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AUSTRIA

This section reviews developments concerning the Cartel Act of 2005, which is enforced by the Cartel Court, the Federal Competition Authority ("FCA") and the Federal Antitrust Attorney ("FAA").

Policy and Procedure

Austrian Cartel Court Refers Case On Cartel File Disclosure To The ECJ

On October 12, 2011, the Austrian cartel court referred proceedings to the European Court of Justice (ECJ),[1] seeking guidance as to whether an Austrian law, which sets out a strict ban on access to sensitive cartel documents, is in line with EU law, particularly following the ECJ's recent Pfleiderer judgment.[2]

The referral arises from the 2010 finding by the Austrian competition authority of a cartel in the distribution and wholesale of printing chemicals industry.[3] A printers association, Verband Druck & Medientechnik, is now preparing a claim against the cartel members for damages and has started separate proceedings to gain disclosure of files, including whistleblower documents. The Austrian court has now referred these proceedings to the ECJ, asking whether an Austrian law restricting the disclosure of cartel files is against EU law.

The Austrian law in question restricts access to sensitive cartel documents, unless the parties to the cartel give their consent. This provision applies only to cartel cases, while in other civil and criminal law cases, Austrian law allows the courts to weigh the competing interests against each other, and may accordingly grant access to sensitive documents.

In Pfleiderer, the ECJ held that it is for Member State courts to decide the conditions for granting access to whistleblower documents, by weighing the competing interests under EU law. In light of the Pfleiderer case, the Austrian law raises two questions according to the Austrian court.

First, Pfleiderer indicates that the competing interests between disclosure for follow-on damages claims and preserving a functioning leniency mechanism must be weighed on a case by case basis. However, because the Austrian legislature, in applying the legal provision preventing disclosure, has determined the balancing of interests for all cases, the court asks whether the provision is contrary to EU law.

Second, in the course of the Pfleiderer judgment, the ECJ stated that the applicable national laws regulating access to cartel documents should not be less favorable than other similar domestic laws on access to files in civil, administrative, or criminal proceedings. In Austria, the right of the court to review the competing interests and exceptionally grant access to documents is only denied in the case of documents produced in a cartel investigation. The court argues that this could be regarded as discrimination against claimants seeking damages from cartel abuses vis-à-vis claimants in other areas of civil and criminal law. The Austrian court asks whether there is a ban against such discrimination following Pfleiderer. If so, the Austrian legal provision would violate EU law.

The ECJ's reply to the Austrian court's request will likely give much needed additional guidance on the appropriate interpretation of the Pfleiderer judgment. In essence, the Court is given another chance to rule on and further fine-tune the margins of how far national law can go in striking the balance between facilitating follow-on damages claims versus maintaining effective national leniency programs.

1 Oberlandesgericht Wien als Kartellgericht, 29 Kt 5/09-86; ECJ, Donau Chemie and others C-536/11.

2 ECJ, *Pfleiderer v. Bundeskartellamt*, C-360/09, 14 June 2011.

3 The Austrian authority prosecuted Donau Chemie, DC Druck-Chemie Süd, Brenntag Austria Holding, Brenntag CEE and Ashland-Südchemie-Kernfest for their participation in the cartel. BWB/K-159, Druckchemikalien KG, 14 April 2010.

BELGIUM

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

Mergers and Acquisitions

Competition Council Opens Second Phase Investigation Into The Acquisition Of The Phone House By Belgacom

On August 12, 2011, the Council opened an in-depth investigation of Belgacom's acquisition of The Phone House, which was notified to the Council on May 24, 2011.

Belgacom and its subsidiaries are suppliers of several telecommunication services and offer products and solutions through their different brands Belgacom, Proximus, Telindus/Belgacom ICT, and Skynet. The Belgacom group is active in fixed line services (FLS), mobile communication services (MCS), and international carrier services (ICS). The Phone House is a retail chain with outlets all over Belgium where consumers can purchase telephony products and services, especially those related to mobile telephony, including products and services of Belgacom and other telecom operators. The Phone House operates independently of any operator or group active in Belgium in the electronic communications sector.

After the closure of the first phase investigation, the Council, which took into account the remedies offered by Belgacom, could not exclude that the transaction would significantly hinder competition on the Belgian market or on a substantial part of it. The second phase investigation determine whether other telephone operators will be able to distribute their products and services on a sufficient basis through The Phone House following the acquisition by Belgacom.

On September 27, 2011, following the in-depth investigation, the Auditorate raised serious objections as to the proposed transaction and advised the Council to prohibit the proposed acquisition. According to the Auditorate, as a result of the transaction the prices for mobile telephony services would be less likely to decrease than without the acquisition. Moreover, the Auditorate claims that the transaction raises barriers to entry to the potential competitor VOO, and decreases competition between the point of sales of The Phone House and Belgacom in certain areas.

Ultimately, the Council must take a final decision regarding the admissibility of the proposed transaction. According to the press release of the Auditorate confirming its objections to the proposed transaction, the final decision of the Counsel can be expected at the beginning of November 2011.

Competition Council Clears Acquisition Of SBS Belgium By De Vijver Media

On September 7, 2011, the Council cleared the transaction whereby De Vijver Media acquired joint control of SBS Belgium, Humo, and DesertFishes.

De Vijver Media SA has been jointly established by Waterman & Waterman, Corelio, and Sanoma Corporation. Following this transaction De Vijver Media will be the owner of the shares in SBS Belgium, which owns two television channels in Flanders (VT4 and VIJFtv), and is also the owner of the shares in HUMO SA, which publishes a weekly magazine under the same name, and in DesertFishes SA, which owns *inter alia* the production houses "Woestijnvis" and "deMENSEN."

The Auditorate submitted on August 17, 2011 its Report to the Council where it makes mention of a possible objection to the proposed transaction. According to the Auditorate the television channels VT4 and VIJFtv could obtain prior knowledge of confidential information regarding the programming schedule of VRT through the production house Woestijnvis. The Auditorate further points out that the programming schedule of a television channel is an essential aspect of competition between television channels and that such potential prior knowledge can provide VT4 and VIJFtv with a competitive advantage (as they can adjust their programming schedule to that of VRT) over competing television channels.

The Council, however, finds it very unlikely that VRT would provide sensitive information regarding its programming schedule to Woestijnvis following this transaction. What is more likely is that, if Woestijnvis wants to continue to work with VRT in the future, it will have to adhere to VRT's contractual confidentiality requirements. Moreover, the Council finds it very unlikely that VT4 and VIJFtv would obtain a competitive advantage since, in their opinion, prior knowledge of the programming schedule could not be of such nature that it would lead to a significant impediment of competition.

DENMARK

This section reviews the competition law developments under the Competition Act (Consolidation Act), as set out by executive order No. 972 of October 1, 2010, and enforced by the Danish Competition Council ("DCC"), assisted by the Danish Competition Authority ("DCA"), and the Danish Competition Appeals Tribunal ("Tribunal").

Horizontal Agreements

A Danish Court Has Imposed Fines On A Potato Growers Association And Its Former President For Attempts To Coordinate Prices And Limit Supply Of Potatoes

On September 6, 2011, the District Court of Kolding found that the Danish Potato Growers Association and its former president had violated Section 6 of the Danish Competition Act by recommending an increase in prices and a limitation of supplies to its members.

This recommendation was first made at a general meeting held by the association on September 3, 2009. The meeting was called as a result of the decrease in potato prices, which had caused considerable frustration amongst the association's members. However, the president of the association repeated this recommendation a few days later during an interview broadcasted on national television.

When setting the fine for the association, the District Court took into consideration that a recommendation from an association to its members with an object to restrict competition between the individual members constituted a serious infringement of the Competition Act. Furthermore, the Court found it to be an aggravating factor that the association in 2008 had received a warning from the Danish Competition and Consumer Agency urging the association to refrain from influencing the price setting of its members. The association had in this connection signed a statement committing it to refrain from exercising such influence. Although, the association only represented a smaller part of the Danish potato growers the above mentioned aggravating factors led the court to set the fine at DKK 500,000 (approx. €67,150).

When setting the fine for the former president of the association, the District Court took into consideration that the former president had figured prominently in the matter, and even recommended price fixing on national television. The Court considered it an aggravating factor that the former president had signed the statement which committed the association to refrain from influencing its member's price setting. Due to these factors the fine was set at DKK 25,000. (approx. €3,350).

A Danish Children's Clothes Manufacturer And Former Retailer Of A Children's Clothes Fined For Infringing Section 6 Of The Danish Competition Act

In October 2011, the Danish children's clothes manufacturer Ticket to Heaven and the former retailer, of children's clothes Bambino have accepted a settlement fine and thereby closing a case that started in October 2008, when the Danish Competition and Consumer Agency ("DCCA") conducted a dawn raid at the premises of Ticket to Heaven. The DCCA found evidence that Ticket to Heaven and Bambino had entered into an agreement whereby they would refrain from selling Ticket to Heaven's products with a rebate of more than 30% online.

The DCCA handed over the case to the Public Prosecutor for Serious Economic Crime ("PSEC") in 2009. When setting the fine for Ticket to Heaven the PSEC took into consideration that Ticket to Heaven had admitted the infringement and had ended the anticompetitive conduct shortly after commencing it (the agreement lasted only six days). The fine was set at DKK 300,000 (approx. €40,300). As Bambino has ceased to exist, the former owner of the retailer accepted the fine, which was set at DKK 25,000 (approx. €3,350).

FINLAND

T*his 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.*

Mergers and Acquisitions

FCA Proposes To Prohibit Acquisition Of Asphalt Paving Business

In August 2011, the FCA proposed that the Market Court prohibit NCC Roads from acquiring the asphalt paving business of Destia. The FCA considers that the acquisition would lead to a jointly dominant market position in the asphalt mix market in the larger Helsinki area between the largest remaining contractors, NCC and Lemminkäinen. This was the second transaction ever proposed to be prohibited by the FCA, and the first in over a decade.

The FCA considered there to be three relevant product markets in the asphalt business, *i.e.*, state contracts, municipal and private contracts, and sale of asphalt mix to other contractors. The FCA argued that the acquisition would have significantly impeded competition in the asphalt mix market in the larger Helsinki area. NCC has disputed the FCA's market definition, arguing that the production and selling of asphalt mix is not a separate market but a part of the asphalt paving market as asphalt mix is mainly produced for the company's own use.

There are currently three companies with fixed asphalt stations in the larger Helsinki area: Lemminkäinen, NCC, and Destia. According to the FCA, smaller contractors are dependent on the asphalt mix bought from these three suppliers in order to compete with them. The FCA considered that the acquisition would result in a jointly dominant position between Lemminkäinen and NCC in the production and sale of asphalt mix in the larger Helsinki area. They could control the asphalt paving market through the production of asphalt mix, either by refusing to sell it to other contractors or by charging prices above the competitive level. This in turn would increase the price level of asphalt paving work.

To alleviate the FCA's concerns, NCC offered various remedies. It offered a number of behavioral remedies to facilitate the possibility for market entry, including an obligation to sell asphalt mix to competitors under conditions monitored by an independent expert.-NCC offered only one remedy of a structural nature, *i.e.*, the possibility to sublease land to a competitor to establish its own fixed asphalt station and enter the market. The notifying parties were not willing to propose a solution which would have led to the divestment of one of the existing asphalt stations held by the combined entity.

The remedies offered by NCC were not sufficient to satisfy the FCA that the markets would remain competitive after the acquisition. The FCA referred to the current practice under EU merger control which emphasizes the importance of structural remedies. The FCA's major concern was that the remedies offered contained few structural elements, and if there was no new market entrant establishing its own fixed asphalt station, only behavioral remedies would be left. The behavioral remedies were not considered sufficient because they were rather complex and would require constant monitoring.

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").

Mergers and Acquisitions

The FCA Sanctions Canal Plus For The Breach Of Its Commitments

On September 21, 2011, the FCA announced the withdrawal of the decision of the French Minister for the Economy of August 30, 2006, approving the merger between CanalSat and TPS, the two main pay-TV operators in France, in light of the serious breaches by Canal Plus of certain of its key commitments.[4] This is the first time that a decision to withdraw a clearance decision has been adopted on the grounds of Article L. 430-8 of the French Commercial Code.

In 2006, the French Minister for the Economy had authorized, subject to certain commitments, the acquisition by Canal Plus, the owner of the CanalSat bouquet, of its main competitor within the French market for the distribution of pay TV, thereby creating a virtual monopoly within the sector. Pursuant to the recommendations of the Competition Council, this approval was subject to compliance with 59 behavioral commitments intended to ensure the development of effective competition – stemming in particular from ADSL suppliers – within the market for distribution of pay TV.

