National Competition Report

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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").

Vertical Restraints

Belgian Supreme Court Upholds Decision Of Brussels Court Of Appeal In Fiat Case

On February 24, 2012, the Supreme Court delivered its judgment in proceedings brought by Fiat Group Automobiles Belgium ("Fiat") against Fortis Banque ("Fortis") and TCI Auto Service ("TCI") seeking to overturn the decision of the Brussels Court of Appeal of April 28, 2010.[1]

Fiat and TCI had entered into an exclusive distribution agreement on September 15, 1993. Under this distribution agreement, Fortis was contractually required to provide a bank guarantee in case of breach of the agreement by one of the parties. Fiat claimed that TCI had breached the agreement and therefore attempted to rely on the bank guarantee provided by Fortis as envisaged by the agreement.

Fortis and TCI argued that the bank guarantee was null and void because the underlying exclusive distribution agreement contained certain anticompetitive clauses, such as territorial restrictions and prohibitions on resale that infringed Article 101 TFEU and, by their nature, affected trade between Member States. The Court of Appeal agreed and held that the exclusive distribution agreement infringed Article 101 EC.

In the proceedings before the Supreme Court, Fiat argued that the Court of Appeal had failed to establish that there was an appreciable effect on trade between Member States as required under EU law. The Supreme Court dismissed Fiat's appeal and upheld the judgment of the Court of Appeal. According to the Supreme Court, the existence of appreciable effects on trade between Member States could be inferred from network effects that characterize the automotive distribution market. The Supreme Court referred to the European Commission's Motor Vehicle Distribution Block Exemption Regulation, which provides that automotive distribution agreements are regularly agreed in similar forms throughout the common market, and that motor vehicle manufacturers can affect trade across the whole common market by establishing multiple agreements which involve similar restrictions on competition.

Mergers and Acquisitions

The Phone House Saga Continues: Competition Council Fines Belgacom For Providing Incomplete Information

On April 5, 2012, the Competition Council imposed a fine of €75,000 on Belgacom for providing incomplete information in the context of The Phone House merger control investigation.[2] As reported earlier, on December 23, 2011, the Council approved the acquisition by Belgacom of The Phone House, subject to certain conditions.

The Auditorate had sent a request for information on August 18, 2011, pursuant to which it requested Belgacom to provide its "gross gains" for postpaid mobile and fixed services for each point of sales of The Phone House. In the figures provided by Belgacom, the number of postpaid clients that had switched from prepaid to postpaid was omitted. The Council ultimately found that such omission by Belgacom was intentional, or at least negligent, and therefore gave rise to a fine pursuant to Article 64 of the APEC. The Council recognized that Belgacom provided the complete figures later in the proceeding. In light of the limited consequences resulting from Belgacom's omission, the Council imposed a relatively modest fine of €75,000.

Policy and Procedure

Government Proposals To Reform The Belgian Competition Authority And The APEC

The Belgian government is currently preparing a structural reform of the Belgian Competition Authority ("BCA") and the APEC. These reforms should not be considered a standalone project of the government, but rather as the execution of a governmental agreement (the "Agreement"), signed on December 1, 2011, which highlights the importance of controlling prices, decreasing inflation, strengthening competition, and increasing the coordination among sector regulators. The envisaged reforms should contribute to the goals set out in the

1 Cour de Cassation, arrêt du 24 février 2012, C.11.0032/F1.

2 Raad voor de Mededinging, Beslissing nr. 2012-C/C-06 van April 5, 2012, Zaak MEDE-C/C-11/0010: Belgacom NV van publiek recht / Wireless Technologies BVBA.

Agreement. In addition, these reforms should be seen in the context of a broader codification exercise to establish a Belgian economic law code, a chapter of which will be devoted to the APEC.

One of the main structural changes contemplated by the government reforms is the creation of a so-called "Markthof" that would have full jurisdiction to review appeals against decisions of the BCA and sector regulators, and that would replace the Court of the Appeal as the appellate body. It is believed that this would allow the judges to gain experience in technical areas and thereby enable them to establish a more coherent case law in the field of regulated markets. The current proposal also envisages the merging of the Auditorate and the Directorate General for Competition. In addition, the current proposal seeks to introduce administrative fines of between €100 and €10,000 for individuals.

It is likely that the Belgian government will reach a final decision formalizing the reforms by the end of 2012.

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 and Consumer Authority ("DCCA"), and the Danish Competition Appeals Tribunal ("Tribunal").

Horizontal Agreements

The Real Estate Business Has Illegally Boycotted Online Property Sale Portal Boliga.dk

By a decision of January 25, 2012, the DCC found that the trade association Dansk Ejendomsmæglerforening (the Danish Association of Chartered Estate Agents), had violated Section 6 of the Danish Competition Act, through its members engaging in a coordinated strategy to prevent Boliga.dk (an internet based property search portal) from showing photos of properties which were for sale.

The DCC held that Boliga.dk became less attractive to visit for potential real estate buyers as they were not able to easily and quickly form a general view of the types of houses that were for sale. The DCC therefore issued an order to cease the illegal boycott.

KMD's Sales Strategy Towards Four Municipalities Does Not Violate The Danish Competition Act

On March 28, 2012, the DCC determined that KMD A/S ("KMD"), a provider of IT products and IT services to public authorities had not infringed Section 11 of the Danish Competition Act and Article 102 TFEU by pursuing a strategy aimed at getting municipalities to enter into IT contracts with KMD without the former issuing public tenders. The DCC presumed that KMD was dominant in the potential market for providing IT-systems for handling payroll management in Danish municipalities and regions.

The DCC noted that only the municipalities are responsible for compliance with procurement rules, just as it is only municipalities that can be sanctioned for failing to comply with these rules. The Council also noted that there is nothing unusual in a strategy to seek to influence buyers to purchase as many products as possible, and that such a strategy cannot be regarded as one designed to eliminate competition. As KMD had not prevented the relevant municipalities in complying with the procurement rules, the lack of tenders could not be attributed to KMD. Therefore, the DCC found that KMD's strategy of urging the municipalities to enter into IT contracts with KMD without having made tenders in accordance with the procurement rules did not constitute abuse of a dominant position under Section 11 of the Danish Competition Act and Article 102 TFEU.

Vertical Restraints

Viasat Cannot Reintroduce Distribution Terms

On January 6, the Maritime and Commercial Court issued a judgement in the case concerning Viasat Broadcasting UK Ltd's ("Viasat") business terms. The Court upheld an order from the DCC, subsequently upheld by the Tribunal, which called for Viasat to change its business terms regarding distribution of TV-channels TV3 and TV3+ to cable networks.

Local cable networks and commercial cable distributors typically offer households a choice of three TV channel packages: (1) a small package with public service TV channels; (2) a medium package with approximately 10 additional (mainly paid for) TV channels; and (3) a large package with approximately 20 additional (mainly paid for) TV channels. Viasat's business terms contained a placement requirement and a minimum penetration requirement. The placement requirement stipulated that a distributor is only allowed to distribute the Viasat TV channels if these channels are inserted into the program package, which contained other channels than public service TV channels (usually the medium package). The minimum penetration requirement stipulated that the TV channels should be distributed in TV channel packages that could be seen by at least 75 % of the connected households.

On September 30, 2009, the DCC held that the distribution terms had the object of restricting competition contrary to Section 6(1) of the Danish Competition Act (which corresponds to Article 101 TFEU). The DCC reached this conclusion primarily on the ground that Viasat's placement requirement gave the widest possible dissemination of Viasat's channels to the detriment of other commercial channels. The DCC ordered Viasat to abolish these terms. With the judgment of the Maritime and Commercial Court, the order has been upheld.

Danish Furniture Manufacturer Erik Jørgensen Møbelfabrik A/S Has Engaged In Resale Price Maintenance

On January 17, 2012, the High Court of Eastern Denmark held that furniture manufacturer Erik Jørgensen Møbelfabrik A/S ("EJM") and two of its employees had infringed Section 6(1) of the Danish Competition Act by attempting to engage in resale price maintenance. The case began in April 2008 when the DCCA conducted an unannounced inspection (a "dawn raid") at EJM's premises. During the dawn raid, the Authority found a number of documents and emails which indicated that EJM had attempted to engage in resale price maintenance towards its distributors, by prohibiting the advertisement of "bargain" sales for two specific designer chairs.

The case was transferred to the Public Prosecutor for Serious Economic Crime ("PSEC"), which in November 2010 brought charges. The District Court found in its judgment of May 18, 2011 that EJM and two of the company's employees had infringed the Danish Competition Act. The Court imposed a fine of DKK 500,000 (approx. €67,000) on EJM, while the two employees received fines of DKK 25,000 each (approx. €3,400).

On appeal, the High Court of Eastern Denmark found that EJM had engaged in resale price maintenance, but had not sought to have resale prices maintained above set minimum prices.

Accordingly, the High Court reduced EJM's fine from DKK 500,000 to DKK 400,000 (approx. €54,000), but maintained that EJM had committed a serious violation, as its purpose was to restrict competition in relation to the distributors' resale prices. The High Court also reduced the fines imposed on the two employees from DKK 25,000 to DKK 20,000 (approx. €2,700).

Mergers and Acquisitions

Danish Agro A.m.b.A. Has Entered Into A Settlement With The Public Prosecutor For Serious Economic Crime For Not Rectifying Incorrect Information In A Merger Case

On January 25, 2010, the DCCA approved the acquisition by agricultural company Danish Agro A.m.b.A.'s ("Danish Agro") of S.A.B. A.m.b.A. Landbrugets Andel ("SAB"). In its draft decision, received by Danish Agro on January 20, the DCCA stated that the clearance of the merger was dependent on Aarhusegnens Andel A.m.b.A. ("AAA") remaining a competitive force in the farm supply market.

On the same day it issued its clearance decision, the DCCA received notification of a framework agreement, dated January 13, 2010, between AAA and a group of companies consisting of Danish Agro and DLG, which provided that Danish Agro and DLG would take over and subsequently unbundle AAA's activities. The framework agreement was drafted as AAA was in financial distress and facing bankruptcy.

On February 1, 2010, the DCCA retracted its approval of the merger, as it was based on incorrect information.

On January 9, 2012, Danish Agro accepted a fine of DKK 50,000 (approx. €6,700) for infringing Section 23(1) (12) of the Danish Competition Act, by failing to inform the DCCA that AAA was distressed and facing bankruptcy. This is the first time that a company was fined for failing to provide correct information to the competition authority.

Finland

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

Vertical Restraints

FCA Drops Investigation Of Hewlett-Packard's Selective Distribution System

In March 2012 the FCA decided not to pursue its investigation regarding Hewlett-Packard's ("HP's") selective distribution system. The investigation aimed at ascertaining whether HP's distribution system of server, storage, and network products restricted retailers' freedom of operation. In particular, it was alleged that HP only selected one retailer for each area and customer to which it would grant reduced special pricing.

HP sold server, storage, and network products through a selective distribution system to wholesale dealers who resold them to authorized HP retailers. The authorized retailers were divided into three levels according to their position in the distribution chain and their level of technical knowledge and specialization. The retailers on the two highest levels were part of the HP partnership program and were granted certain advantages, including additional price reductions in specified projects.

The FCA noted that allocation of retailers to certain levels based on quantitative or qualitative criteria could restrict intra-brand competition and may, in addition, lead to division of markets. The FCA's was concerned that authorized retailers were not able to offer HP products and that customers were unable to choose fully among suppliers of HP products. According to the FCA, the additional price reductions to retailers on the highest levels of classification may therefore have restricted the sales of HP products.

In its response to the FCA, HP denied that its distribution system entailed any geographic division of markets or restriction of retailers' participation in tenders. HP noted that the retailers were free to participate in competitive tenders and to decide their own prices. These facts were also confirmed by the retailers. In addition, all retailers fulfilling the applicable criteria had been authorized to sell HP products and had been granted the same commercial terms according to their level of authorization. According to HP, the objective of the selective distribution system was to make sure that the customers received the best possible service.

The FCA considered that price reductions for only certain members of a selective distribution system can be acceptable if they are granted on the basis of investments in expertise, knowledge, or other assets that help a retailer to gain a competitive advantage. An advantage cannot be granted to a retailer on an arbitrary or otherwise discriminatory basis, or lead to division of markets. In addition, it is required that all members of the system have equal opportunities to receive the commercial advantages and to proceed to the next level through training and, that the advantages and their requirements are communicated openly.

According to the FCA, effective competition between the suppliers of competing products may compensate for the restriction of intra-brand completion brought about by HP's distribution system. Based on surveys with retailers, the FCA found that similar products were offered by several large manufacturers through similar distribution systems and the products could be substituted without significant compatibility issues. Since the markets could, moreover, be characterized as developing and growing where customers were price-conscious, the FCA considered there to be no grounds to continue the investigation.

France

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

Horizontal Agreements

The Paris Court Of Appeals Annulled The €384.9 Million Fine Imposed On French Banks In The Check Commission Case

On February 23, 2012, the Paris Court of Appeals clarified the conditions that must be satisfied to characterize a competition restriction by object.[3]

When the new digital system for processing and clearing interbank checks was set up (Check Image-Exchange - Exchange Images-Chèques – "EIC") in 2002, the main French banks entered into discussions, under the supervision of the French Central Bank, to collectively determine the terms of operation of the system. They agreed to create several new inter-bank fees including the Check Image Exchange Commission ("CEIC"). The CEIC, which was designed to smooth transition to the new system, was implemented starting in January 2002 and was set to be reconsidered at the end of a three year period. However, it was withdrawn only in 2007 under the pressure of the FCA's investigation.

The CEIC was a commission per transaction, in the uniform amount of 4.3 cents per check, paid by the receiver's bank (beneficiary of the check) to the issuer's bank (issuer of the check). According to the banks, it was intended to compensate the issuing banks for the loss of cash generated by the acceleration of the interbank payment of checks that the EIC brought about (since they were debited sooner, there was less time for the issuing banks to invest).

In its decision No. 10-D-28 of September 20, 2010, the French Competition Authority ("FCA") held that the agreement providing for the new digital system constituted a restriction of competition by object.

The FCA considered in particular that the CEIC, which did not correspond to any service rendered, had the effect of artificially increasing the costs paid by the banks on the market for the deposit of checks. According to the FCA, this increase directly or indirectly affected the price levels of bank services, since the banks were likely to pass on the commission, at least partially, to consumers. This increase would also have resulted in a reduction of the offer of check deposit services on the part of the receiving banks.

3 Paris Court of Appeals, Cases n°2010/20555 of February 23, 2012, Check Commissions, http://www.autoritedelaconcurrence.fr/doc/ca10d28_fev12.pdf.

The FCA also held that at the level of the market for the issue of checks the CEIC had generated an artificial increase in revenue for the issuing banks that was not the result of market competition.

