerial statement (the "Steer") of strategic priorities for the new Competition and Markets Authority ("CMA"), which officially came into being on the same day. The Steer reflects the responses of stakeholders collected during an eight-week consultation process, and sets out how the new competition regime fits within the Government's wider economic priorities and the CMA's primary duty to "*seek to promote competition, both in and outside the U.K. for the benefit of consumers*." Its guiding principles are as follows:

- **Strategic priorities**. The CMA should identify markets where competition is not functioning effectively. In doing so, it should take account of consumer behavior and dynamic competition brought about by innovation and new business models. The CMA should also assess specific markets and sectors where enhanced competition could contribute to faster growth, and have regard to speed of process, fairness, transparency, and certainty for business.
- **Efficient enforcement of competition rules**. The CMA should enforce antitrust rules robustly and fairly, so that infringements do not harm consumers. This includes selecting an appropriate mix of complex and simple enforcement cases to maximize impact, striving for swift processing times, and acting as an effective expositor to ensure that businesses have an appropriate understanding of competition law.
- **Accountability**. The CMA should play a key role in challenging Government, in particular where the Government creates barriers to competition through regulation. The Government has committed to accept the CMA's recommendations for improving competition, unless there are strong policy reasons not to do so.
- **Working with partner agencies**. The CMA should provide leadership across the UK economy by working with partner agencies, such as regulators like the Financial Conduct Authority, in order to promote effective competition. It should also maintain and advance its leadership position in the EU and internationally.

The guiding principles are reflected in the CMA's proposal for vision, strategy and values, published on October 2, 2013. The proposal outlines the regulator's five goals: (i) delivering effective enforcement; (ii) extending competition frontiers; (iii) refocusing on consumer protection; (iv) developing integrated performance; and (v) achieving professional excellence.

Overall, the central task of the CMA will be to ensure that competition supports growth and to identify and tackle constraints in markets where competition is not working well for consumers. In doing so, it should take account of both short-term competition and longer-term dynamic competition. The CMA should also enforce antitrust rules effectively, challenge the Government where it creates barriers to competition, and work with and through partner agencies to deliver positive competition outcomes.

The Government has announced that in due course, and in response to a consultation, it will provide draft secondary legislation on the CMA's power to impose financial penalties for failure to comply with information requests and interim measures.

OFT Consults on Accepting Commitments in Hotel Online Booking Case

On August 9, 2013, the OFT proposed to accept commitments offered by Booking.com, Expedia Inc., and Intercontinental Hotels Group plc. ("IHG") in relation to its investigation into the online offering of "Room-Only"[65] hotel accommodation bookings by online travel agencies ("OTAs").

Expedia and Booking.com are OTAs. IHG is the largest hotel company in the world. The OFT was concerned that Booking.com and Expedia had entered into agreements with IHG that restricted their ability to discount the rate at which Room-Only hotel accommodation bookings are offered to customers. In particular, Expedia and Booking.com had agreed to offer accommodation at the Intercontinental London-Park Lane Hotel at a room rate set by IHG, and not to offer rooms at a lower rate, for instance by funding a promotion or discount from its own margin or commission.

The OFT was concerned that the limitations on discounting restricted competition as follows:

- **Limited competition on room-rates**. Because of the restrictions on discounting a hotel's Room-Only accommodation, competition on the offer of room rates between OTAs (and between OTAs and the hotel's direct online sales bookings) might be non-existent.
- **Increased barriers to entry**. The restrictions on discounting might create barriers to entry because they prevent new OTAs from entering the market, and/or achieving sufficient scale to compete with discounted rates.
- **The limitations on discounting might be replicated in the market, and would therefore exacerbate the restriction of competition**. The OFT did not investigate whether similar discounting restrictions were replicated in the market, but understood that the practices were potentially widespread in the industry. A market on which discounting restrictions were prevalent was likely to be characterized by significant limits to price competition and potential barriers to entry.