The purpose of these commitments was in particular to allow new entrants to have access to the premium content and in particular the most attractive channels within the TPS bouquet, in order to be in a position to develop a sufficiently attractive offer to compete with the new entity. Canal Plus therefore agreed to provide third party distributors seven channels, including TPS Star, TPS Cinéstar, TPS Cinétoile, TPS Cinéculte, and TPS Foot, and guaranteed that their attractiveness would be maintained.

In its decision of September 12, 2011, the FCA noted that Canal Plus did not comply with the most important section of the 2006 decision, which raised the risk of a particularly significant detrimental impact on competition within the French market for the distribution of pay TV.

First, Canal Plus delayed its provision of the seven channels in question to third party distributors, thus guaranteeing its new service "Le Nouveau CanalSat" a competitive advantage at the time it was launched. Second, Canal Plus allegedly lowered the quality of the channels provided to its competitors by progressively withdrawing the premium content from the programming – *e.g.*, by lowering the quality of the movie service, losing rights to sporting events, ending broadcasting of premium programming (movie or sporting events) during popular time slots and/or live – thus ensuring that they would be less attractive for subscribers of competing pay TV distributors.

Furthermore, the FCA considered that Canal Plus kept several independent TV channel publishers in a situation of dependence by maintaining opaque, non-transparent, and potentially discriminatory

4 Dec. of the French Competition Authority No. 11-D-12 of 12 September 2011 relating to the compliance with the commitments included in the decision authorizing the acquisition of TPS and CanalSatellite by Vivendi Universal and the Canal Plus Group, http://www.autoritedelaconcurrence.fr/pdf/avis/11d12.pdf.

relations with them regarding their compensation terms and the duration of their contracts, as well as by linking the commercial distribution of these channels to their carriage. Finally, the FCA found that other commitments relating to access to rights to American films and to the rights to sporting events were also breached. In all, it held that 10 commitments out of the 59 that were imposed by the Minister for the Economy were breached by Canal Plus.

Given that some of the breached commitments were "key" commitments, the FCA considered that a simple injunction with an order to comply with such commitments would be inadequate to compensate for the competition harm that resulted from the failures noted since 2007, which also indicate in its opinion the "bad faith and a repeated lack of diligence" of Canal Plus. The FCA therefore relied on Section IV,1° of Article L. 430-8 of the French Commercial Code, which provides that in the event of a breach of a commitment, the FCA can "withdraw the decision authorizing the transaction." Unless it is possible to restore the pre-merger situation, the parties must therefore re-notify the transaction within one month, under penalty of a fine equal to 5% of their revenues. Following the re-notification, the FCA will have to conduct a new competition analysis taking into account any market changes since 2006.

In addition, the FCA also applied the third paragraph of the same Section of Article L. 430-8 of the French Commercial Code in order to inflict a fine of €30 million on Canal Plus for the violation of its commitments.

This unprecedented decision illustrates the difficulties and risks relating to the behavioral commitments that the FCA has been developing for several years. In this case, one could ask whether it was reasonable in the first place to approve a transaction subject to no less than 59 different commitments, most of which were as hard to implement as to manage effectively. The FCA will now face the challenge of restoring competition while the merger has been consummated for more than five years.

Policy And Procedure

Commercial Judge Orders The FCA To Disclose Documents Gathered During A Commitment Procedure

On August 24, 2011, the Paris Commercial Court ordered the FCA to disclose the non-confidential versions of certain documents gathered during a commitment procedure, for the purpose of a private action for damages.[5]

Following a complaint from the company *Ma liste de Courses* (MLDC) and the *Institut de liaisons et d'études des industries de consommation* (ILEC), the FCA investigated certain practices of Highco and Sogec in the market for the issuing and processing of electronic discount coupons (e-coupons). On June 25, 2011, the FCA accepted the commitments proposed by the two groups of companies and closed the proceedings.[6]

MLDC further decided to bring an action for damages against Highco and Sogec before the Paris Commercial Court. However, MDLC could not rely on the FCA decision in order to prove the existence of an infringement, since commitments decisions are silent on whether there has been or still is an infringement. It was therefore crucial for MDLC to be able to use before the commercial court the documents gathered during the FCA proceedings that may contain information with respect to the alleged illegality of the practices.

As a complainant, MLDC had access to the file during the procedure before the FCA. However, pursuant to Article L-463-6 of the French Commercial Code, the information gathered by the FCA within the framework of its powers of investigation is covered by the investigation secret and cannot be disclosed by any party to the proceedings. Such disclosure may only be justified if it is strictly necessary for a party to exercise its rights of the defense.[7]

MDLC could not rely on the French law regarding public access to administrative documents (law n°78-753 of 17 June 1978) either, since Article 6 of the law was modified in May 2011 in order to prohibit the disclosure of documents held by the FCA within the framework of its investigative powers.

As a result, MDLC decided to request a disclosure order from the commercial judge pursuant to Article 138 of the French Code of Civil Procedure. This provision allows a litigating party to ask the commercial judge to order the lodging in court of a document held by a third party, in this case the FCA. Highco and Sogec argued that

5 Paris Commercial Court, Judgment of August 24, 2011, *SAS Ma Liste De Course*.

6 French Competition Authority, decision n°10-D-20 of 25 June 2010.

7 French Supreme Court, judgment of 19 January 2010, *SEMAVEM*.

the disclosure of all or parts of the FCA's file would lead to a distortion of the commitment procedure. However, the Court rejected that argument, holding that although the acceptation of commitments by the FCA puts an end to the competition concerns raised, it does not compensate for the alleged harm suffered by MLDC. Thus, the FCA's administrative decision cannot have the effect of depriving the claimant from invoking its rights within a private enforcement litigation.

The Court also found that MLDC should be able to use the information gathered by the FCA within the framework of its investigative powers, and that the prohibition of Article 6 of Law n°78-753 regarding public access to administrative documents only applies to individual requests and does not affect the power of the judge to order disclosure pursuant to Article 138 of the French Code of Civil Procedure. Finally, the Court emphasized that in any event, the judge is not bound by the FCA administrative decision.

Should it be confirmed, this decision of the commercial court to give access to the FCA's file to private litigants may have important consequences on companies' incentives to enter into the commitment procedure, or other negotiated solutions with the FCA, in the future.

Fining Policy

The French Supreme Court Upholds Fine In The Corsican Cement Case

On July 12, 2011, the French Supreme Court upheld the April 15, 2010, ruling of the Paris Court of Appeals in the Corsican cement case, confirming that the annulment of the FCA's decision with respect to abuse of collective dominance did not necessarily entail a reduction in the level of fines.[8]

On March 12, 2007, the FCA imposed a €25 million fine on the cement companies Lafarge and Vicat (i) for entering into anticompetitive agreements with their key distributors, the aim of which was to reserve the exclusive supply of Corsican wholesalers to Lafarge and Vicat and thus to prevent market entry from foreign competitors; and (ii) for abusing their collective dominant position by granting loyalty rebates to distributors who refrained from importing cement from competing producers.

On May 6, 2008, the Paris Court of Appeals confirmed the FCA's findings as regards the existence of the facts and their characterization in law, but reduced the amount of the fines to €14.5 million on the grounds that the impact of the practices on competition had been overestimated.

On July 7, 2009, the French Supreme Court quashed the May 6, 2008 ruling with respect to "*the finding of a collective dominant position and the related sanctions*." It held that the Court of Appeals failed to determine whether, absent the anticompetitive agreements, Lafarge and Vicat would have had the possibility to behave, to an appreciable extent, independently of their competitors, customers and ultimately of consumers. The French Supreme Court referred the case back to the Paris Court of Appeals for a ruling on these issues.

On March 15, 2010, the Paris Court of Appeals followed the Supreme Court analysis and set aside the finding of an abuse of collective dominance. However, the Paris Court of Appeals refused to lower the amount of the fines as a result of this finding, arguing that the amount of the fines could not, pursuant to principles of national criminal law and to Article L.464-2 paragraph 3 of the French Commercial Code, be divided, where a homogeneous set of behaviors was prosecuted under several legal grounds. Moreover, the Court of Appeals ruled that the alleged abuse of dominance did not give rise to a specific damage to the economy. The Paris Court of Appeals concluded that the amount of the fine was proportionate to the gravity of the infringement and to the damage to the economy.

Before the French Supreme Court, the cement manufacturers argued that the partial annulment of the FCA's decision with respect to the finding of abuse of a collective dominant position, necessarily entailed a decrease in the amount of the fines and that the Paris Court of Appeals had misconstrued its jurisdiction by refusing to reassess the amount of the fine.

The French Supreme Court dismissed their claims. In particular, the French Supreme Court considered that the annulment of the finding of abuse of collective dominance had no incidence on the amount of the fines to be imposed as long as the fines (i) were proportionate to the gravity of the alleged practices; (ii) were based on a fair assessment of the damage done to the economy; and (iii) took the individual situations of the companies into account. In this case, even though the loyalty rebates could not qualify as an abuse of collective dominance, the Court found that the fine still reflected the gravity of the practices and the importance of the damage done to the economy no matter the legal grounds retained to sanction the concerned practices.

8 French Supreme Court, Cases n°10-17.482 and 10-17.791 of July 12, 2011, *Société Lafarge Ciments, Société Vicat*, http://www.autoritedelaconcurrence.fr/doc/cass2_ciments_juille11_07d08.pdf.

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 Provides Guidance For Market Information Systems In The Raw Milk Market

On June 29, 2011, the FCO published standards for the legality of a market information system for the procurement of raw milk.[9] Agrarmarkt Informations-Gesellschaft mbH ("AMI"), a provider of market intelligence for the agri-food sector, had requested for guidance on whether its market information system ("MIS") was in line with Article 101 TFEU and Section 1 GWB. AMI had approached the FCO after the latter had voiced concerns regarding the high transparency of raw milk prices in its interim report on the milk sector inquiry.[10] Generally, companies are expected to self-assess whether their business practices comply with the antitrust rules, and the FCO cannot be consulted on initiatives such as MIS in advance. However, given the importance of MIS for the raw milk market, the FCO made an exception in the case at hand.

AMI intends to provide two types of market intelligence concerning raw milk prices charged to dairies by farmers: individualized historic data, *i.e.*, prices paid by specific dairies in the past, and aggregated current data, *i.e.*, average current prices paid by a sample of dairies. Because the raw milk market is already characterized by a high degree of price transparency, and since AMI's planned raw milk MIS comprises strategic market information, the FCO found that the system may infringe Article 101 TFEU and Section 1 GWB.

In order to alleviate the FCO's concerns, AMI agreed to adjust its MIS. With respect to individualized data, the FCO required AMI to ensure that the data are at least six months old and that no information on rebates and surcharges applied by individual dairies is disseminated. As regards the publication of aggregated data, the FCO found that this part of the MIS would be in line with antitrust provisions provided that the data are sufficiently aggregated, *i.e.*, that the individual players remain unidentifiable.

This decision does not amount to a clearance, and the FCO will monitor the practical implications and effects of AMI's MIS during a one year period. The FCO also announced that it reserves the right to start proceedings against companies, publishers, organizations and institutions which do not adapt their MIS to this standard.

By publishing its assessment, the FCO provided rare and valuable guidance regarding its standards for MIS in the raw milk market. However, the FCO also stressed that, in general, the conformity of a MIS with antitrust provisions always has to be determined on a case-by-case basis and depends on the structure of the relevant market.

FCO Fines Manufacturer Of Fire Engines With Turntable Ladders

On July 27, 2011, the FCO imposed a fine of €17.5 million on Iveco Magirus Brandschutztechnik GmbH ("Iveco"), a German supplier of fire fighting vehicles with turntable ladders, for bid rigging. According to the FCO, Iveco and its major competitor Metz Aerials GmbH & Co. KG, a company of the Austrian Rosenbauer Group ("Rosenbauer"), had agreed to divide the market for fire engines with turntable ladders by bidding collusively on public tenders. The cartel agreement had been effective from at least 1998 to 2007. Since bid rigging is not only an infringement of administrative law but also a criminal offense under German law, the FCO referred the case against the companies' sales managers and directors involved in the cartel to the public prosecutor.

The FCO initiated proceedings against Iveco and Rosenbauer in 2010 following a leniency application by Rosenbauer, who was granted full immunity. Iveco and Rosenbauer both settled the case with the FCO. Earlier this year, the FCO had already fined Rosenbauer and two other companies for bid rigging in the market for other fire fighting vehicles (without turntable ladders). Investigations against Iveco for participation in that infringement are still ongoing. This case confirms the trend that an investigation or fining decision in one sector frequently triggers investigations in related sectors.