The Court of Appeals conducted an in-depth analysis of the conditions that have to be satisfied for the characterization by a competition authority of a practice as a competition restriction by object. This issue is fundamental in that the competition authority that relies on such a restriction does not have to demonstrate that the practice negatively affected competition. Reiterating the criteria applied in the case law of the European Commission and the European Court of Justice, the Court emphasized that the presumption of restriction by object relies on the intrinsic gravity of the restriction, and on the experience told of similar practices. The Court of Appeals noted the characterization of such a restriction is also related to the economic and legal context in which it is applied.

At the end of a detailed description of the economic and legal context, the Court held that the agreement setting up the new digital system was a general interest project, neutral with respect to competition law, and that it constituted undeniable technical and economic progress for all of the actors concerned. Given that digitalization significantly modified the allocation of cash between banks and given the bank's disparate interests, the CEIC appeared to be the best means of convincing all banks to agree to the system.

The Court then emphasized that the competition authorities had not yet ruled on similar or comparable agreements and that it was impossible to argue on this basis that such an agreement was anticompetitive by object. The Court concluded that a restriction by object was not established, and since the FCA had not assessed the effect of the agreement on competition the Court annulled the Authority's decision.

The FCA Imposes Fines Of €242.4 Million For Anticompetitive Agreements In The Flour Sector

On March 13, 2012, the FCA issued a decision by which it sanctioned several anticompetitive infringements in the flour sector.[4] First, the FCA imposed a fine of €95.5 million on German and French millers for a cartel aimed at limiting imports of flour between France and Germany. Second, the FCA sanctioned two anticompetitive agreements among French millers to fix prices, limit output, and allocate customers for packaged flour marketed to French supermarkets and French discount retailers.

On April 2008, the FCA started its investigations after a German miller, Wihl Werhahn ("Werhahn") GmbH & Co. KG, submitted a leniency application. This led to numerous unannounced inspections in France and Germany (with the assistance of the German Bundeskartellamt, before which Werhahn was also a leniency applicant). Evidence obtained from these searches demonstrated that French and German millers had reached an agreement to limit access to each other's market and to maintain French and German exports of packaged flour at a predetermined level, *i.e*. 15,000 tons. The parties met several times to work out the details of this agreement. In addition, the millers regularly allocated customers based in France among themselves and determined the price levels of packaged flour imported from Germany to meet the agreed quotas. These practices took place between 2002 and 2008. To determine the amount of the fines, the FCA assessed the parties' revenues. The Authority found that, considering the nature of the infringement, sales achieved in both France and Germany should be taken into account. As the first leniency applicant, Werhahn was granted full immunity. France Farine and Bach Mühle were held to be the leaders of the cartel, triggering a 10% increase in their fines.

The FCA also fined French millers for two additional anticompetitive agreements having restrictive effects on the French market. The majority of French millers had grouped within two joint ventures (France Farine and Bach Mühlein) in order to market their output. France Farine marketed packaged flour to food retailers, while Bach Mühle marketed flour to hard discounters. According to the FCA, although the joint ventures at issue are not prohibited *per se*, they could be used to organize price-fixing or customer sharing practices. The FCA found that France Farine marketed the packaged flour produced by its shareholders to food retailers, applying a single price that had been previously determined collectively. Once the commercial negotiations with its food retailer customers were concluded, France Farine allocated orders to millers that were located close to the customer site. The FCA considered that this constituted geographic market allocation that enabled French millers to manipulate competition parameters (prices, brands, allocation of customers, markets and outputs). The FCA noted that Bach Mühle and its millers had engaged in similar conduct with respect to hard-discounters. As certain shareholders had worked with these joint ventures for more than forty years, the FCA decided to modulate the multiplying factor in relation to the duration of the anticompetitive conduct. Ultimately, seven millers (Axiane Meunerie, Euromill Nord, Grands Moulins de Paris, Grands Moulins Storione, Grands moulins de Strasbourg, Minoteries Cantins and Moulins Souffletwere) were fined a total of €146.9 million.

4 French Competition Authority, Decision 12-D-09 of March 13, 2012, *Packaged flour marketed in the food retailing sector,* http://www.autoritedelaconcurrence.fr/pdf/avis/12d09.pdf.

The FCA Imposes €35 Million Fine On Pet Food Companies

On March 20, 2012, the FCA fined three leading pet food companies (Nestlé, Royal Canin and Colgate Palmolive) for restricting competition on the market for the sale of dry dog and cat food to specialist retailers from 2004-2008.[5] Specialist retailers include certain shops (pet shops, garden centers, agricultural self-service, and DIY stores), breeders, and vets. Specialist retailers purchase pet food products from wholesalers, who in turn source from pet food companies.

The FCA sanctioned several vertical restraints implemented by each Nestlé and Royal Canin with their wholesalers and retailers, namely resale price maintenance, territorial exclusivities, and customer allocation.

First, each pet food manufacturer negotiated directly with specialist retail chains the prices of products purchased from wholesalers. Wholesalers had no freedom to determine their resale prices and were forced to apply the prices negotiated at the national level between each pet food manufacturer and the retailers. Nestlé extended these resale price maintenance efforts to independent retailers.

Second, wholesalers were attributed exclusive geographic territories by the manufacturers, weakening "intra-brand" competition between wholesalers. In addition, wholesalers agreed to refrain from selling products to retail outlets located outside their distribution area, *i.e.*, the geographic exclusivity applied to passive as well as active sales.

Finally, for high quality producers, each of Nestlé and Royal Canin established distinct distribution systems depending on the category of retailers. Sales to retailers and breeders were entrusted to an exclusive wholesaler for each territory (different for Nestlé and Royal Canin), while sales to vets (and supermarkets in the case of Nestlé) were reserved for manufacturers. This customer allocation was deemed to have reduced intra-brand competition. In addition, wholesalers agreed to enter into an exclusive purchasing agreement with a single manufacturer ("single brand" distribution) preventing retailers from choosing between several brands when purchasing from a given wholesaler.

With respect to Colgate Palmolive, the FCA sanctioned agreements concluded with vet wholesalers preventing exports of Colgate Palmolive's products outside of France without the prior agreement of Colgate Palmolive.

Policy and Procedure

The FCA Releases Guidelines On Compliance Programs And Antitrust Settlement

On February 10, 2012, following public consultation, the FCA released two sets of guidelines, one regarding competition law compliance programs, and another regarding its settlement procedure.[6]

Compliance Programs

The framework document details how to create a credible and effective compliance program, and how the FCA will take into account such programs when dealing with individual cases of anticompetitive agreements or abuse of dominance.

Although there can be no "one-size-fits-all" compliance program, the FCA recommends the inclusion of five key features: (i) a firm, clear and public commitment by the entire board and management to comply with competition law and to support the undertaking's compliance program; (ii) empowering someone within the organization to implement and oversee the compliance program, with the necessary autonomy and means to fulfil this role; (iii) developing an effective information, training and awareness toolkit in order to spread and maintain a competition compliance culture at all levels, from top management to each member of the staff of the undertaking; (iv) setting up effective control, audit, and warning mechanisms; and (v) implementing follow-up and sanction measures in the event of any detection of a violation of competition rules or of a breach of the undertaking's compliance programme.

Setting up a compliance program or improving an existing program within the framework of the settlement procedure can lead to a 10% reduction in fine, on top of the initial 10% reduction granted to companies who engage in the settlement procedure (10%).

In any subsequent investigations of a particular company, the FCA will take into account as a mitigating factor the fact that it discovers and, on its own initiative, puts and an end to an infringement (other than a cartel) before investigations are conducted.

Antitrust Settlement

The settlement procedure enables companies to waive their right to challenge the charges notified by the FCA, in return for a reduction in fine, if the FCA's General Rapporteur considers the case to be fit for settlement. A settlement can lead to a reduction in fine of 10%.

5 French Competition Authority, Decision n° 12-D-10 of March 20, 2012, *Sale of dry dog and cat food in specialist retail,* http://www.autoritedelaconcurrence.fr/pdf/avis/12d10.pdf.

6 French Competition Authority, *Document-cadre du 10 février 2012 sur les programmes de conformité aux règles de concurrence http://www.autoritedelaconcurrence.fr/doc/document_cadre_conformite_10_fevrier_2012.pdf* and *Communiqué de procédure du 10 février 2012 relatif à la non-contestation des griefs* http://www.autoritedelaconcurrence.fr/doc/communique_ncg_10fevrier2012.pdf.

Undertakings that commit to modify their future behavior may receive an additional reduction in fine. The commitments can be either structural, behavioural (modifications to contractual clauses, general terms, *etc.*), or may take the form of compliance programs. The adoption of these commitments can result in a further 5-15% reduction in fine, in addition to the 10% reduction for the settlement procedure.

The notice explains the practical aspects of the procedure and how it may be best implemented in order to achieve increased transparency for all parties involved.

Following a public consultation process, the notice was amended to give undertakings the possibility – if the General Rapporteur deems it appropriate – to combine the benefits of a leniency application with the settlement procedure. This may apply, in particular, if the objections notified to the company in question differ on one or more significant points from the content of its leniency application.

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 Approves DFL's Central Marketing Of Broadcasting Rights Under Comprehensive Commitments

On January 12, 2012, the FCO approved the central marketing system for broadcasting rights for the football season 2013/2014, subject to comprehensive commitments of the German Football League (*Deutsche Fußball Liga* "DFL") and the League Association pursuant to Section 32b of the GWB.[7] The FCO found that the central marketing system constituted an anticompetitive agreement pursuant to Article 101(1) TFEU and Section 1 of the GWB because it prevented football clubs from competing against each other in awarding the broadcasting rights for their games. In addition, the investigation confirmed that the DFL and the League Association had significant market power with market shares of more than 50% on the national market for the marketing of broadcasting rights for the first and second football league, the national cup (*DFB Pokal*), the UEFA Champions League, and the UEFA Europe League with German participation.

In order to respond to the FCO's concerns, the DFL initially offered commitments on a self-binding basis, including in particular the commitment to provide free public access to "packages" for the broadcasting of game highlights. The FCO found that these commitments were necessary in order to ensure that the DFL and the League Association do not abuse their dominant position and discriminate against small TV broadcasters, and declared the commitments to be legally binding. The FCO noted that the central marketing system entailed significant efficiencies, and by facilitating multiple broadcasting, the full league coverage improved the quality of reporting. These benefits when tied to the protection against anticompetitive practices offered by the commitments were sufficient to outweigh the FCO's concerns.

The FCO concluded that as long as the DFL complies with its commitments and awards the broadcasting rights for the first and second league football games in a fair, non-discriminatory, and transparent matter, it will not intervene against the marketing system.

Joint Negotiation Of Supply Conditions By Association Of Press Products Wholesalers With Publisher Infringes Art. 101 TFEU Following The District Court Of Cologne

On February 14, 2012, the District Court of Cologne decided that the joint negotiation of supply conditions of the National Association of Press Wholesalers (*Bundesverband Presse-Grosso* "BVPG") with individual publishers, and the BVPG's request that its members refrain from individually negotiating supply conditions with publisher Bauer Media Group ("Bauer"), infringed Article 101(1) TFEU.[8]

For several decades, the German press wholesale system involved press wholesalers having exclusive territories for the supply of magazines and newspapers.[9] In addition, the BVPG negotiates the supply conditions for all of its members with the individual publishers, including the press wholesalers' margin. In 2010, the general assembly of the BVPG decided that press wholesalers should refrain from individually negotiating supply conditions with Bauer.

7 The decision is available in German at: http://www.bundeskartellamt.de/wDeutsch/entscheidungen/Kartellrecht/EntschKartellW3DnavidW2638.php. A case summary in German can be obtained at: http://www.bundeskartellamt.de/wDeutsch/entscheidungen/Kartellrecht/kurzberichtkart/KurzberichtekartellW3DnavidW2652.php. A press release is available in English at: http://www.bundeskartellamt.de/wEnglisch/News/press/2012_01_13-II.php and in German at: http://www.bundeskartellamt.de/wDeutsch/aktuelles/presse/2012_01_13-II.php.

8 District Court of Cologne, Decision of February 14, 2012, 88 O (Kart) 17/11, available in German at: http://www.justiz.nrw.de/nrwe/lgs/koeln/lg_koeln/j2012/88_O__Kart__17_11_Urteil_20120214.html.

9 There are only four areas in Germany in which two press wholesalers simultaneously supply magazines and newspapers.

Bauer objected to this practice and attempted to negotiate supply conditions with each press wholesaler separately. Bauer ultimately went to court.

The Court decided in favor of Bauer and held that through engaging in negotiation on behalf of its members, BVPG illegally coordinated price and supply conditions. The Court held that press wholesalers were potential competitors, because in the absence of the exclusive supply agreements they could undertake the necessary investments in order to expand their activities to other areas.

The Court rejected BVPG's defense that the joint negotiation of supply conditions would be beneficial for consumers and exempted under Article 101(3) TFEU. The Court dismissed the argument that the press wholesale system would create efficiencies because it would, *inter alia*, ensure neutrality and the supply of a comprehensive portfolio of newspapers and magazines in retail stores throughout Germany, including rural areas. In addition, the Court doubted whether any potential economic benefits would be passed-on to end-consumers as resale prices of newspapers and magazines are fixed by the publishers, which is permissible under German law.[10] The Court also held that the restriction of competition was not indispensable to achieve the alleged efficiencies because several examples illustrated that proper supply of newspapers and magazines was not at risk in areas in which already two press wholesalers supplied newspapers and magazines. Finally, the Court found that the concerted practice restrained competition in the relevant press wholesale market insofar as it excluded competition for essential parts of magazine and newspapers.

This court decision is in line with a recent judgment of the Federal Court of Justice rejecting an exclusive supply claim of a press wholesaler against Bauer.[11] BVPG has appealed the District Court's decision.

FCO Imposes Fines In Several Cartel Cases

Concrete Pipes. On March 1, 2012, the FCO imposed further fines of €1 million on eight companies and concluded its cartel proceedings against manufacturers of concrete pipes and shafts for sewage systems.[12] A number of fines were reduced due to many companies cooperating and reaching settlements to end the proceedings.[13] The pipe manufacturers were fined for entering into price fixing and customer allocation agreements between February 2006 and 2010 across Lower Saxony, North Rhine-Westphalia, Schleswig-Holstein and Hamburg.[14]

Fire-Fighting Vehicles. On March 7, 2012, the FCO fined Iveco Maidus Brandschutztechnik GmbH €30 million for illegally price fixing and participating in quota agreements along with three other manufacturers of fire fighting vehicles since 2001.[15] The FCO had previously (in July 2011) imposed fines of €17.5 million on Iveco.[16] The companies had for many years colluded on prices in addition to granting one another a certain share of sales, a so-called "target quota." After having initially cooperated with the FCO during the investigation, Iveco disputed the findings and refused, unlike the three other companies involved, to settle the case.

Chemical Wholesalers. On March 15, 2012, the FCO concluded its investigations into the chemical wholesale sector by imposing a fine of €8.7 million on 13 wholesalers.[17] The FCO had previously (in December 2010) fined 12 companies €15.1 million.[18] The investigation focused on illegal agreements concerning the standardized industrial chemicals that were distributed from the warehouses of chemical wholesalers. The companies concerned agreed to terminate the proceedings by settlement.