In order to address the OFT's concerns, the parties offered the following formal commitments:

- OTAs would be free to offer reductions on room rates (for example through discounts, vouchers, or rewards) funded by their commission or margin to "Closed Group Members."[66]
- OTAs would be free to publicise information regarding the availability of discounts in a clear and transparent manner; however, OTAs cannot publicise information regarding the specific level of discounts to customers who are not "Closed Group Members."

Notably, the OFT recognized that while the proposed commitments would introduce "*a degree of price competition where […] none may exist*", they would not remove completely the current restrictions on OTAs discounting that exist in IHG's agreements with Booking.com and Expedia. However, the OFT considered that there may be efficiencies in the form of benefits for consumers from hotels having the ability independently to set and control the rate for their hotel rooms (and thus restrict OTAs ability to discount freely of headline rates).

The OFT provisionally considered that the benefits remaining after the implementation of the proposed commitments outweigh those from restrictions on discounting. However, the OFT did not fully test the parties' efficiency arguments, and is specifically seeking appropriate submissions as the parties' efficiencies arguments as part of its consultation on the proposed commitments.

OFT Approves Merger Between BT PLC. and ESPN Global Limited

On July 18, 2013, the OFT cleared the anticipated acquisition of ESPN Global Limited ("ESPN") by British Telecommunications plc. ("BT"). The OFT concluded that the sale of the rights and content associated with the channels ESPN and ESPN America was unlikely to lead to

65 "Room-Only" means hotel accommodation that is offered on a standalone and/or individually priced basis (i.e., not part of a package).

66 Such as members of loyalty schemes. Members must have made a single previous booking since the effective date of the commitments in order to qualify as a "Closed Group Member"

a substantial lessening of competition in either of the markets for acquiring sports rights from sports content holders or for the supply of premium sports channels to end viewers.

The parties submitted that, absent the transaction, ESPN would have exited the UK market. The OFT considered three alternative counterfactuals to measure the acquisition against: (i) ESPN would have inevitably exited the UK; (ii) there would have been an alternative purchaser for ESPN; and (iii) what would happen to the sales of ESPN in the event of its exit.

The OFT found that, although there was sufficient evidence to suggest that ESPN would have exited the UK market absent the transaction (particularly after its failure to win any packages of rights at the FA Premier League auction), ESPN could have been sold to a less anticompetitive purchaser than BT. The OFT based this finding on internal documents indicating that ESPN had considered other broadcasters (such as Perform, Al Jazeera, and Eurosport) but had not fully determined their level of interest. As a result, the parties had failed to provide sufficiently compelling evidence that no alternative purchaser outside of BT and BSkyB existed. The counterfactual against which the OFT therefore proceeded to assess the transaction was that of both BT and ESPN (or another independent company) operating a sports channel from August 2013, with ESPN unsuccessful in its bid for FA Premier League broadcasting rights.

In its assessment of horizontal effects, the OFT found as follows: there were a number of firms active in the acquisition of sports broadcasting rights (BSkyB, BT, ESPN, Eurosport, Channel 5, and BBC); ESPN was not a strong competitor to either BskyB or BT; BT's recent entry to the market had stimulated competition; and, ESPN imposed only a limited competitive constraint on BSkyB and BT (it had market share of only 3-7%). As a result, even though the transaction reduced the number of premium sports channels, it would move ESPN's share the recent entrant BT and thus enhance its content. This would create a stronger competitor to BSkyB's Sky Sports – the dominant player in the UK sports broadcasting market.

Responding to vertical objections raised by third parties, the OFT found that the merger would not materially strengthen BT's ability to foreclose downstream broadcasting rivals or to engage in margin squeezing due to the relatively low demand for ESPN's services.

Although the Ofcom investigation into an alleged abuse of dominance by BT in relation to 'superfast' broadband was on-going, the OFT found that the merger would not produce any effects in this regard because it would not materially strengthen BT's position in that market.

Deutsche Bahn AG & Ors v Morgan Advanced Materials Plc & Ors [2013] Cat 18 (15 August 2013)

On August 15, 2013, the CAT lifted a stay on proceedings in Deutsche Bahn's, and 20 other claimants' (together the "UK Claimants"), follow-on damages action against Morgan Crucible Company plc. ("Morgan").