FCO Fines Manufacturers Of Concrete Pipes

On August 10, 2011, the FCO imposed a €11.86 million fine on two Northern German manufacturers of concrete pipes, Berding Beton GmbH and Betonwerk Bieren GmbH, as well as five individuals, for bid rigging, price-fixing, quota agreements and market sharing from at least 2006 to 2010. The cartel agreement between the two companies concerned the production and sale of standard concrete

9 FCO, decision of May 12, 2011, Case B 2 – 118/10. A case summary in English can be obtained at: http://www.bundeskartellamt.de/wEnglisch/download/pdf/Fallberichte/B02-118-10-ENGLISH.pdf; and in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell11/Fallberichte/B02-118-10-ENDG.pdf?navid=36.

10 *See* National Competition Report, January – March 2010, p. 11.

components such as pipes and sewers for rain and wastewater drainage and was characterized by a high frequency of personal contacts between employees of the two companies.

The FCO initiated an investigation in February 2010 and searched the premises of a number of concrete pipe manufacturers following a tip-off by a competitor. The two afore-mentioned companies cooperated with the FCO and benefitted from the FCO's leniency program, while the FCO is still conducting proceedings against 13 other concrete pipe manufacturers suspected of price-fixing in Central and Northern German markets. Over the past few years, FCO investigations have frequently targeted the building materials industry.

FCO Fines Fiberboard Manufacturers And Ten Company Representatives

On September 20, 2011, the FCO announced that it has imposed €42 million in fines on four manufacturers of fiberboard and other engineered wood products for price fixing. Ten company executives were also fined. A customer complaint had triggered the FCO's investigations in March 2009.

Between 2002 and 2007, company executives of Egger Holzwerkstoffe Brilon GmbH & Co. KG ("Egger"), Glunz AG ("Glunz"), Pfleiderer AG ("Pfleiderer") and Rauch Spanplattenwerk GmbH ("Rauch") agreed on price increases, price floors, surcharges, and, in part, on customer-specific prices, with respect to several types of fiberboard: coated and uncoated fiberboard, medium-density and high-density fiberboard and fiberboard flooring. The FCO levied €32 million in fines on Glunz, Pfleiderer, and Rauch for this behavior. Egger was granted immunity under the FCO's leniency program.

Representatives of Egger, Glunz, and Kronopoly GmbH ("Kronopoly") also agreed on price increases with respect to oriented strand board, a rough and variegated fiberboard typically used in construction, between 2004 and 2006. In this context, the FCO levied fines totaling €10 million on Glunz and Kronopoly, while Egger, again, was granted immunity from fines.

Most of the companies had applied for leniency and agreed to settle the case in exchange for further fine reductions. The FCO's decision is not final and can be appealed to the Düsseldorf Court of Appeals.

Interestingly, the cartel member Pfleiderer was a customer of decorative paper producers on which the FCO had imposed a fine in 2008 because they had formed a cartel. Seeking evidence for its civil damages claim in that case, Pfleiderer requested access to the FCO's file, thus bringing about the European Court of Justice's landmark ruling in June 2011 that EU law does not preclude potential cartel victims from gaining access to cartel members' leniency applications.

Unilateral Conduct

FCO Prohibits Merck's Discriminatory Laboratory Chemical Supply Contracts

On May 19, 2011, the FCO found that supply contracts between Merck KGaA ("Merck") and its distributors of laboratory chemicals infringed Section 20 GWB by discriminating against small, low-volume distributors.[11] The contracts contained discount clauses that were designed to be triggered only if a distributor purchased very large volumes of Merck laboratory chemicals. Small distributors were thus all excluded from receiving discounts. In fact, the only distributor to receive any significant discounts was VWR International Europe BVBA ("VWR"), a company which until recently had been Merck's exclusive laboratory chemicals distributor in Germany. The other distributors had previously only been able to purchase Merck laboratory chemicals directly from VWR.

The FCO ordered Merck to amend the discriminatory clauses by either rescinding them completely, or by reducing the range between the highest and the lowest purchase volumes for which discounts are granted, thus reducing the scope for discrimination against low-volume distributors. Any changes shall apply with retroactive effect from January 1, 2010 onward, which entails that Merck must either reclaim the unjustified discounts that were granted to VWR in the meantime or grant VWR's competitors the foregone discounts.

With this decision the FCO enforces a prior decision of July 14, 2009, in which the FCO first obliged Merck to terminate its exclusivity agreement with VWR and also to supply laboratory chemicals to VWR's competitors.[12] Merck has appealed the decision to the Düsseldorf Court of Appeals.

11 A case summary is available in German at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Missbrauchsaufsicht/Fallberichte-Missbrauch-2011/B03-139-10-FINAL.pdf?navid=55

12 A case summary is available in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell09/Fallberichte/B3-64-05-Fallbeschreibung.pdf?navid=52. *See* also National Competition Report July – September 2009, p. 6.

Mergers and Acquisitions

FCO Clears Homann's Acquisition Of Rügen Feinkost

On July 6, 2011, the FCO, after an in-depth-investigation, unconditionally approved the acquisition of Rügen Feinkost GmbH ("Rügen") by HK Food GmbH ("Homann"). Both companies are active in the production and sale of delicatessen salads and fish specialties, mainly to food retail companies in Germany.[13]

While the FCO had left the market definition open in earlier decisions,[14] the FCO, in this case, found that the product market only included chilled delicatessen salads and fish delicatessen, however not fish specialties, non-perishable delicatessen products, antipasti, and tapas.

Although the statutory presumption of single market dominance was met (Section 19(3) GWB), because Homann's pre-transaction market share already exceeded one-third, the FCO held that the parties had rebutted the presumption. The FCO found that even after the marginal market share increase through the acquisition of Rügen, Homann's market position could be challenged by competitors. In particular, there are no significant barriers for market entry of new competitors, at least for companies which are already processing fish for their food products, as they comply with veterinary regulations and have access to the fish supply market. In addition, retailers can easily switch suppliers: Homann's main competitors could easily increase their supply. Moreover, in addition to the second national supplier in this segment, the Wernsing Group, which also holds a significant market share, a number of smaller or only regional competitors are considered to be real alternatives. Finally, in the last two years, Homann and the other main players had already suffered slight market share losses in favor of these smaller suppliers.

Policy And Procedure

FCO Publishes New Draft Guidance On Market Dominance In Merger Control

On July 21, 2011, the FCO published for public consultation a draft Guidance Paper On Market Dominance In Merger Control ("Guidance Paper").[15] The Guidance Paper is a non-binding summary of the FCO's substantive approach in merger control cases and is intended to increase legal certainty for companies by explaining the criteria used by the FCO to establish whether a transaction raises competition concerns.

Compared with the FCO's previous guidelines that had last been updated in 2005 and that the Guidance Paper is intended to replace, the latter adopts a more economic approach in line with EU law developments and recent developments under German case-law. However, unlike the guidelines issued by the European Commission regarding the treatment of horizontal and non-horizontal mergers, the FCO's Guidance Paper does not provide any "safe harbor" thresholds with respect to market shares or concentration ratios below which mergers are presumed not to raise competition concerns, a shortcoming that limits the Guidance Paper's practical use for companies. Further, it bears mention that the FCO appears to continue to be less inclined than the European Commission to accept pro-competitive effects (in particular of non-horizontal mergers) and to conduct a full and unbiased examination of the efficiencies of a transaction.

The draft Guidance Paper generally takes account of the European Commission's practice and the case law of the EU courts. There remain, however, some areas where the FCO's approach differs to a significant extent from that of the European Commission. For example, unlike the European Commission, which applies a "balance of probabilities" standard of proof, the FCO takes the view that intervention is already called for if a transaction results in "concrete danger" for competition.

Concerning the analysis of collective dominance/coordinated effects, German courts have in principle endorsed the criteria laid down by the Court of First Instance (now the General Court) in Airtours and the European Commission in its Horizontal Merger Guidelines, and the Guidance Paper largely takes them into account.[16] Noteworthy differences to the Commission's approach include the FCO's view that tacit coordination may concern not only prices but also sales

13 FCO, Decision of July 6, 2011, available in German at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion11/B02-023-11.pdf?navid=77. A Press release is available in English at: http://www.bundeskartellamt.de/wEnglisch/News/press/2011_07_11.php.

14 *See*, *e.g.*, FCO, Decision of April 12, 2010, case B 2-117/09, available in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion10/B2-117-09.pdf.

15 A press release in German as well as the German version of the draft Guidance Paper are available at: http://www.bundeskartellamt.de/wDeutsch/aktuelles/presse/2011_07_21_Auslegungsgrundsaetze-Fusionskontrolle.php. A press release in English and the English translation of the Guidance Paper is availble at: http://www.bundeskartellamt.de/wEnglisch/News/press/2011_07_21.php.

16 CFI, Judgment of June 6, 2002, Case T-342/99, *Airtours v Commission* [2002] ECR II-2585.

volumes, territories, the quality of products or customer groups, its strong reliance on market shares rather than the existence of a plausible coordination strategy (as required by the EU Courts),[17] and the FCO's statement that corporate links between companies would typically facilitate the exchange of information and as a consequence make tacit coordination more likely. As regards vertical and conglomerate mergers, the FCO essentially adheres to the methodology of the Non-horizontal Guidelines,[18] making reference to the merged entity's ability and incentive to foreclose customers or competitors. Unlike the European Commission's Guidelines, however, the Guidance Paper does not provide for an assessment of the likely impact on effective competition as a third step. In addition, contrary to the approach at the EU level,[19] the FCO takes the view that it is not necessary to assess whether the prohibition of abuse of dominance may reduce the incentive of the combined entity to pursue potentially anti-competitive practices such as tying and bundling.[20]

FCO Publishes Activity Report 2009/2010

On July 28, 2011, the FCO presented its Activity Report, which outlines the authority's practice in detail for the years 2009 and 2010.[21] The Report focuses mainly on cartel prosecution, merger control, and sector inquiries.

Cartel proceedings once again took center stage in the FCO's practice. In total, 27 proceedings were initiated during the two-year period covered by the Report, with 172 companies being the target of dawn raids. The leniency program continued to enjoy great popularity and is perceived as an essential factor of the FCO's success in uncovering infringements. The majority of all cartel investigations were terminated, at least in part, by way of settlement. The FCO imposed cartel fines totaling roughly €560 million.

The number of mergers notified to the FCO decreased sharply by nearly 50% in 2009-10 compared to the two preceding years, and the FCO issued only 31 decisions after in-depth-investigations (2007-08: 44). This development is due to the general economic downturn and the introduction of a second domestic turnover threshold in early 2009 with the primary objective to reduce the number of notifiable transactions.[22]

The FCO launched several new sector inquiries into various markets and continued pursuing previous investigations. Among others, the FCO continued its analysis of the dairy industry, focusing on the relations between dairy farmers and dairies on the one hand and dairies and retailers on the other hand.[23] The FCO also examined the markets for electricity generation and electricity wholesale, gas pipelines, district heating, and fuel sold at petrol stations. In February 2011, against the background of increased concentration levels among food retailers, the FCO initiated a sector inquiry focusing on the purchasing power of major retail chains.[24]

Sectoral Investigations

FCO Starts Investigations Into The Food Retail Market

On September 16, 2011, the FCO announced that it had initiated an inquiry into the German food retail sector.[25] The inquiry will focus on the procurement side of the sector, where retailers buy food and beverages from producers.

In a first step, the FCO will examine the structure of the sector's procurement markets. It has already sent questionnaires to 21 retailers and approximately 200 producers. On the basis of the information gathered, the FCO will determine the retailers' market shares with respect to specific food groups, instead of examining the entire range of approximately 50,000 food retail articles. It will then verify the results on the basis of a small selection of products that represent a broad range of different articles and suppliers and that generally allow for clear market definitions: canned vegetables, milk,

17 ECJ, Judgment of July 10, 2008, Case C-413/06 P, *Impala*, [2008] ECR 2008 I-4951.

18 Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2008 OJ C 265/6.

19 *See* Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2008 OJ C 265/6, paras 46 and 110.

20 Guidance Paper, para. 170.

21 The Activity Report is available in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Taetigkeitsbericht/TB_2009_2010.pdf. The press release is available in English at: http://www.bundeskartellamt.de/wEnglisch/download/pdf/Presse/2011/110728_PR_E.pdf. and in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Presse/2011/110728_PM_TB.pdf.

22 *See* National Competition Report January – March 2009, p. 9.

23 *See* National Competition Report January – March 2010, p. 11.

24 *See* National Competition Report January – March 2011, p. 12.

