BELGIUM

This section reviews competition law developments under the Act on the Protection of Economic Competition of September 15, 2006 ("APEC"), which is enforced by the Belgian Competition Authority ("BCA"), which comprises the Directorate General for Competition and the Competition Council. The Competition Council is itself consists of the College of Competition Prosecutors ("CCP") and the Council strictu sensu (the "Council").

Unilateral Conduct

The Court of Appeal Clarifies Scope of Voluntary Intervention by the Competition Council in the bpost Appeal

As previously reported, on December 10, 2012, the Council imposed a fine on bpost NV/SA ("bpost"), the Belgian incumbent postal operator, for having abused its dominant position by operating a "model per sender" rebate scheme. Bpost appealed this decision on January 9, 2013. On February 6, 2013, the Council voluntarily intervened in the appeal proceedings. On May 24, 2013, the Court of Appeal (the "Court") issued an interim judgment on the scope of the Council's powers of voluntary intervention.

Following the Council's intervention, bpost argued that the Council's intervention letter did not meet the formal requirements of Article 813 of the Judicial Code and was therefore void. The Court, however, was flexible in its interpretation of Article 813 of the Judicial Code and took into account the specific characteristics of the Council's intervention in this case. On this basis, the Court determined that the Council's intervention was legitimate. The Court stressed that even if it followed a stricter interpretation of Article 813, bpost had failed to demonstrate that it had suffered any prejudice as a result of the incompleteness of the Council's intervention letter.

The Court also rejected bpost's argument that the Council's intervention was not admissible in the absence of an explicit authorization to that effect in the APEC. The Court noted that although the APEC does not explicitly provide for the possibility of the Council to intervene, it does not explicitly prohibit such action. The Court, with reference to the *VEBIC* judgment,[1] held that under Articles 101 and 102 TFEU, national competition authorities must be able to intervene in appeals of their decisions in order to effectively enforce competition law.

The Court also confirmed that any intervention by the CCP in a case such as this would not be admissible because the CCP does not adopt decisions that are subject to appeal.

Policy and Procedure

The 2013 Competition Reform

On April 3, 2013, the Belgian Parliament adopted a new Belgian Competition Act (the "Act") amending the Act on the Protection of Economic Competition of September 15, 2006, which was subsequently published in the Belgian Official Gazette on April 26, 2013. The Act entered into force on September 6, 2013. Reform of Belgian competition law is part of a larger codification project, initiated by Minister J. Vande Lanotte, aimed at establishing a comprehensive Code of Economic Law.[2]

The Act re-establishes the BCA as a single autonomous authority with a simplified internal structure. From September, the BCA will comprise: (i) the President; (ii) the Competition College (consisting of the President and two "assessors" appointed on a case-by-case basis); (iii) a Board of Directors (composed of the President, the Prosecutor General, the Chief Economist and the General Legal Counsel); and (iv) the Prosecutor General and their staff of prosecutors. The Competition College will function

[1] *VEBIC* (Case C-439/09) 2010 ECR I-12471.

[2] Law of April 3, 2013, which introduces a book IV "Protection of Competition" and book V "Competition and Price Evolutions" into the Economic Law Code and inserts definitions and enforcement provisions specific to book IV and book V into the Economic Law Code, and another Law of April 3, 2013, which inserts provisions dealing with article 77 Constitution matters into book IV "Protection of Competition" and book V "Competition and Price Evolutions".

as the decision-making body, while the Prosecutor General will be in charge of investigating alleged restrictive practices and concentrations.

Other changes that will be effected by the Act are outlined below:

- The Act enables the BCA to impose fines ranging from €100 to €10,000 on individuals found to have been involved in certain "hardcore" antitrust infringements (e.g., price fixing agreements, market sharing, and limitation of output or sales).
- The Act allows individuals to apply for immunity. When an individual applies for leniency where their employer company has also applied for leniency, the individual will now need to co-operate with the employing company during its leniency process.
- The Act introduces a settlement procedure for cartel and abuse of dominance cases. Companies that elect settlement may receive fine reductions of up to 10%, but will be obliged to admit liability for the relevant offense. Settlement decisions reached by the BCA are not open to appeal.
- The Act substantially modifies the procedure for requesting interim measures. For example, such requests are now to be initiated directly with the President of the BCA, and not with the CCP as under the previous APEC. Furthmore, interim measure requests will no longer be subject to preliminary investigation by the Prosecutor.
- The new Act reduces the review period for transactions notified pursuant to the simplified merger control rules, from 20 to 15 working days.

Moreover, the Act grants new powers to the BCA relating to price control/monitoring. When the BCA's so-called "Price Observatory" identifies problematic prices or margins, abnormal price evolutions or structural market problems, it may consult the parties involved, professional federations, and consumer organizations and subsequently report its findings to the Minister of Economic Affairs. Such reports will also be simultaneously transmitted to the BCA.

As for urgent matters, the Competition College may proceed to impose interim measures aimed at remedying perceived problems for a maximum period of six months. These interim measures may be appealed before the Brussels Court of Appeal. Where the Competition College has imposed interim measures, the Minister must, within six months, present a plan to the Federal Government outlining structural measures to address the relevant competition concerns.

DENMARK

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

Vertical Agreements

Unilever Denmark Accepts Fine for Imposing Resale Price Maintenance

On April 30, 2013, the consumer goods company Unilever Denmark ("Unilever") accepted a fine of DKK 1.5 million (approx. €201,500) for having engaged in resale price maintenance with respect to its dealers, the retail operations Coop Denmark and Dansk Supermarked.

Unilever produces, distributes, and markets foods, home care and personal care products, including the ice cream brand Frisko. In December 2012, Unilever contacted the DCCA and the Public Prosecutor for Serious Economic and International Crime and explained that it had, in a number of cases, agreed to a so-called "revenue guarantee arrangement" with Coop Denmark and Dansk Supermarked, which both sold Frisko ice cream on behalf of Unilever. Under the revenue guarantee arrangement Coop Denmark had to charge Unilever's recommended prices for Frisko ice cream. The DCCA found that the arrangement provided for anti-competitive resale price maintenance, and that this infringement had lasted a period of three years ending on December 20, 2012.

Unilever did not contest the DCCA's fine of DKK 1.5 million (approx. €201,500). The DCCA took no further action in relation to the infringement.

In setting the fine, the DCCA took into account (i) the duration of the infringement; (ii) Unilever's turnover; (iii) the fact that the revenue guarantee arrangement was re-executed on several separate occasions. The DCCA accepted as mitigating factors the facts that Unilever (i) contacted the Public Prosecutor and the DCCA upon discovering that the revenue guarantee arrangement was potentially anti-competitive; (ii) co-operated with the DCCA throughout its investigation; and (iii) had a well-documented and comprehensive compliance program.

BSH White Goods and Two Members of Its Management Have Accepted Fines in Settlement for Resale Price Maintenance and Prevention of Parallel Imports on White Goods

On April 24, 2013, BSH accepted a fine of DKK 1.5 million (approx. €201,500) for having partly entered into agreements that provided for resale price maintenance and for having partly entered into an agreement with one of the company's wholesalers with the aim of preventing parallel imports of the company's products into Denmark. Further, two members of BSH's management each accepted fines of DKK 20,000 (approx. €2,700) for their participation in the relevant infringements.

In 2010, after carrying out a dawn raid, the DCCA notified the Public Prosecutor for Serious Economic and International Crime about BSH's infringement of the Danish Competition Act. BSH is one of the largest providers of white goods (i.e., household appliances) in Denmark. The company markets the brands Bosch and Siemens.

The DCCA determined first, that BSH had engaged in anti-competitive resale price maintenance by demanding that certain internet dealers sell certain of BSH's products at the prices indicated in the "observed prices", a list compiled and distributed by BSH. Second, the DCCA found that BSH had restricted parallel imports by entering into an agreement with a German wholesaler that prohibited the wholesaler from selling BSH products from Germany in Denmark.

The Public Prosecutor for Serious Economic and International Crime fined BSH DKK 1.5 million (approx. €201,500) for these infringements. BSH did not contest these fines.

The Public Prosecutor also fined two members of the company's management team for their participation in the infringements. The two members each accepted a fine of DKK 20,000 (approx. €2,700).

Horizontal Agreements

The Danish Competition and Consumer Authority Makes an Informative Statement on Trade Association's Publication of Prices

In an informative statement made on May 6, 2013, the DCCA decided that the Danish pig producers trade association (the "DPP") would be allowed to introduce a system for the publication of price statistics without violating the Danish Competition Act.

In a letter of May 2, 2012, the DPP asked the DCCA whether it would be a violation of the Danish Competition Act to introduce a so-called "price portal", the purpose of which would be to grant DPP members access to statistics on the prices charged by other DPP members.

According to the request, the purpose of the price portal would be to strengthen the negotiation position of DPP members with respect to buyers. The DDP stressed that these buyers typically have an advantage in relation to information about prices compared to the members of the DPP, and it sought to minimize this lead in order to better equip DPP members in their negotiations with these buyers.

The DPP stated that its members would report on negotiations carried out in the price portal, after which these data would be collected and aggregated in the form of price statistics which the members could use in comparisons with their own prices. The collection and handling of the price data would be handled by an independent third party.

In the informative statement, the DCCA initially considered whether the price portal could give rise to competition concerns. The DCCA highlighted that the price portal would increase transparency in relation to prices on the market and that consequently members of the DPP would standardize their prices leading to a potential increase in prices.

However, the DCCA eventually concluded that this was an unlikely outcome. It stated that the increased transparency could in fact enhance competitive power and add to members' leverage in negotiations. According to the letter, members of the DPP were not in a position to standardize their sales prices due to an overcapacity in the market in relation to their products which meant that its members would be unable to fix their own sales prices.

Further, the DCCA attached importance to the fact that members of the DPP would only get access to the data in an aggregated form and that any price statistics would be of a historical nature. The DCCA noted that prices would usually have to be at least three months old to be considered historical, but that in this case, one month was sufficient because of the volatile price movements in the market for DPP members' products. Finally, the DCCA emphasized that the data would be processed by an independent third party.

With this background, the DCCA concluded that it was unlikely that the price portal would lead to any competition concerns.

Policy and Procedure

New Changes to the Danish Competition Act Concerning Fees in Relation to Merger Notification

On May 30, 2013, the Danish Parliament adopted changes to the Danish Competition Act submitted by the Ministry of Business and Growth on March 13, 2013, proposing a fee for the notification of mergers of up to DKK 1.5 million (approx. €201,500). These changes will take effect from August 1, 2013.

The fee for a simplified notification amounts to DKK 50,000 (approx. €6,700). The fee for a full notification amounts to 0.015% of the aggregate annual turnover in Denmark of the undertakings involved, with a maximum cap of DKK 1.5 million (approx. €201,500). Thus, due to the threshold values, the fee for a full notification will amount to a minimum of DKK 135,000 (approx. €18,100). The maximum fee of DKK 1.5 million (approx. €201,500) will apply in the case of mergers where the undertakings involved have an aggregate annual turnover in Denmark of DKK 10 billion or more (approx. €1.3 billion). The turnover of the undertakings involved should be calculated according to the same principles used when estimating whether the threshold values in relation to merger control have been exceeded.

According to the amendment to the Act, a merger investigation will only progress when the DCCA has received documentation proving that the fee has been paid. If a notification is submitted without this documentation, the notifying party will receive a notice from the DCCA requiring payment of the fee within 5 days.

If the fee is not paid within this time frame, the merger is declared void. Moreover, the time limit of 25 working days from the receipt of full notification in phase 1 runs from the time the DCCA receives such documentation.

The fee paid to the DCCA is generally non-refundable. Repayment will only take place in situations listed below:

- If the DCCA finds that the transaction is not subject to notification;
- If the notifying party retracts the notification prior to declaring the transaction complete;
- If (i) the notification is withdrawn before a decision has been made by the DCCA, and (ii) the withdrawal is the result of another Danish authority's refusal of permission for the undertakings involved to merge.

If the DCCA requires that a full notification should have been made rather than a simplified notification, the notifying party is obliged to pay the fee related to a full notification (with a deduction of the previously paid fee for the simplified notification). If this amount is not paid, the notifying party will receive a notice from the DCCA requiring payment of the amount within 5 days. If payment is not made within this time period, the merger is declared void.