10 According to Section 30(1) GWB, resale price maintenance between newspaper/magazine producers and distributors is exempted from the cartel prohibition in Section 1 GWB.

11 The FCJ *inter alia* found that an exclusive distribution relationship between a press wholesaler and Bauer restrains competition, as it prevents market entry of a second press wholesaler. FCJ, Decision of October 24, 2011, KZR 7/10, Grossistenkündigung, available in German at: http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=1710cf5fad95fcca48107dcf4dc499b6&nr=58092&pos=0&anz=1; See National Competition Report, October-December 2011, p. 5-6.

12 A press release is available in English at: http://www.bundeskartellamt.de/wEnglisch/News/press/2012_03_01.php and in German at: http://www.bundeskartellamt.de/wDeutsch/aktuelles/presse/2012_03_01.php.

13 A case summary in German can be obtained at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell12/Kartell_Fallberichte_12/B12-015-09-ENDGUELTIG.pdf.

14 *See* National Competition Report, July – September 2011, p.7-8.

15 A press release is available in English at: http://www.bundeskartellamt.de/wEnglisch/News/press/2012_03_07.php and in German at: http://www.bundeskartellamt.de/wDeutsch/aktuelles/presse/2012_03_07.php.

16 For the earlier case see the press release available in English at: http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2011/2011_07_27.php and in German at http://www.bundeskartellamt.de/wDeutsch/archiv/PressemeldArchiv/2011/2011_07_27.php.

17 A press release is available in English at: http://www.bundeskartellamt.de/wEnglisch/News/press/2012_03_15-II.php and in German at: http://www.bundeskartellamt.de/wDeutsch/aktuelles/presse/2012_03_15-II.php.

18 For the earlier case see the press release available in English at: http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2010/2010_12_07.php and in German at: http://www.bundeskartellamt.de/wDeutsch/archiv/PressemeldArchiv/2010/2010_12_07.php.

Unilateral Conduct

Deutsche Post Not Under A Duty To Supply PostIdent Services To Competitors For DeMail Following Düsseldorf Court Of Appeals Judgment

On November 30, 2011, the Düsseldorf Court of Appeals found that Deutsche Post AG ("DPAG") has no duty to provide competitors in the market for DeMail services with DPAG's PostIdent services.[19]

DeMail allows for encrypted transmission of electronic messages with guaranteed sender identity. The German DeMail law requires, *inter alia*, the user's secure identification upon registration for an account.[20] For the secure identification of individuals, not only in the context of DeMail services, DPAG offers "PostIdent" services. DPAG establishes the identity of third persons by checking and documenting the individual's identification data and then transmitting the relevant documentation to its PostIdent clients.

In 2010 DPAG had refused to provide 1&1-Internet AG und 1&1 Mail & Media GmbH ("1&1"), a competitor for DeMail services, with PostIdent services. 1&1 filed a court claim and the District Court of Cologne found in March 2011 that DPAG had abused its dominant position and that it had a duty to supply DeMail conform identification services to 1&1.[21]

The Düsseldorf Court of Appeals overturned this decision and held that, even assuming DPAG had a dominant position on the upstream market for the standardized, DeMail law compatible identification, there was no impediment of competition. In particular, DPAG's refusal to supply did not result in any foreclosure on the downstream market for the provision of DeMail services, since there was an alternative provider of DeMail law compatible identification services. Although offering a narrower scope of identification services than DPAG, this provider could objectively cover a sufficient part of 1&1's demand for identification services and allow it to compete viably on the market for DeMail-services.

Federal Court Of Justice Rules On Potentially Abusive Practices In The Context Of The Restructuring Of A Dominant Company's Distribution System

On January 31, 2012, the Federal Court of Justice ("FCJ")[22] referred appeal proceedings brought by an advertising agency against the phone and business directories publishing entity of Deutsche Telekom ("DT") for abuse of dominance back to the lower court.

The advertising agency places ads on behalf of its customers in DT's directories. Customers can also directly book ad placements with DT, through the latter's advertising subsidiary or through commercial agents. DT provides the price lists for ads in the upcoming edition of its directories to its subsidiary and its commercial agents at a much earlier date than to independent agencies. The advertising agency claimed that this practice constituted unlawful discrimination and unfair impediment of competition.

The FCJ found that DT was dominant on the market for advertisements in local phone and business directories, but found against the appeal court in holding that DT did not engage in unlawful discrimination by favoring its advertising subsidiary or its commercial agents. The FCJ confirmed standing case-law that a dominant undertaking may afford its own subsidiaries preferential treatment over competitors, because they are not "similar undertakings."[23] The FCJ has now extended this jurisprudence to commercial agents, based on the argument that they form an integral part of the principal's business and are, as a consequence, part of the same economic entity.

As regards the agency's claim of unfair impediment of competition, the FCJ held that the appeal court had failed to carry out the requisite comprehensive balancing of interests. The FCJ explained that a dominant company's interest in freely determining its distribution system could be outweighed by the distributor's interests in a scenario where the distributors depend on the products or services provided by the dominant company, add value to them, and provide their own products or services in a separate aftermarket. Under such circumstances, the switch to self-distribution would result in the elimination of these companies and in a monopoly of the dominant company in such an aftermarket.

19 Available in German at: http://www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2011/VI_U__Kart__14_11urteil20111130.html.

20 Available in German at: http://www.gesetze-im-internet.de/bundesrecht/de-mail-g/gesamt.pdf.

21 Available in German at: http://www.justiz.nrw.de/nrwe/lgs/koeln/lg_koeln/j2011/88_O_49_10urteil20110331.html.

22 FCJ, Judgment of January 31, 2012, Case KZR 65/10, available in German at: http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/list.py?Gericht=bgh&Art=en&sid=bf36f53adfd4a182f65a0932ae09b5d7.

23 *See, e.g.*, FJC, Judgment of October 24, 2011, Case KZR 7/10, WuW/E DE-R 3446 (3450) (see National Competition Report October – December 2011, p. 10); Judgment of September 24, 2009, Case KZR 4/01, WuW/E DE-R 1003 (1005); Judgment of February 10, 1987, Case KZR 6/86, WuW/E BGH 2360 (2365).

In this respect, the FCJ noted that the advertising agency's customers paid a 15% premium for the adverts in Deutsche Telekom's directories, which could indicate that the agency did not only sell ads in competition with DT's subsidiary and commercial agents, but that it provided additional consulting services regarding, for example, the design of the adverts, the most cost-efficient advertising strategy, or the best choice of media. If this were indeed the case, DT's behavior could effectively eliminate competition on this aftermarket for advertising consulting.[24] The lower court must now reconsider the matter, taking into account the findings of the FCJ.

Mergers And Acquisitions

FCO Finds Violation Of Notification Requirement Through Formation Of A Joint Venture Abroad

On January 25, 2012, the FCO finished merger control proceedings relating to the establishment of a joint venture, VCE Company LLC ("VCE"), by EMC Corporation ("EMC") and Cisco Systems Inc ("Cisco").[25]

The FCO found that while VCE's business initially was limited to the United States, the parties should have notified the original formation of VCE, or at least a subsequent decision to expand VCE's activities which was accompanied by the transfer of additional assets to the joint venture. The FCO considered that it could at that time have been expected that the joint venture, which was active on an international market (datacenter solutions) would eventually also become active in Germany. This would suffice to create the requisite (potential) effect on competition in Germany so as to trigger a notification requirement under German merger control rules.

EMC and Cisco actually filed a notification with the FCO, but only in connection with the formation of a German subsidiary of VCE through which VCE planned to actually start its business in Germany. Despite the fact that the joint venture had not made any actual sales in Germany before that time, the notification was considered belated.

The substantive investigation of the FCO concluded that the merger would neither strengthen nor create a dominant position on the possible market for integrated datacenters, or on the individual markets for its components (servers, storage, virtualization solutions, and network equipment) and that the joint venture was of minor importance to the German market.

The FCO noted that given EMC and Cisco's global nature and previous merger cases the companies should have been aware of the requirement to notify the formation or the enlargement of the scope of the joint venture to the FCO. However, as the joint venture had only minor economic importance for the German market, the FCO refrained from imposing a fine for failure to notify. The fact that the Parties had in fact filed a notification, albeit in the view of the FCO too late, would seem to have played a role in this regard.

The case is noteworthy for a number of reasons. First, it confirms that not only the formation of a joint venture company can trigger a notification requirement, but also the enlargement of the scope of a joint venture, at least if it is accompanied by a contribution of additional assets. Second, the FCO considers the formation of a joint venture company outside of Germany notifiable from the outset if there is a reasonable expectation that the joint venture will eventually expand its business into Germany. The filing of a notification only prior to the actual commencement of activities in Germany was considered too late. Finally, the FCO's reference to potential fines must be read as a warning that fines might be imposed even in cases where the notification requirement was not entirely obvious.

FCO Clears Acquisition Of Minority Share In Energy Supplier VNG By Gazprom

On January 31, 2012, the FCO cleared the acquisition of a minority interest in VNG Verbundnetz Gas AG ("VNG") by a subsidiary of the state-owned Russian energy supplier Gazprom.[26] VNG is the largest gas supplier for eastern Germany. As a result of the transaction, Gazprom increases its participation in VNG to 10.52%.

In January 2010, the FCO held that Gazprom's intention to increase its share in VNG by 5.26% required the FCO's approval. In order to avoid merger control proceedings at the time, Gazprom decided to waive 1.88% of its voting rights for two years, which lead to a postponement of the merger control proceedings.

The transaction had to be notified to and approved by the FCO, since the latter found that the transaction enabled Gazprom together with BASF's subsidiary Winterstall (with a share of 15.79%) to jointly exert

24 See also FCJ, Judgment of July 13, 2004, Case KZR 17/03, WuW DE-R 1377, where the FCJ found that DT's refusal to accept ads placed by an agency that provided consulting services regarding the most cost-efficient advertising strategy amounted to an unlawful interference in the consultancy market.

25 A case summary is available in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion12/Fallberichte_2012/B07-038-11-FINAL.pdf?navid=98

26 The decision is available in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion12/B8-116-11.pdf?navid=83. A press release in English announcing the FCO's intention to clear the transaction is available at: http://www.bundeskartellamt.de/wEnglisch/News/press/2012_01_13.php. A press release in German is available at: http://www.bundeskartellamt.de/wDeutsch/aktuelles/presse/2012_02_01.php and http://www.bundeskartellamt.de/wDeutsch/aktuelles/presse/2012_01_13.php.

a competitively significant influence on VNG.[27] Winterstall and Gazprom cooperate closely in joint ventures such as Wingas and other projects. Thus, the FCO concluded that it was possible that both minority shareholders would coordinate their behavior in VNG, especially their voting rights, in order to assert their common interests.

In its decision, the FCO examined the import level in the gas market. According to the FCO, the market for the production of natural gas and its import to Germany is national. Gazprom's share accounts for a third of this market; the Dutch state-owned company Gasterra and the Norwegian state-owned company Statoil each have a share of 20%. The question of dominance was not relevant, as the FCO found that Gazprom's minority share in VNG did not strengthen Gazprom's market position in an anticompetitive manner.

The decision illustrates how in German merger control even minor transactions may have to be notified to and approved by the FCO.

FCO Clears Acquisition Of Linpac's "Returnable Transit Packaging" Business By One Equity Partners

On February 2, 2012 the FCO cleared the acquisition of Linpac RTP by One Equity Partners ("OEP") subject to conditions.[28]

The FCO distinguished between four relevant product markets, namely (i) small plastic containers, (ii) large plastic containers, (iii) plastic pallets, and (iv) beverage crates. The FCO found that the geographic market for RTP is limited to Germany due to high transportation costs, a national sales structure, and national industrial and intellectual property rights. OEP has already been active in the German RTP business via its wholly-owned subsidiary Schoeller Acra Systems Gruppe ("SAS") prior to the merger. The FCO found that SAS held a dominant position on the German market for beverage crates with a market share of 40-45%. Moreover, the FCO's market analysis showed that purchasers rarely change suppliers on the market for beverage crates as this entails considerable costs and difficulties. Finally, SAS possesses superior know-how as well as financial and other resources to secure its position on the market. The acquisition of Linpac RTP with a market share of 5-10% would have strengthened OEP's dominant position.

Consequently, the acquisition was only cleared subject to a resolutory condition. OEP has to sell the beverages crates business of Linpac RTP by means of an open and non-discriminatory auction process to a suitable and independent purchaser within a certain time frame. The process is supervised by a divestiture trustee subject to the FCO's approval. The FCO expects that considerable competitive potential will be released, which will give SAS's competitors the opportunity to expand their market position and close the gap on SAS. The FCO chose a resolutory condition as opposed to a suspensive condition as potential purchasers had already signaled serious interest.

The OFTof the U.K. also dealt with the acquisition by OEP of Linpac's RTP business. On December 6, 2011, it decided not to refer the case to the Competition Commission under Section 33(1) of the Enterprise Act.[29]

FCO Blocks Acquisition By Xella Of Danish Aerated Concrete Producer H+H

On March 14, 2012, the FCO prohibited the acquisition of H+H International A/S ("H+H"), a Danish producer of aerated concrete ("AAC") blocks and panels by Xella International Holdings S.à.r.l. ("Xella"). The FCO found that the proposed transaction would have created or strengthened a dominant position in two German regional markets for AAC blocks and, alternatively, masonry wall-building materials (including AAC blocks, calcium silicate ("CS") bricks and clay bricks.[30]

Abandoning its prior case law defining the product market as masonry wall-building materials, the FCO defined a narrow product market limited to AAC (and very similar light-weight concrete blocks). While recognizing that various wall-building materials can be used to build walls, the FCO considered the different materials were not substitutable given differences with respect to certain product characteristics, as well as price differences. Moreover, economic evidence did not show that the various masonry materials belonged to one market. Nevertheless, as a "fallback," the FCO found that the transaction could also be prohibited based on its prior market definition of masonry wall-building materials.

27 According to Section 37 (1) No. 4 GWB, a concentration can be any combination of companies enabling one or several companies to directly or indirectly exercise a competitively significant influence over another company.

28 The decision is available in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion12/B3-120-11.pdf?navid=83. For the press release see http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion12/Fallberichte_2012/B03-120-11-Fallbericht.pdf?navid=98.

29 The decision is available in English at: http://www.oft.gov.uk/shared_oft/mergers_ea02/2011/one-equity-partners.pdf.

30 The decision is available in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion12/B1-30-11-neu.pdf?navid=83. A case report is available in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion12/Fallberichte_2012/B01-030-11-ENDG.pdf?navid=98. A press release in English is available at: http://www.bundeskartellamt.de/wEnglisch/News/press/2012_03_15.php. A press release in German is available at: http://www.bundeskartellamt.de/wDeutsch/aktuelles/presse/2012_03_15.php.

