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BELGIUM

This section reviews competition law developments under the Act on the Protection of Economic Competition of 15 September 2006 ("APEC"), which is enforced by the Competition Auditorate ("Auditorate") and the Competition Council ("Council").

Horizontal Agreements

Council Imposes Record Fine On Radiator Manufacturers

On May 20, 2010, the Council imposed a fine of €3,539,527 on four Belgian producers of steel plate radiators – Masco, Quinn, Radson, and Caradon – for exchanging sensitive commercial information and fixing wholesale prices from 2003 to mid-2006. This is the highest fine ever imposed for a cartel in Belgium. The investigation of the competition authority was based on two leniency applications.

According to the press release, in its decision, the Council found that, through the exchange of sensitive commercial information and the coordination of their pricing policy, the undertakings made their behavior on the Belgian market more predictable for competitors, in violation of both the Belgian and the EU competition rules.

The Council imposed a fine of €1,479,714 on Retting and a fine of €1,855,924 on Caradon. Masco, as the first leniency applicant, received full immunity from fines, while Quinn, the second leniency applicant, was granted a reduction, and was fined a total of €203,889.

DENMARK

This section reviews the competition law developments under the Danish Competition Act, as set out by executive order No. 1027 of August 21, 2007, and enforced by the Danish Competition Council ("DCC"), assisted by the Danish Competition Authority ("DCA"), and the Danish Competition Tribunal ("Tribunal").

Horizontal Agreements

The High Court Of Western Denmark Overturns Judgment By District Court On Price Fixing By Veterinary Hospitals

On May 19, 2010, the High Court of Western Denmark overturned a judgment rendered by the District Court of Århus on February 24, 2010, fining seven veterinary hospitals for price-fixing contrary to Section 6 of the Danish Competition Act.

Danish veterinarians are legally obliged to be on-call outside normal opening hours. The veterinary hospitals in question entered into a cooperation agreement on the provision of veterinary services in emergency situations during nights and weekends, whereby they would take turns to make themselves available to the customers of all seven hospitals. As part of the cooperation agreement, the hospitals charged similar prices for such visits outside normal opening hours.

The District Court of Århus found that the cooperation constituted price fixing contrary to Section 6 of the Danish Competition Act and imposed a fine of DKK 75,000 (approx. €10,000) on each of the hospitals.

The facts showed that: (i) the hospitals had drawn up a schedule whereby only one hospital was on duty at any given time; (ii) the off-duty hospitals referred customers to the on-duty hospital; and (iii) the cooperation agreement only applied to the provision of necessary and sufficient veterinary services to acutely ill and/or injured animals outside normal opening hours. The High Court found that there was no competition between the hospitals in relation to the services covered by the cooperation agreement and that the prosecutor had, thus, not established that the hospitals had engaged in illegal price fixing.

Vertical Agreements

The Danish Maritime And Commercial Court Finds A Royalty Provision Contrary To Section 6 Of The Danish Competition Act And Article 101 TFEU

On April 29, 2010, the Danish Maritime and Commercial Court found a provision in an IP licensing agreement to be null and void, as it was contrary to Section 6 of the Danish Competition Act and Article 101 TFEU. The provision in question required the licensee to pay royalties even if the licensed IPRs were not in fact used to manufacture products covered by the agreement.

The case concerned a licensing agreement entered into in 2005 by two jewelry manufacturers, Pandora Production Co. Ltd. and Lise Aagaard Copenhagen A/S ("LAC"), under which LAC would design glass pearls for Pandora's bracelets and provide technical assistance with production. Pandora was obliged to pay royalties corresponding to 12.5% of Pandora's total net sales of glass pearls, irrespective of whether the pearls were designed by LAC or other designers. Up to

2009, LAC received royalty payments of approx. DKK 32 million (€4.3 million).

Due to a significant increase in demand for Pandora's products (and Pandora's limited production capacity), Pandora considered purchasing glass pearls from other manufacturers. However, a dispute arose between LAC and Pandora as to whether Pandora should pay royalties to LAC for the resale of pearls produced by third parties.

In January 2009, Pandora filed a complaint with the DCA, which was rejected due to the DCA's limited resources. Consequently, Pandora instead instituted a declaratory action with the Maritime and Commercial Court.

The Court found that both Danish and EU competition rules were applicable to the license agreement, as it affected trade between the EU member states. The block exemption regulation for technology transfer agreements (Regulation 772/2004 of 27 April 2004) was not applicable, as the know-how transferred by LAC under the agreement was publicly available knowledge. However, since the license agreement concerned the continuous transfer of the right to use IPR-protected material between two competing undertakings, the Court found that the principles of the regulation should be applied to the assessment of the royalty provision.

The Court stated that the royalty provision restricted Pandora's ability to determine its prices and/or to exploit its own technology when selling products to third parties, and that the provision therefore constituted a hardcore restraint. Since the provision could not be justified under either Article 101(3) TFEU or the equivalent Danish provision (Section 8 of the Danish Competition Act), the Court ruled in favor of Pandora. The obligation to pay royalties to LAC for the sale of glass pearls not designed by LAC was held to be contrary to Section 6 of the Danish Competition Act and Article 101 TFEU and consequently null and void.

The Danish Competition Appeals Tribunal Confirms That Viasat's Business Terms Regarding The Distribution Of The TV-Channels TV 3 And TV 3+ In Cable Networks Must Be Changed

On June 8, 2010, the Danish Competition Appeals Tribunal confirmed a decision by the DCC of September 30, 2009, whereby Viasat's business terms regarding the cable distribution of the TV channels TV 3 and TV 3+ had the object and effect of restricting competition and therefore constituted an infringement of Section 6 of the Danish Competition Act and Article 101 TFEU.

The case was initiated in 2004 by a complaint to the DCC from the Danish Cable Television Association. On March 29, 2006, the Council adopted a decision holding that the business terms in question did not constitute an infringement. On April 27, 2007, however, the Appeals Tribunal annulled the decision and remanded the case to the DCC for reconsideration.

Viasat's business terms stipulated that its channels TV 3 and TV 3+ must be placed in all cable networks' so-called "second package," which is the most advantageous placement for commercial TV channels. The primary program package is by law reserved to so-called "must-carry" channels and certain supplemental channels that are set at such low prices that they constitute only a very limited part of the total package price.

Since Viasat holds a share of over 30% on the market for the cable distribution of pay TV channels in Denmark, the DCC held that the vertical block exemption regulation did not apply. The Council found that Viasat was a principal player on the market for pay TV, whose actions carried great weight on the market. Furthermore, the Council found that the business terms described above were adopted in all distribution agreements between Viasat and the cable distributors/local cable networks, resulting in a TV market with a parallel network of restrictive vertical agreements.

The Council therefore found – and the Appeals Tribunal confirmed – that Viasat's business terms restricted competition between TV channels to obtain the most favorable package placements, as Viasat reserved places in the second package for its own TV channels. The Council therefore found that Viasat's business terms could squeeze competing TV channels out of the second package.

As a result of the case, Viasat has ceased stipulating package placements (along with other terms such as minimum carriage requirements) in its business terms.

Unilateral Conduct

The Danish Supreme Court Refers Questions Concerning Discriminatory Pricing To The European Court Of Justice

On April 27, 2010, the Danish Supreme Court referred two questions concerning discriminatory pricing to the European Court of Justice:

1. Does a dominant undertaking's selective pricing, which is below its average total costs but above its average incremental costs, constitute an abuse of dominance infringing Article 102 TFEU, even if there is no intent to eliminate competitors?

2. Provided that Question 1 is answered in the affirmative, which circumstances should a national court take into consideration when faced with a question concerning exclusionary selective pricing?

The questions arose from a case concerning whether Post Danmark A/S (the incumbent postal operator in Denmark) had abused its dominant position on the market for unaddressed bulk mail. Both the DCC and the Danish Competition Appeals Tribunal found that Post Danmark had abused its dominant position on the market for distribution of unaddressed bulk mail (*e.g.*, advertisements) and local and regional newspapers by applying exclusionary loyalty rebates and discriminatory prices to certain customers where the differentiation was not based on its costs. The High Court of Eastern Denmark upheld these rulings in its judgment of December 21, 2007. In addition, on May 20, 2009, the High Court of Eastern Denmark ordered Post Danmark to pay compensation for damages related to this abuse to its main competitor on the market, Forbruger-Kontakt, amounting to DKK 75 million (approx. €10 million). This judgment is also under appeal to the Supreme Court.

The Danish Competition Appeals Tribunal Upholds Decision Finding Post Danmark's Rebate Schemes Abusive

On May 10, 2010, the Danish Competition Appeals Tribunal affirmed the decision from June 24, 2009, of the Danish Competition Council finding that rebate schemes applied by Post Danmark (the incumbent postal operator in Denmark) constituted an abuse of dominance contrary to both Section 11 of the Danish Competition Act and Article 102 TFEU.

The case concerns the market for distribution of "direct mail" in Denmark. In this market there were only two operators: Post Danmark A/S and Bring Citymail Denmark A/S. Post Danmark is active in the whole of Denmark, whereas Bring Citymail Denmark A/S only was active in North Zealand, including Copenhagen. Citymail exited the Danish market on January 1, 2010.

The scheme offered customers of Post Danmark rebates of up to 16% depending on the yearly amount of direct mails they sent through Post Danmark. The DCC had found that the system was loyalty-enhancing and it had resulted in foreclosure in the relevant market.

Legislation

The Danish Competition Act Has Been Amended

On April 29, 2010, the Danish Parliament adopted an amendment of the Danish Competition Act. The amendment primarily seeks to strengthen merger control in Denmark, but also entails a number of other changes to strengthen enforcement of the competition rules. The amendment will enter into force on October 1, 2010.

The new merger control rules significantly lower the Danish merger notification thresholds. The current rules require notification to the Danish Competition Authority if either:

1. The combined aggregate turnover in Denmark of all the undertakings concerned is more than DKK 3.8 billion (approx. €510 million) and the aggregate turnover in Denmark of each of at least two of the undertakings concerned is more than DKK 300 million (approx. €40 million); or

2. The aggregate turnover in Denmark of at least one of the undertakings concerned is more than DKK 3.8 billion (approx. €510 million) and the aggregate worldwide turnover of at least one of the other undertakings concerned is more than DKK 3.8 billion (approx. €510 million).

The amendment lowers the first set of thresholds to a combined aggregate turnover in Denmark of DKK 900 million (approx. €121 million), and a turnover in Denmark for each of at least two undertakings concerned of DKK 100 million (approx. €13 million). The second set of thresholds has not been amended.

Furthermore, the new rules introduce a new short form notification procedure for "unproblematic" mergers, which fulfill a similar set of criteria to those falling within the European Commission's simplified procedure (albeit with different thresholds).

The amendment also entails a revision of the deadlines applicable for the authorities' handling of mergers. These will to an appreciable extent mirror the deadlines applicable to merger cases handled by the European Commission. Thus, the authorities will have to reach a decision to clear the merger in phase I or to initiate phase II within 25 working days of receiving a complete notification (instead of 4 weeks under the current rules). Phase II will have to be completed no more than 90 working days after the phase I review period has expired, instead of 3 months after receipt of a complete notification under the current rules. According to the new rules, phase II may be extended by up to 20 working days if, *inter alia*, the parties to the transaction propose commitments. Such extensions will not be possible in phase I.