Due to the possibility of an increase in the fee, the notifying party now has the option of appealing against the DCCA's decision to require a full notification instead of a simplified notification to the DCAT. If the notifying party chooses to appeal against the decision, the time limit for the DCCA's consideration of the notification will be suspended until the DCAT has made a decision in the case. It is assumed in the amendment to the Act that such complaints will be dealt with immediately by the DCAT.

FINLAND

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

Horizontal Agreements

Interim Ruling in the Hydrogen Peroxide Damages Case

On July 4, 2006, the District Court of Helsinki (the "Court") heard an action for damages in connection with the hydrogen peroxide cartel censured by the Commission in 2006, despite the fact that the supply agreement between the plaintiff and the cartelist in question contained arbitration clauses.[3]

The Finnish chemicals company Kemira Oyj ("Kemira") was a member of the hydrogen peroxide cartel, selling hydrogen peroxide to Finnish pulp and paper companies Metsä-Botnia and M-real (the "M Companies"), which belong to the Metsäliitto Group. The M Companies claim that the cartel caused overcharging for hydrogen peroxide. The M Companies sold their claim to the Cartel Damage Claims company (the "CDC"), which is now pursuing these claims.

The hydrogen peroxide supply agreements between Kemira and the M Companies contained a number of arbitration clauses, clauses that Kemira claimed prevented the Court from hearing the case (i.e., Kemira claimed that the damages claim must be resolved through arbitration). The Court rejected this argument, finding that the damages claim did not necessarily fall within the terms of the agreement in that it was based on Kemira being party to the illegal cartel agreement. Accordingly, the Court considered itself competent to hear the case in its entirety notwithstanding the arbitration clauses.

This finding is significant because it means that antitrust damages claims can be taken to general courts despite the presence of arbitration clauses in business agreements. Further, the decision indicates that antitrust damages claims are not based on the relevant supply agreement between the cartel member and the plaintiff customer but on the infringement of competition law.

The Court further ruled that the purchase of the antitrust damages claim by CDC was legitimate. Kemira claimed that the M Companies had sold their claim to the CDC as a means of depriving Kemira of costs in the event that the CDC lost the case (Kemira contended the CDC was less well positioned than the M Companies to pay Kemira's costs). Kemira pointed to the very low price at which the claim was sold as evidence that the transfer was a sham. However, the Court rejected this argument and considered the transfer to be genuine. The decision therefore affirms that using specialist antitrust litigation companies to pursue claims is possible in Finland.

Mergers and Acquisitions

Uponor/KWH

On May 24, 2013, the Market Court cleared, subject to conditions, the combination of the civil engineering businesses of Uponor Oyj ("Uponor") and KWH-Yhtymä Oy ("KWH"), the two largest providers of plastic pipe solutions in Finland.[4] The clearance came despite the FCCA requesting that the transaction be prohibited; this was only the third time since merger control rules were introduced in 1998 that the FCCA attempted to prohibit a merger.

The FCCA considered that the proposed transaction would have resulted in a significant reduction in competition, particularly in the market for plastic pipes for use in civil engineering. The FCCA found that the commitments offered by Uponor and KWH did address its competition concerns, and as such the FCCA moved to prevent the acquisition in the Market Court. The FCCA cannot itself set conditions that are not accepted by the notifying party.

[3] District Court of Helsinki, case identification 11/16750, interim judgment 36492 on July 4, 2013.

[4] Case MAO:228/13, case identification 91/13/KR on May 24, 2013

The Market Court accepted the FCCA's argument that the planned acquisition would have significantly reduced competition in the markets for certain types of pipes. In a number of pipe markets, the combined market share of Uponor and KWH exceeded 50%. The Market Court also noted that since Uponor and KWH were each other's main competitors, the transaction would diminish competition to a greater degree than would be indicated by a market share analysis. Furthermore, the Market Court did not identify any appreciable countervailing factors, such as likelihood of entry.

However, the Market Court did not accept the FCCA's proposal to prohibit the acquisition, instead deciding to clear the transaction subject to conditions. Pursuant to these conditions, Uponor and KWH must divest seven production lines to other pipe producers and reserve production capacity in certain types of pipes for other pipe producers.

FRANCE

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

Horizontal Agreements

The FCA Fines Four Distributors of Commodity Chemicals €79 million

On May 29, 2013, the FCA imposed fines amounting to €79 million on four distributors of commodity chemicals – Brenntag, Caldic Est, Univar, and Solvadis – for participating in a cartel.[5]

The FCA's investigation was triggered by a leniency application submitted by Solvadis in September 2006. Brenntag and Univar also applied for leniency in October 2006 and December 2006 respectively.

The parties to the cartel are active in the distribution of commodity chemicals. Commodity chemicals are synthesized raw materials (such as alcohols, ethers, solvents, acids, and bleaches) that are used in a wide variety of industries (e.g., the chemical, agri-food, automobile, water treatment, or textile industries). The parties' combined share of the commodity chemical distribution market amounted to 80%.

In its decision, the FCA found that the parties had engaged in a single and continuous infringement, which involved price fixing and the allocation of customers and markets in France. The FCA noted that the parties monitored the operation of the cartel closely, with the result that the cartel (and the parties' market shares) remained stable.

Generally the FCA holds parent companies liable for the competition law infringements of their subsidiaries. In this case, the FCA did not find Deutsche Bahn liable for the participation of Brenntag, its wholly-owned subsidiary in the cartel under scrutiny (Brenntag was a subsidiary of Stinnes AG, which was acquired by Deutsche Bahn in 2002 – Brenntag was sold by Deutsche Bahn in 2004). The FCA determined that Deutsche Bahn's sole purpose in acquiring Stinnes AG was to obtain its transport and logistics businesses, to the exclusion of any other activities (i.e., the sale of chemical commodities through its Brenntag subsidiary). Indeed, from the time it acquired Brenntag to the time it sold it, Deutsche Bahn did not appoint anyone to Brenntag's board, nor did Deutsche Bahn participate in any way in the nomination of Brenntag executives or administrators. Accordingly, the FCA found that Deutsche Bahn had not exercised control over Brenntag at the time the infringements took place, and therefore could not be held liable for Brenntag's participation in the cartel.

Brenntag was fined €48 million. The FCA imposed fines on the remaining participants ranging from €1.3 to €15 million.

The decision has been appealed before the Paris Court of Appeal.

Unilateral Conduct

The FCA Impolses a Fine of €40.6 Million on Sanofi for Abusive Limitation of Generic Market Entry

On May 14, 2013, the FCA imposed a fine of €40.6 million on the pharmaceutical company Sanofi for having abused its dominant position in the market for the active medicine ingredient clopidogrel, by conducting a communication campaign denigrating the generic drugs produced by its competitors, thereby limiting their ability to enter the market.[6]

On November 2, 2009, the French manufacturer of generic drugs Teva Santé lodged a complaint with the FCA against Sanofi for abuse of dominance in the market for medicines used to prevent relapses of serious cardiovascular diseases. Teva Santé claimed that Sanofi's patent over clopidogrel, the active ingredient in its Plavix drug, expired in 2008, but Sanofi had filed complementary patents with

[5] French Competition Authority, Decision n°13-D-12, May 28, 2013, relating to the practices implemented in the commodity chemicals marketing sector, http://www.autoritedelaconcurrence.fr/pdf/avis/13d12.pdf

[6] French Competition Authority, Decision n°13-D-11, May 14, 2013, relating to practices implemented in the pharmaceutical sector, http://www.autoritedelaconcurrence.fr/pdf/avis/13d11.pdf

the aim of extending the effective period of patent protection. Teva Santé also alleged that Sanofi implemented a commercial strategy to promote its own generic version of Plavix, while denigrating the generic products of Teva Santé and other generic producers.

In its decision of May 14, 2013, the FCA considered that clopidogrel constituted a distinct product market. The FCA found that Sanofi was dominant on this market due to its 60% market share and the fact that Sanofi had been the market leader since 1999.

The FCA concluded that Sanofi's filing of complementary patents did not represent abusive conduct. However, the FCA held that Sanofi had abused its dominant position by implementing a global communication strategy aimed at influencing doctors and pharmacists not to switch from Plavix to generic versions thereof that were manufactured by producers other than Sanofi.

Specifically, this strategy involved convincing doctors to insert the indication "non-substitutable" in their prescription of Plavix to patients and encouraging pharmacists to substitute Plavix for Sanofi's own generic medicine. According to the FCA, this communication campaign generated substantial uncertainty among consumers about the efficacy and safety of generic versions of Plavix. In addition, the campaign was timed to coincide with the entry of generic versions of Plavix to the French market (September 2009 to January 2010).

The FCA determined that the implementation of this strategy led to Sanofi's own generic version of Plavix gaining an unusually high market share, and resulted in a level of penetration of generic clopidogrel that was much lower than expected.

In light of the above, the FCA concluded that the practices implemented by Sanofi infringed Article 102 TFEU and Article L.420-2 of the French Commercial Code, and imposed a fine of €40.6 million on Sanofi.

Sanofi has appealed the decision to the Paris Court of Appeal.

GERMANY

This section reviews competition law developments under the Act against Restraints of Competition of 1957 (the "GWB"), which is enforced by the Federal Cartel Office ("FCO"), the cartel offices of the individual German Länder, and the Federal Ministry of Economics and Technology. The FCO's decisions can be appealed to the Düsseldorf Court of Appeal (Oberlandesgericht Düsseldorf, "DCA") and further to the Federal Court of Justice (Bundesgerichtshof, "FCJ").

Horizontal Agreements

FCO Expresses Concerns About German Electronic Cash Card System

On May 28, 2013, the FCO sent a statement of objections to the German banking associations in which it expressed its concerns with regard to the Electronic Cash or "girocard" card system.[7] The so-called girocard system is the leading card payment system in Germany. It is based on a three-party model between card-issuing bank, cardholder, and merchant.[8] In the girocard system, the merchant pays a fee to the card-issuing bank for providing the payment guarantee for a successfully completed transaction.

The FCO's competition concerns centered on the fact that the card payment fee is uniform across all payments to the relevant card issuing banks and is set by the German banking associations. The FCO stated that each merchant wishing to use the girocard system should individually negotiate its payment fees with the relevant bank. In addition, the FCO objected to certain measures undertaken by banks who are party to the girocard scheme to restrict the use of alternatives to the girocard, such as the electronic direct debiting scheme ELV.

DCA Increases Fines for LPG-Cartel in Appeal Proceedings

On April 16, 2013, the DCA imposed cartel fines totaling €244 million on five suppliers of liquid petroleum gas ("LPG").[9] The DCA thereby dramatically increased the FCO's original fines, which totaled €180 million. The FCO had found that the LPG suppliers in question had allocated customers and deterred them from switching suppliers by quoting extremely high, non-competitive prices to customers attempting to switch. Under the applicable law, the fines imposed could amount to up to three times the additional revenues gained through the infringement in question. The DCA differed from the FCO in its determination of the additional revenues gained by the five LPG suppliers as a result of the cartel. On the basis of these departures from the FCO's approach, the DCA increased the fines substantially, in some cases by as much as 85%. This case represents the first time that the DCA has increased a cartel fine set by the FCO.

Unilateral Conduct

Munich Court of Appeal Dismisses Appeal on Damage Claims Against the Marketing Companies of TV Broadcasters

On February 21, 2013, the Munich Court of Appeal (the "Court of Appeal") dismissed the appeal of a small TV broadcaster claiming damages from the marketing subsidiaries of the TV broadcaster groups Pro Sieben/Sat 1 and RTL.[10] The claimant relied on a decision of the FCO (the "Decision") in which these marketing subsidiaries were fined for infringing Article 101 TFEU by engaging in rebate

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[7] *See* FCO press release, available only in German at: http://www.bundeskartellamt.de/wDeutsch/aktuelles/presse/2013_05_28.php.

[8] As opposed to the four party model of standard credit cards, which involves the card-issuing bank, card holder, merchant and acquiring bank.

[9] *See* DCA, Decision of April 15, 2013, case number VI-4 Kart 2-6/10 (OWi), full decision not published yet (*see* press release of the Düsseldorf Court of Appeal, available only in German at: http://www.olg-duesseldorf.nrw.de/behoerde/presse/archiv/Pressemitteilungen_aus_2013/20130416_PM_Fluessiggas-Entscheidung/index.php; *see* also FCO press release of April 16, 2013, available only in German at: http://www.bundeskartellamt.de/wDeutsch/aktuelles/presse/2013_04_16.php).