The FCO's findings regarding dominance are based on, among other aspects: (i) Xella being the leading supplier of AAC blocks in Germany; (ii) the transaction leading to the acquisition of the largest AAC competitor, with combined market shares of about 60% in Northern and about 42.5% in Western Germany, as well as a large gap to the following competitors; (iii) Xella's financial power, broad production capabilities, and well-known Ytong AAC brand; and (iv) the absence of appreciable competition from imperfect substitutes (*Randsubstitution*) made of other materials. As regards the last aspect, the FCO considered that the same products that it held to compete in the same product market as AAC in prior decisions were too remote to exercise any appreciable competitive pressure.

The analysis is similar in "fallback" masonry markets. With regard to the Western market, where Xella's and H+H's combined market share would only be about 25%, the FCO claimed that various CS competitors would not exert sufficient competitive pressure on Xella to prevent the strengthening of a dominant position, because they are linked to Xella through joint venture companies. The FCO based its decision on the FCJ's *Ost-Fleisch* and *Nord-KS* decisions.[31]

Xella had proposed the divestiture of one of its AAC plants, combined with H+H's customer base in the Northern market, and of one of its CS plants in Northern Germany, as well as to withdraw from the largest jointly owned CS bricks producer in the Western market. The FCO did not consider these remedies sufficient to address its competition concerns.

Policy and Procedure

District Court Of Bonn Rejects Access To Leniency Applications Following The ECJ's Pfleiderer *Decision*

On January 18, 2012, the District Court of Bonn held that a potential plaintiff seeking damages for cartel violations does not have a right to access the corporate statements of a leniency applicant that are contained in the FCO's files.[32] *Pfleiderer*, a customer and alleged victim of the decorative paper cartel, had requested full access to the FCO's cartel file, including access to the leniency statements. The FCO granted limited access to the file, but denied access to its internal documents as well as to corporate statements and documents that were voluntarily submitted in connection with the leniency application. *Pfleiderer* appealed to the District Court of Bonn, seeking access to the entire file. After obtaining a preliminary ruling from the ECJ, the District Court now upheld the FCO's decision to reject access to leniency statements. In addition to access to the fining decisions and a list of evidence, the District Court now also granted access to evidence seized during the proceedings.

The District Court rejected the granting of access to the leniency applications relying on a provision according to which access to file may be refused if the objective of the investigation appears to be compromised as a result. It reasoned that granting access to leniency applications could compromise (future) investigations of the FCO with the purpose of uncovering and prosecuting cartels. According to the Court, there is a risk that cartel members would refrain from applying for leniency if their submissions were provided to potential plaintiffs seeking private damages.

The District Court also concluded that the leniency applicants' interests outweighed Pfleiderer's interests as far the leniency applications were concerned. In this respect, the Court stressed that the leniency applicants had voluntarily created and submitted self-incriminating information, which the FCO would not have been able to obtain in dawn raids. Further, the leniency applicant submitted the leniency application in the expectation that the authority would not disclose it. In addition, the Court emphasized that granting access to leniency applications could have negative effects on the proper functioning of leniency programs. The Court held that this may weaken effective public cartel enforcement, as leniency programs are a very useful tool for the effective enforcement of Article 101 TFEU. Finally, the District Court found that refusing access to leniency applications would also not unduly burden *Pfleiderer*, as it had already received access to the fining decisions as well as a list of evidence collected during dawn raids.

In contrast, the District Court granted *Pfleiderer* access to evidence seized during the FCO's proceedings. However, the District Court implicitly confirmed the original FCO decision in so far as access to voluntarily submitted documents was denied. This seems to indicate that the Court considered that documentary evidence provided voluntarily together with a leniency application constitute a confidential part of the leniency application itself.

The District Court's decision therefore eliminates fears that the success of the FCO's leniency program could be undermined by allowing third party access to leniency applications.

31 FCJ, Decisions of May 8, 2001, Case KVR 12/99 (*Ost-Fleisch*), and of March 4, 2008, Case KVZ 55/07 (*Nord-KS*).

32 District Court of Bonn, Decision of January 18, 2012, Case 51 GS 53/09, available in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Presse/2012/Urteil_des_AG_Bonn_vom_18.01.2012_-_Az._51_GS_53-09.pdf.

German Government Proposes Amendment To The Act Against Restraints Of Competition

On March 28, 2012, the German government adopted a bill amending the GWB.[33] If the bill–the 8th amendment to the GWB–clears parliament, it will come into force on January 1, 2013. The proposed changes are primarily intended to harmonize German merger control rules with the provisions of the European Union Merger Regulation ("EUMR"[34]), simplifying the GWB's provisions on abuse of dominance, and strengthening private antitrust enforcement.

The bill follows a draft bill published in November 2011[35] and differs from the draft in one main respect: the draft bill does not include a provision governing access to the file in cartel cases. The background to the recent debate on access to the file is as follows: In June 2011, the ECJ held in a preliminary ruling procedure initiated by a German court that EU law did not *per se* preclude a victim of anticompetitive practices from gaining access to the FCO's full file, including to leniency applications.[36] It is for national law to determine the conditions under which such access must be permitted or refused by weighing the interests protected by European Union law. The interests at stake are, on the one hand, the promotion and facilitation of private antitrust enforcement by giving victims of anticompetitive conduct access to documents that support their damages claims, and, on the other hand, the effective functioning of leniency programs, which would be undermined if undertakings feared that corporate statements and documentary evidence that they submitted voluntarily could end up in the hands of potential plaintiffs. The German court that had referred the matter to the ECJ later decided not to grant access to either the leniency statements or documents provided to the FCO along with these statements, but ordered the FCO to give the plaintiff access to non-confidential versions of the evidence seized during the cartel proceedings.[37]

While the draft bill had proposed a new provision that third parties would generally not be entitled to gain access to leniency applications, the final version of the bill no longer addresses this issue.[38] Accordingly, it will be up to the courts to determine on a case-by-case basis whether leniency statements and related evidence will become available to victims of anticompetitive practices.

FCO Adopts Guidance Paper On Market Dominance In Merger Control

On March 29, 2012, the FCO adopted a Guidance Paper on the concept of market dominance in merger control.[39] The Guidance Paper is a non-binding summary of the FCO's current approach in merger control cases, with respect to substantive appraisal 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. The final version does not substantially differ from a draft that was published for consultation in July 2011.[40]

In particular, just like the draft, the final version does not address the significant impediment to effective competition ("SIEC") test, which will be introduced as of January 2013 if the German parliament adopts the proposed 8th amendment to the GWB.[41] The FCO notes, however, that the Guidance Paper will be revised once the amendment has come into force and the FCO has applied the new test in a sufficient number of cases.

The Guidance Paper does not provide for any "safe harbor" thresholds for concentrations that do not raise competition concerns. Quite to the contrary, the FCO stresses that the existence of a market share threshold that gives rise to a presumption of single dominance under German law (currently at 33%, to be increased to 40% by the 8th amendment) does not mean that concentrations resulting in a lower combined market share could by definition not raise any problems. As regards efficiencies, the final version is even more dismissive than the draft. The FCO takes the view that there is generally no room for assessing efficiencies in the framework of the market dominance test. Given the difficulty of identifying with sufficient certainty the precise scope of transaction-related

33 Available in German at: http://www.bmwi.de/BMWi/Redaktion/PDF/G/gwb-novelle,property=pdf,bereich=bmwi,sprache=de,rwb=true.pdf.

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

35 See National Competition Report October – December 2011, p. 12.

36 CJEU, Judgment of June 14, 2011, Case C-360/09, Pfleiderer.

37 See below, page 27 et seq.

38 See National Competition Report October – December 2011, p. 12.

39 Available in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Publikationen/2012-03-29_Leitfaden_Endfassung_neu.pdf.

40 See National Competition Report July – September 2011, p. 9.

41 See above, page 25 et seq.

efficiencies, and given that efficiencies have so far hardly ever affected the outcome of merger proceedings in other jurisdictions, the FCO considers that the potential benefit of examining efficiencies would be disproportionate to the high transaction costs resulting from a comprehensive efficiencies analysis.

Some differences between German merger control and EU law in the area of vertical and conglomerate mergers remain visible. In principle, just like the Commission, the FCO considers that mergers can only have negative effects on competition if the merged entity has the ability and incentive to adopt foreclosure strategies. However, this approach is to date not reflected in the FCO's decisions, where the FCO has generally examined whether an existing dominant position is reinforced through vertical integration. This approach is still reflected in the Guidance Paper, and it remains to be seen to what extent the FCO's future practice will change. Other differences include that, unlike the Commission, the FCO does not explicitly refer to the importance of a vertical or conglomerate concentration's effect on consumer welfare, and considers that it is not necessary to assess whether the prohibition of abuse of dominance may affect an undertaking's incentive to adopt a particular behavior.

Interestingly, the FCO points out that merger control regimes worldwide have converged to a large extent and suggests that readers should also refer to guidelines published by the European Commission, competition authorities in other jurisdictions, and by international forums such as the International Competition Network or the OECD.

Sectoral Investigations

FCO Publishes Final Report On The Sector Inquiry Into The Dairy Industry

On January 19, 2012, the FCO published the final report on its sector inquiry into the dairy industry that was launched in 2008.[42] While an earlier interim report had primarily described the legal framework, characteristics, and functioning of the dairy industry in Germany, the final report puts more emphasis on the legal analysis.[43] The focus is on the competitive conditions in the purchasing market for raw milk and dairy products.

As regards raw milk, the FCO notes that, while mergers between dairies have previously been cleared, the market is generally becoming more concentrated. In cases where dairies enjoy single or collective dominance in the regional markets for the purchasing of raw milk, the FCO warns that certain practices and clauses in agreements with raw milk producers could be found anticompetitive. In particular, long contract and cancellation periods coupled with exclusive supply obligations could either foreclose competition from other dairies in the purchasing market or amount to an exploitation of raw milk producers.

The FCO is also concerned about the high market transparency as a result of market information schemes relating to the purchase price for raw milk. Trade journals and industry associations routinely publish these prices, and sometimes current prices of individual dairies are reported on a monthly basis. The final report provides some guidance for the assessment of such market information schemes.[44]

As regards dairy products, *i.e.*, the relation between dairies and food retailers, the final report explores the degree of buying power that food retailers enjoy. The FCO examined whether dairies, when faced with retailers' market power, can shift production to other products or begin producing new products, create a new manufacturers' brand or a private label, or switch to other domestic buyers or export their products. The FCO finds that this ability depends on the global demand for basic dairy products at any given point of time, a dairy's product portfolio, and its incorporation as a cooperative or an undertaking; it can therefore only be determined on a case-by-case basis. On the part of the food retailers, the FCO identifies exceedingly long payment terms for their purchases of dairy products as well as the resale of dairy products below cost as potentially anticompetitive practices.

42 The final report and the press release are available in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Stellungnahmen/2012_01_Sektoruntersuchung_Milch_Endbericht_final.pdf and http://www.bundeskartellamt.de/wDeutsch/download/pdf/Presse/2012/2012-01-19_PM_SU_Milch.pdf.

43 Dated December 2009 and available in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Stellungnahmen/1001_Sektoruntersuchung_Milch_Zwischenbericht_2009.pdf.

44 The FCO has also examined the proposed market information service of a particular agricultural market research company and used the opportunity to issue a case report with general guidance on the permissible scope and detail of such schemes in the dairy sector, see (in German) http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell11/Fallberichte/B02-118-10-ENDG.pdf.

Greece

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

Unilateral Conduct

The HCC Imposes A €16 Million Fine On Tasty Foods, Member Of The Pepsico Group, For Abusing Its Dominance In The Salty Snacks Market

In a long and detailed decision, supported by extensive economic analysis, the HCC found that Tasty Foods had infringed Articles 1 and 2 of the then applicable Greek antitrust law 703/1977 and Articles 101 and 102 TFEU.

The case had been initiated following complaints submitted in 2006 and 2007 by the company Tsakiris SA, member of the Coca-Cola HBC group. According to these complaints, Tasty Foods had engaged in a number of abusive practices which resulted in the increase of its market share from 50% in 1985 to 80% in 2005. These practices included exclusivity arrangements with wholesalers such that they would not deal in competing products, fidelity rebates, and arrangements for the granting of demonstration shelves in exchange for exclusivity.

The HCC firstly defined the relevant product market. Tasty Foods argued that this was the macro snacks market, which included savory snacks, sweet biscuits, chewing gums and chocolate products, or, at least, the savory snacks market, which included not only the core salty, but also salt biscuits, bake rolls, bake bars, and dried fruits. The HCC took a different approach and found that the savory snacks market, which it referred to as "core salty" market, was a distinct market and included only potato or potato derivative snacks, corn snacks, and shrimp-look snacks. This market could be further distinguished by distribution channel of which the HCC identified three, namely the organized trade ("OT") (which included supermarkets), the small drop outlets ("SDOs") channel (including kiosks, bakeries, mini-markets), and the special channel (including instant consumption outlets). Since the year 2001, Tasty Foods consistently held more than 70% share in "all channels," while in the years 2007, 2008, and Q1 2009, its share in the SDO channel exceeded 80%. The complainant, Tsakiris, came second with a 7% share in "all channels," followed by the third largest competitor, Chipita SA, with the same percentage.

The HCC concluded that shares as high as Tasty Food's in themselves constituted evidence of dominance. This conclusion was supported by the substantial gap between Tasty Foods and the other competitors, the important brand portfolio which it owned and which it supported systematically over the past 15 years through investments and support of the distribution channels. All these circumstances, according to the HCC, rendered Tasty Foods an unavoidable trading partner.

The HCC then proceeded to examine the measures adopted by Tasty Foods to foreclose competitors. It began by referring to a number of internal documents obtained during a 2008 inspection that evidenced a plan to eliminate Tsakiris and other competitors. These documents contained statements such as "*elimination of competition*," "*Anti-Tsakiris Plan*," "*how do we block Coca-Coola Tsakiris potential expansion outside Athens*", "*let's finish him before September*", "*I hope someday our friends from Tsakiris and Chipita may understand us and forgive us*." Tasty Foods argued that the subjective and sentimental motives expressed in writing by certain of its employees should not be overstated, but the HCC held that although abusive conduct should indeed be evaluated in an objective manner, such internal correspondence was relevant in interpreting the commercial practices adopted by Tasty Foods. The HCC concluded that the internal documents described a strategy of elimination of Tasty Foods' competitors which was planned and implemented in the knowledge of senior management of the company.

The HCC then proceeded to examine the restrictive measures adopted in the wholesale market and in the retail market throughout the Greek territory.