25 The press release is available in German at: http://www.bundeskartellamt.de/wDeutsch/download/¬pdf/Presse¬/2011/2011-09-16_PM_SU_LEH.pdf, and in English at: http://www.bundeskartellamt.de/wEnglisch/News/press/2011_09_16.php. On January 14, 2011 the FCO had announced its decision to launch a sector inquiry to learn more about the competitive conditions on the *procurement* markets in food retailing, *see* NCR January-March 2011, p. 12.

butter, chilled coffee beverages, ketchup, frozen pizza, roasted coffee and sparkling wine. If necessary, other products will later be included in the analysis.

Probably in January 2012, after the structure of the procurement markets has been assessed, the FCO intends to begin to assess, whether leading German food retailers have a commercial advantage when buying foods and beverages and what the reasons for any such advantages are. The FCO will then determine the effects that the advantages have on competition on the basis of a sample selection of foods and beverages. The results of the inquiry will be published and put up for discussion.

The FCO has investigated the sales side of the food retail sector on a number of occasions. The leading case in this respect is the FCO decision of June 30, 2008, which permitted two of the largest German food retailers, Tengelmann and Edeka, to merge their discount chains Netto and Plus in a joint venture.[26]

GREECE

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

Mergers and Acquisitions

The Hellenic Competition Commission Clears The Concentration Between VIVARTIA And MEVGAL In The Dairy Sector, With Conditions

The HCC cleared the notified concentration between Vivartia and Mevgal, both active in a range of dairy product markets, whereby the former acquired, via its wholly owned subsidiary Delta Foods, the majority of the shares and thereby the exclusive control over the latter. A number of structural and behavioral remedies were agreed as a condition to granting clearance.

Although horizontal overlaps were identified in a number of dairy products markets, the HCC's in-depth investigation in Phase II concluded that the notified concentration is likely to raise competition concerns in the following relevant product markets: (i) the chocolate milk market; (ii) the market for the procurement of raw milk; and (iii) the fresh milk market.

The most anticompetitive effects would emerge, according to the HCC analysis, in the chocolate milk market. Despite the arguments of the parties to the contrary, the HCC decided that this was a separate market in which the participating undertakings possessed a combined market share of 60-70%, whereas the market share of the main competitors ranged between 5-10%, a share that had been stable for the past five years. On top of that, the two undertakings owned two out of the three most recognized and reputable chocolate milk trademarks in Greece – the "MILKO" owned by Vivartia and the "TOPINO" owned by Mevgal. The HCC noted that competitors wishing to enter the chocolate milk market would find it extremely difficult to create a new trademark which could compete with them. It would also be difficult for them to set up an efficient distribution network given that the vast quantity of chocolate milk is not sold through supermarkets, but via mini-markets, bakeries and kiosks, which lack negotiating power *vis-a-vis* the power of the new entity resulting from the concentration. In order to entirely remove the horizontal overlap between the parties and enable access of competitors in the chocolate milk market and given that it was not possible to separate the business activity of the chocolate milk from that of white milk, the HCC concluded that trade mark "TOPINO" of Mevgal should be sold to an appropriate buyer. In order to ensure the viability and competitiveness of the divested asset, Vivartia further committed, subject to buyer's approval, to provide to the buyer access to its distribution network for chocolate milk and to have the new entity enter into a toll manufacturing agreement to produce chocolate milk for the buyer at market prices, for a transitional period of two years following completion of the divestiture.

With regard to the market for the procurement of raw milk, the HCC stressed that the two undertakings would hold a combined market share of about 40-50% of the quantity of milk absorbed by dairy industries, while competitors absorbed much lower quantities. The new entity would thus possess significant buying power vis-a-vis the small and highly dispersed milk suppliers and could use this power in order to strengthen its position towards its competitors in the downstream markets. The HCC concluded that it was necessary to adopt remedies in order to ensure the access of competitors to sufficient quantities of raw milk and to strengthen the negotiating power of the milk producers, especially in the geographic areas in Greece were the new entity would have a big purchasing power. The new entity undertook to supply to competitors raw milk of a maximum yearly volume of 30,000 tons, at cost, for a total period of five years following implementation of the concentration.

26 The decision is available in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion08/B2-333-07_Internet.pdf. A press release in English is available at: http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2008/2008_07_01.php. *See* also National Competition Report April – June 2008, p. 9.

Additionally, in order to strengthen the negotiating power of milk producers in the area of Northern Greece, where the facilities of the participating undertakings were mostly established, the new entity undertook as a behavioral remedy the obligation to continue to procure milk from those milk producers from which both the acquiring company and the target purchased milk during the last three months. This obligation would last for a period of three years, provided of course that the producers would continue to wish to sell their output to them and the volumes were determined on the basis of the average monthly quantity for the previous 12 months delivered to the participating undertakings by each milk producer.

Finally, with the purpose of eliminating concerns about the possibility of foreclosure of competitors at points of sale of fresh milk, the acquiring undertaking agreed to remove all exclusivity from its contracts with retail trade (including freezer exclusivity) and to abstain from introducing same, for a period of five years.

Policy And Procedure

HCC Defines Enforcement Criteria

By its Decision 525/VI/ 2011, the HCC defined the priority criteria on the basis of which it will examine the matters submitted to it by way of a complaint or in the context of a self-initiated investigations. The basic criterion for action by the HCC is the service of the public interest. Priority will be therefore given to:

- the examination of matters involving particularly serious restrictions of competition with effects throughout the Greek territory, taking also into account the market power of the undertakings involved and the structure of the relevant market;
- products and services of primary importance to the consumer, especially when the anticompetitive behavior may result in an increase in prices; and
- anticompetitive practices with a cumulative effect, due to the fact that they are implemented by several companies in the market involved.

Applications for submission to the leniency program rank second in the list of priority, provided they meet all the requirements of the program. The adoption of regulatory measures in particular sectors of the economy, provided that such measures are absolutely necessary and appropriate to create competitive conditions and the opinion rendering activity of the HCC, follow at the third and forth places.

In assessing priority among several matters, the following will be also taken into account:

- the need to clarify novel or important legal issues for reasons of legal certainty;
- whether the HCC is the most appropriate institution to eliminate competition constraints in the particular case, given that private disputes should be addressed to the civil courts and the parties may seek immediate protection though injunction proceedings;
- whether the action to be adopted by the HCC is expected to immediately improve the competitive conditions;
- whether the submitted data are complete; and
- whether the human and financial resources available to the HCC suffice, taking into account the other cases which are pending and the investigations which are undergoing, the aim being to achieve the most efficient allocation thereof.

The HCC Adopts A New Pre-Merger Notification Form And A Form For Commitments

By its Decision 523/VI/2011, the HCC adopted a new pre-merger notification form and short form for concentrations under articles 5-10 of the new Competition Act 3959/2011. These are drafted along the lines of Form CO and henceforth incorporate the additional information required for concentrations in the media sector under law 3592/2007.

Additionally, by its Decision 524/IV/2011, the HCC adopted a form for commitments and a model text for divestiture commitments and a trustee mandate, along the lines of the ones under EC Regulation 139/2004.

IRELAND

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

Policy And Procedure

The Minister For Jobs, Enterprise And Innovation Publishes The Competition Bill 2011

On September 29, 2011, the Minister for Jobs, Enterprise and Innovation published the Competition (Amendment) Bill 2011 to strengthen competition law enforcement in Ireland by providing for new and increased penalties and sanctions.

The main provisions of the Bill include:

- An increase in the maximum term of imprisonment from 5 to 10 years for convictions under the Act;
- A large increase in fines for competition offences;
- Persons convicted of certain competition offences will not be eligible for probation;
- Parties convicted of competition offences may now have to pay investigation and court proceeding costs;
- Persons convicted of non-indictable competition offences may now be disqualified from being a company director; and
- For private individuals, it will be easier to prove an action for damages against a cartelist, after public proceedings have been successfully concluded.

In addition, the Minister announced that an order has been signed to commence section 10 of the Competition Act 2002, providing juries with measures to assist them in understanding complex financial and economic evidence during trials for competition law breaches.

Irish Competition Authority Publishes Concerns Over Proposed Code Of Practice For Grocery Goods Undertakings

In September 2011, the Irish Competition Authority published its concerns over the proposed statutory Code of Practice for Grocery Goods Undertakings (the "Draft Code").[27] The Draft Code is not specifically aimed at tackling competition problems, but by regulating contractual relationships, it may have unintended negative consequences for competition on the grocery goods market.

The Draft Code is modeled on a similar code in the U.K. and seeks to redress the balance in commercial relationships between suppliers and retailers. The ICA recommends promoting existing legislation and redressing the lack of bargaining power between small suppliers and retailers rather than creating a new code. The ICA highlights that legislation currently exists in the Competition Act, in the form of Part 2A, to prevent certain unfair trading practices in the grocery goods market, which could be viewed as anticompetitive. No cases have ever been brought under this section, for two reasons: First, many suppliers are unwilling to make complaints for fear of being delisted by retailers. Second, most suppliers believe that issues arising from unfair trading practices rather than anti-competitive practices affect their businesses the most. The ICA points out that there are no incentives in the Draft Code for suppliers to make complaints against retailers, meaning the situation in this regard is unlikely to change.

The ICA concludes that the Code may have specific unintended anticompetitive consequences for the grocery goods market. First, the requirement for all agreements to be made in writing is likely to create undue compliance burdens for smaller suppliers. This will increase costs, which will then be passed on to the end consumer, affecting the competitiveness of the grocery goods sector and the economy at large. The ICA also referenced its 2009 report on retail-related import and distribution,[28] which found that the speed of price adjustments is linked to the flexibility of the supply chains. Mandatory written contract obligations may impair flexibility, leading to price stickiness, and may even hinder efficiency and innovation.

The ICA referred to developments in 2009 which led to a fall in consumer demand, most notably the fall in value of sterling. As a result, retailers were forced to cut costs, necessitating an aggressive search for the cheapest suppliers. The ICA concluded that if this natural tension between the supplier and retailer is limited, price adjustments will be affected, ultimately affecting the end consumer and indeed competition on the grocery goods market.

ITALY

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

Horizontal Agreements

ICA Imposes A Fine On Alliance Medical S.R.L., Siemens S.P.A., Toshiba Medical Systems S.R.L. And Philips S.P.A., For Bid Rigging Activities In The Market For Supply Of Magnetic Resonance Equipment To Public Hospitals

On August 4, 2010, the ICA fined Alliance Medical S.r.l. ("Alliance"), Siemens S.p.A. ("Siemens"), Toshiba Medical Systems S.r.l.

27 Draft Code of Practice for Designated Grocery Goods Undertakings, Department of Jobs, Enterprise and Innovation, May 2011, available at; http://www.djei.ie/publications/commerce/2011/draftgrocerycodemay11.pdf.

28 Irish Competition Authority, 2009, *Retail-related Import and Distribution Study*.

("Toshiba") and Philips S.p.A. ("Philips") (the "Parties") for violating Article 101 TFEU by means of exchanging confidential strategic information and coordinating their respective commercial conduct in the market for the supply of magnetic resonance equipment.[29] In particular, the ICA found that the Parties had entered into an agreement aimed at rigging a public tender organized in June 2009 by Società Regionale Sanità – SORESA S.p.A. ("SORESA") for the supply of magnetic resonance equipment to certain public hospitals (the "Tender"). As a consequence, the ICA levied against the Parties a fine totaling approximately €5.54.

The Tender concerned the provision (purchase and rental) of seven magnetic resonance devices and related support and maintenance services for a number of health service centers located in Campania. The ICA's investigation was initiated following a complaint filed by a competitor, GE Medical System Italia S.p.A. The ICA found that during a meeting, which took place a few months before the expiration of the deadline for filing the offers, the Parties had reached an agreement as to pro quota allocation of the tendered equipment. In particular, while Siemens and Alliance agreed to form a Temporary Association of Enterprises ("ATI"), which – was to file the offer, Philips and Toshiba were meant to abstain from directly participating in the Tender, agreeing to sub-provide the remaining magnetic resonance equipment directly to the ATI. According to the ICA, this plan altered the competitive dynamics of the bidding process in that it impaired the independence of the Parties' respective commercial strategies, and thus constituted a serious infringement of Art. 101 TFEU. (Interestingly, the Tender was ultimately won by the complainant).

In assessing the amount of the fine to be levied on the cartelists, the ICA took into consideration sales on the national market, although it had previously limited the relevant market to the Tender alone.

ICA Imposes Fines Totaling Over €13 Million On Three Insurance Companies And One Multi-Firm Agency For Bid-Rigging In The Market For Healthcare Liability Insurance

On September 28, 2011, the ICA levied fines totaling over €13 million against the insurance companies HDI Gerling Industrie Versicherung AG (belonging to the German multinational group Talanx), Faro Compagnia di Assicurazioni e Riassicurazioni S.p.A. ("Faro"), Navale Assicurazioni S.p.A. ("Navale") (together, the "Insurance Companies") and the multi-firm agency Primogest S.r.l. ("Primogest") for bid-rigging activities in violation of Article 101 TFEU, affecting 18 tender procedures in the public healthcare sector, launched, between 2003 and 2008, by nine different local administrative authorities in Campania.