[10] See Munich Court of Appeal, Decision of February 21, 2013, U 5006/11 Kart.

practices that, *inter alia*, foreclosed smaller competitors' access to the market for TV advertising.[11]

In its decision, the Court of Appeal referred to Section 33 (4) GWB, which provides that if a third party claims damages due to an infringement of German or EU competition law, the court is bound by the final decision of the competition authority on that infringement. The Court of Appeal held that the scope of this binding effect is limited to the relevant competition authority's finding on whether a competition law infringement was in fact committed. However, the Court of Appeal's decision suggest that, at least with respect to decisions of the FCO, sections of such decisions that do not deal with the existence of an infringement are not binding on civil damages claims.

In particular, the Court of Appeal found that the claimant could not rely on the FCO's market definition in the Decision. In this regard, and with respect to the facts of this case, the Court of Appeal determined that – contrary to what the FCO had found in the Decision – there was no single market for TV advertisements that would cover large and small broadcasters.

The Court of Appeal concluded that the claimant was not active in the same market as large broadcasters and, as such, could not have been affected by the infringement addressed in the Decision.

The decision of the Court of the Appeal represents a stark departure from the decisional practice of the German courts. While the courts and academy have often discussed whether or not only the operative part of a cartel decision should have a binding effect in follow-on damage litigation, in practice, courts generally rely on the factual findings (such as those relating to market definition) of national competition authorities (at least in other antitrust-related litigation). Even more surprising is the deviation from the FCO's conclusions on market definition in the present case, as these findings could be described as central to the FCO's determination of the existence of an infringement.

DCA Rules on Event Fees Collected by Sports Associations (KKL)

On April 4, 2013, the DCA held that for regional triathlon sports associations to collect fees from organizers of sport events do not violate competition law.[12] In Germany, regional and national sports associations commonly authorize private sports events and collect event fees from the organizers in order to fund their work. The regional triathlon association had rejected authorization for a private sports event because the organizer had not paid the fees for a previous event. The triathlon organization competes with private organizers to the extent that it also hosts sports events.

The DCA confirmed that sports associations fall within the scope of antitrust law as they offer commercial services in connection with sports events. Accordingly, as regional sports associations are in many cases dominant, they may be fined for abuse of dominance under German competition law. In this case, the DCA held that the fees charged by the triathlon association restricted competition but not appreciably so, given the fact that they applied equally to all private event organizers. In determining whether a practice restricts competition so significantly that it represents an abuse of dominance, the German courts must take into account the interests of the parties concerned as well as those of the public at large. In this case, the DCA found that private organizers benefit from the work of sports associations, including those involved in youth, amateur and professional sports. In light of the beneficial activities facilitated by the triathlon association's charging of fees to sports organizers, the DCA held that this practice was not anticompetitive.

[11] *See* National Competition Report October – December 2007, p. 12. The decision of the FCO is only published as a press release by the FCO, available in English at: http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2007/2007_11_30.php.

[12] *See* DCA, Decision of April 2, 2013, case number VI-U (Kart) 9/13, available in German at: http://www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2013/VI_U_Kart_9_13_Beschluss_20130402.html.

Mergers and Acquisitions

FCO Clears Acquisition of Rosen Eiskrem Group by Competitor DMK Eis GmbH

On March 27, 2013, the FCO approved the acquisition of Rosen Eiskrem Group ("Rosen") by its competitor DMK Eis GmbH ("DMK Eis") in a phase-II decision.[13] Both companies are active in the market for production and distribution of private-label ice cream.

The FCO found that there is a separate product market for the production and distribution of private-label ice cream which has to be distinguished from the branded ice cream market.[14] In particular, the FCO found that there are significant price differences between the two, and that, due to strategic decisions, a manufacturer of branded ice cream would not engage in competition with private-label ice cream and *vice versa*.[15]

While the statutory presumptions of dominance (Section 19(3) GWB) were met, because the parties' combined market shares exceeded one-third of the market, the FCO held that the transaction would not create or strengthen a dominant position. The FCO found that post-transaction, the parties' market position could still be challenged by competitors, because *inter alia* the main competitors could easily increase their supply as there is significant spare capacity in the market. Further, the FCO carried out a bidding analysis that demonstrated that the parties were not each other's closest competitors. Finally, the FCO noted that food retailers have strong buyer power and are thus capable of exerting countervailing pressure.

In addition, even though the statutory presumption of collective dominance was met,[16] the FCO also found that the transaction would not create or strengthen a collectively dominant position. The FCO found that while some factors of the market (e.g., market transparency and product homogeneity) suggest that it would be prone to tacit collusion, such collusion appeared unlikely in light of the significant actual competition between the putative oligopolist.

FCO Clears Acquisition of Frankfurter Rundschau Based on Failing Company Defense

On February 27, 2013, the FCO approved the acquisition of German newspaper Frankfurter Rundschau ("FR") by its competitor Frankfurter Allgemeine Zeitung GmbH ("FAZ") based on the failing firm defense in a phase-I decision.[17]

The transaction affected, *inter alia*, the markets for the supply of regional daily newspapers as well as the related newspaper advertising markets in the area of Frankfurt am Main. FAZ was the only competitor to FR in the supply of regional daily newspapers. Regarding regional advertising markets, due to the fact that the transaction met all the requirements of the failing firm defense, the FCO ultimately left open whether the regional edition of the tabloid BILD as well as regional advertisement papers would be part of the relevant regional newspaper advertising market..

The failing firm defense is only available when (i) the acquired company had been failing; (ii) there is no less anticompetitive alternative; and (iii) absent the

[13] *See* FCO, Decision of March 27, 2013, Case B2-113/12, available in German at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion13/B2-113-12.pdf. A press release in English is available at http://www.bundeskartellamt.de/wEnglisch/News/press/2013_03_28.php.

[14] The FCO bases its market definition regarding the production of private-label and branded products on the facts of each individual case and industry. *E.g.*, in its decisions Homann/Ruegen Feinkost (Case B2-23/11) of July 6, 2011 (*see* National Competition Report July – September 2011, p. 9) and Kamps/Nadler (Case B2-117/09) of April 12, 2010, the FCO found that such a distinction would not be appropriate, as all players were active in the field of private-label as well as branded products.

[15] This market definition is in line with decisions of the European Commission, *e.g*., Decision of February 25, 2002, COMP/M.2640 – *Nestlé/Schoeller*.

[16] The statutory presumption of collective dominance was met under both statutory alternatives, because (i) the combined market shares of the parties together with another competitor exceeded 50% (Section 19(3) No. 1 GWB), and (ii) the combined market shares of the four strongest companies exceeded two thirds (Section 19(3) No. 2 GWB).

[17] *See* FCO case summary available only in German at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion13/Fallberichte_2013/B06-009-13_FR_FAZ_endg.pdf?navid=106. A press release in English is available at http://www.bundeskartellamt.de/wEnglisch/News/press/2013_02_27.php.

contemplated acquisition, the failing firm's market share would in any event entirely be absorbed by the prospective acquirer.

The FR had filed for insolvency in November 2012, and its activities would have been terminated by the end of February 2013 absent the transaction. There had been an alternative bid for FR's assets, but the FCO concluded that this would not have constituted a less anticompetitive alternative; the alternative buyer would not have been able to acquire FR before March 2013, and thus, absent the contemplated acquisition, the failing firm would not have remained in the relevant markets. With respect to the regional supply market, the FCO found that FR's readers would in any event have migrated to the FAZ. A similar situation applied to the advertising markets. Irrespective of the question of whether the regional edition of the tabloid BILD as well as regional advertisement papers would be part of the relevant regional newspaper advertising market, the FCO did not expect that the regional edition of BILD along with regional advertising papers would have been able to absorb a significant part of FR's advertisement budget/market shares.

FCO Clears Acquisition of a Majority Share in Wasgau Food Beteiligungs-GmbH by REWE Group

On April 29, 2013, the FCO cleared the acquisition of 51% of the shares of the Wasgau Food Beteiligungs-GmbH ("Wasgau Food") by the REWE Group ("REWE"), one of Germany's leading food retailers and supermarket chains.[18] Wasgau Food is a majority shareholder of WASGAU Produktions – und Handels AG ("Wasgau"), so REWE also acquired indirectly the majority of Wasgau's shares. Wasgau is a minor competitor of the REWE Group at the food retail/supermarket level. Edeka Südwest ("Edeka") – a major competitor of REWE – holds the remaining 24.98% of Wasgau's shares.

The FCO cleared the acquisition under German merger control rules since it found the transaction not to create or strengthen a dominant position, neither on the affected regional sales markets nor on the national procurement markets, due to Wasgau Food's insignificant market shares.[19] The FCO found that the transaction raised a number of concerns relating to collective dominance in the national procurement market, but that Wasgau's market shares were too low for the transaction to have any appreciable impact on this market.[20] (However, the FCO will continue to investigate the competitive structure of the procurement markets in its ongoing sector inquiry into the food retail market.)[21]

Notwithstanding the merger control clearance, the FCO opened an investigation pursuant to Section 1 GWB in connection with the future horizontal cooperation of REWE and Edeka.[22] This investigation concerns possible anticompetitive effects stemming from REWE's and Edeka's joint ownership of Wasgau.

FCO Clears the Merger of Kliniken Main-Taunus-Kreis and Klinikum Frankfurt-Höchst

On May 27, 2013, the FCO cleared a merger between the Main-Taunus District Clinics (Kliniken des Main-Taunus-Kreises) and the Frankfurt Höchst Clinical Center (Klinikum

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18 *See* FCO press release, available in in German at: http://www.bundeskartellamt.de/wDeutsch/aktuelles/presse/2013_04_29.php, and in English at: http://www.bundeskartellamt.de/wEnglisch/News/press/2013_04_29.php.

19 In 2011, the FCO had already cleared REWE's acquisition of 25,1% of Wasgau Food's shares. At the same time, the FCO prohibited, however, a parallel purchasing cooperation between REWE and Wasgau finding that the purchasing cooperation infringed Section 1 GWB. Hereinafter, the cleared acquisition has not been realized by REWE and Wasgau food.

20 The FCO came to a similar conclusion in its *Edeka/trinkgut* decision, *see* Decision of October 28, 2010, Case B2-52/10, available in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion10/B02-052-10.pdf; a press release is available in English at: http://www.bundeskartellamt.de/wEnglisch/download/pdf/Presse/2010/101029_PR_EDEKA-trinkgut_engl.pdf; *see* National Competition Report October-December 2010, p. 11.

21 *See* National Competition Report January-March 2011, p. 20; National Competition Report July-September 2011, p. 10; and National Competition Report April-June 2012, p. 12.

22 Unlike under European Law, the FCO may carry out the assessment of the compatibility with the merger control rules and the assessment of potentially anticompetitive agreements separately.

Frankfurt Höchst).[23] Both operate hospitals in the Höchst/Main Taunus region.

The FCO determined that the merger did not create or strengthen a dominant position in the relevant market for acute in-patient hospital services. With respect to the geographic scope of this market, the FCO adopted the principles laid out in the FCJ's decision *Kreiskrankenhaus Bad Neustadt*.[24] According to this decision, the geographic market for acute in-patient hospital services must be assessed by considering the degree of "immigration" of patients (the FCJ and FCO use the term "immigration" to describe the phenomenon that inhabitants of a one region with its own hospital(s) seek treatment in the hospitals of a neighboring region). In other words, a significant number of inhabitants of a respective region must have sought treatment in the hospitals concerned by the merger to fall within the relevant geographic market. A minor degree of "immigration" from a certain neighboring region is not sufficient to broaden the relevant geographic market to include that region. Based on this analysis, the FCO found that the region Höchst/Main Taunus constituted the relevant geographic market. The FCO noted that 12.5% of patients in the neighboring Hochtaunus sought treatment in hospitals covered by the transaction, but that this level of immigration was not sufficient to render Hochtaunus part of the relevant geographical market.

The FCO cleared the merger despite the fact that the parties' combined market shares amounted to 55% in the market for acute in-patient hospital services in the Höchst/Main Taunus region. This is notable since under German law, an undertaking is presumed to be dominant if it has a market share of at least one-third (as of June 30, 2013: 40%, see below).[25]

The FCO based its conclusion on the characteristics of the market for acute in-patient hospital services. With prices in this market being regulated by legislation, the FCO found that the main competitive parameters are the quality of hospital services and the specializations of the relevant hospitals. In this regard, the FCO noted that post-transaction, patients would still have numerous alternatives to the merging parties for hospital treatment; patients could avail themselves of hospital services offered in the neighboring Frankfurt region, in which there are a large number of hospitals which can be reached by patients located in the Höchst/Main Taunus within 20 minutes. In this regard, the FCO stressed that pre transaction, 30% of the inhabitants of the Höchst/Main Taunus region "emigrated" to Frankfurt for hospital treatment.[26] The FCO considered this "emigration" gave the providers of hospital services in Frankfurt significant incentive to attract patients located in the Höchst/Main Taunus region. Accordingly, post transaction, the merging parties would face substantial competitive pressure from hospitals in the Frankfurt region.