In the wholesale market, the HCC found that Tasty Foods concluded consecutive 5-year exclusive agreements with wholesalers all around Greece. These agreements imposed an obligation on wholesalers not to deal in competing products and to acquire exclusively from Tasty Foods 100% of their requirements. These wholesalers received rebates in their capacity as exclusive distributors of Tasty Foods. The HCC found that the foreclosure effects were substantial because the Tasty Foods wholesalers traded 80-85% of the salty snacks destined for small points of sale. Indeed, such points of sale found it more efficient to concentrate their orders and deal exclusively with the wholesalers who could offer them a wide range of products. The HCC held that the arrangements were geared toward strengthening the dependency between the dominant firm and its customers, and underlined that Tasty Foods did not offer convincing arguments to objectively justify these arrangements.

The arrangements were also found to be in breach of Article 1 of law 703 /1977 and 101 TFEU. The HCC stated that the Block Exemption Regulation 330/2010 or its predecessors could not apply given the high market share of Tasty Foods. Likewise, the arrangements could not be exempted in the context of an individual assessment under Article 1(3) of law 703/77 or Article 101(3) TFEU, not only because of their obvious foreclosure effects at the wholesale level, but also because of the cumulative effect of exclusivities at a retail level (given the contractual obligation of wholesalers to undertake the installation of shelves at points of sale for the exclusive display of Tasty Foods snacks).

With respect to the retail market, the HCC found that Tasty Foods was granting shelves to points of sale at reduced prices or for free, in exchange of their exclusive use for its snacks. Tasty Foods' continuous effort was to capture the maximum space possible at points of sale so as to install such shelves. The HCC found that such supply was equally restrictive as an exclusivity clause because it created a barrier to entry to new entrants, given that the space available in small POS was limited. The restrictive effects were enhanced by the fact that retailers were not willing to change supplier because Tasty Foods supplied the entire range of products and because, by their nature, snacks were food of instant consumption at the point of sale. A market research invoked by the HCC indicated that 9 out of 10 points of sale had only one shelf installation, and these were devoted to Tasty Foods. These practices were found to constitute breaches of Articles 1 and 2 of law 703/77 and Articles 101 and 102 TFEU.

Finally, the HCC examined the target rebates granted by Tasty Foods to wholesalers and retailers, and found that these constituted an abuse of dominance. The targets for the rebates were set with reference to the performance of previous years with respect to the entire range of purchased Tasty Food products (including those which were dominant). The HHC concluded that structured so as to enhance loyalty among customers of dominant products, and were therefore abusive.

When assessing a fine, the HCC held that although, in principle, the turnover of the undertaking in the relevant product market is taken into account as the basis for such assessment, the Commission is not prevented from using another basis for such assessment in view of the circumstances involved. In the present case, although Tasty Foods' turnover from salty snacks could be taken into account, it was accepted that the primary target of the restrictive measures was to dominate in the small points of sales channel and as a result, the turnover in this channel was taken as a basis, while the turnover from sales of salty snacks in the channel of organized trade ("OT") was excluded. According to the decision, the Commission took into account that the restrictive practices were implemented for 8 years, from 2000-2008, that the measures adopted both at wholesale and retail level were in severe breach of competition rules, and that some of the measures continued in 2009-2010, *i.e.*, even after the investigation at the undertaking's premises in the year 2008.

On the basis of all the preceding, it imposed on Tasty Foods a fine of €11.7 million for infringement of Article 2 of law 703/1977 and Article 102 TFEU and a fine of €4.4 million or infringement of Article 1 of law 703/1977 and Article 101 TFEU. No fines were imposed on wholesalers or retails as it was accepted that such restrictive measures were initiated and applied by Tasty Foods as a result of its economic power as against these market operators.

Italy

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

Horizontal Agreements

The ICA Fines 15 Shipping Agents And Two Trade Associations For Setting Up Price Fixing Practices At The Port Of Genoa

In February 22, 2012, the ICA imposed fines totalling approximately €4.1 million, against 15 maritime agents and two trade associations for violating Article 101 TFEU by entering into an anticompetitive agreement aimed at increasing tariffs for certain maritime agency services.[45] The investigation was initiated after an immunity application was submitted by the maritime agent Maersk (during the investigation another maritime agent, Hapag Lloyd, applied for leniency and obtained a 50% fine reduction).

According to the ICA, the collusive actions of the maritime agencies constituted a single agreement, which entailed both horizontal and vertical anticompetitive effect. The horizontal aspects of the agreement related to seven meetings of the Assagenti Port Commission (a commission established within the trade association of maritime agencies, "Assagenti"), which took place between February 18, 2004 and October 12, 2007. According to the ICA, during these meetings the parties agreed to increase the agency tariffs relating to the preparation and issuance of bills of lading and delivery orders. The maritime agencies also discussed the application of fidelity rebates to be granted to the members of Spediporto who were freight forwarders.

45 Case I 733 – *Servizi di agenzia marittima*.

The vertical effects concerned an agreement between Assagenti and Spediporto to pass on the cost of the increased tariffs described above to the final customers the increased amounts of the above-mentioned tariffs agreed within the Port Commission, and to allow the forwarders to benefit from the fidelity rebate (€4 for each bill of lading/delivery order issued).

This decision represents one of the rare cases where the ICA engaged in detailed explanation of the factors taken into account and steps followed in calculating the fines imposed on each member of a group of infringing undertakings. This increased rigour is welcomed, and could be seen as the answer of the ICA to the recent case law of the Italian administrative judges, expressing a constant criticism in relation to the lack of transparency of the ICA's methodology in assessing the amount of fines.

Unilateral Conduct

ICA Fines Pfizer Group €10.7 Million For Limiting Generic Competition For Xalatan

On January 11, 2012, ICA fined Pfizer Italia S.r.l., Pfizer Health A.B. and Pfizer Inc. (together "Pfizer"), the manufacturer of Xalatan (a blockbuster drug, based on the active ingredient latanoprost, which is aimed at treating glaucoma), €10,677,706 for abusing its dominant position in the market for drugs based on prostaglandin analogs.[46] The patent for latanoprost ("Principal Patent"), which was originally issued to Pharmacia A.B. (later acquired by Pfizer) was due to expire in September 2009. In 1997, Pharmacia A.B. requested in several Member States a Supplementary Protection Certificate ("SPC"), in order to compensate for the reduced effective term of the Principal Patent resulting from time expended obtaining clearance to commercialize the patented drugs in question. However an SPC request was not filed in Italy. Thus, in those Member States where an SPC request was filed and obtained, patent protection of Pharmacia's (and, after 2003, Pfizer's) blockbuster drug based on latanprost (namely, Xalatan), was extended until July 2011, while in Italy the original expiry date of the Principal Patent remained in force (*i.e.*, September 2009).

The ICA held that Pfizer, by misusing the patent release procedures and engaging in vexatious litigation, had engaged in a strategy aimed at prolonging the patent protection of Xalatan in Italy thereby hindering the commercialization of generic prostaglandin analogs. Pfizer's strategy involved the filing of a divisional patent in Italy whose scope overlapped with that Principal Patent, so that the relevant drugs would be protected in Italy for as long as they were in other Member States were SPCs were granted. In addition, Pfizer sought extension of this new patent on the grounds of necessity (for experimentation regarding the use of Xalatan in paediatrics).

The ICA held that Pfizer's conduct had the sole aim of artificially prolonging the protection of Xalatan in Italy. The ICA noted that after obtaining the divisional patent, Pfizer did not commercialize a new drug, and that this clearly indicated that the new patent did not protect any additional therapeutic use of Xalatan. The ICA also held that Pfizer's request for an extension of the divisional patent was dilatory, given that the request was filed after this patent was revoked by the EPO. Concerning the alleged "dilatory" nature of the pending litigation among Pfizer and several generic drug manufacturers, the ICA concluded that it was irrelevant that the litigation was formally initiated by the generic drug producers, since these actions were a direct consequence of Pfizer threatening the generic producer with damage actions.

Based on the above, the ICA concluded that Pfizer's conduct was in breach of Article 102 TFEU, and ordered Pfizer to cease immediately the contested conduct. According to the ICA, Pfizer's actions had delayed by seven months the entry of generic versions into the Italian market, which enabled Pfizer to generate €17 million in profit it would have otherwise lost to generic producers. The willingness of the ICA to assess the effects of Pfizer's asserted abusive conduct could be seen as a disguised invitation to the affected generic producers and the NHS to engage in private antitrust litigation. This is consistent with the new policy announced by the ICA's President, aimed at increasing deterrence of antitrust infringements, also by encouraging greater recourse to private enforcement.

Policy And Procedure

The Regional Administrative Tribunal's ("TAR LAZIO") Judgment On The Right To Autonomously Appeal The ICA Decision To Carry Out Surprise Inspections

On January 26, 2011, TAR Lazio rendered its much-awaited judgment on an appeal brought by Ferrovie dello Stato S.p.A. ("FS") for the annulment of the decision of the ICA to: (i) initiate an investigation into FS and its subsidiary, Rete Ferroviaria Italiana S.p.A. (*i.e.*, the Italian railway network manager, "RFI"), in relation to an alleged abusive strategy aimed at hampering access to the railway network by Arenaways S.p.A., a competitor of Trenitalia S.p.A., a subsidiary of FS and the incumbent Italian railway operator (the "Decision to Initiate Proceedings"); and (ii) to authorize a surprise inspection at the premises of FS, which was carried out by officials

46 Case A431 – *Ratiopharm/Pfizer*.

of the ICA on December 21, 2010 (the "Inspection Decision").[47] Against those decisions, FS pleaded, *inter alia*, that: (i) the ICA was not competent to initiate the proceedings, as competence was granted by the national legislator only to the sector-specific regulator; (ii) the Inspection Decision was not properly grounded because the ICA did not provide reasons justifying the use of the most intrusive investigative tool at its disposal; and (iii) the Inspection Decision was adopted in contravention of Article 8 of the ECHR, as it violated the guarantees established by the *Colas Est* case,[48] including, for example, prior authorization by a judge of the inspection procedure.

According to Italian case law, the Decision to Initiate Proceedings and the Inspection Decision are considered "infra-proceeding decisions." As such, they do not cause actual harm to their addressees, and they can be appealed only alongside the ICA's final decision. Such case law would suggest that appeals brought against infra-proceedings decisions are normally declared inadmissible. However, in the case at issue, TAR Lazio held that such case-law should be partially revisited. In particular, the judges ruled that an appeal against infra-proceedings decisions, such as the Decision to Initiate Proceedings and the Inspection Decision, should be granted in all cases where the interest the claimant seeks to defend through lodging the appeal (i) is distinct from any interest which the claimant may seek to defend by appealing the final infringement decisions; and (ii) could not be secured by a jurisdictional decision annulling the final decision.

In relation to the Decision to Initiate Proceedings, TAR Lazio held that those two conditions were satisfied with respect to FS' plea against the competence of the ICA to initiate proceedings. According to the judges, FS's interest in appealing the Decision to Initiate Proceedings, insofar as it represented sparing FS of the onerous duty to cooperate with ICA, was different from the interest of having the final infringement decision annulled and one which could not be satisfied by that final decision. With regard to the Inspection Decision, TAR Lazio held that the aforementioned conditions were satisfied in relation to FS's interest not to have the documents seized by the ICA officials disclosed to third parties and competitors. Indeed, according to TAR Lazio, such an interest could not be satisfied by a judgment annulling the final decision (this was so because the adoption of the final decision following the normal deployment of the proceedings, would involve the disclosure of FS documents to third parties).

In light of the above, TAR Lazio declared admissible the appeal brought by FS only to the extent that such appeal was directed towards satisfying the interests described above.

Nevertheless, TAR Lazio rejected the merits of the appeal. In particular, the judges held that the ICA's competence for the investigation of antitrust infringements was like that of the sector-specific regulator – the former authority aimed to protect consumers and competition, while the latter aimed to ensure non-discriminatory access to the railway network. Thus, the ICA was competent to initiate proceedings. Concerning the inspections, TAR Lazio pointed out that the applicable legislation did not require the ICA to use methods such as requests for information before carrying out the inspection. Finally, the judges held that the inspection carried out by the ICA at FS' premises did not infringe Article 8 of the ECHR, because: (i) the right to the inviolability of domicile is not absolute and can be limited to protect other constitutional guaranteed rights, such as the protection of competition; and (ii) the ICA does not have coercive powers, since it is required to call for the assistance of the Italian financial police in the event ICA officials are refused access to an undertaking's premises.

Ireland

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

Mergers And Acquisitions

ICA Clears Joint Venture Between RTÉ And TG4

On February 24, 2012, the ICA approved the creation of a joint venture between two national television broadcasters, Radio Teilifís Éireann ("RTÉ") and TG4. The purpose of the JV is to broadcast the television channels RTÉ One, RTÉ Two, and TG4 on a free-to-air basis in parts of Northern Ireland on the basis of a multiplex license to be awarded by the U.K. Ofcom under the Wireless Telephony Act.

RTÉ was established under the Broadcasting Authority Act 1960 as a public service broadcaster, and operates two free-to-air channels, RTÉ One and RTÉ Two, which cover sports, movies, news, and general entertainment, predominantly in the English language. RTÉ sells advertising airtime and sponsorship on its television channels, which accounted for almost half of its annual turnover in 2010, other

47 Case A 436 – *Arenaways/Ostacolo all'accesso nel mercato dei servizi di trasporto ferroviario passeggeri*.

48 *Case Colas Est a.o./France* 37971/97 [2002] ECHR (Judgment of April 16, 2002).

funding being sourced from the State television license fee. RTÉ channels maintain between approximately 23% and 10% of the viewership in Ireland. TG4 was established under the Broadcasting Authority Act 2001 as a public service broadcaster, and operates one television channel, TG4, which covers sports, movies, news and general entertainment, predominantly in the Irish language. TG4 generates minimal revenues from the sale of advertising airtime, and receives 98% of its funding from the Irish Government. TG4 maintains approximately 2% of the viewership in Ireland.

The creation of the JV did not have a commercial motivation, and was formed pursuant the Memorandum of Understanding ("MOU") between the governments of Ireland and the U.K., which committed the two governments to ensure the "widespread availability on the DTT platform of TG4 [and of] RTÉ services in Northern Ireland." The ICA noted that television broadcasting is a two-sided market, and that the competitive assessment would address the implications of the JV's formation for both advertisers and viewers. The counterfactual generated by the ICA to analyze the JV took account the MOU between the Irish and British governments, the imminent switchover from analogue to digital transmission for all Irish free-to-air television channels, as well as the reality of terrestrial spill-over, meaning that a proportion of the population in Northern Ireland are already capable of receiving Irish terrestrial television broadcasts.

The ICA concluded that the JV (which would lead, in light of pre-existing terrestrial spill-over, to an estimated increase in viewership of RTÉ and TG4's channels in Northern Ireland by between 11% and 35%) was unlikely to facilitate coordination between RTÉ and TG4, as the JV's operation does not involve the setting of prices or output levels for the parents' products and services. In addition, the two broadcasters were not close competitors; TG4's target audience is different to that of RTÉ in light of the former's Irish language content, and TG4 rarely competes for advertisers, as the channel is almost entirely funded by the Irish government.