In the ICA's view, the anticompetitive objective pursued by the Insurance Companies was achieved through various co-insurance arrangements. In particular, the Insurance Companies entered into co-insurance agreements: (i) before putting in a tender, agreeing to share the insurance risk and revenues arising from the provision of a parcel of the insurance service, rather than competing on an individual basis for the award of the whole insurance service; (ii) shortly after the adjudication of a tender, thus granting a share of the service to the companies which had decided not to participate in the bidding process; and (iii) during the execution of the contract awarded, in order to take over the supply of the insurance service in case of withdrawal by the original assignee, thus preventing the procurement entities from launching a new call for tender. The ICA did not contest the fact that co-insurance agreements are lawful in principle as they are legitimate arrangements explicitly contemplated by Art. 1911 of the Italian Civil Code, whereby insurance operators may legitimately determine to share on a pro quota basis the risk arising from the conclusion of an insurance contract. However, the ICA contested the fact that in the case at hand co-insurance arrangements constituted a tool to alter the outcome of the bidding process and/or to carry out unlawful revenue-sharing schemes.

Moreover, according to the ICA, the contested conduct also consisted of reciprocal exchanges of information before the execution of the tenders, which overall strengthened the ability of the Insurance Companies to alter the competitive dynamics of the bids and preserve a fixed quota of insurance contracts awarded. The ICA's investigation showed that approximately 60% of insurance contracts allocated in Campania in the public healthcare sector were awarded to the Insurance Companies.

As regards the multi-firm agency, Primogest, the ICA concluded that it played a key role in coordinating the pre-bid preparatory phase and post-bid withdrawals and takeover mechanisms, by coordinating contacts among the Insurance Companies and by securing on their behalf smooth relations with the administrative bodies in charge of launching the tenders. In the ICA's view, the infringement was very serious in the light of its nature, the large number of public entities and contracts involved, the significant duration, and the vulnerability of the health insurance sector to bid-rigging.

Nonetheless, the ICA granted significant reductions of fines in consideration of the undertakings' inability to pay, pursuant to

29 Case I729 – *Gara d'appalto per la sanità per le apparecchiature per la risonanza magnetica*.

paragraph 35 of the European Commission's guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003, which applies where objective evidence shows that the imposition of the fine would irretrievably jeopardize the economic viability of the undertaking concerned. Ultimately, the ICA granted Navale a 20% reduction of fine, because of material financial losses it experienced in the previous years, and Faro a 80% reduction, because the company is currently undergoing forced liquidation.

Unilateral Conduct

ICA Fines Bayer CropScience For Exclusionary Behavior In Fosetyl-Based Fungicides

On June 28, 2011, the ICA fined Bayer CropScience SRL ("BCS"), the Italian branch of Bayer's crop protection division, €5.124 million for abusing its dominant position on the Italian market for fosetyl-based fungicides, which serve to protect grapevines from peronospora.[30]

The case originated from a complaint by Sapec Agro SA, a competitor of BCS that, along with other companies forming the "EU Fosetyl Task Force," had applied to the Italian competent authorities for renewing the authorization for marketing fosetyl-based products. Sapec complained that, from February 2007 onwards, BCS repeatedly refused to grant it and the other companies of the Task Force access to two scientific studies on the impact of fosetyl on human health and environment, which are required to obtain and/or renew the authorization.

In its decision, the ICA considered a series of factors to establish BCS's dominant position on the Italian market for the manufacture and sale of fosetyl-based fungicides against peronospora, namely: (i) BCS's high market shares (46% and 69% including the share of its distributors); (ii) BCS being the only manufacturer of fosetyl-based fungicides that was also active on the upstream market for the supply of fosetyl; (iii) the existence of significant barriers to entry in the form of high R&D costs and authorization requirements; and (iv) BCS's high degree of autonomy in the determination of its pricing policy from 2007 to 2010.

Turning to BCS's behavior, the ICA first noted that BCS had systematically and deliberately taken steps to hamper the negotiations and to prevent the reaching of an agreement with the companies of the Task Force. BCS's exclusionary intent was explicitly confirmed by a series of internal documents and emails gathered during the inspections, where BCS's managers expressed their satisfaction for BCS's successful strategy aimed at driving generic companies out of the market.

The ICA then examined BCS's behavior in the framework of the essential facilities doctrine. First, it noted that the scientific studies conducted by BCS were not replicable, since the relevant EU regulatory framework prohibits the duplication of tests and studies on vertebrate animals if those tests and studies have already been performed. Secondly, no alternative existed for securing the required authorizations, meaning that access to the studies was essential. Thirdly, there was no objective justification for BCS's refusal. Fourth, BCS's refusal eliminated competition by forcing all the companies of the Task Force out of the market (the only actors left on the market being BCS's own distributors and Helm, a company that was not part of the Task Force). Finally, BCS's conduct harmed consumers by reducing their choice and causing a 25% increase in the price of fosetyl-based products. BCS's behavior also allowed it to further strengthen its dominant position in the relevant market, as shown by the increase in its market share from 46% in 2007 to 50-60% in 2010.

The ICA concluded that BCS's refusal amounted to an abuse of its dominant position that lasted from February 2007 to February 2011 (the date when one of the companies was eventually granted an authorization for fosetyl-based fungicides). Since it was capable of producing effects in the whole Italian territory, BCS's conduct was liable to affect trade between Member States and fell therefore within the scope of Article 102 TFEU. The ICA also mentioned, without providing further details, that it had previously rejected commitments proposed by BCS.

Although the ICA found that the abuse was committed by BCS SRL together with BCS AG (the parent company of Bayer's crop protection division), the fine of €5.124 million was only imposed on BCS for the conduct attributable to it, since BCS AG had not achieved any sales on the relevant market in Italy in 2010.

Mergers and Acquisitions

ICA Prohibits The Acquisitions Of Vallenergie And Deval By CVA

On August 4, 2011,[31] the ICA prohibited the acquisition of sole control of Vallenergie S.p.A. ("Vallenergie") and Deval S.p.A. ("Deval") by CVA-Compagnia Valdostana delle Acque S.p.A. ("CVA").

30 Case A415 – *Sapec Agro/Bayer-Helm*.

31 C11082 – *Cva-Compagnia Valdostana delle Acque /Deval-Vallenergie*.

The proposed transaction concerned the markets for electricity in Valle d'Aosta, a region in the North of Italy. CVA was active in the generation, wholesale, and retail of electricity, while Vallenergie and Deval were active, respectively, in the distribution and the retail of electricity. The capital of the target companies was detained at 51% by Enel, the national incumbent operator, and at 49% by CVA, through its parent company Finaosta S.p.A. Pursuant to the proposed transaction, CVA would have acquired sole control of the two target companies.

The ICA found that the proposed transaction would have created a dominant position capable of substantially lessening or eliminating competition in the regional market for the retail supply of electricity to domestic and non-domestic customers. Consistent with its previous decisions, the ICA considered that the operation affected three product markets, namely: (1) the distribution of electricity, (2) the retail supply of electricity to domestic final users, and the (3) retail supply of electricity to non domestic final users, *i.e.*, small businesses. The ICA concluded that these markets were local, finding that their geographic dimension was defined by the territorial extension of both the distribution network and the administrative authorizations held by the target companies.

The notified transaction would have created a dominant position in the local markets for the retail supply of electricity to domestic and to non-domestic users. The post-merger entity would have detained a share above 90% in both markets, the remaining 10% being fragmented among several minor competitors.

The ICA also found that potential competition was hindered by significant legal barriers to entry. To reduce the price of electricity, the local regulation granted to distributors the refund of 30% to be directly applied in the customers' invoices, provided that they complied with local technical specifications. In the ICA's view, to comply with these specifications new entrant distributors would have had to implement substantial changes to their payment systems, which would have ultimately rendered the refund inefficient.

The parties unsuccessfully argued that the operation did not entail the creation of a dominant position within the meaning of the Italian Law, as CVA already jointly controlled the targets and, thus, the dominant position pre-existed to the transaction. The ICA did not explicitly respond to the parties' allegation. The parties, in the alternative, tried to obtain conditional clearance of the operation. Pursuant to the parties' proposed commitments, CVA would have undertook not to modify the prices applied to customers for a period of two years, with a possibility for the ICA to require an extension of the commitments up to four years. Interestingly, the ICA rejected the proposed behavioral commitments concerning CVA's future pricing policy finding that they did not address the competition concerns stemming from the Transaction. Indeed, in the ICA's view the position of quasi-monopoly held by CVA, and the existence of the above-described barriers to entry represented durable structural factors which prevented the entry into the market of new operators and/or the migration of CVS's current customers toward other operators, hindering the incentives of CVA to act pro-competitively for an indefinite period of time. In this regard, the ICA expressly referred to paragraph 17 of the Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, pursuant to which: "*commitments in the form of undertakings not to raise prices [...] will generally not eliminate competition concerns resulting from horizontal overlaps.*"

NETHERLANDS

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

Mergers and Acquisitions

NMa Blocks KPN's Acquisition Of Cable Company CAIW

On August 8, 2011, the NMa blocked the acquisition of the small cable service provider CAIW (known as Caiway) by KPN,[32] the largest Dutch telecoms operator, holding that the acquisition would limit competition. According to the NMa, the acquisition would mean that one company would own not only the cable network, but also the copper-line network in the densely populated west of the Netherlands, thereby affecting consumer choice in television services, internet access, and fixed line telephony. If KPN continues its plans to acquire the company, it will have to apply for a license and the NMa will open an in-depth investigation into the merger in cooperation with the Dutch Independent Post and Telecommunications Authority (OPTA).

CAIW has its own cable and fiber optic network on which it offers television, radio, Internet, and telephony services. KPN owns the copper-line network in that region of the Netherlands and started

32 http://www.nma.nl/en/documents_and_publications/press_releases/news/2011/11_39_nma_wants_to_investigate_dutch_telecom_company_kpn_s_acquisition_of_cable_company_caiw_further.aspx.

providing television services. The NMa considered in its preliminary investigation that competitors of the companies may not be able to exert enough competitive pressure on KPN post-merger and that they would need access to the networks to offer their television, telephony, and Internet services. The NMa was not convinced by the condition that CAIW imposed on KPN to require it to provide access to competitors to both networks and held that potential consumers and competitors may not be interested in this option and that it remains to be seen whether the conditions of such offer by KPN would be attractive.

NMa Announces In-Depth Investigation Of Merger Between Two Hospitals

On September 5, 2011, the NMa announced an in-depth investigation of a merger between two hospitals, Orbis Medical Centre and Atrium Medical Centre, in the southern region of Limburg.[33] The NMa found in its preliminary investigation that the transaction could impede competition in the inpatient and outpatient care markets in that region considering the 50% market share that the merged hospital would have. Only two competitors would remain: two other hospitals in the same province.

The Dutch Health Care Authority (Nederlandse Zorgautoriteit) warned for potential price increases and reduced choice for patients. The NMa indicated that it would analyze in an in-depth investigation whether hospitals in border regions in Belgium and Germany would be able to compete with the merged entity.

The health care sector is an enforcement priority for the NMa following the government's decision to liberalize the sector. The NMa closely monitors the developments in the sector and has blocked several health care mergers in the past years.

NMa Conditionally Clears Acquisition Of SBS

On July 22, 2011, the NMa conditionally cleared the joint acquisition of TV company SBS by the Finnish media group Sanoma and Dutch media group Talpa, which is owned by the Dutch media tycoon John de Mol.[34] However, it ordered Talpa to sell its minority interest in a competing Dutch media company: RTL Nederland.

Talpa will acquire 33% of the shares in SBS from the German broadcaster ProSieben. In order to proceed with the acquisition, Talpa is ordered to sell within three years its 26.3% share in RTL Nederland. The NMa stated that Talpa – a producer of television content – would be able to exclude its competitors from access to SBS as well as RTL (both broadcasters have multiple channels in the Netherlands) and in addition, competition between the two broadcasters could decrease. To ensure that Talpa does not exercise its influence on RTL Nederland and thereby gaining a competitive advantage, it must transfer its shares to an independent trust fund while the divestiture is pending.