In addition to the revised rules on merger control, the amendment includes, *inter alia*, the following amendments to the Danish Competition Act:

- The *de minimis* limits for market and customer-sharing agreements and agreements on limitation of production have been removed, thereby forbidding this type of agreement regardless of turnover and market share figures.
- The Forbrugerombudsmanden (the "Consumer Ombudsman") has been empowered to act as a representative in class actions concerning compensation for harm caused by infringements of competition law to protect the interests of consumers and small businesses in such cases.

Finally, in order to liberalize the Danish book market, an interim provision in the Danish Competition Act regarding previous approvals of fixed resale prices on books is to be abolished as of January 1, 2011.

FINLAND

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

Vertical Agreements

Iittala Resale Price Maintenance

On April 29, 2010, the FCA proposed that the Market Court impose a fine of €4 million on Iittala Group ("Iittala") for resale price maintenance ("RPM") in violation of Section 4 of the Finnish Act on Competition Restrictions. According to the FCA, Iittala imposed minimum resale prices on several well-known Iittala homeware products between 2005 and 2007. The FCA considered that the RPM concerned nearly all retailers in Finland and prevented any price competition for Iittala products.

In 2006, the FCA opened its investigation into Iittala's practices, following a complaint by various retailers. Iittala continued to impose minimum resale prices following the opening of the investigation. The FCA found that Iittala concluded product-specific distribution agreements with retailers containing RPM clauses. Although some retailers refused to sign these agreements, they nevertheless complied with the retail prices set by Iittala, as Iittala threatened to cut off supplies if they did not.

Iittala claimed that its actions could be justified by the need to maintain good brand placement in discount stores and specialized shops. The FCA rejected this argument, holding that although this may be the reason why Iittala initiated the infringement, it was nevertheless not a valid justification. Further, the FCA noted that Iittala applied RPM in its agreements with all types of retailers, not only the discount stores and specialized shops in which brand management was allegedly necessary.

In its fining analysis, the FCA noted that RPM is one of the most serious forms of vertical competition restrictions. The FCA emphasized that Iittala applied a consistent strategy throughout Finland to restrict retail price competition in several product markets, thus increasing the prices paid by consumers. The FCA further noted that in addition to enforcing compliance with the agreements, Iittala monitored actual retail prices, and informed retailers on their competitors' compliance.

Veho Commitments

On May 28, 2010, the FCA issued a decision accepting commitments proposed by the Veho Group ("Veho"), a distributor of Mercedes-Benz vehicles, to increase the scope for independent mechanics to access technical training sessions organized by Veho on the repair of Mercedes vehicles. According to the FCA, the commitment will allow consumers to choose from a larger selection of qualified mechanics since independent mechanics are capable of providing the same level of service as Mercedes-Benz authorized technicians. The FCA noted that repair and maintenance costs account for an estimated 40% of the total cost of owning a car and thus efficient competition between car mechanics is of essential importance to consumers.

Policy and Procedure

Act On Competition Restrictions To Be Amended

In June 2010, a Bill proposing a new Competition Act was published. The Bill, which is expected to come into force by early 2011, is intended to harmonize Finnish competition law with the relevant EU legislation, would introduce several changes to the Finnish rules on merger control, fines and damages.

First, the Bill would reform the Finnish rules on merger control to introduce the SIEC (significant impediment to effective competition) test in place of the existing dominance test, thus bringing Finnish law in line with the EU Merger Regulation. Under the proposed rules, the Market Court could, on the FCA's proposal, prohibit a transaction, order it to be cancelled or impose conditions if the concentration would significantly impede effective competition in Finland or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position. The current one-week time limit for merger notifications would be removed, and a transaction could be notified to the FCA before a binding agreement has been concluded. The FCA could extend the investigation period in case of significantly incomplete or inaccurate information or delays in providing the information.

Second, the Bill would make it possible for fines to be imposed on the acquirer of a business which committed a competition infringement. The maximum fine would be 10% of the total turnover of the acquiring undertaking.

Third, the Bill would make it possible for any person who suffered harm caused by a competition infringement to claim damages on the basis of the Act. Limitation periods for damage claims would also be clarified.

Finally, the Bill would make it possible for the FCA, with the prior authorization of the Market Court, to conduct an inspection outside the business premises of a suspected undertaking (for example in a private residence) if the FCA has reasonable grounds to suspect that documents relevant to a severe competition restriction are kept there.

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 ("FCA") and the Minister of the Economy ("Minister").

Horizontal Agreements

French Supreme Court Holds That The Damage To The Economy Resulting From An Agreement To Exchange Information Must Be Substantiated

On April 7, the French Supreme Court held that the damages resulting from an agreement to exchange information must be substantiated, *i.e.*, based on the price-elasticity of demand for the relevant products (in this case, mobile phone services).[1]

In November 2005, the FCA found that the three main French mobile operators had agreed, from 1997 to 2003, to share strategic information on new subscriptions and cancellations, and to stabilize their market shares. Consequently, Orange France, SFR and Bouygues Télécom were fined €256 million, €220 million, and €58 million, respectively.

The decision was initially upheld by the Paris Court of Appeals in December 2006, but was subsequently annulled by the French Supreme Court in June 2007, on the ground that the anticompetitive object or effect of an agreement to exchange information must be substantiated for such an agreement to be deemed unlawful.

The case was remanded to the Paris Court of Appeals. On March 11, 2009, the Court of Appeals issued its judgment, in which it assessed the anticompetitive effects of the information exchange, but also held that the damage to the economy resulting from such an anticompetitive practice could be presumed based on (i) the significant size of the affected market, and (ii) the participation of all the mobile operators in the agreement. Orange France lodged an appeal before the French Supreme Court, claiming that the damage to the economy should have been adequately reasoned.

The French Supreme Court endorsed the appellant's view by reference to Article L. 464-2 of the French Commercial Code, which prescribes that the level of the fine must be proportionate to the importance of the damage caused to the economy by the restrictive practice. The Supreme Court held that the Paris Court of Appeals failed to duly ascertain the damage to the economy, since the price-elasticity of the demand for mobile phone services was not addressed when reviewing the impact of the exchange of information on the economy. The case has been remanded to the Paris Court of Appeals for final determination.

Paris Court Of Appeals Subjects Dawn Raids Targeting Newspaper Companies To Strict Conditions

On June 17, 2010, the Paris Court of Appeals quashed a lower court order authorizing dawn raids in the premises of the Amaury press group, thereby applying a higher standard of proof for search and seizure orders concerning newspaper companies.[2]

On December 10, 2008, the company editing the French sports newspaper *Le 10-Sport* filed a complaint with the FCA alleging that the Amaury press group had abused its dominant position to drive *Le 10-Sport* out of the market – in violation of Article L. 420-2 of the French Commercial Code.

The claimant contended that Amaury (i) simultaneously launched a competing newspaper, *Aujourd'hui Sport*, (ii) bundled the sale of advertising space in *Aujourd'hui Sport* and the mainstream sports newspaper in France (*L'Equipe*), and (iii) required newsstand owners to display its own sports newspapers (in particular *L'Equipe*) more prominently.

At the request of the FCA, the judge at first instance issued a search and seizure order. The dawn raids were carried out on May 19, 2009, on the premises of the Amaury newspaper companies, which subsequently lodged an appeal before the Paris Court of Appeals.

1 Judgment of the French Supreme Court of April 7, 2010, *Mobile Telephony*, n° 430 FS-P+B, http://www.autoritedelaconcurrence.fr/doc/cass2_mobiles_avril10.pdf.

2 Orders of the Paris Court of Appeals of June 17, 2010, n°09/12774, 09/12788, 09/12814, 09/12813, 09/12809, 09/12781, 09/12808.

The Court of Appeals first recalled that, pursuant to Article L. 450-4 of the French Commercial Code, the judge at first instance must ascertain that the suspected competition law infringements warrant a search and seizure order. The Court also noted that searching for and seizing evidence in the premises of newspaper companies constitutes a serious encroachment on freedom of the speech, as protected by Article 10 of the European Convention on Human Rights and similar provisions under French law.

Accordingly, the Court reasoned that dawn raids should only be authorized in the premises of newspaper companies where "*particularly troubling indicia*" point towards the likely existence of anticompetitive practices. This requires that the evidence put forward by the FCA be sufficiently detailed and strong for the search and seizure order to be necessary and proportionate to the interest of democratic society in securing a free press.

The Court then proceeded to examine whether the FCA had adduced sufficient evidence in that respect, and found the allegations relied on to be inconclusive, both on a stand-alone basis and taken together. For example, the Court considered that the judge at first instance should have assessed whether third parties had corroborated the complainant's allegations (which were self-serving, since the complainant's financial hardships could have been explained by other factors than Amaury's alleged anticompetitive practices in light of the industry-wide difficulties of the printed press). Similarly, the Court took the view that the FCA had not sufficiently examined the substance of Amaury's alleged bundled offers before drawing any inferences from them. Lastly, the Court pointed out that the relatively small number of *Le 10-Sport* newspaper sales could have been accounted for by the fact that it is not displayed on the newsstands.

The Paris Court of Appeals therefore annulled the lower court's order, declared that the search and seizure operations had been carried out unlawfully, and ordered the restitution of the seized documents to the Amaury press group.

The FCA lodged an appeal before the French Supreme Court.

Paris Court Of Appeals Holds That Parties Being Denied Full Access To The Administrative File Must Demonstrate The Prejudice Caused To Their Interests

On June 1, 2010, the Paris Court of Appeals held that a mere refusal by the FCA to disclose certain documents in the FCA's case file cannot be deemed to have prejudiced the parties' interests. It must be demonstrated to the court that, absent this procedural irregularity, the commitments would not have been endorsed by the FCA or would have been altered.[3]

In 2004, Canal 9's radio station "Chante France" was refused access to an economic interest group ("Les Indépendants"), that pools together several local and regional radio stations in order to market advertising space to national or international advertisers.

Canal 9 thus filed a complaint with the FCA on the ground that it had been discriminated against, and shut out from the market for national advertisement. After the FCA expressed preliminary competition concerns, Les Indépendants proposed a set of commitments, which the FCA endorsed pursuant to Article L. 464-2 of the French Commercial Code.

The commitments decision was initially upheld by the Paris Court of Appeals in November 2007, but was subsequently annulled by the French Supreme Court in November 2008. The Supreme Court held that the non-disclosure of the investigation report and the opinion of the Audiovisual Superior Council could have infringed the adversarial principle.

The case was remanded to the Paris Court of Appeals for further determination. In a preliminary judgment, the Court of Appeals requested that the documents to which the parties had been denied access be disclosed. Canal 9 claimed thereafter that its interests had been harmed, since it had not been in position to voice its concerns on the proposed commitments in the absence of a full access to the file.

The Court of Appeals first recalled that the parties must have access to (i) all the documents used by the case handler to draft his preliminary assessment, and to (ii) all the documents used by the FCA to decide on the commitments. However, the mere refusal to disclose certain documents cannot be deemed to have effectively prejudiced the complainant's interests. The court must therefore enquire whether, absent this procedural irregularity, the commitments would have been endorsed, or modified, by the FCA.