The ICA dismissed the concern that RTÉ would be able to raise its prices to advertisers on the basis of expanded viewership. The ICA noted that RTÉ does not currently consider viewers in Northern Ireland in setting prices to advertisers, and had made assurances it had no intention of doing so in the future. In addition, customer responses revealed that advertisers generally buy from Northern Ireland broadcasters to reach audiences in that jurisdiction. Should an advertiser wish to reach audiences in both the Republic of Ireland and Northern Ireland, it would not be able to rely solely on the JV as a "one-stop-shop"; Northern Ireland television channels would still remain necessary platforms. Finally, advertisers indicated to the ICA that they were unconvinced that a modest increase in RTÉ's Northern Ireland coverage brought about by the JV would result in a corresponding increase in RTÉ viewership in Northern Ireland.

On the basis of the analysis summarized above, the ICA held that the formation of the JV would not substantially lessen competition in Ireland.

ICA Clears The Acquisition By Southbank Media Limited Of Travel Channel

On April 20, 2012, the ICA granted an unconditional clearance to Southbank Media's acquisition of Travel Channel International. The acquisition concerned the nationwide market for lifestyle-oriented television channels. Southbank Media, a wholly owned subsidiary of Scripps Networks Interactive ("Scripps"), maintained a media portfolio including television channels such as Home and Garden Television, the Travel Channel,[49] the Food Network, the DIY Network, the Cooking Channel, and Great American Country. Scripps had also recently acquired a 50% stake in UKTV, whose portfolio of television channels includes lifestyle and entertainment channels G.O.L.D, Dave, Watch, Alibi, Home, Good Food, Really, Eden, Blighty, and Yesterday. Travel Channel International was an independent company which operated a television channel by the same name.

The ICA raised concerns relating to the removal of potential competition between Scripps and Travel Channel International. The ICA found that were it not for the proposed transaction, Scripps would have likely brought its Travel Channel to Europe to compete with Travel Channel International.

However, the ICA held that the loss in potential competition did not amount to a substantial lessening of competition. The ICA reached this conclusion, *inter alia*, on the ground that cable operators who carried both Scripps channels and Travel Channel International expressed no objection to the transaction. The ICA also noted that none of Scripps, UKTV, or Travel Channel International had audience shares above 10% in Ireland, and that none of the channels of these broadcasters carried advertizing aimed at an Irish audience.

49 To be distinguished from Travel Channel International of the target company.

The 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 Opens Second Phase Proceedings After Requesting Referral From European Commission

By decision of February 13, 2012, the NMa concluded that it will conduct an in-depth review of a concentration involving the two largest producers, Buitenfood and Ad van Geloven, of frozen snacks in the Netherlands. The NMa is concerned that the concentration will significantly impede competition in the market for frozen snacks in the Netherlands, which could result in higher prices and reduced quality. The concentration will bring together some of the Netherlands' best known snack brands, resulting in combined market shares of up to 90% in, for example, the markets for "kroketten" and "bitterballen."

The Parties notified the concentration to the European Commission on November 16, 2011. On December 8, 2011, the NMa requested the partial referral of the case under Article 9 of the Merger Regulation (the "German clause"). The NMa considered that the concentration threatened to significantly affect competition on the Dutch market for frozen snacks. The Commission referred the notified concentration to the NMa by decision of January 13, 2012.

Policy And Procedure

Tribunal Confirms The District Court Of Rotterdam's Judgment That A Seller Cannot Be Held Liable For Gun-Jumping

In a judgment of February 24, 2012, the Trade and Industry Appeals Tribunal (*College van Beroep voor het bedrijfsleven*, the "Tribunal") confirmed that the NMa cannot fine a seller for gun-jumping (*i.e.*, failing to notify a transaction prior to execution).

By decision of September 30, 2009, the NMa fined both the buyer and seller of a controlling stake in one of the seller's subsidiaries €22,500 for failing to notify the transaction.[50] By judgment of January 13, 2011, the District Court of Rotterdam annulled the decision of the NMa, finding that the Dutch Competition Act does not impose an obligation to notify on the seller. The NMa appealed the judgment to the Tribunal, arguing that, on the basis of the legislative history, a seller should be considered an "undertaking concerned" to which the obligation to notify under Article 34 of the Dutch Competition Act would apply. The NMa also argued that it has consistently fined sellers for gun-jumping, and expressed its concern that it could not effectively enforce the merger control rules if it can only hold one of the parties to a transaction liable for the failure to notify.

The Tribunal, however, concluded that Article 34 of the Dutch Competition Act has the same scope as Article 4 of the EU Merger Regulation, with respect to the definition of an "undertaking concerned," meaning that a seller could not be obliged to notify a proposed transaction under Dutch law. The Tribunal noted that contrary to the submissions of the NMa, the Dutch legislature intended to adopt the European concept of undertaking concerned. The Tribunal further explained that the principle of legal certainty required that the law itself should be clear as to whom the prohibition of Article 34 of the Dutch Competition Act applies, and it is not for the NMa to stretch the legal notion of "undertaking concerned" to include the seller. The Tribunal therefore rejected the appeal and endorsed the judgment of the District Court of Rotterdam.

As a result of the judgment of the Tribunal, which is the highest administrative court, the NMa can no longer fine a seller for the failure to notify a transaction (which has been its practice for over ten years), and also has to change its explanatory note to the notification form, which currently states that both the buyer and seller are responsible for notifying a concentration.

A Court of First Instance Denies Legal Privilege To An In-House Lawyer Admitted To The Bar

In a judgment of February 28, 2012, in a civil law matter, the Court of Groningen (a first instance court) considered that the reasons cited in the European Court of Justice's *Akzo* judgment against the extension of legal professional privilege to in-house counsel apply equally outside the area of EU competition law.[51] By reference to the arguments in the *Akzo* judgment, the Groningen Court therefore ruled that an in-house lawyer's communications with his or her client (*i.e.*, the employer) do not benefit from legal professional privilege, even if the in-house lawyer has been admitted to the Dutch bar.

In the Netherlands, in-house lawyers can be members of the Dutch Bar provided that their employers agree to sign a *Professioneel statuut*, which sets forth a number of rules guaranteeing the in-house lawyers' independence. Under the regulations of the Dutch

50 Decision of September 30, 2009, in Case 6286/185. The NMa had initially fined the seller €92,000 and the buyer €315,000, but lowered these amounts on (administrative) appeal (Decision of November 19, 2008, in Case 6286/127).

51 Judgment of the District Court of Groningen of February 28, 2012, http://www.rechtspraak.nl/ljn.asp?ljn=BV7149. *See also* Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. European Commission ("*Akzo*"), Case C-550/07 P.

Bar, in-house lawyers admitted to the Bar are subject to the same ethical and disciplinary rules as independent lawyers. In light of these regulations, Dutch courts have up until this point not treated in-house lawyers any differently to independent lawyers for the purposes of legal privilege rules. However, the Groningen Court believes that this practice is incompatible with the *Akzo* judgment.

In the context of a civil procedure, an employee of a Dutch company was called as a witness to testify about a particular discussion he had with some of the company's directors and its in-house lawyer. The witness refused to disclose what he discussed with the in-house lawyer, claiming that this was protected by legal professional privilege. The Groningen Court referred to paragraph 47 of the *Akzo* judgment, which provides that "*an in-house lawyer cannot (...) be treated in the same way as an external lawyer, because he occupies the position of an employee which, by its very nature, does not allow him to ignore the commercial strategies pursued by his employer, and thereby affects his ability to exercise professional independence*." The Groningen Court found that Dutch civil procedure was sufficiently close to European Competition Law in terms of legal context that the reasoning of the European Court of Justice in the *Akzo* case with respect to legal privilege, notwithstanding the obligations imposed on in-house lawyers by the Dutch Bar.

The Groningen Court's judgment is not enforceable until it has been confirmed on appeal (or has otherwise become final). A Dutch Member of Parliament has asked formal questions to deputy minister Teeven for Security and Justice on March 21, 2012, urging the government to take a stance in the debate on the status of the in-house lawyer in the Netherlands.

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

The CNC Fined Iberdrola For Distortion Of Free Competition By Means Of Unfair Acts

After a complaint filed by Gas Natural Servicios SDG, S.A. and Unión Fenosa Comercial, S.L., the CNC Directorate for Investigation opened formal proceedings against Iberdrola Comercialización de Último Recurso, S.A.U. ("Ibercur"), Iberdrola, S.A. ("Iberdrola|) and Iberdrola Generación, S.A.U. ("Iberdrola Generación") for a possible breach of Article 3 of the Spanish Competition Act ("LDC").

The conduct under examination was the automatic transfer of contracts between consumers and the electricity distributor of last resort to a distributor in the deregulated market without obtaining the consumer's express consent. Pursuant to regulations which cover the energy sector, and in order to avoid the automatic cut-off of electricity to customers without a contract in the unregulated market, in July 2009, Ibercur (the Group's distributor of last resort) assumed, on an interim basis, the supply of 470,791 consumers. 268,001 out of these customers were subsequently and automatically transferred without consent from Ibercur to Iberdrola (the Group's market distributor).

The regulations applicable to the sector require obtaining the consumer's express consent for the change of suppliers. The CNC considered that this requirement was clearly stated in the regulations, and that tacit consent was not sufficient. Furthermore, the system of communication used by Iberdrola was not appropriate the requirements of the regulations, given that it was not possible to know whether the letters sent to customers were actually received.

In addition to violating the relevant sector regulations, the conduct described above amounted to an unfair act as defined by Article 15(2) of the LDC.

Contrary to Iberdrola's claims, the CNC held that this practice was not beneficial to consumers, who, in the context of the deregulation of the retail market for the supply of electricity, could have received more favorable offers from alternative competitors. In addition, the CNC took into account, on one hand, that the conduct was directed to small and medium-sized enterprises and, on the other hand, that the provision of electricity is a basic input for businesses and an essential service for domestic consumers. For all these reasons, it was clear that the conduct affected the public interest, therefore, amounting to a violation of Article 3 LDC.

The CNC imposed a fine of €10,685,000 on Iberdrola, S.A., Iberdrola CUR S.A.U., and Iberdrola Generación, S.A.U., declaring them jointly liable.

Unilateral Conduct

CNC Fines ABERTIS For Abusive Margin Squeeze

On April 8, 2010, after a complaint filed by Ses Astra Ibérica S.A. ("Astra") against Abertis Telecom S.A.U. ("Abertis") for an alleged constructive refusal to supply in the form of a margin squeeze, the CNC opened formal proceedings against Abertis for an alleged infringement of Article 2 of the Spanish Competition Act ("LDC") and

Article 102 TFEU. The CNC concluded that Abertis had abused its dominant position.

The CNC held that Abertis enjoyed a dominant position in the relevant downstream and upstream markets, given that its network locations and centers for broadcasting DTT signals could not be replicated and thus, Abertis controlled essential inputs for the provision of DTT signal transport and distribution services, both at the national and at the local level. In addition, the CNC took into account the existence of high barriers to entry in the relevant markets; impeding access to this network would, in the view of the CNC, eliminate all possibility of competition in the market.

The CNC followed the practice of the European Commission and the ECJ in assessing the margin squeeze by applying the "*as efficient competitor test*," which takes into account the costs incurred by the undertaking concerned. The CNC concluded that Abertis' conduct fell within this practice, which amounted to an abuse of a dominant position in the sense of Article 2 LDC and Article 102 TFEU, as it hindered the entry of competitors in the DTT signal transport and distribution market. As the ECJ recognized in *Telia Sonera*, "*a margin squeeze, in view of the exclusionary effect which it may create for competitors who are at least as efficient as the dominant undertaking, in the absence of any objective justification, is in itself capable of constituting an abuse within the meaning of Article 102 TFEU*."

The CNC agreed with the Directorate for Investigation that there was no objective reason to justify Abertis' conduct, as the dominant undertaking had enough room to maneuver to fix its wholesale and retail prices. According to EU case law, competition principles can be applied where sector specific regulation does not impede the regulated undertaking to develop an autonomous conduct that impedes, restricts or distorts competition. Therefore, the fact that the Spanish Telecommunications Market Commission ("CMT") fixed a maximum level to the wholesale prices in 2010 was not relevant, as until that moment Abertis had enough margin to fix the retail and the wholesale prices. Furthermore, once the CMT regulated the wholesale prices, Abertis could still have lowered the prices respecting the maximum level fixed by the CMT. As the ECJ mentioned in *Telia Sonera*, "*notwithstanding such legislation, if a dominant vertically integrated undertaking has scope to adjust even its retail prices alone, the margin squeeze may on that ground alone be attributable to it (see, to that effect, Deutsche Telekom v. Commission).*" Consequently, and with regard to the seriousness of the conduct and its effects (*i.e.*, *de facto* impeding the entry of competitors in the market), the CNC fined Abertis €13,755,000.

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.

Unilateral Conduct

SCA Dismisses Abuse Of Dominance Claim Against Systembolaget AB

On March 13, 2012 the SCA dismissed a claim brought by Clubvino Antipodes Premium Wines ("Antipodes") against Systembolaget AB ("Systembolaget"), the Swedish state-owned monopolist on the market for sales of alcohol to consumers, alleging that Systembolaget abused its dominant position. Antipodes is a wine club that offers home delivery of wines ordered over the Internet to Swedish consumers.

In November 2011, the youth sobriety organization, ("IOGT-NTO"), filed a complaint against ten undertakings, including Antipodes, for infringement of the Swedish Alcohol Act and/or the Swedish Alcohol Taxation Act. Subsequently, Antipodes filed an abuse of dominance claim against Systembolaget, arguing that Systembolaget had collaborated with IOGT-NTO in launching a complaint against Antipodes (that was made in 2011 by IOGT-NTO described above) as a means of damaging its reputation and position in the alcohol distribution market.

During the SCA's investigation, IOGT-NTO revealed that in the process of following the trend of online purchases of alcohol, it had been communicating with various public authorities, such as the Tax Authorities, the Customs Office, the Swedish National Institute of Public Health, and Systembolaget. IOGT-NTO and Systembolaget admit to having met to discuss online purchases of alcohol, but Systembolaget denies having participated at all in the complaint.

SCA found no reason to pursue the case further.

However, since Sweden joined the EU in 1995, the SCA has an obligation to report on Systembolaget's operations and actions to the Commission twice per year. According to the SCA, the issues raised by Antipodes regarding Systembolaget's behavior will be referenced in the next of these bi-annual reports.

Mergers And Acquisitions

SCA Clears Merger Between Confectionary Manufacturers Cloetta And Leaf Holland

On February 3, 2012, the SCA cleared a merger in the confectionary industry between Cloetta AB ("Cloetta") and Leaf Holland B.V. ("Leaf").

Cloetta is the oldest confectionary manufacturer in Northern Europe. It mainly produces chocolate confectionary, including brands such as Kexchoklad, Center, Plopp and Polly. Cloetta is also active in the sugar confectionary segment, with brands such as Sockerbitar and Polkagrisar and through its subsidiary, Karamellpojkarna. Cloetta has two production sites in Sweden and sells confectionary primarily in Sweden and in the other Nordic countries. Cloetta's 2010 turnover amounted to €111 million, of which €93 million was generated in Sweden.