Policy And Procedure

NMa Upholds Fine Imposed On Wegener And Five Former Executives

On August 24, 2011, the NMa dismissed the objections of media company Koninklijke Wegener N.V. ("Wegener") and five of its former executives and upheld the total of €20 million fines it imposed on them on July 14, 2010.[35] The NMa imposed the fines because Wegener and the individuals did not comply with the commitments offered when Wegener acquired competitor VNU Dagbladen ("VNU") in 2000. According to the NMa it was clear to Wegener as well as the five executives that were employed to supervise the implementation of the commitments, that the commitments required Wegener to guarantee the commercial and editorial independence of the Provinciale Zeeuwse Courant ("PZC") (at that time already owned by Wegener) and the competing BN/De Stem, which it obtained with the acquisition of VNU. The NMa held that by, among other things, merging the editorial boards and coordinating the financial policies of the papers, the commitments were violated.

Before the acquisition, both PZC and BN/De Stem published their respective papers in the Zeeuws-Vlaanderen region. In assessing the acquisition, the NMa held that it would cause an increase in the prices of the papers as well as a derogation of the quality of the papers post-transaction. To take away these concerns Wegener offered a number of commitments to the NMa, one of which was to maintain the commercial and editorial independence of both papers. In July 2010, Wegener requested that the NMa abolish the requirement. The NMa denied the request, holding that Wegener did not establish that the requirement would be disproportionately burdensome to Wegener or that the then-current market conditions warranted abolition of the requirement. After that, the NMa imposed

33 http://www.nma.nl/en/documents_and_publications/press_releases/news/2011/11_43_nma__hospital_merger_in_southern_region_of_the_netherlands_requires_a_license.aspx.

34 http://www.nma.nl/en/documents_and_publications/press_releases/news/2011/11_38_nma_conditionally_approves_acquisition_of_sbs_netherlands_by_sanoma_and_talpa.aspx.

35 Case 1528/961 Wegener, NMa, August 24, 2011 http://www.nma.nl/images/1528BBS22-192482.pdf; Case 1528/846 Wegener, NMa, July 14, 2010 http://www.nma.nl/images/1528BLD22-150949.pdf.

a fine on Wegener when it violated that commitment. In its 2011 decision, it held that the commitment was clear to Wegener and its former executives, especially in light that Wegener proposed the commitment and communicated about it with the NMa in length. It was the first time that the NMa held individuals liable for a violation of its orders.

Wegener maintained that it never agreed with the NMa that both papers would not engage in any cooperation. According to Wegener it only agreed to set up a structure that would guarantee the independence of both "small" papers, which commitment had not been violated, since both papers are published by separate entities, have an independent editorial statute, and an independent editor in chief. It maintained that keeping both papers entirely independent – commercially and editorially – would be too grave a measure and it would never have agreed to that. In light of the 10,000 circulation, such requirement would have been unacceptable for Wegener. In addition, it stated that the requirement to keep the papers independent from each other infringed the company's editorial independence and freedom of press.

The NMa found that content was shared, that news gathering was coordinated, and that, de facto, there was no independence between the two papers and that the papers should be considered a single news organization. It did not find valid grounds for lowering the fines in spite of Wegener's arguments that the fines were disproportionately high given the papers' combined gross profit of €600,000 in 2009. By holding so, the NMa it did not follow the Advisory Committee on Administrative Appeals that advised to substantially lower the fines for reasons of legal certainty, the wording of the commitment and the novelty of the application of the competition law in this case. The NMa, however, held that the commitments were clear and that the novelty of application of the competition law to the individuals in itself did not mandate a lowering of the fine. Further, it held that in the 2010 procedure initiated by Wegener to review the commitments, the appropriate agency assessed the commitment and found that it did not violate the constitutional right of freedom of press. In addition, the NMa stated that it did not see how the commitments would violate that right, since the NMa did not interfere with the content of the papers, but was merely guarding competition by trying to maintain independence of the papers. On August 31, 2011, Wegener announced that it would challenge the fine in court.

SPAIN

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

Horizontal Agreements

Termination By Commitments In Relation To The Proceedings Against Antena 3, Veo Televisión And Disney Channel For Possible Restrictive Practices

On June 30, 2011, the CNC approved the Termination by Commitments of the proceedings against Antena 3 Televisión S.A (ANTENA 3), Atres Advertising S.L.U. (ATRES- subsidiary of ANTENA 3), Veo Televisión S.A. (VEO) and The Walt Disney Company Iberia S.L. (Disney) for conduct falling under Article 1 of the Spanish Competition Act 15/2007 of 3 July 2007 (LDC).

The agreements that gave rise to the opening of formal proceedings were two different agreements, one between ATRES and VEO on December 15, 2009 and the other between ATRES and Disney on May 6, 2008. The market affected was the national marketing of television advertising. The CBC considered that these agreements did not have substantial effects on the interior market, as the linguistic, cultural and regulatory barriers determined that offer and demand operate in a national level.

Both agreements dealt with the joint marketing of advertising slots in television, containing agreements to fix rates and commercial discounts between competitors. In addition, the agreement ATRES-VEO applied the "single model" system (modelo de "pauta única"), which introduced additional restrictions. The "single model" system established that any advertising agreed by ATRES would have to be broadcast at the same time in all the channels operating under the "single model" system. Therefore, advertisers would have to acquire advertising slots in all the channels operating under this model, limiting choice. Regarding the agreement ATRES-Disney, a non-compete covenant was established, forbidding ATRES to sign advertising slots agreements with channels that may compete with Disney without the approval of Disney.

In the analysis of the restrictive effects of these agreements, the Council pointed out that the channels involved had relatively little market power given their advertising revenues at the time. Nevertheless the dynamic effects that these agreements might have were considered to be significant. The CNC considered that the provision included in Article 1.3 LDC, which exempts certain agreement when the conditions there specified are met, did not apply because the alleged cost reduction was minimal, it would not be sufficient to compensate the restrictive effects of the agreements, and it would not be passed on to consumers. Furthermore, the Council considered that the improvement of the product and its marketing had not been proven.

In light of the foregoing analysis, the parties offered commitments in order to terminate the proceedings. On March 15, 2011, Disney presented a proposal to rescind its agreement with ATRES and to establish a transitional contract with ATRES, limited to technical assistance, for the maximum duration of about nine months. On April 6, 2011, VEO offered to rescind its agreement with ATRES.

In regard of these proposed commitments, the Council considered, first, that both of them were adequate to solve the competition concerns raised, and the requirements in Article 52.1 LDC for the use of the Termination by Commitments Procedure by the CNN were fulfilled. Finally, in relation to the transitional contract between ATRES and Disney, the Council did not see any potentially restrictive effects, given the agreements limitation to a service of technical assistance and its maximum duration of six months.

Unilateral Conduct

Gas Natural Fined For Abusive And Unfair Practices In The Marketing Of Gas Natural To End Consumers

On July 27, 2011, the CNC fined Gas Natural €3.27 million in the context of a complaint filed by Iberdrola on September 11, 2009. The fine was imposed for two anticompetitive practices:

The first of these practices, considered by the Authority as a violation of Article 2 of the Spanish Competition Act 15/2007 of 3 July 2007 ("LDC") and Article 102 TFEU, involved a campaign initiated by Iberdrola in order to attract new clients. Iberdrola contacted prospective clients via telephone, thus ensuring that the conditions of the agreement and the verbal consent of the clients remained recorded. These recordings were then sent to Gas Natural by Iberdrola as evidence that the prospective customers wanted to change gas distributors.

Even though Gas Natural had not previously refused to honor telephone transactions, it alleged that these applications could not be taken into account inasmuch its verification, the identification of the applicant, and the integrity of the content could not be guaranteed. In addition, it argued regulations did not recognize verbal consent via telephone as a valid procedure for the change. Gas Natural maintained this position even after the National Commission of Energy specifically stated that, even if the oral consent was not envisaged in the actual regulation, this procedure would help reducing the costs of change of distributor. The CNC viewed the rejection by Gas Natural to accept the telephone applications as a clear abusive practice that reduced consumers' choice, as they had no other alternative but to remain with their previous distributor, namely one of Gas Natural's distributors.

The second practice analyzed by the CNC related to a campaign initiated by Gas Natural after a significant loss of clients. The object of the campaign was to persuade consumers not to change suppliers. For this purpose, Gas Natural sent letters to its clients that warned them of the potential fraud they could encounter as a result of visits allegedly reported by Gas Natural's clients from representatives of other distributors that offered to change distributors under advantageous conditions. The CNC put special attention on the expressions and language used in these letters, which seemed to challenge the reliability of competitors. Gas Natural recommended to take some precautions and provided a telephone service to assist clients with any doubt or concern they might have. Gas Natural alleged that the purpose of these letters was to protect clients, but the CNC disagreed, finding the practice unfair and restrictive and an infringement of Article 3 of the LDC.

Correos Fined For Breach Of Settlement Agreement

On August 23, 2011, Sociedad Estatal Correos y Telégrafos S.A. ("Correos") was fined €4.8 million for failure to comply with a Settlement Agreement, on the basis of a breach of Article 62.4.c) of Spanish Competition Act 15/2007 of 3 July 2007. The settlement was concluded between Correos (the public postal service in Spain), the Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia (Asempre) and the CNC.

The agreement settled the alleged infringement consisting on the conclusion of contracts with large customers. In these contracts, large discounts and possibly predatory prices were applied, through a policy of cross subsidies. After the settlement was reached, Correos offered to large customers unjustified premium discounts during the years 2008 and 2009. Subsequently, the CNC opened formal proceedings against Correos and concluded on August 11, 2011 that a breach of the settlement agreement had taken place.

Correos claimed no breach of the agreement took place and submitted an economic report to support the calculation of the costs, account taken of the cost structure of each client. The CNC did not admit this claim since it would have been tantamount to a unilateral modification of the terms of the settlement. In this regard, Correos should have required a modification of the settlement if it considered the terms were not sufficient in order to apply maximum discounts to customers. Because the conduct was considered to be a very serious infringement, the CNC imposed a fine of €4.8 million.

Mergers and Acquisitions

Telecinco Fined For Delayed Implementation Of Commitments

In October 2011, the CNC fined Telecinco €3.6 million for failing to file an Action Plan in relation to commitments submitted as part of Telecinco's merger with Cuatro. In April 2010, the CNC was notified the merger involving the acquisition of Cuatro by Telecinco. Given the competition concerns raised by the operation, the CNC resolved to authorize the operation subject to compliance with commitments proposed by Telecinco. Telecinco committed to limitations on its advertising business and limits on permissible contracting for third-party content (*e.g.*, to limit the duration of any exclusivity).

The authority obliged Telecinco to submit an Action Plan detailing the measures intended to implement the commitments within one month. Telecinco did not submit the Action Plan until January 13, 2011, despite the granting of a five-day extension.

As a consequence, the Authority opened formal proceedings to determine whether an infringement of the Spanish Competition Act took place, and found that a violation of Article 62.4(c) of the Competition Act, on the basis of the failure of Telecinco to submit an Action Plan within the deadline. This infringement, which is considered to be very serious, resulted in a fine of €3.6 million for Telecinco, (now Mediaset Spain Communication, Inc). Telecinco claims to have submitted the Action Plan in due time, considers the penalty disproportionate and unjustified, and has appealed the decision.

SWEDEN

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

Policy And Procedure

SCA Issues A Report On The Implementation Of The Revised Public Procurement Act

On July 15, 2010, new rules were included in the Swedish Public Procurement Act. The new rules enable a supplier who discovers that a contract notice and/or a contract award has not been published to go to court within six months of the award to get the contract declared ineffective. It is only after this that the SCA can utilize the new rules to take the case to court. If the court concludes that an illegal direct award of contracts has taken place, the municipal authority, county council or government authority may be ordered to pay a public procurement damage fine. A procurement that is broken down into several smaller parts just to avoid the requirement of publication of a contract notice may also be deemed to be an illegal direct award of contracts. Extending or expanding the scope of contract agreements or ordering supplementary supplies without these being exposed again to competition are other examples of illegal direct award of contracts.

In July 2011, the SCA issued a report to the government on the implementation of the new rules. Approximately thirty cases are currently before the SCA and two cases have already been brought before a judge. The SCA is satisfied with the results but expresses its astonishment at the high number of infringements. It is currently doing a thorough job indentifying new infringements and numerous new cases are expected to start shortly. Since the introduction of the new rules, the SCA has discovered approximately 400 cases of suspected illegal direct award of contracts, but for reasons of limited resources, the SCA opened investigations in only about 100 cases.