In the present case, the Paris Court of Appeals found that (i) the arguments put forward by Canal 9 following the disclosure of the two documents in question were no different from the concerns already voiced during the commitments procedure, and (ii) the FCA had already relied on the views expressed in the investigation report and the opinion of the Audiovisual Superior Council to request amendments to the proposed commitments. As a result, the Court of Appeals dismissed Canal 9's claim as unfounded.

3 Judgment of the Paris Court of Appeals of June 1, 2010, *Canal 9 / G.I.E. Les Indépendants*, n° RG 2008/21057, http://www.autoritedelaconcurrence.fr/doc/ca3_gie_indepen-dants_juin10.pdf.

FCA Rules That Collusion Between Competitors Is Not Exempt From Liability When Instigated By A Public Authority

On April 15, 2010, the FCA fined the participants in two cartels concerning the provision of (i) stevedoring and (ii) terminal operator services to container shipping lines in the port of Le Havre ("Le Port du Havre," operated by the Le Havre Harbour Authority).[4]

The first infringement concerned the allocation of new berths to be constructed at the harbor. The FCA found that Le Port du Havre organized several meetings with the stevedoring companies already operating in Le Havre with a view to allocating the berths. The FCA held that the stevedoring companies could be fined for such market-sharing practices, even though the allocation of the berths was prompted by, and fell within the exclusive competence of, the Harbour Authority. However, the FCA considered that it was not competent to rule on the liability of Le Port du Havre, since Article 101 TFEU and Article L. 420-1 of the French Commercial Code do not apply to administrative decisions regarding the management of public land (such as the allocation of concessions).

The FCA regarded the stevedoring companies' attendance at the meetings organized by the Harbour Authority to discuss the berth allocation as sufficient evidence of their involvement in the cartel, although no agreement was reached during these meetings. However, the FCA merely imposed symbolic fines in order to take due account of two mitigating factors: (i) the effect of the collusion was modest, since the berths have not yet been allocated and, pursuant to regulatory provisions adopted in 2008, a call for tender will be issued to ensure an open and transparent allocation of the berths, and (ii) the meetings between the terminal operators took place at the instigation of the Harbour Authority itself.

The second infringement concerned the implementation of an agreement between Moller-Mærsk (a container ship operator) and Perrigault (a terminal operator) preventing their stevedoring joint venture operating in Le Havre (TPO) from contracting with any customer apart from Moller-Mærsk and certain Perrigault customers. The prohibition resulted from a wide interpretation of a non-compete clause contained in the joint venture agreement. Whereas the non-compete clause provided that Perrigault and TPO should refrain from soliciting their respective customers, Perrigault and TPO construed the clause as prohibiting TPO from contracting with any third party. Upon finding that such interpretation effectively prevented TPO from competing with other terminal operators in Le Havre and had resulted in anticompetitive effects, the FCA fined Perrigault and the joint venture TPO for market-sharing practices.

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.

Horizontal Agreements

FCO Fines Manufacturers Of Ophthalmic Lenses And Trade Association Of Optometrists

On May 28, 2010, the FCO imposed fines totaling €115 million on five manufacturers of ophthalmic lenses, the trade association of optometrists, and seven individuals for agreeing, *inter alia*, on recommended retail prices, price surcharges, bonuses, and discounts.[5] Three manufacturers of ophthalmic lenses received a reduction of their fine under the FCO's leniency program. The ophthalmic lenses case seems to be a "hybrid" settlement, *i.e.*, a few, but not all, companies and individuals concerned have settled the case with the FCO.[6]

The decision illustrates two recent developments in German cartel enforcement: (i) settlements seem to have become the norm rather than the exception (in particular, as the FCO also accepts "hybrid" settlements),[7] and (ii) the FCO increasingly fines associations for facilitating or participating in cartel infringements.[8]

FCO Fines Coffee Roasters And Trade Association For Price Fixing

On June 8, 2010, the FCO imposed fines totaling €30 million on eight coffee roasting companies, the trade association of coffee roasters (Deutscher Kaffeeverband e.V.), and ten individuals for price fixing

4 FCA, Decision No.10-D-13, April 15, 2010, http://www.autoritedelaconcurrence.fr/pdf/avis/10d13.pdf.

5 A press release is available in English at: http://www.bundeskartellamt.de/wEnglisch/download/pdf/Presse/2010/100610_PR_ophtalmic_lenses.pdf; an English case summary can be obtained at: http://www.bundeskartellamt.de/wEnglisch/download/pdf/Fallberichte/B12-11-08_Bussgeld_Brillenglaeser-E.pdf?navid=29.

6 According to the FCO case summary, the trade association and two manufacturers settled the case.

7 In the beginning of 2008, the FCO and the companies and individuals involved in the cartel proceedings against decor paper manufacturer settled the case. This was one of the first settlements in Germany (see National Competition Report, 1st Quarter 2008). There are no published guidelines on the settlement process, but the FCO provided an overview of its practice in its Annual Report 2007/2008 (p. 35) and is generally open to providing informal guidance.

8 The FCO recently imposed fines against two trade associations for agreeing on set-up fees for dry mortar silos (see National Competition Report, 1st Quarter 2010, p. 9), and against the trade association of coffee roasters (see below).

related to coffee for commercial use (catering sector, bulk buyers, etc.).[9] Alois Dallmayr Kaffee oHG, the immunity applicant in the case, did not receive a fine. Melitta SystemService GmbH & Co. KG and J.J. Darboven GmbH & Co. KG received a reduction of their fines for their cooperation under the leniency program. This decision also involved a "hybrid" settlement as two companies decided not to settle with the FCO.

The case was part of a broader FCO investigation in the coffee sector. On December 18, 2009, the FCO imposed fines totaling €159.5 million on three coffee roasting companies for price fixing in the retail coffee sector.[10] In addition, the FCO initiated proceedings against several cappuccino producers, and it announced that it intends to complete this investigation in due course.

Regarding roasted coffee for commercial use, the FCO found that the companies held regular meetings from at least 1997 to mid-2008 in order to coordinate price increases and reductions. The FCO also fined the trade association because it found that the cartel members had informed the trade association about the details of the agreement, and upon the cartel members' request, the trade association had published press releases in order to justify future price increases within the market.

While the FCO found that the cartel infringement occurred from 1997 to mid-2008, it only imposed a fine for the period after the implementation of the 7th amendment of the GWB, which became effective in July 2005. However, with respect to Kraft Foods Außer Haus Service GmbH the FCO also applied the pre-July 2005 law as the FCO did not have sufficient evidence to prove that Kraft had participated in the coordination of price increases (and reductions) after April 2005. Nevertheless, the FCO found that Kraft had participated in an illegal information exchange with respect to a price increase in the beginning of 2008, and therefore imposed an additional fine under the current law.

Interestingly, the FCO again, as it had in the press release and case summary regarding the coffee roaster cartel in the retail sector,[11] explicitly referred to the amount of the cartel overcharge. Based on the FCO's press release and its August 6, 2010 case summary, the FCO found that in at least two cases, the cartel overcharge amounted to approximately €1.40 per kg in 2005 and €0.90 per kg in 2008. It is still unclear whether this is an exceptional approach in the coffee roaster cartel cases or whether this is the beginning of a new practice, perhaps being a conscious effort by the FCO to encourage and facilitate private damages claims.

Karlsruhe Court Of Appeals Limits Standing To Direct Purchasers And Disallows Passing-On Defense For Private Actions For Damages

On June 11, 2010, the Karlsruhe Court of Appeals awarded €100,000 in damages and interest to a savings bank, in a cartel follow-on damages claim against August Koehler AG, a manufacturer of carbonless paper.[12] The claim was lodged in the aftermath of the European Commission's carbonless paper cartel investigation. An insolvent company that used to provide printing services and had sourced carbonless paper from paper wholesalers, including a wholly-owned subsidiary of the defendant, had assigned the claim for damages to the savings bank.

The Court held that the standing of potential cartel victims is in principle limited to direct purchasers. An exception applies if the potential cartel victim has purchased products from a wholly-owned subsidiary of a cartelist. Otherwise, cartelists could circumvent their civil damages liability by simply using a wholly-owned subsidiary as an intermediary. The Court explicitly rejected the holding of the Berlin Court of Appeals ("Kammergericht Berlin") judgment of October 1, 2009, that both direct and indirect purchasers could, as joint and several creditors, in principle claim the entire amount of the damage incurred, regardless of whether the overcharge was passed on from the direct to an indirect purchaser.[13] Instead, the Court held that, in practice, the direct purchaser would be best placed to prove damages.

Further, the Court disallowed the application of the passing-on defense. The Court concluded that whereas in principle defendants in damages litigation could prove that the plaintiff was able to decrease the amount of damages *ex post*, this would not apply in cartel damages cases. The Court stated that allowing the passing-on defense in cartel damages cases would impede an efficient enforcement of EU law as it would lead to a decrease of the level of deterrence.

9 A case summary is available in English at: http://www.bundeskartellamt.de/wEnglisch/download/pdf/Fallberichte/B11-019-08-ENGLISH.pdf?navid=29; for the English press release see http://www.bundeskartellamt.de/wEnglisch/download/pdf/Presse/2010/100609_PM_Kaffee-E.pdf.

10 See National Competition Report, 4th Quarter 2009, p. 6 and 7.

11 See press release, published in English on December 21, 2009: http://www.bundeskartellamt.de/wEnglisch/download/pdf/Presse/091221_Kaffeeroester-E.pdf; and the case summary (reference number B11-18/08), only published in German on January 14, 2010, available at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell09/Fallberichte/B11-018-08-Fallbeschreibung.pdf.

12 Karlsruhe Court of Appeals, Decision of June 11, 2010, Case 6 U 118/05.

13 Kammergericht Berlin, Decision of October 1, 2009 – *Transportbeton II*, see WuW DE-R 2773 or WuW 2010 p. 189. See also National Competition Report, 4 th Quarter 2009, p. 7.

With respect to the calculation of damages, the Court considered two possible methods to establish whether the cartel had led to higher prices (cartel overcharge). First, the Court assessed whether one should compare the price of carbonless paper in Germany with prices in other geographic markets in which there was no cartel. However, the Court rejected this approach in the case at hand as the cartel had covered the entire EU/EEA. Second, the Court used the evidence provided by the plaintiff and findings of the European Commission in its fining decision. Namely, the Court used the European Commission's findings regarding agreements on individual price increases as quasi *prima facie* evidence for a cartel overcharge, and estimated damages at €100,000.[14] This estimate was based on the plaintiff's calculation of the cartel overcharge on the monthly purchases. Moreover, the Court took into account in favor of the defendant that the plaintiff had managed to reduce the announced price increase by, for instance, ordering bigger quantities in order to receive higher rebates. But the Court also considered in favor of the plaintiff that it was not plausible that the cartel-related price increase would decrease immediately after the end of the cartel to the level of competitive prices. Thus, the Court stated that it was very likely that purchases until February 1995, *i.e.*, five months after the cartel had ended, had been affected by the cartel.

With regard to interest payments, the Court stated that the new rule on interest (Section 33(4) sentences 4, 5 GWB), in force since July 2005, according to which cartelists shall pay interest on damages starting from the day the damages are incurred, does not apply retroactively. Hence, the Court applied the former version of the law, and granted interest from the date on which the claim was filed to the Court.