Leaf is a Dutch company, which is active in about 50 countries, but mainly in the Netherlands, Belgium, Sweden, Norway, Denmark, Finland and Italy. Leaf is chiefly active in the sugar confectionary market, and owns brands such as Djungelvral, Ahlgrens Bilar, Malaco. Leaf is also active in the refreshment market, with, for example, the brand Läkerol. Leaf's 2010 turnover amounted to €527 million, of which €94 million was generated in Sweden.

The parties suggested that the confectionary market be divided into four separate markets: the chocolate confectionary market (including both bagged candy and Pick & Mix); the sugar confectionary market (including both bagged candy and Pick & Mix); the refreshment market (throat lozenge and chewing gums with a specific function); and travel retail.

The SCA as well as various market participants considered that in certain cases, narrower market definitions may be appropriate. For instance although throat lozenge and chewing gums sometimes fulfill the same function (refreshment), they are purchased by different consumer groups. Furthermore, the SCA found that the delimitations between the different confectionary markets may not be as clear as was suggested by the parties, in particular with respect to the market sugar confectionary and the market for chocolate confectionary. The SCA however left the precise product market definition open.

The parties submitted that the geographic market should be limited to Sweden, except for the travel retail market, which covered at least Northern Europe and possibly the EEA. While not objecting to the parties' suggested market definition, the SCA ultimately left the geographic market definition open.

The SCA noted that the parties overlapped in several markets. Both parties were active in the sugar confectionary market, but as Cloetta mainly offered seasonal products, the parties were not in direct competition. The most important overlap identified by the SCA was in the refreshment market, more specifically the throat lozenge segment. However, the market share increment was rather low and the parties' most important products did not compete closely with one another. The investigation also highlighted a significant overlap in the bagged chocolate and sugar confectionary segment, within which both parties had very strong brands However, the SCA concluded the parties' products were highly substitutable with those of competing manufacturers, both within and outside of this segment.

The confectionary market was described by the SCA as highly competitive and driven by innovation, with high potential for new entry and expansion. Certain customers expressed hope that the merger would lead to better product development and market investments.

The SCA concluded that the merged entity would not have an incentive to increase prices, as other confectionary manufacturers would continue to exert substantial competitive pressure.

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").

Mergers And Acquisitions

FCC Approves Orange Switzerland Acquisition By Apax

On February 17, 2012, the FCC cleared the acquisition of Orange Switzerland by Apax Partners LLP. The preliminary investigation did not reveal any indication that the proposed acquisition would create or strengthen a dominant position of any of the network providers in the Swiss mobile telecommunication market.

Swisscom, Sunrise and Orange are the three major market players on the Swiss mobile telecommunication market. The preliminary investigation revealed that the acquisition of Orange Switzerland by the UK private equity investment firm Apax Partners LLP does not change the present structure of the market.

The FCC found that, following the proposed acquisition, the Swiss mobile telecommunication market will still have three large network providers who will exert competitive pressure and open the marketplace to further innovation. The FCC thus decided that the proposed transaction between Orange Switzerland did not raise any concerns from a competition law perspective.

Policy and Procedure

FCC Publishes Recommendation On The Opening Of Taxi Services Market

On March 29, 2012, the FCC published a recommendation to all cantons and municipalities to grant taxi services providers from other regions the possibility of unhampered development. In Switzerland, the regulation of taxi services falls under the jurisdiction of cantons. Most cantons however delegate this competence to the municipalities. This leads to abundance of regulations which hamper the taxis operators' free movement between the municipalities.

The review by the FCC of the cantonal and local regulations revealed that cantons and municipalities do not sufficiently reflect the principles of the Act on the Internal Market ("AIM"). The AIM aims to create a Swiss internal market in which all economic players may act without local or cantonal restrictions. On that basis, taxi service providers have a right to provide certain taxi services even beyond the territory of the municipality in which they are registered.

The FCC's recommendation explains which activities any taxi service provider has a right to exercise outside of the municipality of its registration. In addition, it states the conditions under which all municipalities shall institute authorization systems which allow undertakings from other regions to provide taxi services. The FCC's recommendation also urges the relevant authorities to recognize that the concessions for the use of parking areas in the public domain shall be granted in a transparent and non-discriminatory manner.

Sectoral Investigations

CC Launches An Investigation Into Possible Manipulation Of The LIBOR And TIBOR Reference Rates

On February 3, 2012, the FCC launched an investigation into possible manipulation of the London interbank offered rate ("LIBOR") and its Japanese equivalent TIBOR against the two major Swiss banks (UBS and Credit Suisse), ten foreign financial institutions (Bank of Tokyo-Mitsubishi UFJ, Citigroup Inc., Deutsche Bank Aktiengesellschaft, HSBC Holdings plc, JP Morgan Chase & Co., Mizuho Financial Group Inc., Rabobank Groep N.V., Royal Bank of Scotland Group plc, Société Générale S.A., Sumitomo Mitsui Banking Corporation) and other financial intermediaries. The investigation concerns how the banks set LIBOR and TIBOR, the key reference interbank lending rates for vast quantities of financial instruments set in London and Tokyo.

The FCC announced that the information had come to light following an application under its leniency program, suggesting a whistleblower may have prompted the inquiry. Such information indicated that collusion between derivative traders might have influenced the LIBOR and TIBOR reference rates, and market conditions regarding derivative products based on these reference rates might also have been manipulated.

The FCC is focusing on the impact in the Swiss market. Other antitrust regulators probing LIBOR rates include the U.S. Securities and Exchange Commission, the U.S. Commodity Futures Trading Commission, Japan's Financial Supervisory Agency, and the U.K. Financial Services Authority, and European Union regulators.

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").

Vertical Restraints

High Court Declares Territorial Exclusivity Of Football Broadcasting Rights Incompatible With EU Law

On February 3, 2012, the High Court issued a judgment on the compatibility of the territorial licensing of football broadcast rights with EU competition law.[52] In accordance with the ECJ's ruling on a point of law, the High Court declared that obligations in exclusive license agreements that prohibit the supply of decoder cards to TV viewers across national borders in the EU was a restriction on competition prohibited by Article 101 TFEU.

The ECJ had considered whether it was lawful under the principles of freedom to provide services for Member States to restrict the use of foreign decoder cards to receive broadcasts intended for reception in other countries, and also whether contractual provisions to the same effect infringed competition law. It held that both the national rules and the contractual restrictions were unlawful.

Although Advocate General Kokott had argued for an extension of the principle of exhaustion to services in this case, the ECJ did not

52 Football Association Premier League Ltd. and others v. QC Leisure and others [2012] EWHC 108 (Ch), http://www.bailii.org/ew/cases/EWHC/Ch/2012/108.html.

adopt this approach in its reasoning. Rather, its judgment is limited to the specific provisions of the Satellite and Cable Directive.[53] The Directive provides that there is a single exploitation of copyright in a satellite broadcast, at the point of uplink to the satellite. There is no separate exploitation at the point of reception. It is therefore possible for a licensor to restrict the territory of uplink of a satellite broadcast (although there may be little practical reason for doing so). However, any contractual restrictions on the territory of reception cannot be justified by copyright law (and must be assessed individually as to their compatibility with competition law).

The High Court issued a declaration formally stating that the territorial license agreements infringed Article 101. However, the court carried out no further analysis of the facts nor provided any further guidance on the application of competition law. In particular, the court did not consider the distinction between active and passive sales of decoder cards, nor whether (and in what circumstances) the exemption criteria in Article 101(3) might apply.

The court also considered the implications of displaying the broadcast in pubs for commercial purposes, as opposed viewing the broadcast privately. The ECJ had held that displaying the broadcast to customers in a pub might constitute a communication to a new public for the purposes of the Copyright Directive, requiring a separate license. In applying this judgment, the High Court found that under U.K. law (which it found to be consistent with the Copyright Directive) no separate communication to the public of a television broadcast takes place in circumstances where the customer was not required to pay an entrance fee.[54] This exemption extends to broadcasts, and to films and sound recordings included in the broadcast. However, recordings of music whose author is not the author of the broadcast, and which are not embodied in the film itself, do not benefit from exemption. The court concluded that, although most of the broadcast could be displayed for commercial purposes in a pub without a separate license, any recording of the Premier League anthem as it was played in a stadium before a match was not embodied in the film, and so did not benefit from the exemption, and therefore was a separate act of communication to the public, requiring a license.

Mergers And Acquisitions

CC Issues Statement On South Staffordshire Water/Cambridge Water Merger

On February 6, 2012, the CC published an issues statement in the acquisition of Cambridge Water Plc ("Cambridge Water") by South Staffordshire Plc ("South Staffordshire") following referral by the OFT.[55] South Staffordshire is a water company whose assets include a network infrastructure (mains infrastructure, water treatment works and pumping stations) for the supply of water in the South Staffordshire area, but which does not have a regulated sewerage business. It generates approximately £250 million in turnover per year.[56] Cambridge Water is also a water company, owning a network infrastructure for the supply of water in the Cambridge area, but no regulated sewerage business. It is one of the smallest of the water companies in England and Wales, supplying water to a population of 309,000 in an area covering south Cambridgeshire and the City of Cambridge and generating a turnover of approximately £20 million per year.[57]

The OFT referred the acquisition by South Staffordshire, the owner of South Staffordshire Water PLC ("SST"), to the CC under section 32(b) of the Water Industry Act 1991, as amended by the Enterprise Act 2002. This was a mandatory water merger reference on the basis that the turnover of both SST and Cambridge Water exceeds £10 million. Following such a reference, the CC must consider whether the merger has or may be expected to prejudice the ability of the Water Services Regulation Authority ("Ofwat") to make comparisons between different water enterprises in carrying out its functions.

The CC's issues statement, published one month after the initial reference from the OFT, sets out the CC's preliminary views on the merger. In its initial views, the CC has observed that there are three ways in which the merger could theoretically prejudice Ofwat's ability to make comparisons between different water enterprises (the "Potential Adverse Impacts"): it could have an adverse impact on Ofwat's ability (i) to make comparisons when setting price limits, (ii) to monitor and incentivize performance and regulatory compliance, and (iii) to identify and spread best practice. The Potential Adverse Impacts could arise as a result of a decline in the precision of the comparative tools used by Ofwat, and a weakening of the targets that Ofwat uses those comparative tools to set (for example, by the

53 Satellite and Cable Directive (93/83/EEC).

54 Copyright, Designs and Patents Act 1988, section 72.

55 CC Statement of Issues, *Completed Acquisition of Cambridge Water PLC by South Staffordshire PLC,* (February 6, 2012), http://www.competition-commission.org.uk/assets/competitioncommission/docs/2012/south-staff-cambridge-water/south_staffs_issues_statement_.pdf. *See also* OFT Press release 01/12 OFT refers water merger to the Competition Commission, (January 5, 2012), at http://www.oft.gov.uk/news-and-updates/press/2012/01-12.

56 http://www.oft.gov.uk/shared_oft/mergers_ea02/2012/South_Staffs.pdf.

57 http://www.oft.gov.uk/shared_oft/mergers_ea02/2012/South_Staffs.pdf.

loss of a possible benchmark against which other companies are compared). In addition, the creation of a new entity with characteristics that may be different from those of each merging party individually may alter the nature of the comparators that are available to Ofwat.

The CC will examine the impact of the merger on the precision of comparisons and target levels across each of the Potential Adverse Impacts and consider the detriment to customers that may result from any impact identified. It will then consider whether any adverse impact, on its own or together with others, amounts to prejudice.

It should be noted that Ofwat has recently published two consultation documents setting out proposals for reforming its approach to price setting and monitoring compliance. These proposals seem to imply that Ofwat may rely less in future on comparators when carrying out its statutory functions. The CC has stated that it will consider whether its assessment of the Potential Adverse Impacts would be affected by Ofwat's proposals, taking into account the timing and nature of the different regulatory changes under consideration, including potential changes to comparative methodologies.

CC Announces Adverse Provisional Findings On Anglo American/Lafarge Construction Materials Joint Venture

On February 21, 2012, the CC announced its provisional findings in relation to the proposed construction materials joint venture (the "JV") between Anglo American PLC ("Anglo American") and Lafarge S.A ("Lafarge") (together, the "Parties").[58]

The JV, which aims to consolidate the Parties' U.K. activities in the production and supply of aggregates, asphalt, cement and ready-mix concrete ("RMX"), qualified for review under the EU Merger Regulation. However, the Parties made a pre-notification request under Article 4(4) of the EU Merger Regulation for the European Commission to refer the merger to the OFT, on the basis that the effect of the transaction would be felt only within the U.K., and that it should therefore be examined by the U.K. authorities. The European Commission made the Article 4(4) reference on May 16, 2011, and, on September 2, 2011, the OFT announced that it had decided to refer the proposed JV to the CC.

The CC reached the provisional finding that the proposed JV would give rise to a substantial lessening of competition in relation to the supply of bulk cement. It also provisionally concluded that the JV would lead to a substantial lessening of competition in the national markets for the supply of rail ballast and high purity limestone, and in a number of local markets for the supply of primary aggregates, asphalt, and RMX.

The CC announced that it was considering a number of possible remedies, including limiting the scope of the JV (to exclude the parties' cement and RMX operations), or alternatively requiring the divestment of certain cement and RMX operations. In relation to the concerns in the aggregates, asphalt and RMX markets, the potential remedies identified by the CC would require the divestment of local operations to remove the relevant overlaps.

The deadline for the CC to issue its Final Report is May 1, 2012.

The OFT Refers The Acquisition By VPS Of SitexOrbis To The CC

On March 5, 2012, the OFT referred the completed acquisition of SitexOrbis Holdings Limited ("SitexOrbis") by VPS Holdings Limited ("VPS") to the CC.[59]

VPS and SitexOrbis are the two largest suppliers of vacant property security services to local authorities and businesses. This involves securing vacant social housing and commercial properties through the provision of steel screens, doors and alarms.

The OFT found that the acquisition may be expected to result in a substantial lessening of competition, on the basis that (i) the parties are each other's closest competitors, (ii) their nearest competitors are small in geographic scope and scale and (iii) there is no compelling evidence suggesting that the parties' competitors would be able to expand their services (or that a new entrant would be able to introduce services) to counteract the loss of competition caused by the Merger. The OFT also noted that a number of customers raised concerns about the impact of the merger and the consequent loss of the strong competition between the parties.

The CC has been asked to decide whether the merger may be expected to result in a substantial lessening of competition in any market or markets for goods or services in the U.K. and is expected to produce its report by August 19, 2012. The CC requests that evidence from interested parties be provided, in writing, by March 20, 2012.