Dan Sjöblom, the Director-General of the SCA, noted in a speech on September 28, 2011, that the building sector is particularly affected by infringements to the Swedish Public Procurement Act. Several cases are currently brought against Swedish public authorities, such as various Swedish communes and the Swedish Migration Board, for having directly awarded contracts to building companies without following the public procurement procedure. The SCA is planning on imposing high fines to obtain a sufficiently strong deterrent effect. Director-General Sjöblom also noted that the monetary limit on fines (SEK 10,000 to 10 million, or a maximum of 10% of the value of the contract) limits the deterrent effect of the fine. More generally, the SCA has recognized a general lack of competition in the Swedish building sector, in which cartels and corruptions remain common. This lack of competition arises because there are only a few companies who are large enough to take on substantial projects, there is limited foreign competition, and there are high barriers to entry.

SCA Issues A Report On The Implementation Of The Provision On Public Sales Activities

On July 22, 2011, the SCA issued a follow-up report to the Swedish Parliament regarding the implementation and effects new provisions in the Swedish Competition Act (implemented on January 1, 2010). The new provision established that the State, a municipality, or a county council can be prohibited from engaging in sales activities on the free market if the activities inhibit or distort competition. Since January 2010, large number of private companies have filed complaints with the SCA, and approximately 50 of these have led to further investigations. The SCA has taken three of these cases to court. A large number of the investigations have resulted in commitments for which the SCA supervises the implementation.

The primary sectors where investigations have taken place are fitness-related activities/services, the hotel/restaurant/conference sector, and high-speed internet. The SCA has decided to take further measures in seven cases, concerning the organization of conferences, flushing of water pipe systems, alarm services, interpreters, the energy market, and scanning activities. A typical case is that against Svenska Spel ("Swedish Games"), which is the state company which operates on the regulated Swedish gambling market. Complaints had been filed against Swedish Games in relation to its gaming houses. Swedish Games agreed to a certain number of commitments, such as imposing an entry fee to all their gaming houses, reducing marketing, and clearly distinguishing the budget for its game and restaurant activities. The SCA is currently supervising the implementation of these commitments.

Generally, the new provision has generated positive effects as fewer private companies have to compete with state actors in the marketplace. The SCA also positively notes an increase of self-regulation initiated by various public bodies, which has led to an increasing amount of self-initiated discontinuation of sales activities that may have been anti-competitive.

SWITZERLAND

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

Unilateral Conduct

Electrolux And V-Zug Reach Settlement With Competition Commission

On July 11, 2011, the FCC closed its investigation of online retailing restrictions imposed by Electrolux and V-Zug. Electrolux had completely forbidden its distributors (be they members of its selective distribution network or not) from selling household appliances online. V-Zug had imposed various restrictions on its distributors regarding such sales. Based on an amicable settlement entered into with the FCC, Electrolux and V-Zug made a commitment to allow retailers who are members of their selective distribution network to trade online, and also (in principle) to do so under a different domain name from the one they use for their physical sales points. The FCC however authorized Electrolux and V-Zug to impose specific qualitative requirements on online retailing and to oblige their resellers to simultaneously run a physical sales point. The FCC also agreed that Electrolux and V-Zug may oblige their approved resellers to set up their website so as to make sure their contact details (company name and full address) as well as the addresses of their physical points of sale clearly appear on it and at first glance.

The FCC considered that the bans imposed by Electrolux and V-Zug amounted to unlawful "agreements" affecting competition, despite the fact that such bans could appear as being the result of measures unilaterally imposed by these two manufacturers. The FCC highlighted that the ban on online sales announced by Electrolux and V-Zug, if it had been implemented, would have applied to "mixed" resellers (that is to say those who are both trading on the Internet and selling goods in physical points of sale), since their refusal to respect the announced prohibitions would have resulted in a cessation of deliveries and, subsequently, a considerable decline in their turnover.

The FCC denied that the contemplated ban on online trading could fall within the scope of Article 5 para. 4 ACart, which forbids the setting of fixed resale prices (retail price maintenance) and the granting of territories to the extent that sales by other distributors into these territories are not permitted (absolute territorial protection). The FCC indicated in this respect that a restriction on online trading could only be likened to the setting of fixed resale prices in qualified circumstances, notably when the ban on online sales is combined with price recommendations or with agreements that influence the price policy of retailers, or when – in addition to forbidding or restricting the online business – the supplier threatens to exert or actually exerts pressure on the retailers (threats, intimidation, warnings, sanctions, delay or suspension of sales, etc.) so as to ensure that they apply a certain price level. The FCC reiterated that, according to paragraph 10 of its Notice on the Competition Law Treatment of Vertical Agreements of June 28, 2010, sales on the Internet shall be regarded as passive sales and hence that a ban on these sales can fall within the scope of Article 5 para. 4 ACart if the manufacturer agrees with its exclusive retailer to prevent access to its website to customers from outside the designated territory, or if the retailer commits to introducing a system on his website that automatically redirects such customers towards the manufacturer's or another retailer's website, or if the retailer commits to interrupting any transaction on the Internet whenever the credit card of a customer is indicating an address outside the designated area.

After concluding that the contemplated agreement led to a significant restriction of competition, the FCC commission further examined whether such a restriction could be justified on grounds of economic efficiency according to Article 5 para. 2 ACart. Pursuant to section 16 (4) of the Notice on Competition Law Treatment of Vertical Agreements, an agreement affecting competition may be justified, *inter alia*, when it appears necessary to ensure the uniformity and quality of the contractual products or to avoid inefficient levels of sales promotion measures (*e.g.*, "free-riding"). In this respect, the FCC considered that the fight against free-riding by online retailers at the expense of the physical points of sale was not a decisive argument. An important part of the customer base of household appliances consists of professional buyers (construction companies, architects, real estate agencies, etc.), who do not need specific advice when placing their orders. Furthermore, the investigation of the FCC revealed that Electrolux and V-Zug both had about 10 permanent showrooms spread over the Swiss territory, where customers could also obtain information about the products of these manufacturers before placing any order on the Internet. In addition, and most importantly, recent economic studies show that free-riding is not necessarily detrimental to retail shops operators, but rather that retail outlets and online retailing tend to increasingly influence each other to the extent that they appear to be complementary distribution channels.

In the course of the investigation, Electrolux and V-Zug tried to justify the contemplated ban on online sales by submitting that they had actually put in place a "purely qualitative" distribution system, where distributors are exclusively selected on the basis of objective and qualitative criteria required by the nature of the product. The FCC took this opportunity to clarify the conditions under which such a distribution system can, in its view, be considered to be a lawful restriction of competition:

(1) the selective distribution system must be "required" by the nature of the product (which means that it is necessary in order to safeguard product quality and ensure its correct use);

(2) the retailers must be selected on the basis of objective criteria of a qualitative nature, which must be set in a uniform way and applied in a non-discriminatory manner;

(3) the set criteria should not go beyond what is necessary;

(4) the selective distribution system should neither fall within the definition of a "hardcore restriction" according to Article 5 para. 4 ACart, nor contain a qualitatively significant restriction in the meaning of section 12 (2) of the Notice on the Competition Law Treatment of Vertical Agreements.

The FCC stressed that if a company manufacturing products under different brands wishes to distribute them through different distribution channels and to position them in different price segments, it will then not be possible to justify a selective distribution system only for those products in the highest price segments if the products of the various brands are technically similar and if the way one should use them does not fundamentally differ.

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

OFT Imposes Fines Totaling £49.51 Million On Four Supermarkets And Five Dairy Processors

On August 10, 2011, the OFT issued its decision in the retail pricing investigation started almost 8 years ago, finding that four supermarkets (Asda, Safeway, Sainsbury's and Tesco) and five dairy processors (Arla, Dairy Crest, McLelland, The Cheese Company and

Wiseman) coordinated prices for certain dairy products.[36] The exchange of information between producers was pursued openly and with the intention of ensuring that U.K. dairy farmers would be able to remain commercially viable. Substantial financial penalties have been imposed on each of them with the exception of Arla, who was granted immunity under the OFT's leniency program. The implication of the OFT's decision is that businesses can have well meaning intentions and still be in breach of competition law.

Tesco is set to be appealing the decision on two grounds: (i) that it did not participate in any unlawful concerted practices and (ii) that the fines were excessive and disproportionate. Both grounds merit further attention. The results of Tesco's appeal, along with the OFT's full decision (set to be published in autumn 2011) are eagerly anticipated. They would shed further light on the concept of a concerted practice in the context of trilateral agreements.[37]

Mergers and Acquisitions

CAT Rules That OFT Is Unable To Apply National Merger Control Legislation While Appeals Are Ongoing In The European Courts

On July 28, 2011, the CAT ruled that the OFT was not time-barred from referring Ryanair's acquisition in 2006 of a minority shareholding in Aer Lingus Group plc ("Aer Lingus") to the Competition Commission under the Enterprise Act 2002 (the "Act").[38] The decision concerned the relationship between the U.K. merger regime and the "one stop shop" principle enshrined in Article 21 of the EU Merger Regulation ("EUMR"),[39] according to which the European Commission has exclusive jurisdiction over mergers with an EU dimension.

Following a Phase II investigation, the European Commission concluded on June 27, 2007 that Ryanair's bid to acquire the entire share capital of Aer Lingus was incompatible with the common market. On the same day, the European Commission refused a request from Aer Lingus that Ryanair be ordered to divest its 25.2% minority shareholding under Article 8(4) EUMR.[40] Both parties' appeals against these decisions (the "Appeals") were dismissed on July 6, 2010, by which time Ryanair's equity stake in Aer Lingus had increased to 29.8%.[41] The period for making a further appeal expired on September 17, 2010. Shortly afterwards, the OFT requested information pursuant to a preliminary merger investigation into Ryanair's minority shareholding.

Ryanair claimed that the usual four-month time period in which a referral to the CC had to be made under sections 22 and 24 of the Act began once the European Commission had concluded their takeover investigations on June 27, 2007. The OFT, Ryanair claimed, was therefore time-barred from conducting this merger investigation. The CAT ruled unanimously, however, that an investigation by the OFT whilst the Appeals were active would have given rise to potential inconsistencies in outcome and conflicts in jurisdiction contravening the duty of sincere cooperation under Article 4 TFEU. The four-month period for making a referral under s. 22 of the Act had thus been preserved until September 17, 2010, when neither party could make any further appeal at the EU-level.

The OFT relied on section 122(4) of the Act, which permits staying of referrals to the CC if such referrals cannot be made due to anything done under or in accordance with the EUMR. The CAT commented that this provision is Parliament's means of enabling the OFT to comply with the duty of sincere cooperation under Article 4 TFEU and the "one stop shop" principle of Article 21 EUMR.[42]

OFT Refers Anglo American/Lafarge Construction Materials Joint Venture To The Competition Commission For Investigation

On September 2, 2011, the OFT announced that it was referring a proposed construction materials joint venture between Anglo American plc ("Anglo American") and Lafarge SA ("Lafarge") to the Competition Commission under the Enterprise Act 2002.

This transaction would combine the parties' U.K. aggregates, asphalt, grey cement and ready-mix concrete businesses to form a 50:50 joint venture. Although the transaction qualified for review by the European Commission, the parties made a pre-notification request under Article 4(4) of the EU Merger Regulation petitioning

36 Cheese in 2002 and 2003 and fresh Liquid Milk in 2003.

37 OFT Press Release 17/07 of February 7, 2007.

38 At http://www.catribunal.org.uk/238-7216/Judgment.html.

39 Council Regulation (EC) No 139/2004 of January 20, 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1).

40 Commission Decision C(2007) 4600 of October 11, 2007.

41 Case T-342/07 *Ryanair Holdings plc v Commission* [2011] 4 CMLR 245 and Case T 411/07; *Aer Lingus Group plc v Commission* [2011] 4 CMLR 358.

42 1174/4/1/11 *Ryanair Holdings plc v Office of Fair Trading* [2011] CAT 23, Para 125.

the European Commission to refer the joint venture to the U.K. on grounds that its impact was limited to the U.K.[43]

The OFT referred the transaction to the CC citing a number of factors, including: overlaps between the parties in the supply of aggregates, asphalt, and ready-mixed concrete in a number of local areas; an overlap in the supply of bulk grey cement at a regional and/or national level; and questions over the supply of bulk cement to independent ready-mix concrete suppliers.[44] The CC will carry out a detailed investigation and report its findings in 2012.

Policy And Procedure

ICB Releases The Vickers Report

On September 12, 2011 the U.K.'s Independent Commission on Banking ("ICB") released its widely awaited Final Report on measures to reform the U.K. banking system. The report has two distinct themes: financial stability and competition in U.K. retail banking.

Financial Stability Measures. The ICB recommends a degree of structural separation ("ring-fencing") between U.K. banks' wholesale investment banking and retail banking services. The aim is to make it easier to manage the failure of banks in difficulty without the need for taxpayer support and insulate vital banking services relied on by households and medium-sized enterprises from problems elsewhere in the global financial system. Furthermore, separation should curtail the need for implicit government guarantees.