The judgment is not yet final as the defendant appealed the decision on points of law to the Federal Court of Justice.[15]

FCO Fines Producer Of Cable Filling Compounds

On June 16, 2010, the FCO imposed a fine of €400,000 on Condor Compounds GmbH, a producer of cable filling compounds, and on two individuals for bilateral price fixing with its competitor Melos GmbH between 2004 and 2008.[16] The FCO imposed a low fine in comparison to other recent cartel cases, as the turnover affected by the infringement was small. Melos had triggered the investigation with a leniency application and received immunity from fines. Condor and both individuals agreed to settle the case.

Vertical Agreements

FCO Fines Manufacturer Of Portable Navigation Devices For Vertical Resale Price Maintenance

On June 18, 2010, the FCO imposed a €2.5 million fine on Garmin Deutschland GmbH, a producer of portable navigation devices, and one individual for establishing a resale price maintenance system.[17] Garmin voluntarily reported this conduct to the FCO in October 2009, although the German leniency program does not apply to vertical agreements. The system was designed as a program that rewarded retailers that sold at the recommended retail price. In addition, Garmin "punished" retailers that sold below the recommended retail price with price increases afterwards. With this system, Garmin in particular tried to increase the level of retail prices in the Internet distribution channel. Garmin, as well as the individual concerned, settled the case. This is another recent case in which the FCO imposed fines for vertical resale price maintenance.[18]

Unilateral Conduct

Düsseldorf Court Of Appeals Denies Obligation To Grant Access To A Port Under The Essential Facilities Doctrine In Interim Proceedings

On June 10, 2010, the Düsseldorf Court of Appeals ruled in favor of Scandlines Deutschland GmbH in interim proceedings against an FCO decision dated January 27, 2010, which had ordered Scandlines, owner and operator of the Puttgarden ferry terminal, to negotiate (reasonable) access modalities to the port infrastructure with two Norwegian ferry operators.[19]

The FCO had found that Scandlines was dominant in the provision of terminal facilities and in the downstream market for ferry services between Puttgarden and Rødby. According to the FCO, Scandlines'

14 Ultimately, if the plaintiff is unable to fully prove or accurately assess the scope of damages, under German procedural law the courts are allowed to estimate damages (see Section 287 of the German Code of Civil Procedure).

15 Case File no. Kart ZR 75/100.

16 The case summary in German is available at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell10/Fallberichte/B11-015-09_Kabelfuellungen.pdf.

17 See the case summary, published in German on June 28, 2010: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell10/Fallberichte/B05-100-09_Preisbindung_Garmin.pdf?navid=35.

18 On October 14, 2009, the FCO imposed a € 4.2 million fine on Phonak GmbH for resale price maintenance, see National Competition Report, 4th Quarter 2009, p. 8. On September 25, 2009, the FCO had imposed a € 11.5 million fine on Ciba Vision Vertriebs GmbH, the market leader for contact lenses in Germany, for resale price maintenance and restricting internet trade, see National Competition Report, 3rd Quarter 2009, p. 6 and 7. On April 8, 2008, the FCO had imposed a fine of € 9 million on Microsoft Deutschland GmbH for influencing retail prices, see National Competition Report, 2nd Quarter 2009, p. 7.

19 See WuW/DE-R 2941; see also a brief summary of the FCO decision in: National Competition Report, 1st Quarter 2010, p. 9.

refusal to grant competitors access to the port infrastructure constituted an abuse of a dominant position pursuant to Section 19 GWB and Article 102 TFEU as the port constituted an essential facility.

Scandlines appealed the decision and requested interim measures, *i.e.*, granting the appeal suspensive effect (which it does not have by law). The Court ruled in favor of Scandlines and held that the FCO had likely misapplied Section 19(4) GWB, a provision that obliges dominant companies under certain conditions to grant competitors access to essential facilities, as the FCO had failed to take into account an exception to this rule. Under this exception, access to an essential facility can be refused if the concurrent use of the facility is impossible or cannot reasonably be expected. The Court held that the concurrent use of the ferry terminal would likely be impossible due to legal and factual reasons.

The Court held that there were obstacles for the two Norwegian ferry operators to obtain the necessary public permits to use and reconstruct the premises situated on the landside behind the port. In addition, the Court stated that the two Norwegian ferry operators would not be able profitably to operate an additional ferry service in the near future and that they would likely refrain from using the port facilities and from making the necessary investments. The Court concluded that given that the completion of the bridge across the same sea route between Germany and Denmark is expected in 2018, which will render the ferry service obsolete, the duration of main judicial proceedings, and of the necessary preparations for the start-up of the ferry service, the investment could not be amortized.

The FCO did not appeal the interim decision. However, the main appeal of Scandlines against the FCO decision in the main proceedings is still pending.

Mergers and Acquisitions

FCO Clears Merger In The Press Wholesale Sector Between Roth+Horsch Pressevertrieb And Presse Vertrieb Pfalz

On March 31, 2010, the FCO approved Roth+Horsch's acquisition of control of PV Pfalz after an in-depth investigation.[20] Both parties are active in the press wholesale sector. Roth+Horsch is a press wholesaler active in southern Hesse and has been, to date, independent from publishing houses. Ten publishing houses, including the publishers Axel Springer and Bauer, together hold an interest of 80% in PV Pfalz, which is active in Palatine and in northern Baden-Württemberg. As a result of this acquisition, the business activities of Roth+Horsch and PV Pfalz will be merged into a new company, Frankenthaler Pressevertrieb, in which the ten publishing houses will jointly hold a minority interest of less than 40%.

The Association of German Book, Newspaper & Magazine Wholesalers (Bundesverband Presse-Grosso) expressed concerns that the participation of publishing houses in the new company might jeopardize the impartiality of the wholesale sector vis-à-vis the publishing sector, and further strengthen the allegedly dominant positions of publishers in the newspaper and magazine markets.

However, the FCO found that the merger would neither create nor strengthen a dominant position in the press wholesale market, since the merger of two press wholesalers would only create a larger distribution area in which two former monopolists would be replaced by a new one.

As far as the newspaper and magazine markets were concerned, on which the parties to the transaction were not active, the FCO left open the question of whether it could take into consideration whether the merger created or strengthened a dominant position of the publishers that held an interest in one of the merging parties. In any case, this would require that the publishers' acquisition of interest in the new entity would constitute a (hypothetical) concentration within the meaning of Section 37(1) GWB. However, the FCO found that this was not the case, and in particular, that the publishing houses could neither alone nor jointly exercise "competitively significant influence," within the meaning of Section 37(1)(4) GWB, over the new company Frankenthaler Pressevertrieb given that the publishing houses do not have common interests. But even if the publishers would exercise such influence, the FCO did not expect that this could strengthen a dominant position in the newspaper and magazine markets. The FCO found that Axel Springer's and Bauer's strong market positions would not change as a consequence of the transaction, because the existence of eight additional publishing houses jointly holding the minority interest together with Axel Springer and Bauer would prevent them from obtaining priority treatment for their own products or any other significant advantage. Moreover, Frankenthaler Pressevertrieb was committed to impartiality vis-à-vis all publishing companies by its own statutes.

The decision is not yet final as it has been appealed by the Association of German Book, Newspaper & Magazine Wholesalers (Bundesverband Presse-Grosso).

20 FCO, Decision of March 31, 2010, Case B6-98/09, available in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion10/B6-98-09.pdf?navid=49; case summary available in English at: http://www.bundeskartellamt.de/wEnglisch/Decisions/KurzberichteFus/KurzberichteFusion_eW3DnavidW2638.php.

German Federal Court Of Justice Overturns Court Of Appeals Judgment In The GN Resound And Phonak Merger Case

On April 20, 2010, the German Federal Court of Justice ("FCJ") quashed the judgment of the Düsseldorf Court of Appeals of November 26, 2008, which had affirmed an FCO decision of April 11, 2007, blocking the acquisition of GN Resound by Phonak (now Sonova), both hearing-aid manufacturers.[21]

The FCO blocked the merger on the grounds that it would have strengthened the collective dominant position of the top three market players. The transaction would have led to the merger of the second and fourth largest players in the market, with combined market shares between 25-35%, and would have reduced the number of leading suppliers from five to four. The parties appealed the FCO decision to the Düsseldorf Court of Appeals and sought an interim measure to allow for the completion of the transaction. Following the rejection of this interim measure, Phonak announced that it would abandon the intended merger, but the parties proceeded with the main appeal, which was rejected by the Court of Appeals. GN Resound appealed this judgment on points of law to the FCJ, which overturned the Court of Appeals judgment and declared the FCO decision unlawful.

In the FCJ's view, the Court of Appeals was wrong to find that the parties had not been able to rebut the presumption of collective dominance under Section 19(3) GWB. Focusing on the criterion of internal competition between the oligopoly members, the FCJ stressed that it is necessary to examine whether the market structure is prone to tacit collusion, for which market transparency and effective sanction mechanisms are strong indicators. But other elements should also be considered, such as the product portfolio symmetry and the parties' actual competitive behavior. The FCJ rejected the FCO's view that similarly high market shares could *per se* justify the assumption that an oligopolistic market is prone to tacit collusion that would preclude effective internal competition. It held that it is rather the symmetry of product portfolio, technology, and cost that speaks in favor of a tacit collusion. The FCJ ruled that the Court of Appeals overrated the significance of market shares and misinterpreted the symmetry criterion. In addition, the FCJ held that the Court of Appeals had erred as it did not take into account market share fluctuation prior to the merger and that such fluctuation generally speaks against (the creation of) a dominant oligopoly.

The FCJ also rejected the Court of Appeals' approach regarding the nexus between transparency and effective competition. The Court of Appeals had found that the existing competition on rebates between the oligopoly members was not effective due to market transparency. In contrast, the FCJ ruled that while transparency could be a decisive indication for tacit collusion that precluded effective internal competition between members of a potential collectively dominant oligopoly, transparency could not be used as a sole factor to establish collective dominance. Should significant actual competition exist even in such a transparent market, actual competition cannot be considered as ineffective only because the market structure indicates that the market is susceptible to tacit collusion.

FCO Clears Acquisition Of Faber-Benthin Group By Hunter Douglas Based On "De-Minimis Markets" Clause

On May 20, 2010, after an in-depth investigation, the FCO cleared the acquisition of the Faber-Benthin Group by Hunter Douglas N.V, without conditions.[22] The parties' activities mainly overlapped in the development, manufacture, and sale of window covering systems to fabricators of customized window coverings. These systems include various components, machinery, and equipment for the assembly of a customized window covering, but not necessarily the drapery or slats.

As far as window covering systems were concerned, the FCO defined separate relevant markets for different types of window coverings, including pleated blinds, Venetian blinds, vertical blinds, and roller blinds. It found that the merged entity would have a dominant position in these markets. The combined market shares in vertical blinds and pleated blinds amounted to 85% to 100%, and there were no other significant competitors or potential entrants. However, the total turnover in each of these markets remained below €15 million in Germany, making them *de minimis* markets pursuant to 35(2) GWB.[23] The FCO then addressed whether it could "bundle" these markets to overcome the €15 million threshold, but found that the different markets for each product group were not similar enough in terms of product characteristics and market structure for such bundling.