The original claim was brought in December 2010 pursuant to section 47A of the Competition Act 1998 and based upon a 2003 decision of the EU Commission in relation to the carbon and graphite products cartel.

The claimants had previously relied on Morgan as the "anchor" defendant in the proceedings: as a company incorporated in England, its presence would secure jurisdiction under Article 6(1) of the Brussels Regulation. However, Morgan sought to reject the claims against it on the grounds that those claims had been brought too late. This question was the subject of appeal before the UK Court of Appeal; accordingly, the follow-on damages proceedings were stayed from July 26, 2011. The appeal continues before the UK Supreme Court, with the hearing scheduled for March 2014.

In light of Morgan's ongoing appeal, the UK Claimants decided to change their grounds for seeking jurisdiction in the UK; They sought to rely on Article 5(3) in order to establish jurisdiction by reference to the place where the alleged damage occurred. The UK Claimants thus applied to lift the stay only for claims relating to damage allegedly suffered in the UK (save any such claims against Morgan).

The CAT accepted jurisdiction for these claims, holding that there was a "good arguable case" that damage had occurred in the UK, because products affected by the cartel's price fixing (the "Products") had been sold to direct and indirect purchasers within the UK. In so finding, the CAT rejected the defendants' arguments that the Products were sold by their subsidiaries or that evidence of damage arising from direct purchases was limited. The CAT also held that it was inappropriate to assess the question of "passing on" at the jurisdictional stage, rather it should be heard along with the substantive issues.

The CAT acknowledged that the UK Claimants had changed their grounds for seeking jurisdiction (from Article 6(1) to Article 5(3)), but found that this late identification of the new ground was immaterial. Although the original claim form did not expressly refer to Article 5(3), the facts stated were sufficient to establish damage-based jurisdiction.

The CAT also held that the Defendants could appear before the Tribunal to defend the UK Claimants' claims based on Article 5(3) without prejudice to their jurisdictional objections to the other non-UK Claimant claims.

The CAT emphasized that, once a clear jurisdictional basis has been established, claimants in the UK are entitled to have claims expeditiously determined, provided there are no good case management grounds for denying that right. And, in the instant case, the CAT found that running two sets of claims would not cause significant case management problems as the defendants would remain entitled to maintain their jurisdictional objections with respect to the non-UK Claimants; document management systems would facilitate reviewing documents for disclosure without presenting an excessive burden from "repeated trawling"; and, should the remaining claims eventually make it before the Tribunal, there would be no need to duplicate the entire action, as the general operation of the Cartel would already have been pleaded, and the specific claims of the UK Claimants would have been dealt with. The CAT accepted the possibility that Morgan would have to 'catch up' on the proceedings should its appeal fail, but considered it important that some progress could be made in the intervening period.

OFT Publishes Guidance on Applications for Leniency and No-Action In Cartel Cases

On July 8, 2013 the Office of Fair Trading (OFT) published the final version of its revised guidance on applications for leniency and no-action in cartel cases to replace its previous guidance documents on no-action letters for individuals and on leniency and no-action in cartel cases.

The final version remains substantially unchanged from the version put out for consultation in October 2011 save in respect of waivers of legal professional privilege. Following a supplementary consultation in October 2012, the OFT has decided that it will not, as a condition of leniency, require waivers of legal professional privilege over any relevant information in either civil or criminal investigations. Instead, the OFT has introduced a procedure whereby it will seek advice from independent counsel to verify the leniency applicant's claims that information is protected by legal professional privilege.

The guidance includes simplified rules on the different types of leniency are available to businesses:

- **Type A immunity**. This type offers automatic and guaranteed 'blanket' protection to the applicant and all of its cooperating current and former employees and directors (including protection from director disqualification). It is only available to the first member of a cartel to come forward and provided the OFT has not already begun an investigation or does not already have sufficient information to establish the existence of the alleged cartel activity.
- **Type B immunity/leniency**. Type B applicants may be eligible for corporate immunity from penalties or a reduction in the level of the penalty of up to 100 percent, criminal immunity from prosecution for co-operating current and former employees and directors,

and protection for its current and former cooperating directors from director disqualification. Provided there is no Type A applicant, Type B immunity/leniency is available to a business that is the first to report and provide evidence of a cartel but does so only after the OFT has started an investigation.