This is the second time in 2013 that the FCO cleared a hospital merger despite significant or high combined market shares.[27] However, there have also been an appreciable number of transactions in this sector that have

[23] *See* FCO, Decision of May 27, 2013, Case B3-17/13, available in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion13/B3-17-13.pdf; a case summary is available in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion13/Fallberichte_2013/B03-017-13-ENDG.pdf; a press release is available in German at: http://www.bundeskartellamt.de/wDeutsch/aktuelles/presse/2013_05_29.php, and in English at: http://www.bundeskartellamt.de/wEnglisch/News/press/2013_05_29.php.

[24] *See* FCJ, Decision of January 16, 2008, KVR 26/07, available in German at: http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=fb5fa09edb12450a6a4c76b85d1e2c0c&nr=42420&pos=9&anz=13; *see* National Competition Report January-March 2008, p. 8.

[25] Section 19(3) GWB.

[26] The Frankfurt region was not included in the relevant geographic market since, at the same time, "immigrating" patients from Höchst/Main Taunus represented only 10-15% of total numbers of treated cases in the bigger Frankfurt hospitals.

[27] In *Universitätsklinikum Heidelberg/Kreiskrankenhaus Bergstraße* the FCO referred to the remaining competitive pressure that, in its view, would remain although the accumulated market shares of 45% would have clearly exceeded the legal presumption of 33%. *See* FCO, Decision of March 15, 2013, Case B3-129/12, available in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion13/B3-129-12.pdf?navid=90.

been blocked or cleared only after the imposition of substantial commitments.[28]

Policy and Procedure

FCO Publishes New Fining Guidelines

Following a recent decision of the FCJ[29] concerning the interpretation of Section 81(4) of the GWB, pursuant to which the FCO can impose a fine of up to 10% of an undertaking's total worldwide group turnover in the preceding business year for antitrust infringements, the FCO revised its fining policy and published new fining guidelines on June 25, 2013.[30] The FCJ had held that the 10% limit should not be considered a cap on the final fine (as is the case under EU law), but rather as the upper limit of the base fine, which can be further altered following consideration of aggravating and mitigating factors. Under its previous approach, to which the FCJ objected, the FCO (following a methodology similar to that of the European Commission) calculated the applicable fine primarily based on the turnover generated during the infringement period with the products affected by the infringement and then capped – if necessary – the fine at 10% of the infringer's global group turnover for the last financial year, thus making it possible, at least in theory, to impose a fine of up to 10% even for less serious infringements.

According to the FCO's new methodology, the agency will now take into account on the one hand the harm that may be caused by the antitrust infringement and the total consolidated group turnover on the other.

First, the FCO will calculate the initial amount; the FCO will take 10% of the company's relevant turnover that was achieved with the products or services related to the infringement for the period during which the infringement was ongoing. As a second step, depending on the size of the company, this initial amount will be multiplied by a factor between 2 and 6, or even higher in cases where the company's turnover exceeds €100 billion. The resulting base amount may then be altered depending on whether there are any mitigating or aggravating circumstances. However, the base amount cannot exceed 10% of the infringer's total group turnover. Therefore, under the new fining guidelines, the ultimate fine imposed by the FCO can exceed 10% of the infringer's total group turnover, if, for example, aggravating circumstances are identified and used to increase the base amount: it is only the base amount (that which emerges following the second step described above) that is subject to the 10% limit.

Eighth Amendment of the German Act Against Restraints of Competition

On June 30, 2013, the Eighth Amendment to the GWB took effect after both chambers of the German parliament reached an agreement on the new law.

The main changes are as follows:

Merger Control

The Eighth Amendment's primary goal is to align German merger control rules with the European Union Merger Regulation (the "EUMR"). Accordingly, the EUMR's "significant impediment to effective competition" (the "SIEC") test replaced the dominance test as the substantive criterion for assessing concentrations. As is the case under the EUMR, the market dominance test serves as an example of a significant impediment to effective competition.[31]

The ARC still contains a statutory presumption of dominance. However, while a company holding a market share of one third was presumed to have single dominance

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28 *See e.g.*, National Competition Reports January-March 2005, p. 7; April-June 2005, p. 6; April-June 2006 p. 7 *et seqq.*; April-June 2007, p. 14 *et seqq*. Recently, in *Asklepsios/Rhön* the FCO cleared the transaction at issue only after the parties had offered commitments since the already very strong position of the parties would have been further strengthened (up to 82% market shares) by the merger, *see* FCO, Decision of March 12, 2013, Case B3-132/12, available in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion13/B3-132-12.pdf?navid=90.

29 *See* National Competition Report January-March 2013, p. 15.

30 *See* FCO Fining Guidelines, available at http://www.bundeskartellamt.de/wEnglisch/download/pdf/Bussgeldleitlinien-E-June2013.pdf.

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

under the old law, the presumption for single dominance now only applies in case of a market share of 40%. The collective dominance presumption (a market share of 50% held collectively by two or three companies, or a market share of two thirds held by five or less companies) remains unchanged.

Further, the *de minimis* market exemption has been abandoned. However, while concentrations involving *de minimis* market shares now have to be notified to the FCO, the FCO cannot prohibit concentrations whose competitive impact would be *de minimis*.

To prevent companies from circumventing German merger control by splitting a major transaction into several smaller transactions that fall below the domestic turnover thresholds, the new law explicitly provides that transactions taking place within a two-year period between the same parties are to be treated as a single transaction for purposes of merger control (in line with Article 2(5) EUMR).

The new law also eliminates the uncertainty regarding transactions that are implemented prior to merger clearance. Under the old GWB, it was unclear whether such transactions were permanently invalid under German civil law. The new law clarifies that such transactions are only provisionally invalid. In the future, such transactions will become valid after the FCO has initiated and subsequently closed dissolution proceedings for lack of competition concerns.

The last key change concerning merger control provisions relates to remedies. Similar to the EUMR's provisions, the German law now contains an automatic extension of the FCO's deadline for issuing a decision in phase II (but unlike under the EUMR, remedies in phase I are still not possible in Germany). If the FCO opens a phase II investigation, it is required to issue a decision within four months from the notification of the transaction. This deadline is now extended by an additional month in the case that the parties submit commitments to the FCO.

Abusive Practices

As already mentioned in the context of merger control, the threshold for a presumption of single dominance was raised from one-third to 40%.[32] In addition, the Eighth Amendment now clarifies that the FCO can impose both behavioral and structural measures (such as divestitures) in order to bring antitrust infringements to an end (in line with the powers of the European Commission, see Article 7 Regulation 1/2003). Additionally, the FCO can now order companies to pay restitution for any gains they received as a result of their antitrust law infringements.

Procedural Law

The main change regarding procedural law is the introduction of an obligation for legal entities to reply to requests for information by the FCO regarding company and market data, such as turnover.

Private Enforcement

Under the revised GWB, the chambers for commercial matters at regional courts no longer have jurisdiction for hearing cartel damage claims. Instead, cartel damage claims are now exclusively heard by chambers for civil matters. In addition, certain institutions and associations, in particular consumer protection associations, now have the right to bring actions for injunctive relief or for the skimming off of economic benefits. However, class actions are still not admissible under German law.

Sector-Specific Rules

Other relevant changes relate to specific industry sectors, in particular the print media, the energy and water industries, and the statutory health insurance funds.

FCO Publishes Activity Report 2011/2012

On June 26, 2013, the FCO published its activity report for 2011 and 2012.[33] In the past two years, the FCO has

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

33 *See* FCO press release, available in English at http://www.bundeskartellamt.de/wEnglisch/News/press/2013_06_26.php and in German at http://www.bundeskartellamt.de/wDeutsch/aktuelles/presse/2013_06_26.php. The activity report is available only in German at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Taetigkeitsbericht/Bundeskartellamt_-_Taetigkeitsbericht_2011-2012.pdf.

imposed fines in 34 cartel proceedings totaling €505.8 million on 108 companies and 68 individuals (2012: €316 million and 2011: €189.8 million). The highest fine of €124.5 million was imposed on the members of the so-called rail cartel. The number of notified mergers has remained stable in the last two years. In 2011, the FCO reviewed a total of 1,108 notifications and in 2012 a total of 1,127 notifications. In 28 cases, the FCO carried out an in-depth (phase II) investigation. It blocked six transactions and cleared two only subject to strict remedies. In the last two years, the FCO concluded 67 abuse of dominance proceedings, in particular in the area of general public services, e.g., district heating and water, in which, historically, natural monopolies prevailed.

GREECE

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

Unilateral Conduct

The Hellenic Competition Commission, by Decision no 555/VII/2012, Imposed a €4.2 Million Fine on DESFA SA, the Hellenic Gas Transmission System Operator, for Abusing Its Dominance by Refusing to Grant Aluminium SA Access to an Essential Facility.

Aluminium SA (the "AL SA"), a company owned by the MYTILINEOS GROUP, is the only producer of alumina and aluminum in Greece and, as such, is classified as an "energy dependent" undertaking. In order to address its substantial energy requirements, Aluminium SA constructed a gas-burning plant for the production of electricity and heat.

DEPA Group is the incumbent natural gas utility in Greece responsible for the wholesale, trading, transmission, distribution and supply of natural gas. DESFA is 100% controlled by DEPA, but is commercially and economically autonomous. DESFA was established in 2007 and was assigned to the administration of the National Natural Gas System (NNGS), until then forming part of DEPA. The NNGS transmits natural gas from three entry stations to users in continental Greece through 35 exit stations. One of these exit stations is allocated exclusively to AL SA, from which it supplies gas to its plant described above (the "AdG exit station").

AL SA is a customer of DEPA. At the same time, as a user of the NNGS, AL SA is also DEPA´s potential competitor in the market of supply of natural gas because it has the right to resell the gas produced.

In 2009, AL SA filed a an abuse of dominance complaint against DEPA, the facts of which are set out below.

<u>The Facts</u>

In 2009, AL SA informed DESFA of its intention to conclude an agreement whereby it would purchase liquefied natural gas ("LNG") originating in Algeria, and that in order to implement this agreement, AL SA would need DESFA to grant it access to the receiving terminal on the Revithousaisland in the gulf of Megara under the same terms it provided to other users. DESFA rejected AL SA's request for access on the basis that transmission capacity at the AdG exit station was blocked by DEPA.

AL SA then requested DEPA to release blocked capacity to enable AL SA to access the receiving terminal, but DEPA rejected this request on the basis that AL SA would not be able to absorb the minimum quantities of natural gas provided in the supply agreement between them until year-end, and that this could create problems for DEPA with respect to its suppliers.

However, a few days later, and contrary to its previous refusal, DESFA decided to release the requested transmission capacity at the AdG exit station, a decision also approved by the Regulatory Energy Authority. Nevertheless, and contrary to the requests of AL SA, DESFA did not conclude further agreements with AL SA for the use of an LNG station in Revithousa and for the transportation of the natural gas through the NNGS. DESFA defended this refusal on the basis that there was no legal framework in place to conclude the necessary agreements.

As a result of DESFA's refusal, the ship carrying the LNG ordered by AL SA could not unload its shipment at the island of Revithousa and was forced to depart fully loaded on December 4, 2009.

DESFA rejected on similar grounds subsequent requests from AL SA for new shipments of LNG during the first half of 2010. However, following the coming into force of new regulations covering the operation of the NNGS the publication of model contracts for transportation of natural gas and use of stations, DESFA finally signed two agreements with AL SA for the use of the station on the island of Revithousa and for the transportation of the gas through the NNGS.

The HCC's Assessment

In analyzing the facts, the HCC identified two relevant product markets: (i) the market for access to the NNGS; and (ii) the market for the supply of natural gas.

The HCC found that DESFA held a monopoly in the primary market for access to the NNGS. The HCC determined that by delaying the release of transmission capacity at the AdG exit station, DESFA had abused its dominant position by restricting a competitor's access to an essential facility.