While the merger also affected markets with an annual size of more than €15 million in Germany (drapery and slats), as well as the (downstream) market for the fabrication of customized window

21 See with respect to the FCO prohibition decision, National Competition Report, 2nd Quarter 2007, p. 15.

22 FCO, Decision of May 20, 2010, Case B5 – 17/10, available in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion10/B5-017-10-Entscheidung.pdf?navid=49; case summary available in English at: http://www.bundeskartellamt.de/wEnglisch/download/pdf/Fallberichte/B05-017-10-engl.pdf?navid=38.

23 Under Section 35 (2) sentence 1 no. 2 GWB, markets with a size of less than € 15 million per year are exempted from merger control.

coverings, the parties' activities in these areas were limited and did not give rise to competitive concerns.

The FCO also announced that despite of the clearance, it intended to monitor whether the merged entity would abuse its dominant position, in particular whether the merged entity would increase its efforts to tie sales of window covering systems to the sale of drapery and slats.

FCO Blocks Acquisition Of Convertible Roof Manufacturer Karmann By Magna

On May 21, 2010, the FCO blocked the acquisition by Magna Car Top Systems GmbH ("Magna") of the convertible roof systems business unit of Karmann GmbH ("Karmann") (which was insolvent), because it would lead to the creation of a collectively dominant duopoly at the EEA level.[24]

The FCO indicated in December 2009, in a clearance decision regarding the acquisition of Eschda AG, an insolvent manufacturer of roof systems for convertibles, by competitor Webasto AG, that further consolidation in the market would raise competition concerns.[25] Accordingly, the FCO stressed in the case at hand that the transaction would not only establish a duopoly, but also leave two remaining suppliers with symmetric market shares and comparable business sizes. Further, the FCO applied the *Airtours* criteria of the European Court of Justice for determining collective dominance.[26] The market for convertibles' roof systems was transparent enough to allow for pinpoint retaliation mechanisms. Therefore, effective competition between the duopoly members would be unlikely, and entry was unlikely. Moreover, the FCO was not convinced that the automobile manufacturers, with generally strong buyer power, were capable of exerting countervailing pressure on the duopoly as there were no alternative suppliers and it would not be economically feasible for them to produce roof systems for convertibles in-house.

The FCO rejected the failing company defense raised by the acquirer, who noted that Karmann had been insolvent for some time. The FCO found that Karmann's roof systems business unit had substantial market potential and that there were, apart from Magna, several alternative bids from non-competitors. This also meant that Karmann's market position would not automatically fall to Magna in case the FCO blocked the notified acquisition. It bears mention that in its clearance decision regarding the acquisition of Eschda by Webasto, the FCO had relied on the buyer's (Webasto's) assertion that absent the transaction, it would exit the market due to its steadily declining commercial success, and accepted the failing company defense.[27]

GREECE

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

Vertical Agreements

HCC Finds Joint Purchasing Agreement Does Not Constitute An Infringement

On March 23, 2010, the HCC concluded that an agreement relating to the joint supply of jet fuel by two Greek refineries, Hellenic Petroleum ("HELPE") and Motor-Oil, did not infringe Article 1 of Law 703/77 (the Greek equivalent of 101 TFEU).[28]

The Decision was the result of the *ex officio* investigation carried out by the General Directorate of Competition following a mandate by the HCC. The HCC was investigating possible competition law infringement relating to the 2004 agreement between HELPE and Motor-Oil providing for the joint purchasing of fuels between them to supply the Athens airport.[29] Under the agreement, HELPE undertook to sell and deliver fuels to Motor Oil's warehouse within the HELPE installations, up to a maximum quantity each year. Respectively, Motor Oil undertook to sell and deliver fuels to HELPE's warehouse within the Motor Oil installations at a quantity equal to that of fuels purchased by Motor Oil from HELPE. Motor Oil would deliver such fuels on behalf of HELPE to the latter's clients following its instructions.

The construction and operation of this pipeline had been assigned by law to a company whose shareholders were HELPE, Motor Oil, AIA, and Olympic Airways, and aimed at securing the effective supply of jet fuels to the air carriers operating from the Athens International

24 FCO, Decision of May 21, 2010, Case B9-13/10, available in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion10/B9-13-10-OeFneu.pdf?navid=49.

25 FCO, Decision of December 22, 2009, available in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion10/B9-84-09.pdf. *See* also National Competition Report, 4th Quarter 2009, p. 9.

26 See, Bundesgerichtshof, judgment of November 11, 2008, Case KVR 60/07 - *E.ON/Eschwege*; see also National Competition Report, 4th Quarter 2008, p. 11.

27 See National Competition Report, 4th Quarter 2009, p. 9.

28 Decision No. 480/VI/2010.

29 In 2006, the share of HELPE was 74% while that of Motor Oil was 24%.

Airport. This company was under obligation to allow for equal access to the users of the pipeline-suppliers of jet fuels to air carriers, on payment of a compensation per unit of transferred volume.

The HCC held that the relevant product market was the wholesale market of jet fuel of type JA-1 (where HELPE and Motor Oil held a joint share of 90%) and the relevant geographic market was the route followed by the pipeline and beginning from the HELPE refinery in the area of Aspropyrgos to the AIA. That geographic market was distinct from other geographic markets serving the AIA which involved supply of jet fuel through trucks and/or tankers. On the other side of the wholesale market, there were the trading companies, buying the fuels from the two Greek refineries or via imports, which further distributed them to the air-carriers with whom they cooperated.

The HCC found that, as of the commencement of the pipeline's operation in the year 2004, the structure of the jet fuels market has changed from a traditional market to a market with network effects. The pipeline constituted an essential facility to which all users should have an equal access. In order to achieve such access, HELPE and Motor Oil signed in 2004 an agreement for the mutual purchase of fuels between them aiming at the unimpeded supply of the Athens airport with such fuels and the avoidance of transfer of fuels by traditional means from the installations of the two refineries to the airport, as well as at the decrease of the possibilities of accidents and pollution.

The HCC saw this agreement for the mutual supply/purchase of fuels as two separate agreements where the identities of the seller and the buyer were interchanging. In this sense, the agreement was a vertical one since, for its purposes, each of the contracting parties was active at a different level of the supply chain. The agreement included no exclusivity of purchase clauses regarding specific quantities of jet fuels, nor other provisions restrictive of competition.

According the HCC's assessment, the agreement had beneficial effects overall as it provided the possibility of access to the pipeline resulting in an important reduction of cost of supply of the airports in Greece, which led to a reduction of the wholesale and consequently of retail fuel prices. It was also beneficial to the companies involved as it increased efficiency. In the absence of the agreement, Motor Oil would have to bear the cost of transportation by tankers of the quantities it would like to pass through the pipeline from its refinery at Corinth to the beginning of the pipeline at Aspropyrgos, i.e., a longer distance from the Corinth refinery. The agreement also reduced the cost of supply to other airports in Greece as such supply would, following the agreement, occur for both companies from the Motor Oil installations in Corinth.

On the basis of the preceding, the HCC found that the agreement between the two refineries did not infringe Article 1 of law 703/77 as it did not restrict competition by object or effect.

ITALY

This section reviews developments under the Competition Law of October 10, 1990, No 287, which is enforced by the Italian Competition Authority (the "ICA"), the decisions of which are appealable to the Regional Administrative Tribunal of Lazio ("Tribunal").

Unilateral Conduct

The Tribunal Annuls The ICA Decision Accepting Commitments Offered By The Italian Soccer League For Serie A And Serie B TV Broadcasting Rights

On May 10, 2010, the Tribunal rendered its judgment on the appeal brought by Adiconsum (an Italian consumer association) against the ICA's decision to accept the commitments offered by the Italian Soccer League ("Lega Calcio") pursuant to Art. 14-*ter* of Law No. 287/90, in connection with a possible abuse of dominant position relating to the centralized marketing of *Serie A* and *Serie B* TV broadcasting rights.

On July 22, 2009, the ICA opened an investigation into Lega Calcio's creation of satellite and digital platform package deals for *Serie A* TV rights for the 2010-2011 and 2011-2012 seasons. On October 1, 2009, the ICA broadened the investigation to possible abusive conduct by Lega Calcio relating to *Serie B* TV rights.

In order to address the ICA's concerns, Lega Calcio first proposed a set of commitments exclusively regarding *Serie B* TV rights. Following the outcome of a market test (which called for commitments specifically concerning *Serie A* TV rights), Lega Calcio offered a second set of commitments concerning *Serie A* TV rights. The Tribunal annulled the ICA decision to accept the two sets of commitments both on (i) procedural and (ii) substantive grounds.

First, the Tribunal upheld Adiconsum's plea regarding the ICA's violation of the duty to publish the commitments on the ICA's official website (as required by the ICA Notice on the commitments procedure pursuant to Art. 14-*ter* of Law No. 287/90). In particular, according to the Tribunal, the second set of commitments should also have been published and subjected to a market test, in order to allow for third party comments. Contrary to the ICA's view, according to which the second set of commitments offered by Lega Calcio was merely ancillary to the first set, the Tribunal held that the second set of commitments was crucial for the assessment of the case, since it was specifically designed to allay the competitive concerns raised in the ICA's decision to open the procedure (which concerned *Serie A* TV rights).

Second, the Tribunal held that (a) the commitments relating to the *Serie B* TV rights were not capable of removing the ICA's competitive concerns relating to *Serie A* TV rights; and (b) the commitments relating to *Serie A* TV rights (which were limited to licenses for the broadcast of 10-minute summaries of each *Serie A* match) were not attractive to TV operators (other than those that were granted the main TV packages), since they did not have substantial business value and could not be adequately exploited for advertising purposes.

Policy and Procedure

The Administrative Tribunal Of Lazio Upholds The Italian Antitrust Authority Decision Regarding Access To File In The Cosmetics Cartel Procedure

On April 22, 2010, the Regional Administrative Tribunal of Lazio (the "Tribunal") rendered its judgments on appeals brought by two undertakings against the ICA's decision to deny them access to a number of documents in its case file relating to the cosmetics cartel.[30] The documents in question included transcripts of leniency statements (and related attachments),[31] as well as a number of replies to requests for information made by the ICA during the procedure.[32]

The Tribunal upheld the ICA's decision on the basis that the principle of equality of arms (whereby a defendant undertaking must have the same knowledge of the contents of the case file as the ICA)[33] cannot undermine the protection of business secrets. According to the Tribunal, equality of arms is respected if two formal conditions are met: (i) the ICA must permit the undertaking concerned to have knowledge of the contents of the file by providing a detailed index (with a brief description of each document); and, (ii) the ICA must grant access to the documents relevant to that undertaking's defense (*i.e.*, both inculpatory and exculpatory documents), limiting redactions to what it is strictly necessary to protect business secrets.

The Tribunal held that leniency documents cannot be deemed *per se* relevant to an undertaking's defense. In addition, the Tribunal held that the sufficiency of the access to the case file granted by the ICA should not be assessed in light of the content of the documents in question, but rather on the basis of a number of objective elements, including (i) the nature and origin of the documents in question; (ii) the total number of documents to which access was denied; (iii) the merits of the appellants' specific allegations with regard to each document; and (iv) whether access to some of the relevant documents was granted pending the appeal.

The Tribunal's judgments are currently under appeal before the Italian Supreme Administrative Court.

NETHERLANDS

This section reviews developments under the Competition Act of January 1, 1998, which is enforced by the Dutch Competition Authority (NMa).