58 CC Notice of Provisional Findings made under Rule 10.3 of the CC Rules of Procedure, *Reference Relating to the Anticipated Joint Venture Between Anglo American PLC and Lafarge S.A.,* (February 21, 2012), http://www.competition-commission.org.uk/assets/competitioncommission/docs/2011/anglo-american-lafarge/anglo_notice_of_pfs.pdf.

59 OFT Press Release 14/12, *OFT refers completed acquisition by VPS Holdings Limited of SitexOrbis Holdings Limited to Competition Commission*, (March 5, 2012), http://www.oft.gov.uk/news-and-updates/press/2012/14-12.

CC Approves Joint Venture Between Alpha Flight Group And LSG Lufthansa

On March 14, 2012, the CC formally cleared the anticipated joint venture (the "Transaction") between Alpha Flight Group Limited ("Alpha") and LSG Lufthansa Service Holding AG ("LSG") unconditionally.[60] The CC concluded that the 50/50 joint venture was unlikely to lead to a substantial lessening of competition in the market for the supply of in-flight catering services in the U.K.. The CC's decision was based on several factors, including the presence of substantial countervailing buyer power, low barriers to entry and evidence of customers switching between different catering providers in recent years.

The Transaction qualified for review under the EU Merger Regulation. However, the parties made a request under Article 4(4) of the EU Merger Regulation for the Transaction to be referred in whole to the U.K. The OFT agreed with the referral request and the European Commission referred the Transaction to the OFT for investigation on July 19, 2011. On October 10, 2011, the OFT announced that it had decided to refer the Transaction to the CC under Section 33(1) of the Enterprise Act 2002, on the basis that it had a realistic prospect of having unilateral effects at several UK airports. The OFT also concluded that the joint venture could result in a substantial lessening of competition in the supply of full service catering for long-haul flights.

In its counterfactual analysis, the CC noted that in-flight catering supply contracts tended to be three to five years in length and, as such, considered that the appropriate counterfactual should be over a period no longer than three years. Based on the financial performance of Alpha and LSG, it concluded that, in the absence of the merger, both Alpha and LSG would continue to compete and/or operate in Heathrow and regional airports.

The CC considered that the relevant market was the supply of in-flight catering services in the U.K., due to the overlap in services provided by both parties and the fact that most competition faced by a supplier of the relevant service came from other suppliers of such service. However, the CC recognized that the specific requirements of customers varied according to the type of flight and airport. As a result, the CC looked at the joint venture within each of seven distinct customer segments to determine whether it would lead to higher prices or a lower quality of service.

The CC took into account the following competitive features of the market: (i) the prevalent use of bidding processes by airlines in selecting their catering provider, which tended to result in competitive outcomes even where there was a low number of bidders; (ii) the existence of new entrants in the last ten years, which suggested that barriers to entry were not prohibitive; and (iii) the significant buyer power that some airlines have in individual negotiations because of the value of their business to in-flight caterers.

The CC's decision was finely balanced in relation to the long-haul customer segment, both at Heathrow and at regional airports. However, it concluded that the existence of credible suppliers, when combined with a range of factors conferring a degree of buying power on customers, meant that the proposed merger was unlikely to give rise to a substantial lessening of competition in these segments. In short-haul customer segments, the CC considered that barriers to entry were not generally high, and that, in some cases, sufficient potential bidders would remain in the market post-merger to ensure an effective and competitive bidding process and, in others, airline customers were large and sophisticated customers who would have options in terms of sponsoring or encouraging entry. As a result, the CC concluded that the proposed merger would not be expected to lead to a substantial lessening of competition in any relevant market in the U.K.

Policy And Procedure

HM Treasury Publishes The Financial Services Bill

On January 27, 2012, HM Treasury published the text of the Financial Services Bill (the "Bill")[61], which was introduced into Parliament on January 26, 2012 and sets out reforms to the U.K. financial regulatory system. Under the Bill, conduct of business regulation will be transferred from the FSA, which will cease to exist, to the newly-created Financial Conduct Authority (the "FCA"), which will have a strategic objective of ensuring the proper functioning of financial markets, as well as three operational objectives: consumer protection, integrity, and promoting effective competition in the interests of consumers in the markets for regulated financial services.

The Bill will enable designated consumer bodies to make complaints to the FCA if they consider that a feature of the U.K. market for financial services is, or appears to be, significantly damaging the interests of consumers. The FCA must publish a response to any such complaint within 90 days after the day on which it is received, stating what action it proposes to take. In addition, the Bill empowers the FCA to conduct market studies on its own initiative and, in situations

60 http://www.competition-commission.org.uk/assets/competitioncommission/docs/2011/alpha-flight-group-lsg-lufthansa/final_report_excised.pdf.

61 Financial Services Bill (http://www.publications.parliament.uk/pa/bills/cbill/2010-2012/0278/2012278.pdf).

where it wishes to draw on the powers or expertise of the competition authorities, to make references to the OFT on the question of whether any feature of a market for the supply or acquisition of financial services in the UK or a part of the UK may prevent, restrict or distort competition. The OFT must publish a response within 90 days after the day on which it receives such reference, stating whether it intends to refer the matter to the CC, use its own powers of enforcement under the Competition Act, or take no further action. The government notes that references to the OFT are likely to be particularly important in the first five years of the new regime and that, after the expiry of this initial period, as the FCA develops competition expertise of its own, the FCA's recourse to competition authorities will be reviewed.

In addition to repealing the special competition regime for recognised investment exchanges and clearing houses contained in the Financial Services and Markets Act 2000 (the "FSMA") (and removing exclusions for such bodies from the Competition Act), the Bill further amends the FSMA to give both the OFT and CC powers to scrutinise the practices (including guidance, rules, statements and codes) of the FCA and the Prudential Regulation Authority (the "PRA"). If the OFT or CC consider that the regulating provisions or practices of the FCA or PRA may cause or contribute to the prevention, restriction or distortion of competition in the supply or acquisition of goods and services in the U.K., they may give advice on such regulating provisions or practices, to which the FCA or PRA must respond, in writing, within 90 days. Having considered this response, if the OFT or CC have not changed their view of the relevant regulating provisions or practices in question, it may refer the matter to the Treasury, which, having consulted the FCA or PRA and considered the OFT or CC's advice, as well as the FCA or PRA's response, may give directions to the FCA or PRA requiring specified action to be taken.

The OFT has stated that it supports the plan to grant competition regulation powers to the FCA and that it will work with the FSA to implement a framework for the FCA that is effective for both markets and consumers. The Bill is due to receive Royal Assent by the end of 2012 and the new regulatory regime is expected to be operational in early 2013.

U.K. Government Reforms The Competition Regime

On March 15, 2012, the U.K. Government Department for Business, Innovation and Skills ("BIS") published a response following its March 2011 announcement of a consultation entitled "A Competition Regime for Growth" which identified possible reforms to the U.K. competition regime designed ostensibly to improve the robustness of decisions, ensure better focus on "high impact" cases, and improve the speed and predictability of investigations.[62]

The Response explains the BIS's decision to create a new Competition and Markets Authority ("CMA") to which the functions of the CC and the competition functions of the OFT will be transferred. In addition, the Response proposes *inter alia* the following changes to the criminal cartel regime, the mergers regime, and the antitrust regime.

With respect to the criminal cartel regime, the most significant, and potentially controversial, decision in the Response is BIS's decision to remove the "dishonesty" element from the cartel offense and define the offense so that it does not include cartel arrangements that the parties have agreed to publish in a suitable format before implementation (so that customers and others are aware of them). Although certain exceptions apply, the reform has the potential to significantly diminish the standard for the cartel offense.

With respect to mergers, BIS has decided to maintain the voluntary notification system, albeit with some amendments, such as statutory information gathering powers, statutory power to suspend and reverse integration steps, and powers to introduce fines, alongside judicial remedies, for the failure to comply with "hold separate" requirements. The Response also proposes to maintain the current jurisdictional thresholds and to introduce a statutory time limit to the review process. The time limits would be 40 working days for Phase I (capable of extensions where information is outstanding); 50 working days from a Phase I decision to finalising remedies; and 24 weeks for Phase II (extendable by 8 additional weeks). This will make the statutory Phase I review period one of the longest in the world. In addition, merger fees are due to increase from October 6, 2012.

With respect to the antitrust regime, the Response considers carefully the perceived failings of the current system, notably the low number of cases and unsuccessful prosecutions, the duration of the investigations, and the fact that there is a risk of confirmation bias given the OFT's role as investigator, prosecutor, and decision maker. BIS has decided, however, not to amend the current structure of the regime principally because the OFT's recent *Competition Act Procedures Guidance* (published in March 2011) adopts measures designed to quell concerns. The Response therefore proposes only minor changes to the antitrust regime, which include the introduction of statutory time limits for investigations, a requirement

62 Department for Business, Innovation &Skills, *Growth, Competition, and the Competition Regime: Government Response to Consultation,* March 2012, at http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/g/12-512-growth-and-competition-regime-government-response.pdf.

for decision makers to be separate from those carrying out investigations, and the use of an adjudication panellist in antitrust cases.

Finally, the Response seeks to address complaints that the Markets Regime is too complicated, duplicative, lengthy, and disjointed. To address these concerns, the BIS intends to introduce statutory time limits and confer information gathering powers upon the CMA (with civil penalties for failure to comply) at the market study phase before a reference is made, creating a formal Phase I.

Certain of the proposed reforms will be subject to changes in primary legislation (*i.e.*, principally to the Enterprise Act 2002 and the Competition Act 1998). These amendments will proceed through Parliament in the ordinary course and be subject to Parliamentary timing and approval. In parallel, the U.K. Government will implement reforms that are not subject to Parliamentary approval and will consult on changes to the consumer enforcement regime and the recovery of CAT costs. BIS expects the CMA to be fully operational by April 2014.

CAT Confirms That Litigation Privilege Applies To Competition Act Investigations

On March 21, 2012, the CAT considered an application by the OFT for an order for disclosure. The application related to certain documents which the OFT considered to be relevant to the liability issues in an appeal brought by Tesco to the OFT's decision of July 26, 2011 called "Diary retail price initiatives" (the "Decision"). The CAT denied the OFT's application, and commented on the scope of litigation privilege before the adoption of an infringement decision.[63]

In the Decision, the OFT found that four supermarket chains (including Tesco) and five dairy processors had breached Chapter I of the Competition Act 1988 (the "Act") by co-ordinating price increases for certain diary products through indirect exchange of retail pricing in 2002 and/or 2003. The OFT imposed a fine of £10.43 million on Tesco for its part in the scheme, which involved alleged infringements during 2002 and 2003 in the domestic market for cheese. On October 10, 2011, Tesco lodged an appeal with the CAT seeking annulment of the OFT's decision or, in the alternative, a reduction in the fine imposed.

On July 27, 2011, a day after the OFT took the Decision, but ten working days before it had been notified to Tesco and the other parties, Tesco's solicitors sent two witness statements to the OFT and a letter indicating they had spoken to a number of individuals involved in the infringements and that the OFT should not reach its final decision without taking account of this new evidence. The OFT informed Tesco that its submission was out of time and returned the statements unread. Following Tesco's appeal to the CAT in October 2011, the OFT asked Tesco to identify all potential witnesses it had contacted before or since July 27, 2011. Tesco claimed that the relevant material was and remained subject to litigation privilege and that, in any event, the OFT's application for disclosure was unnecessary.

The CAT found that disclosure would be contrary to the overriding objective of rule 19 of the Competition Appeal Tribunal Rules 2003 to deal with the appeal justly. It further found that the documents sought by the OFT were neither necessary nor proportionate to the issues before the CAT in the appeal. Although not strictly necessary for the decision, the CAT then proceeded to comment on the issue of litigation privilege. Citing the House of Lord's decision in the case of *In re L (a minor) (Police Investigation: Privilege)* [1997] AC 16, the CAT found that the question hinged on whether or not the OFT's investigation could be properly classified as adversarial, as opposed to merely investigative or inquisitorial. It found that it would be incorrect to characterize all competition law investigations as being inquisitorial in nature irrespective of the proceedings in question and the particular circumstances of the case. In this case, the CAT decided that the administrative procedure under the Act was sufficiently adversarial by the time Tesco gathered the material sought by the OFT and, as a result, litigation privileged protected this material from disclosure.

The CAT noted that, in finding that litigation privilege applied to documents created during the context of the OFT's administrative procedure, it did not consider that it was breaking new ground. It commented that it was "*likely that both legal advice privilege and litigation privilege have routinely been claimed and probably never challenged in relation to similar or analogous investigations under the Act. Were it otherwise, the scope for witnesses being discouraged and unfairness would surely be increased*." Nevertheless, it is likely that the CAT's decision will bring greater certainty to the status of material gathered by a company's solicitors in competition law investigations, and particularly after the issue of a statement of objections.

63 *Tesco Stores Limited, Tesco Holdings Limited and Tesco plc v. Office of Fair Trading*, [2012] CAT 6, judgment of March 20, 2012.

Sectoral Investigations

CAT Refuses BAA Permission To Appeal Against CAT Judgment On Divestment Of Stansted

On March 12, 2012, the CAT published an order by which it refused BAA permission to appeal against the CAT's decision of February 1, 2012 (the "Decision") to uphold the CC's decision to require BAA to divest Standsted airport. The CAT found that BAA does not have a real prospect of success in appeal, and that the proposed appeal does not raise a point of general public importance such as to warrant the grant of permission to appeal.

The Decision comes after numerous appeals launched by both BAA and the CC arising from the CC's report of March 19, 2009 (the "2009 Report"). In the 2009 Report, the CC concluded, *inter alia*, that BAA's common ownership of airports in the south east of England and lowland Scotland gives rise to adverse effects on competition in connection with the supply of airport services. To address the adverse effects identified, the CC decided on a package of remedies which required BAA to divest both Stansted and Gatwick airports and either of Edinburgh or Glasgow airports.

Following unsuccessful attempts by BAA to quash the CC's decision, in November 2010 the CC invited evidence on whether there had been any relevant developments since the 2009 Report sufficiently significant to engage Section 138(3) of the Enterprise Act 2002, which requires that any remedy decisions of the CC shall be consistent with the decisions taken in the market investigation report unless there has been a material change of circumstances since the preparation of the report or the CC otherwise has a special reason for deciding differently. On July 19, 2011, the CC published its final decision finding that there were no material changes of circumstances or special reasons that would justify amending the decision in the 2009 Report. BAA applied to the CAT to review the CC's decision of July 19, 2011 under section 179 of the Enterprise Act 2002.

In the Decision, the CAT rejected each of BAA's grounds of challenge and found that the CC had been entitled to conclude that the divestiture of Standsted remained a proportionate remedy. As well as refusing permission to appeal the Decision, the CAT has rejected an application from the CC to abridge the time for BAA to apply directly to the Court of Appeal for permission to appeal. The CAT does not consider that there is sufficient urgency to warrant such abridgement of time. It notes, however, that BAA should get on with any such application as promptly as possible, and that it would be desirable for the Court of Appeal to consider any such application promptly.

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