Prior to reaching this conclusion, the HCC examined two central arguments of DESFA, namely that: (i) its refusal was due to the absence of a regulatory framework related to the actions required from it and; (ii) that the transmission capacity which AL SA was asking to have released was already blocked by DEPA, thus the need for DEPA's consent. With respect to the first argument, the HCC found that the lack of a regulatory framework in this case did not justify a breach of competition rules because DESFA did not lack the discretion to address the issue of AL SA's access to the network.

With respect to DESFA's second argument, the HCC held that DEFSA was under no obligation to block capacity, as there was no concern that physical capacity would actually be blocked.

In light of the above, the HCC considered that DESFA had abused its dominant position in breach of Article 2 of the GCA and of Article 102 TFEU. The HCC ordered DESFA not to engage in similar conduct in future and imposed a fine of €4.2 million.

IRELAND

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

Mergers and Acquisitions

Phase II Clearance of Proposed Acquisition in Pharmaceuticals

On April 30, 2013, following a full (phase II) investigation, the ICA cleared the proposed acquisition of Cahill May Roberts Limited ("CMR") by Uniphar plc ("Uniphar"),[34] despite the fact that the Parties operated two very similar business divisions and that the merger would result in reducing the number of full-line pharmaceutical wholesalers in Ireland from three to two.

The first division of each party covered the full-line wholesale of pharmaceutical, healthcare, and veterinary products to pharmacies, hospitals and veterinary surgeons, while the second division covered the pre-wholesale[35] of pharmaceutical, healthcare, veterinary products and healthcare equipment mainly to competing wholesalers and community pharmacies.

The ICA considered that the pre-wholesale supply of pharmaceuticals constituted a relevant product market separate from the full-line wholesale supply of such products. In support of this, the ICA noted that the website of each of the three full-line wholesalers active in the state described their pre-wholesaling and wholesaling activities separately and that 11 of the 16 respondents to the Commission's questionnaire only sold human pharmaceutical drugs to pre-wholesalers. The ICA identified five potentially affected product markets, although it deemed it unnecessary to come to a definitive view on the precise market definition. Of the five markets, the ICA focused its analysis on the market for the full-line wholesale supply of pharmacy-only human pharmaceutical drugs. The ICA examined the transaction at the national (rather than regional) level, although it decided that it was also unnecessary to come to a definitive conclusion as to the precise geographic market.

In examining potential coordinated effects in the full-line wholesale market, the ICA noted that, as the discounts offered by wholesalers to pharmacies are negotiated bilaterally, they are not transparent and so it was unlikely that the parties would coordinate the level of discounts offered. The ICA did however find that the fairly significant degree of transparency regarding frequency of deliveries would facilitate coordination. This was compounded by other market conditions, including the fact that there would be only two full-line wholesalers active in Ireland after the acquisition, the stability of market shares in recent times, and the fact that the three wholesalers provided very similar delivery services to their customers. The ICA considered that these elements, in addition to the existence of the Pharmaceutical Distribution Federation ("PDF"), a national organization representing full-line wholesalers, would make it easier for the merged entity and its competitor, United Drug, to coordinate their behavior post-transaction.

However, the ICA found that other market conditions meant that the merger would not result in tacit coordination, including the fact that the two competitors would be able to deviate from coordinated behavior with little cost. The likelihood that the merged entity and its competitor would continue competing on discounts would also make it difficult for the two firms to coordinate on delivery frequency.

In assessing the unilateral effects of the proposed acquisition in the full-line wholesale market, the ICA found that all three full-line wholesalers were substitutable (offering essentially the same products and very similar services). If the merged entity were to offer smaller discounts or reduce the quality of its services, pharmacies would immediately move their business to United Drug,

[34] Determination of Merger Notification M/12/027 – Uniphar/CMR.

[35] Pre-wholesalers act as agents on behalf of pharmaceutical manufacturers and distribute pharmaceutical products to full-line wholesalers (para. 2.11 of the decision).

who had enough spare capacity to take on the business lost by its competitor.

The ICA also found that no competitive concerns would arise post-merger in the market for the pre-wholesale supply of pharmacy-only human pharmaceutical drugs[36] and in the other three markets affected by the proposed transaction,[37] where the parties had combined market shares of 10% or less. It therefore concluded that the acquisition would not substantially lessen competition in markets for goods or services in the state.

Phase II Clearance of Proposed Acquisition in Savory Snacks

On April 22, 2013, following a full (phase II) investigation, the ICA cleared the acquisition by Intersnack International B.V. ("Intersnack"), through its subsidiary Top Snacks Limited ("Top Snacks") of the KP Snacks business from United Biscuits (UK) Limited ("United Biscuits").[38] The merger was cleared despite the fact that the transaction had been implemented (at least in part) prior to notification to the ICA and that the merger fell within Zone C of the ICA's Merger Guidelines.[39]

While examining the effects of the proposed merger, the ICA realized that the parties had already implemented the transaction, subject to a hold-separate arrangement for the direct supply arrangements.[40] Section 19 of the Competition Act 2002 (the "Act") provides that if a merger that should be notified is completed prior to obtaining clearance from the ICA, it is to be deemed unlawfully implemented and void. The ICA thus held that the transaction was void and accordingly proceeded to evaluate it "as if it were a proposed transaction."[41]

The ICA did not find it necessary to conclude whether there was a single relevant product market including all potato crisps, corn snacks, nuts, popcorn, and other savory products or a market limited to crisps and snacks, excluding popcorn and nuts, on which the parties operated. With regards to the relevant geographical market, the ICA was concerned with the significant differences in national consumer preference in terms of flavors and type of crisps. It also observed that transport and distribution costs are significant for crisps and snacks because they are bulky and generate low average revenue per kilo. The ICA thus concluded that the relevant geographic market was national in scope (i.e., was limited to Ireland only and did not comprise the UK and Ireland, as advocated by the parties).

The ICA considered that the crisps and snacks segments of the market were very brand-driven and proceeded to analyze the competitive effects of the transaction using consumer surveys and econometric analysis. The competitive assessment pointed to a significant likelihood of switching to third party crisp brands, notably Walkers, Pringles and supermarket labels, in the case of a 10% price rise by the merged entity (switching between crisps and nuts was more limited). Although the econometric analysis of AC Nielsen price and volume data was an important piece of evidence, no definitive conclusions could be drawn from it: the analysis indicated competitive concerns but its results were ambiguous and were also contradicted by the market investigation and internal documents of the parties.

As regards ease of market entry, the ICA placed importance on the marketing costs associated with establishing brand recognition in a sector where brands

[36] Coordinated behavior in this market would be difficult given the lack of transparency regarding contract terms, while unilateral effects were considered unlikely for much the same reasons as outlined in relation to the wholesale market (in particular, ease of switching).

[37] The other three markets were the markets for the supply of front-of-counter and non-pharmacy only products, the supply of veterinary drugs, and the supply of medical supplies.

[38] Determination of Merger Notification M/12/031- Top Snacks/KP Snacks.

[39] Zone C mergers occur in markets that are already highly concentrated pre-merger and usually raise competitive concerns, see Competition Authority Notice in Respect of Guidelines for Merger Analysis (N/02/004),http://www.tca.ie/images/uploaded/documents/n_02_004%20Merger%20Analysis%20Guidelines.PDF, para. 3.10.

[40] The transaction covered matters other than the direct supply arrangements, including perpetual rights to important brands. The ICA explained, "*the Act does not permit partial implementation of a merger or acquisition even where a 'framework agreement' or other kind of hold-separate arrangement is put in place with regard to certain parts of the business within the State*" (para. 1.18 of the decision).

[41] Para. 1.19 of the decision.

play a significant role. However, despite this and the absence of any entry in recent years similar in scale to that of Walkers (who had achieved and maintained a 15% share since its entry), the ICA concluded that more limited entry was nonetheless possible and would exert competitive pressure on the new entity.

The ICA concluded that the acquisition of KP Snacks by Top Snacks would not substantially lessen competition in any potential savory snacks market in Ireland.

Horizontal Agreements

Price-fixing Case Against Doctors' Association

On January 16, 2013, the ICA initiated proceedings before the High Court of Ireland (the "High Court") seeking a declaration that a decision of the members of the Irish Medical Organisation ("IMO") be void under EU and Irish competition law. The ICA also requested interim relief.[42]

Following a proposal by the Irish Government to reduce fees paid to general practitioners ("GPs") under the General Medical Scheme (the "GMS"), the GP Committee of the IMO held a meeting on the matter. In a press release on July 10, 2013, the IMO announced that GPs had decided to collectively withdraw a number of patient services in protest against the Government's proposed cuts.

The ICA wrote to the IMO setting out its objections. Notably, it explained that since GPs are self-employed, an agreement between them to take collective action, or any subsequent action on foot of that agreement, infringed section 4 of the Competition Act 2002 and/or Article 101 TFEU.[43] The ICA viewed this agreement to withdraw certain patient services, which may have been free or *pro bono*, as an attempt to fix the fees paid to GPs by the state under the GMS.[44]

The ICA gave the IMO until midnight on July 15, 2013, to "remove the press release … from their website and to publish an undertaking to reverse the decision."[45] The IMO failed to do this and the ICA accordingly initiated proceedings before the High Court. Subsequently, on July 23, 2013, the IMO gave undertakings to the High Court to remove the press release and suspend any collective withdrawal of services "pending the outcome of proceedings."[46]

42 http://www.tca.ie/EN/News--Publications/News-Releases/Competition-Authority-to-take-court-action-against-IMO.aspx (last accessed, July 23, 2013)

43 http://www.tca.ie/EN/News--Publications/News-Releases/Competition-Authority-Issues-Warning-to-Irish-Medical-Organisation.aspx (last accessed, July 23, 2013)

44 http://www.tca.ie/EN/News--Publications/News-Releases/Competition-Authority-extends-deadline-for-IMO-to-comply-.aspx (last accessed, July 23, 2013)

45 http://www.tca.ie/EN/News--Publications/News-Releases/Competition-Authority-to-take-court-action-against-IMO.aspx (last accessed, July 23, 2013)

46 http://www.tca.ie/EN/News--Publications/News-Releases/Competition-Authority-welcomes-undertaking-from-IMO-to-suspend-action.aspx (last accessed, July 24, 2013)

ITALY

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

Unilateral Conduct

The ICA Found That Poste Italiane Abused Its Dominant Position by Applying a VAT Exemption to Its Universal Postal Services Individually Negotiated with Customers, Although This Conduct Was in Line with Relevant Italian Tax and Postal Rules

On March 27, 2013,[47] the Italian Competition Authority ("ICA") ruled that Poste Italiane S.p.A. ("Poste Italiane") (the Italian incumbent postal service provider) abused its dominant position in breach of Article 102 TFEU by not applying value added tax ("VAT") to its universal postal services[48] individually negotiated with customers. The ICA concluded that this practice effectively represented a form of discounting that could not be replicated by Poste Italiane's competitors, given that they are legally required to apply a VAT rate of 21% to their comparable postal services.

The ICA noted that the practice under scrutiny was permissible under Italian tax and postal rules; under these rules, where an undertaking is obliged to provide universal postal services, its provision of these services is exempted from VAT. Accordingly, the conduct of Poste Italiane was valid under the relevant national legislation. This was confirmed by statements from the Italian Ministry of Economy and Finance and the Italian Revenue Agency.

However, the ICA considered that the Italian tax and postal rules in question violated EU law, according to which a VAT exemption cannot apply to postal services that are individually negotiated. In this regard, the ICA referred to the ECJ's judgment in *TNT Post UK Ltd* which concerned the interpretation of Article 132(1)(a) of the VAT Directive. In that case, the ECJ held that under the directive, a VAT exemption[49] "is not to apply to specific services dissociable from the service of public interest, including services which meet special needs of economic operators" and "does not apply to the supply of services […] for which the terms have been individually negotiated".[50]

According to General Court precedent, where a national competition authority ("NCA") finds as anticompetitive conduct that is legitimate under national legislation that is in itself in breach of EU law, the NCA in question should set aside the relevant national rule and prosecute the antitrust violation that had been identified.[51] In line with this precedent, the ICA ordered Poste Italiane to start applying VAT to those of its universal postal services that are individually negotiated.

The ICA Found That Telecom Italia Abused Its Dominant Position by Hindering Competitors' Access to Its Local Telephone and Broadband Networks as Well as Offering Anticompetitive Rebates to Business Clients in the Unbundling Local Loop Areas

By a decision of May 10, 2013,[52] the ICA found that Telecom Italia, the incumbent national telecoms operator, abused its dominant position in the national markets for the

[47] Case A441 – *Applicazione dell'IVA sui servizi postali*.