Mergers and Acquisitions

NMA Fines British Insurance Company And Dutch State For Failing To Notify A Concentration

On May 3, 2010, the NMa imposed a fine on the British insurance company Amlin Overseas Holding Limited, its parent company Amlin plc (together, "Amlin") and the Dutch State, for failing to notify Amlin's acquisition of Fortis Corporate Insurance ("FCI") from the Dutch State.[34] The NMa fined Amlin and the Dutch State €1,366,000 and €782,000, respectively.

On July 22, 2009, the Dutch State sold its shares in FCI to Amlin, thereby granting it full control over FCI. The NMa became aware of this transfer in the summer of 2009, following media reports. The NMa received a notification of the concentration on December 30, 2009, and approved the transaction on January 20, 2010.[35] However, in its decision of May 3, 2010, the NMa held that the concentration infringed Article 34 of the Dutch Competition Act, which prohibits putting a concentration into effect without prior notification to the NMa.[36]

First, the NMa rejected Amlin's arguments concerning the interpretation of the thresholds mentioned in Article 29 and 31 of the

30 I-701 – Vendita al dettaglio di prodotti cosmetici.

31 With specific regard to leniency statements, the Tribunal found that the ICA, in line with EU Commission practice, granted access subject to both procedural and substantive restrictions, namely: (a) postponement of the access until the issuance of the SO; (b) access at the ICA's headquarters only, and (c) prohibiting copies. No pleas were raised by the applicants with respect to the restrictions imposed by the ICA on access to leniency statements.

32 The relevant provisions of Italian law regarding the access to the file are contained in the Decree of the President of the Republic of April 30, 1998, No. 217.

33 Case T-30/91 *Solvay SA v. Commission* [1995] ECR II-07751, § 83.

34 NMa Decision, May 3, 2010, Case Amlin-Staat, number 6843/68.

35 NMa Decision, January 20, 2010, Case Amlin-Fortis Corporate Insurance, Number 6869 / 5.BT.

36 NMa Decision, May 3, 2010, Case Amlin-Staat, Number 6843/68.

Dutch Competition Act. Amlin argued that those provisions should be interpreted as requiring notification if the parties jointly obtained €113.5 million in gross booked premiums, at least two parties each obtained €30 million of these premiums in the Netherlands, and at least two parties each obtained €4,540,000 of these premiums from Dutch residents. Amlin argued that it did not meet the notification thresholds, as it obtained less than €30 million in gross booked premiums during 2008 in the Netherlands. The NMa held, however, that for concentrations between insurance companies, as had been clarified in previous cases, the €30 million threshold does not apply.

Second, Amlin argued that, for the purposes of Article 31, the term "Dutch resident" only includes companies with parent companies domiciled in the Netherlands. The NMa, however, held that a "Dutch resident" should be defined as a natural or legal person that is domiciled in the Netherlands or that maintains an office in the Netherlands, regardless of whether the parent company is domiciled in the Netherlands. According to this interpretation of "Dutch resident," Amlin reached the threshold of €4,540,000 in premiums from Dutch residents.

Third, Amlin argued that Article 31 of the Dutch Competition Act was not clear and therefore infringed the principle of legality. The NMa held that the legal provisions concerning the thresholds were clear and predictable. The NMa considered that Amlin's initial failure to mention in its notification the threshold of €30 million in premiums in the Netherlands was confirmation that the legal provisions were at the time clear and predictable for Amlin and therefore did not violate the principle of legality. Furthermore, the NMa stated that in case of ambiguity, Amlin, as a professional market player, had the responsibility to conduct the necessary investigations.

Fourth, the Dutch State argued that the Dutch Competition Act applies only to enterprises within the meaning of the Dutch Competition Act. According to the Dutch State, since it was acting in the public interest and with public authority, it could not be considered to be such an enterprise. Moreover, the Dutch State argued that it would not have acquired "control" over FCI. The NMa ruled, however, that Article 34 applies not only to enterprises, but to every party involved in a concentration, so the State, as seller, is also subject to this provision. Furthermore, the NMa held that the State in fact acted as an enterprise in any event.

Finally, the NMa rejected the Dutch State's argument that there was no legal obligation for the seller to notify the concentration, as the seller did not put the concentration into effect. In addition, the Dutch State argued by analogy to the EU Merger Regulation, pursuant to which only involved parties (and not the seller) must notify transactions. The NMa held that under a literal interpretation of Article 34 (and the explanatory memorandum to the law), the seller, by transferring its shares to the buyer, must be considered to be an involved party. The NMa held that the analogy with the EU Merger Regulation was not relevant, as the wording of the Dutch prohibition is different. In addition, the NMa referred to prior decisions in which sellers were fined, rendering the above interpretation foreseeable.

In its fining analysis, the NMa took into account as a mitigating factor the fact that it subsequently approved the transfer after it was notified on December 30, 2009. The NMa fined Amlin and the Dutch State €1,366,000 and €782,000, respectively.

Policy and Procedure

Dutch Court Of Appeal Overturns Dutch Competition Law On Energy

On June 22, 2010, the Dutch Court of Appeal overturned in three judgments[37] the Dutch competition law of November 21, 2006 (the "Unbundling Act") forcing energy companies to split up their distribution activities from their other activities (including the production, supply, and trade in gas and electricity),[38] ruling that the law was contrary to European law.

The three proceedings against the Dutch State were commenced by three vertically integrated energy companies, Essent, Delta, and Eneco, all of which produce energy (gas and electricity) for supply to consumers over their own gas and electricity networks. The dispute had its origin in the amendments to the Dutch Electricity and Gas Acts made by the Unbundling Act. The European Commission's third legislative package for gas and electricity markets, which will come into force in March 2011, offers Member States a choice between (1) requiring full ownership unbundling, and (2) requiring undertakings to set up a system operation or transmission operator that is independent from supply and production interests.[39] The amendments made by the Unbundling Act prohibit network management companies from being members of the same corporate group as companies producing and trading energy in the

37 Hague Court (First Civil Chamber), June 22, 2010, Case Numbers 200.035.170/01, 200.035.381/01, and 200.035.392/01.

38 Grid Independence Act of November 21, 2006, Stb. 23 November 2006, 614.

39 Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, OJ L 211, 14.8.2009, p.55-93; and Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, OJ L 211, 14.8.2009, p.94-136.

Netherlands (the so-called "group ban," *i.e.*, ownership unbundling). The integrated energy companies mentioned above were therefore obliged to unbundle their activities by January 1, 2011. Essent had already completed the unbundling process. The Dutch Court of First Instance dismissed the claim of the three companies. The Dutch Court of Appeal ("the Court") reversed these judgments.

First, the Court held that the "privatization ban" (whereby the Minister of Economy must consent to any transfer of shares in a network management company, and must withhold this consent whenever a transfer would result in non-public sector ownership of such shares) imposed by the Unbundling Act did not prevent the Court from verifying the compatibility of the group ban with the free movement of capital and the freedom of establishment. Rejecting the arguments of the Dutch State, the Court held that rules governing the trade in shares in network management companies are subject to the Treaty rules on free movement of capital and the freedom of establishment. Furthermore, the Court stated that Article 345 TFEU ("*The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership*") cannot be interpreted in a way that would justify measures of nationalization or privatization – including a prohibition on privatization – that infringe other provisions of the Treaty, in particular the provisions concerning the free movement of capital and the freedom of establishment.

Second, the Court held that the group ban restricts the free movement of capital. The Court held that, under the Unbundling Act, an enterprise from another Member State with energy activities in the Netherlands is not allowed to acquire shares from a network management company or from another company that is part of a group that includes a network management company.

Third, the Court considered that none of the four reasons put forward by the Dutch State was an overriding reason in the general interest that could justify the aforementioned restriction:

- *Cross-subsidization*. The Dutch State argued that the legislation prevents cross-subsidization, *i.e.*, advantages being granted by network management companies to energy companies following vertical integration. However, the Court considered that this argument amounted to an attempt by the Dutch State to protect economic interests, which, according to the constant case law of the European Court of Justice, cannot justify restrictions on the free movement of capital. Furthermore the Dutch State did not sufficiently prove the existence or threat of such cross-subsidization. The Court added that splitting up vertically integrated energy companies would go beyond what is necessary to avoid cross-subsidization, as the same result could be achieved through regulatory means.
- *Transparency*. According to the Dutch State, the group ban would increase price transparency for consumers, resulting in a situation whereby tariffs would be a true reflection of actual costs (which could only be achieved in the absence of cross-subsidization). The Court held that the goal of price transparency could not justify the restriction, since it would also amount to the protection of an economic interest.
- *Security of supply of energy*. The Court agreed with the Dutch State that maintaining continuity of supply of energy (and therefore the public order and security) could justify such a restriction. However, as it concerns the basic principle of free movement of capital, there has to be a genuine and sufficiently serious threat to a fundamental interest of society.[40] The restrictive measure, in this case the group ban, must be adequate to achieve this objective and should not go beyond what is necessary. The Court held that the Dutch State had not shown how the group ban adds anything to the regulations and competences that already exist to secure the supply of energy.
- *Focus on public task*. Finally the court rejected the argument that the group ban could be justified by the need for network management companies to focus their efforts on their public service tasks, as the companies in question remained free to be members of corporate groups performing commercial, non-energy related activities.

The Court concluded that the legislation violated Article 63 TFEU, declared the group ban unenforceable and overturned the judgment of the Dutch Court of First Instance.

SPAIN

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

Horizontal Agreements

Iron Warehousers Association Fined €650,000 For Price Recommendation

On May 17, 2010, the CNC fined the Iron Warehousers association €650,000 (Unión de Almacenistas de Hierro de España, "UAHE"), for engaging in two types of anticompetitive conduct:

40 Case C-483/99 *Commission v France* [2002] ECR I-4781, para. 48.

(1) recommending and adopting a billing system that fixed the minimum amount of surcharges to be applied to the warehousers' customers and (2) recommending the payment alternatives to be offered to customers by member warehousers during holiday periods.[41]

On the basis of certain reports regarding possible anticompetitive arrangements in the iron sector, the Investigations Division decided to conduct on-site inspections at the headquarters of UAHE and of three iron warehousers. The information obtained in the inspections supported a finding that the UAHE had engaged in two types of conduct prohibited by Spanish competition law.

The first unlawful activity involved the UAHE's agreeing and disseminating, by means of a prior and continuing recommendation, a billing model that fixed the surcharges to be applied to customers, the minimum for such charges and the conditions for applying them. The CNC Council considered it proven that the UAHE engaged in this conduct on a continual basis from October 1999 until, at least, June 2008. During that time period, the UAHE carried out a series of acts with the common and ultimate objective of unifying the behaviour of its members in relation to how they charged customers for their services. The information on record in the case file was sufficient to show that the billing system, which included a minimum cost for particular services, was followed by both member and non-member warehousers and resulted in increased prices.[42]

The second unlawful activity involved the UAHE's promotion of a strategy for joint action by the warehousers when customers deferred payments that fell due during holiday periods. The CNC found that the UAHE facilitated a joint determination (amongst UAHE members) for the amount of any bonus or surcharge to be applied in cases where customers accelerated or delayed a payment. The CNC ruled that the battle against payment delinquency in trade relations was a matter of general public interest, but that it could not be used as pretext for a business association to act in a way that helps unify the commercial policy of the member warehousers.