The report also reflects the consensus that banks should enhance their ability to absorb losses. The ICB recommends that large U.K. retail banks maintain equity of at least 10% of risk-weighted assets (3% higher than recommended under Basel III). Furthermore, all banks should maintain a leverage ratio of at least 3% (calibrated against Tier 1 capital), tightened correspondingly to 4.06% for ring-fenced banks required to have an equity ratio of at least 10%. Additionally, loss-absorbing capacity could include long-term unsecured debt that regulators could require to bear losses in resolutions ("bail-in bonds"). A further recommendation is that insured depositors should rank ahead of all other unsecured creditors in insolvency.

From a competition perspective, these proposals could have potentially significant implications which the final report fails to address. For example, ring-fencing and capital requirements may increase costs and therefore raise barriers to entry, preventing future entrants from benefiting from the economies of scale that existing banks have enjoyed.[45]

Competition In U.K. Retail Banking. The Final Report observes that the largest four banks in the U.K. account for 77% of personal current accounts and 85% of SME accounts. Consumers face difficulties both in making a choice and in switching between providers and there is a perceived lack of transparency in relation to the banking services on offer. Banks which are believed to be "too big to fail" benefit from a competitive advantage over smaller banks.

In order to improve prospects for competition in U.K. retail banking, the ICB recommends the creation of a strong and effective new challenger through the divestiture of the Lloyds Banking Group. Whether this focus on Lloyds is justified from a competition perspective is open to debate. No such recommendations were made for other incumbents, and the basis on which it was selected (owning "one in four personal current accounts") is dubious when the required percentage for establishing a rebuttable presumption of market dominance is 40%.[46]

In order to facilitate switching between banks, the report recommends the introduction of a redirection service for personal and small business current accounts. The ICB also sees the role of the Financial Conduct Authority ("FCA") developing to include exercising specific and strong pro-competitive regulatory powers and duties. Should one or more of these conditions not be achieved by 2015, the ICB recommends that a market investigation reference be considered by the Office of Fair Trading.

43 Council Regulation (EC) No 139/2004 of January 20, 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1).

44 http://www.oft.gov.uk/news-and-updates/press/2011/95-11.

45 James R Modrall, David R Little and Richard Pepper, *More Work Needed*, IFRL November 2011.

46 James R Modrall, David R Little and Richard Pepper, *More Work Needed*, IFRL November 2011.

The OFT Launches New Guidance On Competition Law Compliance

On June 27, 2011, the OFT issued new guidance on competition law compliance – How Your Business Can Achieve Compliance.[47] The guidance is intended to help all businesses, regardless of size, to comply with competition law, via a risk-based,[48] four-step approach for achieving a competition law compliance culture. The OFT qualifies that the implementation of the four-step process is not mandatory, but that a business' compliance efforts will ultimately have an impact on the level of penalties set for any competition law infringements.

The OFT emphasizes that for an effective compliance culture, there must be a core commitment to competition law compliance. This commitment must come from the senior management commitment which the OFT recognizes as the "essential ingredient." In this regard, the OFT recommends that there should be a senior officer within the business who has the role of driving compliance within the entire business. Moreover, a "clear and unambiguous" commitment to compliance must be demonstrated at all levels of the management chain. For instance, the OFT suggests appointing some mid-level or junior managers as "compliance champions" to ensure compliance within the team.

The first step of the four-step process is risk identification. The risks vary according to the nature and size of the business, and may also be event driven such as if a business engages in mergers and acquisitions activity or enters new product or geographic markets. The guidance provides non-exhaustive lists of considerations to enable businesses to determine if they could be in breach of the Chapter I or II prohibitions.

The second step – risk assessment – is for a business to assess the level of those risks identified according to a three-point scale (high, medium, or low). This risk assessment, the OFT suggests, can also be linked to the degree of staff exposure to the competition law risk. For example, senior managerial roles and sales and marketing staff could be identified as being high risk, while manual labor, HR, or back-office staff may be considered low-risk.

The third step is risk mitigation, where the business implements suitable training activities, policies and procedures, according to the type of staff and their 'risk-rating' to mitigate its identified risks. In the guidance, the OFT provides suggestions as to the type of procedures that could be implemented to mitigate the identified risks.

The fourth step is the review stage where businesses regularly review all stages of the process to ensure that there is a clear and unambiguous commitment to compliance from the top down. So, the risks identified or assessment must not have changed, and the risk mitigation policies remain appropriate and effective. Whilst there is no standard review period, the guidance seems to suggest that they should be conducted on an annual basis or as and when appropriate.

Finally, the guidance explains that the amount of financial penalty imposed may be reduced (by up to a maximum of 10%) where "adequate steps" have been taken to ensure compliance. These "adequate steps" include implementing the four-step process or "reasonably equivalent" measures. Businesses seeking a reduction would have to demonstrate that the steps taken were appropriate to the size of the business and its overall level of competition law risk.

Sectoral Investigations

BAA To Appeal Against CC's Decision To Require Divestments Of Airports

BAA has made an application to the Competition Appeal Tribunal under section 179 of the Enterprise Act 2002 for a review of the decision of the CC contained in its report of July 19, 2011 (the "2011 Report"), entitled "BAA Market Investigation: Consideration of possible material changes of circumstances."[49] The 2011 Report concludes that BAA's common ownership of Heathrow, Gatwick, and Stansted airports, along with both Edinburgh and Glasgow airport, gives rise to an adverse effect on competition ("AEC") within the meaning of section 134(2) of the Act. In order to remedy this AEC, Stansted and either Edinburgh or Glasgow airport are required to be divested to different Approved Purchasers.

The common ownership of the relevant airports was first identified as an AEC in the CC's report of March 19, 2009, "BAA airports market investigation".[50] The 2011 Report is the result of an investigation by the CC into whether there have been any

47 At http://www.oft.gov.uk/shared_oft/ca-and-cartels/competition-awareness-compliance/oft1341.pdf.

48 Risk based means that the approach is tailored to the specific risks faced by the business.

49 http://www.competition-commission.org.uk/inquiries/ref2007/airports/pdf/final_report_excised.pdf.

50 http://www.competition-commission.org.uk/rep_pub/reports/2009/fulltext/545.pdf.

developments since the publication of its 2009 report sufficient to constitute a material change of circumstances ("MCC") or a special reason within the scope of section 138(3) of the Act.

The BAA is appealing the CC's decision in relation to the divestment of Stansted airport on four grounds:

(1) That the CC failed in its duty to gather and assess the information necessary to perform its function and/or acted irrationally, in particular as regards its adherence to its assessment of the competition benefits connected with the expansion of runway capacity in circumstances where the prospect of new runway capacity and the principal competition benefits identified in the 2009 report had fallen away.

(2) That the CC's assessment of whether common ownership of Heathrow and Stansted airports gave rise to an AEC, and of the timing and sequencing of the divestiture remedy, was flawed.

(3) That the CC's analysis of Stansted airport's profitability in the 2011 Report, which was used to support its findings that the financial situation at Stansted airport did not give rise to a MCC and that the divestiture remedy was proportionate, was irrational.

(4) That, in assessing whether the divestiture remedy remained proportionate, the CC failed to take into account damage to BAA and its shareholders flowing from the requirement to divest Stansted airport within a short specified period.

BAA requests that the 2011 Report be quashed and remitted for reconsideration and further investigation. It also seeks an interim order under section 179(3) of the Act and rule 61 of the Rules suspending the effect of the CC's decision. The case management conference took place on October 7, 2011. Ryanair Limited was granted permission to intervene and a timetable was established for the future conduct of the appeal. The main hearing, which has been given a time estimate of three days, has been listed to commence on December 5, 2011.

In view of the CAT proceedings, the CC has set a revised timetable for the divestments, requiring the divestment of either Edinburgh or Glasgow to be undertaken first. On October 19, 2011, BAA announced plans to sell Edinburgh airport with a view to agreeing a sale by summer 2012.[51]

The OFT Refers Building Materials Sector To The CC

On August 16, 2011, the OFT published its market study into aggregates, cement and ready-mix concrete. The market study, carried out under section 5 of the Enterprise Act 2002, was launched in September 2010. It identifies a number of features of the relevant sectors which could prevent, restrict, or distort competition and proposes a referral of the matter to the Competition Commission under section 131 of the Act.

Features identified by the OFT as preventing, restricting, or distorting competition relate to structural features of the market and the conduct of major firms towards their smaller competitors. The level of investment required to enter the industry, coupled with the difficulty of obtaining planning permission, creates high barriers to entry. Moreover, the industry is growing increasingly concentration, with five major players accounting for over 90% of cement sales, 75% of aggregate sales, and 68% of ready mix sales.

These major firms, which include Lafarge, Holcim, Heidelberg, Cemex, and Tarmac, benefit from the effects of vertical integration. The OFT has received complaints about vertically integrated firms refusing to supply or discriminating against non-integrated competitors. It is concerned that the lack of effective competition is leading to higher prices for consumers, as well as affecting the public sector and business customers. A final decision on whether to make this referral is expected by the end of the year.

OFT Receives Super-Complaint From Consumer Focus

On September 21, 2011 the OFT received a super-complaint from Consumer Focus concerning the cost of obtaining foreign currency and of overseas use of credit and debit cards. A super-complaint, which is defined by section 11(1) of the Enterprise Act 2002, is a complaint submitted by a designated consumer body to the effect that 'any feature, or combination of features, of a market in the United Kingdom for goods or devices is or appears to be significantly harming the interests of Consumers. Consumer Focus, which was formed under the Consumers, Estate Agents and Redress ("CEAR") Act 2007, is a designated statutory body.

51 http://www.baa.com/portal/page/BAA%20Airports%5EMedia%20centre%5ENews%20releases%5EResults/88e1489a94913310VgnVCM10000036821c0a____/a22889d8759a0010VgnVCM200000357e120a____/.

Consumer Focus estimates that charges to customers for exchanging money are around £1 billion per year. In order to determine the extent to which these charges are warranted, Consumer Focus has requested that the OFT investigate three key areas of the market. The first of these is the charges incurred by consumers using debit or credit cards overseas. Consumer Focus believes that the significant variation in these charges is unnecessarily complex and confusing for consumers, who find it difficult to establish the full costs and compare products. It recommends the simplification of charging structures for using cards overseas.

The second area identified by Consumer Focus for investigation is the cash withdrawal fees charged by banks and credit card providers to consumers buying travel money with a card in the U.K. It recommends that these charges be banned if not justified, or at least made cost-reflective. The third is the use of misleading marketing phrases, such as "0% commission" and "competitive exchange rates" by suppliers. In practice, these exchange rates already include mark-ups and so are not fee-free as implied, and the use of the phrase makes it difficult for consumers to compare banks with bureaux de change or the Post Office. Consumer Focus recommends that consumers should be provided with a clear illustration of the rates they will receive.

Under section 11(2) of the Act, the OFT is required to make a public statement as to how it will deal with a super-complaint within 90 days after the day on which the complaint is received. This means that a response is expected on or before December 20, 2011.[52]

CC Proposes Provisional Remedies In Its Investigation Into The Local Bus Market

On October 6, 2011, the CC published a provisional decision on remedies in relation to its investigation into the local bus services market,[53] which was prompted by an OFT referral in January of this year. The proposed remedies aim to open up the local bus services market, reducing barriers to entry and expansion and creating an environment where competition is likely to be sustained. Three key areas identified as being in need of reform are ticketing, operator behavior, and access to bus stations.

In relation to ticketing, the CC recommends that multi-operator ticketing schemes be made mandatory but that operators engage in an effective voting mechanism, ensuring that no individual operator can unilaterally set the terms of a scheme. It is suggested that the OFT should review the ticketing block exemption (a scheme which allows bus operators to agree public transport ticketing schemes) at the earliest possible opportunity.

Operator behavior, it is proposed, should be tackled by the introduction of a Code of Conduct, which would be enforced by Traffic Commissioners. The types of behavior targeted by the Code would include "over-bussing," a strategy involving short-term changes to service frequency aimed at destabilizing competitors.

Local bus operators managing relevant bus stations will, under the proposals, be required to provide third party operations access to stands, layover bays, facilities for drivers and facilities for publicizing services and timetables on fair, reasonable and non-discriminatory terms. Other areas covered by the report include supported services, effective competition enforcement, partnerships and the Bus Service Operators Grant. The final report is expected later this year.

52 Further information can be found at http://www.consumerfocus.org.uk/news/costa-lot-consumers-pay-too-much-for-foreign-currency.

53 At http://www.competition-commission.org.uk/inquiries/ref2010/localbus/pdf/provisional_%20decision_on_remedies_excised.pdf.

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