[48] According to Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, OJ 1998 L15/14, art. 3(1), the notion of universal postal service implies that "*Member States shall ensure that users enjoy the right to a universal service involving the permanent provision of a postal service of specified quality at all points in their territory at affordable prices for all users.*"

[49] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L347/1.

[50] *TNT Post UK Ltd v. The* Commissioners *for Her Majesty's Revenue and Customs* (Case C-357/07) 2009 ECR I-3025, paras. 46 and 49.

[51] *Consorzio Industrie Fiammiferi (CIF) v. Autorità Garante della Concorrenza e del Mercato* (Case C-198/01) 2003 ECR I-8055, para. 40 ff.

[52] Case A428 - Wind-Fastweb/Condotte Telecom Italia.

wholesale supply of access to local telephone (unbundled access to local loop,[53] ULL) and broadband (bit-stream access) networks, with the aim of obstructing the expansion of its competitors in the downstream markets for voice telephony and broadband internet access services. The investigation which led to the decision began in June 2010, and was prompted by complaints lodged by Fastweb S.p.A and Wind Telecomunicazioni S.p.A., two other Italian telecoms operators.

In the decision, the ICA stressed that it has the authority to investigate alleged anticompetitive conduct in highly regulated markets, particularly where the relevant undertakings enjoy a margin of discretion with respect to the application of the sector-specific legislation in question. Telecom Italia has such a margin of discretion under the applicable legislative framework, and the ICA concluded that Telecom Italia unlawfully exercised this margin of discretion, having crafted its organizational structures, systems, and processes in a way that infringed competition rules.

Specifically, the ICA found that Telecom Italia had: (i) unjustifiably restricted other licensed operators' ("OLOs") access to its telephone and broadband networks; and (ii) offered anticompetitive discounts to large business clients in the ULL areas.

The ICA found that Telecom Italia had, by refusing to grant competitors physical access to its telephone and broadband networks on the basis of unjustified technical reasons, constructively refused to supply an essential facility. The ICA held that this practice was in breach of Telecom Italia's duty to make its infrastructure accessible fair, reasonable, and nondiscriminatory terms (the so-called FRAND terms). Moreover, the ICA held that Telecom Italia had discriminated against OLOs with respect to activation requests in favor its own in-house downstream operations. Consequently, the ICA concluded that Telecom Italia's conduct: (i) had a negative impact on the OLOs' reputations and adversely affected their ability to provide services in a period of time acceptable to customers; and (ii) hindered the expansion of the OLOs in the relevant downstream markets by making it significantly more difficult and more costly for them to attract new customers.

With respect to Telecom Italia's discount policy applied to business customers based in the ULL areas, the ICA determined that this rebate policy, combined with the high wholesale prices applied by Telecom Italia to its competitors for access to local networks, would not have allowed them to recover the costs they would have incurred in offering the relevant services to their final customers. Accordingly, the ICA found that Telecom Italia had engaged in margin squeezing.

The ICA concluded that Telecom Italia's conduct was in breach of Article 102 TFEU and imposed a fine of €103,794. In imposing this fine, the ICA took into account, *inter alia*, certain steps that had been taken by Telecom Italia in the past to improve competitors' access to its network.

Policy and Procedure

Amendment to the Italian Merger Control Thresholds

As of April 1, 2013, Italian merger control thresholds were raised to: (i) €482 million for the combined aggregate national turnover of all the undertakings concerned, and (ii) €48 million for the aggregate national turnover of the acquired undertaking.[54]

As of January 1, 2013, concentrations are subject to mandatory notifications to the ICA only if *both* the above-mentioned thresholds are met (cumulative conditions).

[53] The "local loop" is the physical telecoms circuit connecting the subscriber's premises to the main distribution frame or equivalent local facility.

[54] The amendment to the thresholds is based on the increase in the GDP deflator index, which the General Report on the Economic Situation in Italy (ISTAT) indicated as 1.61% in 2012.

NETHERLANDS

This section reviews developments under the Competition Act of January 1, 1998 (the "Competition Act"),[55] *which is enforced by the Netherlands Authority for Consumers and Market (Autoriteit Consument & Markt, "ACM").*[56]

Mergers and Acquisitions

ACM and Courts Act upon Infringements of ACM's Procedural Rules for Merger Notifications

Each of the ACM, the Rotterdam District Court (the "Court") and the Trade and Industry Appeals Tribunal (*College van Beroep voor het bedrijfsleven,* the "Tribunal") have recently been engaged in cases concerning the infringement of the ACM's procedural rules for merger notifications.

On March 28, 2013, the ACM fined Motorhuis B.V. and its two parent undertakings for failing to notify the acquisition of the Bulters group.[57] The ACM held that by not notifying the merger, the parties had infringed Article 34 of the Competition Act, which stipulates that undertakings may not implement mergers without prior notification and a four-week waiting period. In calculating the fine of €500,000, the ACM took into account that the merger itself was not anticompetitive,[58] that the parties had signed a standstill agreement and cooperated with the ACM during its investigation.

On May 23, 2013, the Court ruled on another fine imposed for failure to notify.[59] The merging parties had been fined €1,366,000 on the basis of the ACM's 2007 Fining Guidelines, taking into account their 2009 turnover as the turnover of the year preceding the infringement decision. In an interim ruling,[60] the Court had already held that the relevant business year was arbitrary as it depended on the date on which the ACM took its decision. This meant that in some instances the relevant turnover could include that of both merging parties, whereas in other cases it included that of just one of the parties. In its final judgment, the Court held that the fine should be recalculated on the premise that the moment of the infringement decision should not influence the determination of the relevant turnover. Establishing that the parties had in fact merged on July 22, 2009, the Court set the fine at €130,000, based on the parties' 2008 turnover.

Finally, on May 13, 2013, the Tribunal decreased a fine imposed for providing incorrect/incomplete information in a merger notification. The appellant had been fined €468,000 for omitting to mention, even after multiple questions by the ACM, that two of its subsidiaries were active in the same market as the appellant. The Court held that the ACM had correctly calculated the fine and that the appellant could be held liable for omitting information, even if done so by mistake. On appeal, the Tribunal upheld the Court's judgment but decided to decrease the fine. The Tribunal ruled that by using a gravity factor of 1.5 (the maximum gravity factor was 2) the ACM had not taken into account that the omitted information did not substantially affect the ultimate clearance decision. Finding a gravity factor of 1 to be more appropriate, the Tribunal lowered the fine to €312,000.

Policy and Procedure

Concentrations

Changes in Policy Rules for Concentrations

On April 16, 2013, the ACM changed its policy rules for concentrations (*Spelregels bij Concentratiezaken)*.[61] Apart from several formal changes, in order to correspond to current practice, paragraph 88 now states that a merger or

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

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

[57] Case 7491 (Motorhuis), ACM decision of March 28, 2013.

[58] Once the Parties notified the merger, it was cleared by the ACM (Case 7491/22, ACM decision of August 24, 2012).

[59] Rotterdam District Court, Judgment of May 23, 2013, ECLI:NL:RBROT:2013:CA1229.

[60] Rotterdam District Court, Judgment of June 28, 2012, ECLI:NL:RBROT:2012:BW9829.

[61] https://www.acm.nl/nl/publicaties/publicatie/11348/Wijziging-Spelregels-bij-concentratiezaken/ (consulted on July 26, 2013).

acquisition that the European Commission refers to the ACM on the basis of Article 9 of Regulation 139/2004,[62] should be notified to the ACM by the parties to the transaction themselves.

Private Damages

Utrecht District Court Rejects Causal Link Between Cartel and Private Damages Claim

On March 13, 2013, the Utrecht District Court (the "Court") rejected a private damages claim on the basis of the European Commission's decision in the Elevator cartel.[63] In its decision, the Commission established that Otis B.V. had participated in a cartel from 1998 to 2004 through sharing the Dutch elevator market. On that basis, an organization of home owners claimed damages for having allegedly paid too much for the maintenance of three elevators by Otis B.V. The Court rejected the claims, holding that the parties had not proven a causal link between the Commission's decision and their alleged damages.

The Hague District Court Rules on Several Civil Law Questions Relating to Damages Claims Following a Commission Cartel Decision.

In its judgment dated May 1, 2013, the District Court in the Hague (the "Court") ruled on several procedural questions regarding the civil law consequences of the decision of the European Commission regarding the paraffin wax cartel.[64] CDC Project 14 SA ("CDC") is the plaintiff in the main proceedings and claims, on behalf of several customers of paraffin wax, damages from the addressees of the Commission decision (the "Defendants").

First, CDC claimed that the Court is competent to rule on the dispute, given that Article 2 of the Brussels I Regulation[65] provides that, in principle, defendants are to be sued in the courts of the Member State where they are domiciled and that one of the Defendants (a parent company of one of the alleged cartelists), Shell Petroleum N.V., is domiciled in the Netherlands. Based on Article 6 of the same Regulation, CDC stated that it could also sue the other Defendants in the Netherlands, as the respective claims "are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings."

According to the Court, it is not necessarily relevant that the claims are against both direct participants of the cartel and parent companies that gave direct instructions to their subsidiaries, given their shared liability in the Commission decision. Furthermore, the Court held that the claims as regards the different defendants do not need to have the same legal basis, as long as it is possible for the defendants to foresee that they could be sued in each of the jurisdictions where one of them was domiciled, which, it held, was the case here. The Court also rejected the argument that one of the Defendants, Total, could not rely on the agreements concerning jurisdiction that its German subsidiaries had agreed on with its customers. In sum, the Court concluded that the claims were sufficiently closely connected, and that it had the competence to assess them.

Second, the Defendants claimed that the damages claim should be stayed until the General Court had ruled on the appeal lodged against the Commission decision. Referring to the judgment in *Masterfoods*,[66] the Defendants held that when the outcome of the dispute before the national court depends on the validity of the Commission decision, it follows from the obligation of sincere cooperation that the national court should, in order to avoid reaching a decision that runs counter to that of the Commission, stay its

[62] Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ 2004 L 24/1.

[63] Utrecht District Court, Judgment of March 13, 2013, ECLI:NL:RBMNE:2013:CA1922.

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

[65] Council Regulation (EC) No 44/2002 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001 L12/1.

[66] *Masterfoods* (Case C-344/98) 2000 ECR I-11369.

proceedings pending final judgment in the action for annulment by the Union Courts.

However, the Court held that in this stage of the proceedings, where the Court had not yet been provided with the substantive arguments (*Conclusie van Antwoord*) of the Defendants, and had not yet had a chance to review the Commission decision, that there was no room to conclude that the outcome of the dispute depends on the validity of the Commission decision. The Court stated that it expected that, even if it were necessary to stay the proceedings at some point, there would be other issues to decide on, unrelated to the validity of the Commission decision, also taking the principle of effectiveness into account. The Court referred to essentially the same reasoning with respect to the possible need to stay the proceedings in light of the cases lodged in the United Kingdom pursuant to Article 28 of the Brussels I Regulation.

Third, Esso, one of the Defendants, requested CDC to provide it with certain documentation on the basis of Article 843a Civil Procedural Code (*Wetboek van Burgerlijke Rechtsvordering*), but the Court concluded that this provision does not provide for a general duty to provide documentation, in order to avoid fishing expeditions. In particular, one cannot claim documents to be *created* on the basis of this provision. Esso claimed, *inter alia*, access to the agreements transferring the rights to claim damages from the customers to CDC, but had not sufficiently specified the information it needed in order to evaluate the validity thereof. Finally, the Court concluded that documentation concerning any potential damages were not relevant yet, given that these would be calculated in separate proceedings (the so-called *Schadestaatprocedure*).

Procedural Rules for Obtaining Information in Antitrust Investigations

Rotterdam District Court Annuls Two Infringement Decisions on the Basis of Incorrectly Obtained Wiretaps

In two separate judgments the Rotterdam District Court (the "Court") annulled two ACM decisions which used evidence obtained through wiretaps. As the ACM does not have the authority to use wiretaps under Dutch law, it used data obtained through wiretaps from other government regulators.