Accordingly, the CNC found that the Iron Warehousers association had infringed Article 1(1) of the Spanish Competition Law 16/1989 as well as Article 101(1) TFEU for having engaged in two types of anticompetitive conduct, namely, recommending and adopting a billing system that fixed the minimum amount of surcharges to be applied to the warehousers' customers and recommending the member warehousers the payment alternatives to be offered to customers during holiday periods.

Mergers And Acquisitions

Fine Of €46,500 For Failing To Notify The Purchase Of Ecotec

On April 9, 2010, the CNC fined Consenur, S.A. €46,500 for having failed to satisfy its obligation to notify the acquisition of Ecología y Técnicas Sanitarias, S.L. (Ecotec).[43]

The CNC found that Consenur had completed the takeover before having duly notified it. The purchase of Ecotec by Consenur took place in October 2007. The operation, which involved the acquisition of sole control of Ecotec, was notified more than two years later, in November 2009, following a request to do so from the CNC's Investigations Division.

On March 10, 2010, the CNC authorized the concentration between Consenur and Ecotec in first phase without any commitments.[44] Despite this clearance, the CNC found that Consenur had infringed Articles 62(3)(d) and 9(1) of the Spanish Competition Law 15/2007. As no mitigating or aggravating circumstances were applied and the concentration had already been authorized in first phase without any commitments, the CNC decided to fine Consenur €46,500 (equivalent to 3% of the sales volume of Ecotec).

Pursuant to the Spanish Competition Law 15/2007, the CNC can impose a fine amounting up to 5% of the company's turnover of the preceding business year, on the company that fails to notify the concentration. The Spanish Competition Law classifies failure to notify as a serious offence. Companies should bear in mind that the amount of the fine can rapidly increase if the parent company is held liable for the actions of its subsidiary as it is the group turnover which is taken into account when setting the fine and not that of the individual subsidiary.

Policy and Procedure

The CNC Publishes Its Report On The Draft Royal Decree Amending Royal Decree 134/2010, Which Created The Procedures Relating To Energy Supply Guarantees

On May 26, 2010, the CNC published its report on the draft Royal Decree, amending Royal Decree 134/2010, which created the procedure for resolution of restrictions due to supply guarantee.

41 Decision S/0106/08 *Almacenes Hierro*.

42 The billing system was denounced by certain customers in letters addressed to the warehousers warning of the unlawful nature of the UAHE's conduct and of the possibility that the CNC could levy severe penalties for the practice. However, these complaints were unrelated to the initial CNC iron sector investigation.

43 Decision SNC/0005/09 *Consenur/Ecotec*.

44 Decision C/0185/09 *Consenur/Ecotec*.

According to Royal Decree 134/2010, the Spanish Government can organize the energy market so that national primary energy sources are used, up to a maximum of 15% of the total primary energy necessary to produce the electricity demanded on the market. This report was approved in exercise of the mandatory consultation powers in relation to drafts and proposals for rules and regulations affecting competition that are conferred on it by Article 25(a) of the Spanish Competition Law 15/2007. In its report, the CNC issued a negative evaluation of the proposed Royal Decree, which was then in draft form. The draft Royal Decree was finally passed, with the proposed text being largely maintained.

The Royal Degree 134/2010 was passed on February 12, 2010. It establishes the procedure for resolution of restrictions due to supply guarantee and amends Royal Decree 2019/1997 of December 26, 1997, which organizes and regulates the electricity production market. This Royal Decree modifies the arrangement of the electricity production market, establishing a new adjustment procedure for the system known as "resolution of restrictions due to supply guarantee."

This new draft Royal Decree amends Royal Decree 134/2010, primarily based on the EU Commission's input during the pre-notification process,[45] it was necessary to introduce certain improvements into the proposed mechanism, and remove incompatibilities that were initially included in the programme with the Community legislative framework. However, the draft Royal Decree retains the procedure for adjustment of the system known as "resolution of restrictions due to supply guarantee" that is contained in the current Royal Decree. The CNC therefore considers that the main conclusions that it reached in the first report in respect of each of the following three aspects remain completely relevant.

Firstly, the strong distortion introduced into the electricity generation market by the interference of the restrictions on supply guarantee procedures in the results of the clearing on the daily market. According to the CNC, the proposed Royal Decree not only retains but actually increases the significant distortions in competition introduced by Royal Decree 134/2010. The main effect of the amendment is that the extra costs, over and above the market clearing price, represented by the remuneration to the national coal-fired plants taking part in the procedure will actually be increased as a consequence of the new criterion established in the draft Royal Decree in relation to the withdrawal mechanism of the plants expelled from the clearing. Secondly, the CNC refers to the lack of justification for the creation of this mechanism to support the national coal industry, in particular with regard to the fact that it is supposedly necessary in order to guarantee the supply of electricity. Finally, the CNC is concerned about the possibility that the measure constitutes State aid to the national coal industry and therefore needs to be notified to the European Commission.

The CNC takes a positive view of the fact that the entry into force of the mechanism is subject to the approval of the measure by the European Commission. Notwithstanding this, the result of that notification does not, in the CNC's opinion, alter its evaluation of the effect of the measure on efficiency and competition on the markets.

Sectoral Investigations

Extension Of The Proceedings To Include CIMSA-CONTROL y MONTAJES, WILO IBÉRICA And BOMBAS BLOCH In The Fluid Pumps Sector Investigation

On June 1, 2010, the Investigations Division of the CNC resolved to extend the investigation that it is currently undertaking in relation to the Fluid Pumps case, opened by the Investigations Division on September 16, 2009, to Cimsa-Control y Montajes, S.L., Wilo Ibérica, S.A. and Bombas Bloch, S.L.[46] The proceedings relate to practices prohibited by Article 1 of the Spanish Competition Laws 16/1989 and 15/2007, and were opened following a confidential probe by the Investigations Division and as a result of the inspections carried out on February 17, 2009, at the head offices of the main undertakings in the sector and at the trade association for the fluid pump supply sector.

The Investigations Division has become aware of certain information that could point to the participation of these three undertakings in possible anticompetitive practices, consisting of agreements for the direct or indirect fixing of prices and other commercial and service conditions and the exchange of sensitive information in the fluid pumps sector on the Spanish territory.

The current maximum period of 18 months for the investigation of the case and its resolution by the National Competition Commission (which began on September 16, 2009) remains unchanged. The CNC still has until March 16, 2011, to reach a final decision on the matter.

45 On November 4, 2009, the Spanish Competition Authority (CNC) issued a negative evaluation of the proposed Royal Decree, finding the measures adopted could constitute State aid. Therefore, the draft Royal Decree had to be notified for approval to the European Commission ex Art. 108.3 TFEU.

46 Case S/0185/09 *Bombas de fluido*.

SWITZERLAND

This section reviews competition law developments under the Federal Act of 1995 on Cartels and Other Restraints of Competition (the Competition Act), as amended 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

The FCC Secretariat Calls For Fines Of Up To CHF 25.5 Million Against Companies In The Perfume And Cosmetics Sector For Alleged Cartel Activities

In May 2010, the FCC proposed fines of between CHF 17,000 and CHF 25.5 million on various producers in the cosmetics sector. An investigation of the Association of Manufacturers, Importers and Suppliers of Cosmetic and Perfumery products ("ASCOPA") and its individual members was opened on December 1, 2008, regarding the exchange of competitively sensitive pricing and/or output information. This procedure marks the first investigation of the FCC in connection with exchange of sensitive information that could result in fines.

The investigation was launched after a whistleblower informed the Secretariat of potential violations. After an 18-month investigation, the Secretariat found evidence that the undertakings concerned aligned their prices and froze their market shares after they had exchanged sensitive information (on prices, sales figures and advertising expenses).

The Secretariat characterizes exchanges of information regarding prices or sales figures as restrictions of competition – effectively anticompetitive agreements on prices and/or quantities within the meaning of Article 5(3) of the Competition Act. The Secretariat therefore asked the FCC to recognize these actions as violations of the Swiss Cartel Act and to sanction the parties to the unlawful agreements. The proposed fines are calculated according to each company's turnover and the gravity of the violation.

The undertakings concerned have received the Secretariat's proposed decision and have the right to respond. The FCC will then make its decision on the basis of these responses (subject to further possible investigation steps).

The FCC Fines A Manufacturer Of Components For Sanitary, Heating And Cooling Installations For Anticompetitive Agreements On Prices.

On May 27, 2010, the FCC imposed a fine of CHF 169,000 on Flamco AG for price-fixing. The FCC found unlawful agreements between two component manufacturers for sanitary, heating, and cooling installations regarding the level and timing of price increases. Pneumatex AG, the other company involved, obtained immunity from fines for informing the FCC of these activities.

The FCC found that Flamco and Pneumatex colluded in determining the level and timing of price increases for several related products including expansion vessels, air separators, and dirt separators. The FCC found that these behaviors, which originated in EU territories, had effects in Switzerland and were therefore subject to sanction.

Pursuant to the Swiss leniency program, which has been in place since 2004, companies that contribute to the uncovering and elimination of an anticompetitive restriction may obtain partial or full immunity from a fine. To qualify for full immunity, the undertaking concerned must be the first to provide the FCC with information that enables it to open an investigation or must present evidence which makes it possible to the FCC to prove a hardcore horizontal cartel (*e.g.*, price fixing, customer/territorial allocation, or capacity restrictions) or hardcore vertical agreements (*e.g.*, resale price maintenance, absolute territorial protection). Full immunity can only be granted if the company applying for leniency has not been the main actor (or "ringleader") within the cartel and has cooperated fully with the FCC during the whole investigation procedure.

Information provided in Pneumatex's leniency application enabled the FCC to conduct its investigation very quickly, concluding the investigation and issuing a fine (on Flamco) in less than 18 months. Pneumatex received full immunity from fines.

Mergers and Acquisitions

The FCC Prohibits The Merger Between Orange And Sunrise

On April 22, 2010, the FCC prohibited the proposed concentration between France Telecom SA's and TDC A/S's respective Swiss subsidiaries, France Telecom (Orange) SA and Sunrise Communications AG ("Sunrise"), on the grounds that the merger would result in collective dominance (between the merged entity and Swisscom, on the Swiss market for mobile telephony).

According to the planned concentration, Sunrise was to be integrated into France Telecom (Orange). Although the FCC acknowledged that the merger would create a stronger competitor to Swisscom, it would also be a three-to-two, leaving only two remaining operators with their own network. The FCC concluded these companies would have collective dominance and the merger was likely to impede effective competition. Moreover, the entry on the market of a new operator with its own network was unlikely. The FCC considered that three operators were necessary to maintain innovation and competition in the marketplace. As no commitments were found to address the FCC's concerns, the merger was prohibited.

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").

Horizontal Agreements

Criminal Proceedings Against BA Executives For Price-Fixing Withdrawn By OFT

On May 10, 2010, the OFT withdrew criminal charges for price-fixing against four former and current British Airways executives in the midst of their trial.[47] The criminal proceedings were brought under Section 188 of the Enterprise Act 2002, which imposes criminal liability on individuals for anticompetitive behavior, including price-fixing, market sharing, bid-rigging, and production and supply limitation. These offenses are *per se* illegal, and it is also an offence to attempt to enter into such agreements. The penalties on conviction can be up to five years' imprisonment, an unlimited fine, and/or disqualification from acting as a director of a company for up to 15 years. The proceedings marked the first time that individuals had been put on trial under the cartel offense, although three defendants in the marine hoses case had entered guilty pleas in 2007 for their participation in that cartel.