- **Type C leniency**. Under this type of leniency, a business may be eligible for a reduction in its corporate penalty of up to 50 per cent, discretionary criminal immunity for specific individuals, and protection for its current and former directors from director disqualification. Type C leniency may be granted to a leniency applicant that reports and provides evidence of cartel conduct in circumstances where another business has already reported the cartel activity, and is the only type of leniency available to an applicant who has coerced another undertaking to take part in the cartel activity.

The OFT have also published Quick Guides to leniency applications for businesses and individuals involved in cartel activity. The Quick Guide for individuals, in particular, outlines and clarifies many of the issues in this area. Self-reporters may be granted immunity from prosecution in the form of a no-action letter if certain criteria are met. An applicant must: (i) admit participation in the cartel offence; (ii) provide information regarding the cartel activity; (iii) co-operate with the OFT throughout the investigation; (iv) have ceased involvement in the cartel; and (v) not have coerced another business to take part in the cartel.

CC Retains BBC Magazine Undertakings

On September 24, 2013, the CC confirmed its provisional decision of August 16, 2013, to retain undertakings which restrict the BBC's ability to use air time to promote magazines published by the BBC.

Following a 1992 Monopolies and Mergers Commission report on the publicizing of goods supplied by the broadcaster, the Commission recommended the prohibition of the promotion of BBC of magazines published by the BBC or any of its subsidiaries on BBC1 or BBC2. With estimated market shares by circulation of 90, 43 and 32 per cent in the food and cookery, listings and gardening sectors, the promotion by BBC of its magazines on free airtime was found to distort competition in the relevant consumer magazines sectors. Additionally, concern was expressed that the distortion of competition would arise in further consumer magazine sectors. On November 4, 1992, pursuant to section 88 of the Fair Trading Act 1973, the Secretary of State for Trade and Industry accepted the undertakings recommended by the Commission.

In the United Kingdom, the OFT has a statutory duty to review orders and undertakings made under the Fair Trading Act 1973 and the Enterprise Act 2002, and assess whether a change of circumstances has rendered an order or undertaking inappropriate. The CC has the power to vary or revoke the orders or undertakings. Thus, in line with its statutory duty, the OFT carried out an own-initiative review of the BBC undertakings. In its advice of February 1, 2013, the OFT stated that a change of circumstances made it appropriate for the CC to consider whether the BBC should be released from the undertakings, or whether the undertakings should be varied or superseded.

The CC found that the October 2011 acquisition by Exponent of the consumer magazine business of BBC Worldwide Ltd. represented such a change of circumstances. The transaction included the sale of certain BBC and third party titles, a license agreement entitling Exponent to publish certain BBC and third party titles, and a publishing agreement entitling BBC Magazines Ltd. to exclusive production, publication, distribution, promotion and sale of certain BBC titles.

The BBC lost all sales-related income for the titles sold to Exponent and the third party titles under the license agreement. The CC found that the BBC had lost its incentive to favour these publications over any other. Therefore, the undertakings were held not to apply to these titles. However, the CC found that the BBC retained its incentive to promote the sixteen magazine titles acquired by Exponent on a license to publish and on a contract publishing agreement, for which the BBC retains a sales-related income. In addition, the CC found that the BBC's high viewership share of 33 per cent, with an even more significant figure for programs in the magazines would be promoted, the BBC retained its ability to favour promotion of these publications. The BBC Fair Trading Guidelines, which stipulate that BBC magazines must not be advertised on BBC radio, television or online, was found not to constitute a sufficient constraint on the ability of the BBC to promote these magazines. The CC held that apart from the undertakings, the BBC was not prevented from changing its policies with regard to the promotion of magazines.

The CC therefore held that the BBC had the incentive and ability to distort competition through the promotion of its magazines during BBC programming because of the size of its share of television viewing. The CC concluded that the undertakings should be retained in their present form without any variation because the terms of the undertakings already apply to the sixteen magazine titles.

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