In the *Limburg Construction* case, the ACM had fined two employees in control of management (*leidinggevenden*) for an antitrust infringement.[67] All the evidence used in the case was obtained through a wiretap used by the police in a separate corruption investigation. During its investigation the police contacted the ACM about the possible existence of price fixing agreements between construction companies and provided it with the wiretap data. Having obtained a permission to use the wiretap evidence from the public prosecutor, the ACM used the evidence to fine multiple companies and individuals for infringing competition law.

On appeal, the individuals claimed that the ACM had incorrectly used the wiretap evidence as it infringed the individuals' right to privacy and that the ACM did not have the right to use wiretaps itself. The Court upheld the appellants' claims and found that the wiretaps were originally obtained in a criminal procedure. Evidence obtained in a criminal procedure may only be shared with third parties for non-criminal procedures when there is an overriding public interest, which was not proven to exist in this case. In addition, no balancing of the public interest against the individuals' right to privacy had been performed. Therefore, the ACM was not allowed to use the wiretaps. The Court stressed that this was supported by the legislators' explicit choice not to give the ACM its own right to use wiretaps in order to obtain evidence of competition infringements. As the ACM's entire decision

[67] Rotterdam District Court, Judgment of June 13, 2013, LJN: CA3079.

was based on the wrongly obtained wiretaps, the Court subsequently annulled the decision.

In the later *Shipping-Waste* cartel judgment, the Court used the same reasoning.[68] In this case, the ACM received a warning of possible price fixing agreements from the ministry of environmental affairs, which had used wiretaps in an environmental investigation. Based on this warning and the wiretaps, the ACM started an investigation and fined multiple companies for infringement of the Competition Act. The Court held that the wiretaps had been obtained illegitimately, and because the decision had been solely based on the wrongly obtained wiretap evidence, the Court annulled the decision.

On July 18, 2013, the ACM announced that it had appealed both rulings, holding that these judgments would allow companies infringing competition rules to escape sanctions.[69]

Appeal Court Rules That Third Party Should Comply with Information Request

On April 23, 2013, the Hague Court of Appeal issued its appeal judgment in the interim proceedings between Difotrust and the ACM.[70] Difotrust is a company that carries out research for undertakings in order to assess whether they might have infringed competition law. During a dawn raid of Company X, which was carried out in connection with a specific sector inquiry regarding potential anti-competitive agreements in this sector, the ACM found a Difotrust report which included a section on the destruction of incriminating documents. The ACM therefore decided to raid Difotrust as well, and found incriminating documents about Company X that were no longer held by Company X.

The ACM subsequently requested from Difotrust a list of all undertakings in the sector under investigation for which Difotrust had performed similar services. The request was based on Article 5:16 of the General Administrative Law Act (*Algemene Wet Bestuursrecht*, "AWB"), which is a general provision that allows regulators to request information. Article 5:20 AWB contains a general duty on all persons to cooperate with such requests.

In first instance, the District Court the Hague had ruled that Article 5:16 AWB does not permit fishing expeditions, and that the ACM's request was disproportionate. The Appeal Court, however, disagreed, ruling that this was not a fishing expedition because the ACM had clear indications that certain companies in the sector for which Difotrust performed services had violated competition law. The Court held that there was no dispute about the fact that Difotrust had performed services for other companies in the sector, and, thus, that Difotrust possessed the requested list. It considered that Article 5:16 AWB in principle allows for requests for information vis-à-vis third parties, and that it is not required that the third party is involved in any infringement of competition law nor that there is a concrete allegation of such infringement.

The Court further considered that it was relevant that Difotrust's activities focus specifically on assessing whether there have been antitrust violations, and in the case of Company X, Difotrust's activities had in fact led to the destruction of incriminating evidence (Difotrust's report referred to "destruction of bad documents"). In addition, the ACM's request was not disproportionate, given that it only requested Difotrust to provide a list of undertakings it had performed service for, and not to provide any documents from those companies which it might have in its possession. The judgment does, however, order Difotrust to store all data for six months, which suggests that nothing would stop the ACM from subsequently requesting those documents.

The question whether the analysis would be different if Company X and/or Difotrust had hired a law firm is raised twice in the judgment, but remains unanswered. First,

[68] Rotterdam District Court, Judgment of July 11, 2013, case nr 12-1946; 1947; 1948; 1949.

[69] ACM, "Hoger beroep tegen verbod gebruik van gegevens van telefoontaps", press release of July 18, 2013, https://www.acm.nl/nl/publicaties/publicatie/11691/ACM-Hoger-beroep-tegen-verbod-gebruik-van--gegevens-van-telefoontaps/.

[70] Gerechtshof Den Haag, April 23, 2013 (published on June 13, 2013), ECLI:NL:GHDHA:2013:3041.

Difotrust argued that its entire business would be at risk if it would have to provide the requested information, and that it had already started to work through law firms to create privileged material. The ACM contested that Difotrust would be able to rely on privilege if it had been hired by a law firm. The Court did not answer the question as, since Difotrust believes it can continue its business by working through law firms, its argument that its entire business is at risk was thought to have failed as a matter of logic. Second, Difotrust argued that the ACM's request might also cover privileged information if Difotrust had been hired by a law firm. Again, the Court did not answer the question because (i) Difotrust raised the argument too late in the proceedings; and (ii) Difotrust did not identify any undertaking responsive to the ACM's request that had hired Difotrust through a law firm.

PORTUGAL

This section reviews competition law developments under the new Competition Act of May 8, 2012, Law No. 19/2012, which entered into force on July 7, 2012 (the "2012 Competition Act"). Previous pending cases are governed by Competition Act of January 18, 2003, Law No. 18/2003 (the "2003 Competition Act"). Both Acts are enforced by the Portuguese Competition Authority (the "PCA").

Unilateral Conduct

Portuguese Authority Imposes a €3.7M Fine on Sport TV

On June 19, 2013, the PCA sanctioned Sport TV Portugal, S.A. ("Sport TV") for abusing its dominant position in the Portuguese market for TV access to premium sports content. Sport TV is the dominant Portuguese television broadcasting company as it is the only operator permitted to broadcast certain competitions.[71] The abuse consisted of charging other pay TV operators discriminatory mandatory remuneration fees based on their specific broadcasting penetration.

This decision resulted from an investigation started in July 2010 following a complaint submitted by the TV operator Cabovisão - Televisão por Cabo, S.A. ("Cabovisão") concerning the mandatory remuneration fee demanded by Sport TV for the supply of its sport channels.

According to the competition authority, Sport TV systematically and continually restricted access to TV content from January 1, 2005 until March 31, 2011. As such, the regulatory body did not investigate or decide on the new distribution contracts dated on or after April 1, 2011, which may still be subject to further investigations.

During the infringement period, Sport TV imposed discriminatory and unequal conditions on various pay TV operators for identical or equivalent services. It also limited the production, distribution, technical development and investments in relation to the services concerned, penalizing certain operators to the detriment of competition and consumers.

In Portugal, abuses of a dominant position are punished with a fine of up to 10% of the turnover of the infringing company in the previous year.[72] Taking into account the seriousness of the infringement at hand, the PCA imposed a fine of €3,730,000.

Furthermore, the PCA required that SPORT TV publish an excerpt of the PCA's decision in two major national newspapers.

Sport TV has stated that it will appeal the PCA's decision before the Court of Competition, Supervision and Regulation, on the grounds that the release of the decision was unjustifiably late and that the sanctions imposed were disproportionate and unfair.

It is almost certain that the newly established Court of Competition, Supervision and Regulation will subject the decision to close scrutiny. Since its creation in 2012, the specialized regulatory court has upheld very few measures against abuses of dominance. A possible dismissal of Sport TV's appeal may be an important test for competition law enforcement in Portugal and a significant promotion of the PCA's activities.

[71] PCA's notice is available at http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_201315.aspx?lst=1&Cat=2013.

[72] Pursuant to Art. 43 of 2003 Competition Act.

SPAIN

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

Unilateral Conduct

The CNC Fined Correos €3,319,607 for Abusing Its Dominant Position in the Wholesale Market for Access Services to the Public Postal Network and in the Retail Services Market for Administrative Notifications

On May 9, 2011, the Directorate of Investigations of the CNC opened formal proceedings against Correos, the Spanish public postal services operator, for possible anticompetitive practices consisting of refusing to grant access to the public postal network to administrative notifications presented by private postal operators. In its Decision of April 22, 2013, the Council of the CNC declared that such conduct violated Article 2 LDC and 102 TFEU.

The CNC Council identified two relevant markets:(i) the wholesale market for access services to the public postal network and (ii) the retail services market for administrative notifications. The CNC observed that the retail services market for administrative notifications is characterized by the existence of limited demand-side substitutability, since demand is limited to entities involved in public administration, which are the only ones who make such notifications. Supply-side substitutability in this market is also limited due to the fact that Correos is the only operator that benefits from a legal presumption of veracity and authenticity in the delivery of administrative notifications.

According to the CNC Council, Correos enjoys a dominant position both in the wholesale market for access services to the public postal network, where it has a 100% market share, as well as in the retail services market for administrative notifications.

The CNC Council established that Correos' refusal to supply competitors wholesale access services from 2011 onwards, in particular, services related to the delivery of administrative notifications, constituted an abuse of this undertaking's dominant position. The CNC Council reached this conclusion on the grounds that (i) it is practically impossible for competing undertakings to replicate Correos' postal network; (ii) Correos' wholesale services are essential for the delivery of administrative notifications for which the presumption of veracity and authenticity is demanded; (iii) there was no objective justification for the refusal; and (iv) the refusal created an insurmountable barrier to entry, in that it prevented other operators from providing administrative notifications services to public authorities who require the presumptions described above when contracting their postal services.

In light of the above, the CNC Council ruled that Correos had breached Article 2.2(c) of the Spanish Competition Act and Article 102 TFEU and imposed a €3,319,607 fine on the undertaking.

Horizontal Agreements

The CNC Fined 22 Distributors of Sanitary and Plumbing Materials More Than €6.4 Million for Participating in a Cartel

On October 10, 2011, the Directorate of Investigations of the CNC opened formal proceedings against 22 companies operating in the sanitary and plumbing materials sector for a possible infringement of Article 1 LDC. The proceedings began as a result of a complaint submitted by an association of businessmen before the competition authorities of the region of Valencia. In its decision of May 23, 2013, the CNC Council declared that such undertakings had breached Article 1 LDC by participating in a cartel which had lasted from the second half of 2008 to 2011.

The anticompetitive practices identified by the CNC took place in the wholesale market for materials used in the installation, maintenance and repair of pipes for water and other fluids, and for other sanitary, heating and/or refrigeration services in buildings, i.e., the wholesale market for sanitary and plumbing materials.

During the first half of 2008, a series of competing suppliers, mostly located in the Levante region, began to maintain contacts. The aim of these contacts was, in principle, to cooperate so as to deal with problems of late payment and debts. These contacts gave way to agreements and meetings between a large number of market operators, especially during the second half of 2008 and the first quarter of 2009. In particular, such cooperation led to an agreement concerning the application of financial surcharges to customers, as well as the amounts and the coordinated implementation of such surcharges.

In addition, as a result of contacts maintained during the second half of 2008, the participants in the cartel agreed to exchange information and to establish maximum sales discounts for certain products of certain brands. The CNC Council noted that there was sufficient proof that these agreements had actually taken place and that the participants in the cartel monitored both their application as well as their effectiveness.

The CNC Council was of the view that these agreements and the exchange of information had an effect on end prices paid by customers and that by engaging in such conduct the participants in the cartel sought to strengthen their bargaining power vis-à-vis their customers, increasing, re-establishing or maintaining their profit margin through means different to those which condition normal competition and which are thus contrary to Article 1 LDC.

Policy and Procedure

National Commission of Markets and Competition

On June 4, 2013, Law 3/2013 was enacted, creating the National Commission of Markets and Competition (“*Comisión Nacional de los Mercados y la Competencia*”). This law contains 39 articles, which are divided into 5 chapters, 18 additional provisions, 10 transitory provisions, a repeal provision, 11 final provisions and an annex. Law 3/2013 entered into force on June 6, 2013.

The new National Commission of Markets and Competition brings together seven different governmental agencies, , the National Competition Commission, as well as six regulatory agencies, i.e., the National Energy Commission, the Telecommunications Market Commission, the Railway Regulatory Committee, the National Postal Sector Commission, the Airport Economic Regulatory Commission and the Audiovisual Media Council. These agencies are now part of a single and unified institution, meaning that the CNC no longer exists.

Law 3/2013 is of an exclusively institutional nature and provides for no substantive changes to competition law.