In June 2006, the OFT announced that it had opened civil and criminal investigations into the price-fixing of fuel surcharges imposed on long haul flights between 2004 and 2006, following information provided by Virgin Atlantic. The fuel surcharges had been imposed following the unexpected rise in the price of oil. The civil investigation concluded in August 2007, with British Airways fined £121.5m (around €181m) for admitting to collusion with Virgin Atlantic over the price-fixing fuel surcharges. Virgin Atlantic obtained full immunity under the OFT's leniency programme. In August 2008, the criminal investigation ended, and one current and three former BA executives were charged with the cartel offence. All four executives entered "not guilty" pleas. The trial commenced in April 2010.

The OFT dropped the charges because it discovered that a substantial amount of evidence had not been included in the criminal investigation, including emails sent to or by Paul Moore, a key Virgin Atlantic employee, whose evidence the jury were due to hear on the day that the OFT dropped the charges. The trial judge had ruled (upon discovery of the undisclosed material) that the trial could continue: failure to disclose information was not such as to "render a fair trial impossible." However, the OFT decided to drop the charges as it was not realistic to request an adjournment of the trial, which the late disclosure of the material would otherwise have necessitated.

The principal practical implication may relate to Virgin's full civil and criminal immunity, obtained when it alerted the OFT to the infringement in question. The OFT stated in its press release that it will review the role played by Virgin Atlantic in light of the airline's obligations to provide the OFT with complete and continuous co-operation. The press release speaks of "potential consequences" for Virgin, but cautions that "no inferences" should be drawn until the outcome of the review.

OFT Imposes Highest Ever Fines On Tobacco Retailers And Manufacturers For Pricing Practices

On April 16, 2010, the OFT imposed fines totaling £225 million on two tobacco manufacturers and nine retailers for anticompetitive pricing practices relating to the retail prices of tobacco products. The pricing practices in question were found by the OFT not to be horizontal price fixing or "cartel-like" co-ordination but vertical "price-matching" arrangements that protected the market share of the manufacturers and reduced the incentives of retailers to compete on price. The OFT decided not to pursue allegations relating to the indirect exchange of pricing information or "hub and spoke" arrangements, which were an initial spur to the investigation.

On April 25, 2008, the OFT announced that it had sent a Statement of Objections to two tobacco manufacturers and 11 retailers in relation to the pricing practices of retail tobacco products. The two manufacturers were Imperial Tobacco Group plc (the second-largest tobacco company in the U.K., and owner of brands Embassy, John Player and Lambert & Butler) and Gallaher Group plc (the third-largest tobacco company in the U.K., and owner of brands Benson & Hedges and Silk Cut). Together, the manufacturers supplied retailers Asda, the Co-operative Group, First Quench, Morrisons, Safeway, Sainsbury, Shell, Somerfield, T&S Stores, Tesco, and TM Retail.

The OFT investigated the market for the tobacco products during the period March 1, 2001 to August 15, 2003, and concluded that each of the manufacturers had agreed with various retailers to link the price of its brands to the price of a competing manufacturer's brand (*i.e.*, if one manufacturer increased or decreased the price of its product, the retailer would change the price of the competing

47 *See* http://www.oft.gov.uk/news-and-updates/press/2010/47-10.

product accordingly). The OFT found that this limited competition by reducing the incentives of the retailers to compete on price and thus protected the market share of the manufacturers' products. The OFT decided there was insufficient evidence to pursue allegations made in respect of the relationship between Tesco (the largest retailer in the U.K.) and the manufacturers. The OFT rejected the arguments made by Imperial Tobacco Group and the Co-op that the agreements should be granted an individual exemption from the Chapter I prohibition. The OFT was not persuaded that the agreements had sufficient pro-competitive advantages to outweigh the anticompetitive effects.

The fines imposed on the ten retailers in relation to the products supplied by Imperial Tobacco amounted to around £112 million, and the fines in relation to the products supplied by Gallaher amounted to around £50 million. The largest individual fine for a retailer was £14 million, imposed on each of Asda and the Co-Operative Group. However, Morrisons bears a total fine of nearly £19.5 million, as it was fined £8.6 million for its own conduct, but is also liable for the £10.9 million fine imposed on Safeway, which it acquired in 2004.

The OFT was alerted to the pricing practices following an immunity application by Sainsbury's (which was therefore not fined). Gallaher, Asda, First Quench, One Stop Stores, Somerfield, and TM Retail benefited from a reduction in fines under the OFT's "early resolution procedure," by admitting liability following notification of the Statement of Objections.

The OFT's decision has been challenged before the CAT by a number of the fined companies.

Mergers and Acquisitions

CAT Upholds CC's Approach In Stagecoach Appeal But Quashes Substantive Competitive Assessment

On May 21, 2010, the CAT handed down judgment in the judicial review by Stagecoach Group plc ("Stagecoach") of the CC's decision to prohibit its acquisition of Preston Bus Ltd ("PBL").[48] The transaction was completed in January 2009, and subsequently referred by the OFT to the CC in May 2009. The CAT quashed the CC's competitive assessment of the relevant counterfactual on the grounds of *Wednesbury* unreasonableness, the ordinary legal standard for judicial review in the U.K. However, since Stagecoach had already proceeded with finding a buyer for the business it had undertaken to divest, the only relief was a summary costs order in favour of Stagecoach.

On November 11, 2009, the CC published its final report on the completed acquisition of PBL by Stagecoach, an international public transport group. PBL provided urban bus services in Preston, a town in the north of England. In 1993, PBL was sold to its employees, and until June 2007 the company was profitable. In July 2006, where Stagecoach approached PBL with an offer to purchase the company. After the offer was refused, Stagecoach entered into direct competition with PBL in providing bus services in the Preston area in mid-2007. Between the launch of the bus services and Stagecoach's acquisition of PBL, PBL suffered considerable losses, and PBL's owners decided to sell to Stagecoach.

In a decision that referred to this period of competition as "abnormal," the CC held that Stagecoach's conduct in competing with PBL was not consistent with gaining a minority share in the Preston bus market. Specifically, the CC did not accept Stagecoach's contention that the relevant counterfactual to assess was immediately prior to the merger. The CC held that PBL would have continued to run its services profitably as it had done without the competition from Stagecoach. The CC did not accept that PBL was a failing firm prior to the merger. The CC found that, following the merger, the likelihood of increased competitiveness against Stagecoach from PBL (or a more efficient purchaser of PBL) could not occur in the market for bus services, and therefore the merger resulted in a substantial lessening of competition. Stagecoach undertook to divest a business of sufficient scale to restore the level of competition lost as a result of the merger.

Stagecoach application for review was based on four grounds: (1) the CC erred in law in assessing the effects of the acquisition (that the competitive assessment of the period of "abnormal competition" was unreasonable or irrational); (2) the CC made findings of fact unsupported by evidence; (3) the CC acted with procedural unfairness in rejecting Stagecoach's evidence; (4) the CC erred by imposing a disproportionate remedy beyond what was necessary to remedy the SLC.

The CAT upheld Stagecoach's arguments in relation to the first ground of review as to the unreasonableness or irrationality of the CC's choice of counterfactual. However, the CAT rejected subsidiary arguments that the CC erred in law by applying section 35 of the Enterprise Act 2002 on the ground that the CC's competitive assessment of the 18 months of pre-merger conduct was an unreasonably long period of time. The CAT held that section 35 does not require the CC, in every case, to compare the situation on the market immediately before the merger took place. The correct

48 *See* http://www.catribunal.org.uk/files/1145_Stagecoach_Judgment_210510.pdf.

comparison was between the post-merger market and the. So the procedural approach taken by the CC to the competitive assessment was broadly upheld.

The CAT agreed with the procedural approach taken by the CC, comparing the post-merger market and the scenario that, on the balance of probabilities, would have developed in the market in the absence of that merger. However, the CAT found that the CC acted irrationally by relying on the lack of contemporaneous evidence as to Stagecoach's intentions in the period before the merger occurred and that the CC was unjustified in implying there were inconsistencies in Stagecoach's case from the difficulties it had experienced in collecting evidence. The CAT concluded that the CC's choice of counterfactual followed from its conclusion that Stagecoach's entry into the Preston Bus market in June 2007 was undertaken with little regard to profit and normal commercial competition. This was a conclusion that was not open to the CC on the basis of the evidence that was available to it. As these unsupported findings were central to the CC's reasoning, the conclusions were irrational and could not stand.

Policy and Procedure

OFT Issues New Guidance On Director Disqualification Orders For Competition Infringements

On June 29, 2010, the OFT published new guidance as to when it will apply for a disqualification order against company directors for infringements of competition law for which they are responsible.[49] The Company Directors Disqualification Act 1986 sets out the circumstances when a Court *may* or, for behavior in a corporate insolvency that makes an individual "unfit" to be a director, *must* make a disqualification order against company directors for improper corporate conduct upon the application of sectoral regulators. A regulator with standing to apply to a Court for a disqualification order can (if it decides that this is appropriate) accept a disqualification undertaking from the individual concerned in similar terms to the proposed disqualification order, removing the need for a lengthy and costly application to the Court.

The power of the OFT to apply to a Court to make disqualification orders against directors for infringements of competition law and accept disqualification undertakings was inserted into the Company Directors Disqualification Act 1986 by the Enterprise Act 2002. Competition disqualification orders ("CDOs") and competition disqualification undertakings prohibit the individual from acting for up to 15 years as a director of a company. The OFT issued guidance in May 2003 as to how it would apply to make CDOs against directors for infringements of competition law. It published a consultation in August 2009 on proposed changes to the 2003 guidance. The OFT proposed to extend the application of the 2003 guidance to allow it to apply for a CDO in all cases where it believes a director is unfit to be concerned in the management of a company, and not merely where the director concerned was directly involved in or contributed to an infringement of competition law.

The OFT's revised guidance sets out a "five-step process" to deciding whether to apply for a CDO. The regulator must consider: (1) whether there has been a breach of competition law; (2) the nature of the breach and whether a financial penalty has been imposed; (3) whether the company in question benefited from leniency; (4) the extent of the director's responsibility for the breach of competition law; and (5) aggravating and mitigating factors. This guidance also applies to other sectoral regulators with responsibility for competition law enforcement, such as the Office of Rail Regulation. The OFT will not apply for a CDO against any current director of a company that has benefited from leniency in respect of conduct for which the leniency relates (para. 4.13). However, a CDO may be sought against a director who does not co-operate in the leniency process (para. 4.14).

As to the director's conduct, the OFT will consider evidence whether he planned the infringement, either alone or with other persons, or used his position of responsibility to encourage others to assist him, and whether there are aggravating or mitigating factors. If a director was not responsible, the OFT will consider whether there were reasonable grounds to suspect and prevent an infringement or whether he ought to have known about it (para. 4.19-4.23). The regulator will not apply for a CDO against any beneficiary of a "no-action" letter to an individual that they will not face criminal prosecution for cartel activities specified in the letter (para. 4.27).

49 *See* http://www.oft.gov.uk/shared_oft/business_leaflets/enterprise_act/oft510.pdf.

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