SWEDEN

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

Mergers and Acquisitions

The SCA Clears Two Pharmacy Acquisitions

On May 17 and May 22, 2013, the SCA unconditionally approved two proposed acquisitions in the pharmacy sector: the acquisition of Vårdapoteket i Norden AB ("Vårdapoteket") by ApoPharm AB ("ApoPharm") and the acquisition of Medstop Group Holding AB ("Medstop") by Oriola-KD Holding Sverige AB ("Oriola"), respectively. All the parties to the transactions operate pharmacies in Sweden. The acquiring companies are also active in the distribution of pharmaceuticals and other products to pharmacies.

The SCA found that both transactions gave rise to horizontal overlaps in the market for pharmaceutical retailing. The SCA left the precise market definition open but noted that the European Commission had previously considered that pharmaceutical retailing may represent a discrete market, which could be either national or local in scope. The SCA found that the merged entities would continue to face strong competition from numerous competitors, most notably Apoteket AB, which would, post-transaction, remain the largest operator in the market both in terms of revenue and number of outlets. The SCA noted that the pricing and sales conditions of prescription pharmaceutical products is heavily regulated in Sweden, meaning that the transaction was unlikely to have any appreciable impact on competitive conditions. With respect to non-prescription pharmaceutical products, the SCA concluded that the merged entities would face robust competition from non-pharmacy retailers. Moreover, the market investigation indicated that customers generally viewed different pharmacy chains as highly substitutable, with the choice between retailers being directed primarily by location.

The transactions also gave rise to vertical relationships due to ApoPharm's and Oriola's activities in the distribution of pharmaceuticals products. The SCA found that due to the terms of the regulations and trade agreements covering the supply and pricing of prescription pharmaceutical products, the merged entities would be unable engage in any customer or input foreclosure strategies with respect to pharmaceutical products. The SCA noted that consumers could easily switch to non-pharmacy retailers to satisfy their demands for non-prescription pharmaceutical products.

Ultimately, the SCA found that neither of the acquisitions would significantly impede effective competition in the Swedish market or in any substantial part thereof.

The Market Court Significantly Reduces TeliaSonera's Fine for Margin Squeeze

On April 12, 2013, the Swedish Market Court (the "Market Court") ruled that the Swedish telecommunications operator, TeliaSonera Sverige AB ("TeliaSonera"), had abused its dominant position in the Swedish wholesale market for broadband access through ADSL by engaging in margin squeeze on several occasions from July 2001 to January 2003. The Market Court largely upheld the Stockholm District Court's (the "District Court") 2011 judgment but reduced the administrative fine significantly, from SEK 144 million (approximately €15 million) to SEK 35 million (approximately €4 million).

TeliaSonera owns the fixed-line telecommunications network encompassing all households in Sweden and uses this network to provide retail telecommunications services. TeliaSonera also acts as wholesaler, offering competing operators access to its network.

The lengthy legal proceedings were initiated in 2004, when the SCA brought an action against TeliaSonera before the District Court claiming that TeliaSonera had charged unfairly high prices for wholesale access to its network, thereby squeezing its competitors' profit margins.

In 2009, the District Court requested a preliminary ruling from the ECJ regarding the specific criteria for establishing margin squeeze abuse. In 2011, the ECJ held that, in essence, margin squeeze was a form of abuse in its own right rather than a form of a refusal to supply, and thus an abusive margin squeeze could occur even though the dominant undertaking was not under a duty to supply the wholesale product.

In a judgment of December 2011, the District Court concluded that TeliaSonera had engaged in margin squeezing on several occasions from April 2000 to January 2003 and ordered it to pay the highest fine ever imposed in Sweden for abuse of dominance. TeliaSonera appealed the judgment to the Market Court, which is the ultimate court of appeal for competition cases. The Market Court largely upheld the District Court's judgment but found that the SCA had only proved abuse from July 2001 to January 2003 and in fewer instances than established by the District Court. As a result, the Market Court significantly reduced the fine.

At the outset, the Market Court emphasized that because of the severe nature of administrative fines in competition law cases, the presumption of innocence and other rights listed in Article 6.2 of the European Convention on Human Rights apply. The Market Court noted that the SCA is required to present an investigation that is "robust," meaning that a further investigation could not have affected the value of the evidence. Also, the SCA must prove the existence of the circumstances constituting an abuse and the circumstances of relevance for setting the level of the administrative fine to the requisite legal standard.

The Market Court departed from the District Court's market definition, which excluded dial-up internet connections completely. Instead, the Market Court found that the market for wholesale broadband access should include (in addition to ADSL) dial-up internet connections up to mid-2001. While the Market Court found that TeliaSonera was dominant in the wholesale market for broadband access through ADSL, the SCA had not demonstrated that the company was dominant in a market which included dial-up internet connections. As a result, the Market Court found that TeliaSonera's dominance emerged only after July 2001.

In assessing whether TeliaSonera's conduct constituted margin squeezing, the Market Court first emphasized that a prerequisite for a finding of a margin squeeze is that the products that the dominant undertaking offers to its competitors in the wholesale market are similar or comparable to the products that the dominant undertaking itself uses to access the retail market. Going against the decision of the District Court, the Market Court found that the SCA had not demonstrated that the products delivered to one of the wholesale customers (Bostream) were similar or comparable to the products that TeliaSonera used to access the retail market. TeliaSonera's conduct in relation to this customer could therefore not be considered a margin squeeze.

The Market Court then went on to assess TeliaSonera's margin between its prices for ADSL input services and its costs for retail broadband connection services. The District Court had identified several occasions where TeliaSonera's margins were negative or insufficient to cover its costs for supplying retail services to end-users based on the so-called LRAIC method (long run average incremental cost).

The Market Court referred to the Commission's decision in *Deutsche Telekom*,[73] noting that when the margins are negative, no further assessment of the costs is necessary. Therefore, the Market Court found that TeliaSonera had applied a margin squeeze in all instances where its margins were negative (and where that this conduct occurred after July 2001 and related to products that were similar or comparable to the products that TeliaSonera used to access the retail market).

In reviewing the assessment of the costs in the cases where TeliaSonera had positive margins, the Market Court noted that the evidence raised several questions as to the reliability of the LRAIC method, which both the SCA and the District Court had used to determine that TeliaSonera's wholesale prices were insufficient to cover its costs at the retail level. The Market Court found that TeliaSonera had

[73] *Deutsche Telekom AG* (Case COMP/C-1/37.451, 37.578, 37.579), Commission decision of May 21, 2003, para. 153.

never used the LRAIC method in its pricing decisions and that the method was not used in practice for price-cost calculations. Since the SCA had not presented any other evidence to support its position that TeliaSonera's retail costs exceeded its wholesale prices, the Market Court held that a margin squeeze could not be established where TeliaSonera's margin was positive.

In assessing the gravity of the infringement, the Market Court noted that the SCA had failed to provide a reliable basis for its estimate of TeliaSonera's turnover on the relevant market during the time of the infringement and to indicate the part of the market affected by the infringement. Despite these shortcomings, the Market Court found that an overall assessment of the evidence showed that TeliaSonera's conduct amounted to a serious infringement. In reducing the administrative fine, the Market Court considered that the conduct occurred over ten years ago for a limited period, and that only part of the market was affected.

SWITZERLAND

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

Horizontal Agreements

The FCC Fines Marketers of French Language Books

In a decision dated May 27, 2013, the FCC fined 10 marketers of French-language books active in Switzerland for restrictions on parallel imports. According to the FCC, the following companies prevented Swiss retailers from supplying themselves with cheaper French-language books from abroad, (in particular from France), between 2005 and 2011: Albert le Grand SA, Dargaud (Suisse) SA, Diffulivre SA, Diffusion Transat SA, Editions Glénat (Suisse) SA, Interforum Suisse SA, Les éditions des 5 frontières SA, Les Editions Flammarion SA, OLF SA and Servidis SA. According to the FCC's press release,[74] this foreclosure of the market allowed the marketers to maintain stable market shares and profit levels at the wholesale level, and higher prices for books at the retail level in Switzerland. The fines imposed amounted to approximately CHF 16.5 million (roughly €13.4 million).

Investigation

In France, the retail price of books is set by publishers; booksellers cannot deviate from it by more than 5% by virtue of the "Lang law." When a publisher decides to sell a French-language book in Switzerland, it generally employs the services of a marketer located in Switzerland, which markets the books of the relevant publisher on an exclusive basis. Marketers (*diffuseurs*) approach the retailers to promote the books in the catalog of the publishers for whom they act, who may or may not belong to the same group as the marketer. This service is performed by commercial teams consisting of representatives who present new issues, draw attention to existing titles and engage in other promotion operations. The marketer takes orders from dealers and passes them on to the distributors (*distributeurs*), who handle all logistical operations involved in getting books to the customer. The Swiss marketer applies a conversion rate (which it sets freely) to the French price, with the resulting price being the gross wholesale price applied to the retailers. Such a mark-up is supposed to cover the expenses of marketing and distribution in Switzerland. The marketer then grants a discount on the gross wholesale price to booksellers.

In July 2007, the Secretariat of the FCC opened a preliminary investigation into the French-language book market in Switzerland. This preliminary investigation was intended to determine whether the retail price differences observed between books sold in Switzerland and those sold in France (which amounted to between 25% and 35% at the time) were the consequence of a possible restriction on competition as defined in the Competition Act.

On March, 13 2008, the FCC decided to open a regular investigation into marketers of French-language books operating in Switzerland. In view of the exclusivity granted to marketers by publishers (as described above), the FCC considered that there were indications that the marketers of French-language books might hold, on an individual basis, a dominant position in the Swiss market, and that the level of prices charged for marketing services might be regarded as abusive pursuant to Article 7(2) of the Competition Act. Subsequently, the Commission widened its investigation to include Swiss gross wholesale prices set by marketers in order to examine whether such practices (as well as the juxtaposition of vertical agreements between marketers and booksellers) could be regarded as illegal price-fixing within the meaning of Article 5 of the Competition Act.

On March 18, 2011, the Swiss Parliament adopted new legislation through which book prices were to be fixed. In particular, the proposed act allowed the publisher or importer to set the final retail price of books that it publishes in, or imports into, Switzerland, with retailers being

[74] The press release is available in French at the following address: http://www.news.admin.ch/message/index.html?lang=fr&msg-id=49225.

compelled to resell the books at the price so determined. Given that the act was subject to an optional referendum, on March 24, 2011, the FCC decided to temporarily suspend the investigation that it had opened in parallel to the legislative process. On March 11, 2012, the new act was rejected by the Swiss people in a referendum, so the FCC decided to re-launch its investigation.

Decision

According to the FCC, the investigation established that the marketers implemented distribution systems that had the effect of restricting competition on the market for the supply of French-language books. The FCC found that Swiss retailers were unable to supply themselves abroad during the period covered by the investigation due to the exclusivity agreed by each marketer with the publishers. Thus, between 2005 and 2011, practically no parallel importation took place, and attempts by bookshops wishing to supply themselves abroad at lower prices than those applied in Switzerland failed.

The FCC decided to fine Albert le Grand SA, Dargaud (Suisse) SA, Diffulivre SA, Diffusion Transat SA, Éditions Glénat (Suisse) SA, Interforum Suisse SA, Les éditions des 5 frontières SA, Les Editions Flammarion SA, OLF SA and Servidis SA. It took into account not only the turnover achieved on the Swiss market by these entities and the duration and gravity of the infringement, but also the ability of companies to pursue their activities despite the sanction. Marketers are expected to adapt their contracts and their behavior so as to permit retailers to supply themselves through alternative channels in conformity with the principle of competition.

Policy and Procedure

The FCC Publishes Its 2012 Annual Report and Announces That the Market Foreclosures and the Freedom to Set Prices Will Be Its Permanent Priorities. On April 29, 2012, the FCC published its 2012 annual report.[75]

The report stresses the importance of preventing market foreclosures, as they can be particularly harmful to a small economy like Switzerland. Where these market foreclosures relate to agreements between undertakings, the FCC consistently intervenes. By way of example, because the manufacturer BMW prevented Swiss customers from importing BMW and MINI vehicles directly into Switzerland, the FCC fined it CHF 156 million (approx. €127 million). Likewise the association for the Swiss music industry, the IFPI, was fined because it required its members not to engage in parallel imports.

As regards price-fixing agreements, the investigation into road construction and civil engineering in the Canton of Aargau allowed the FCC to detect a large number of separate cases of bid rigging. In the investigation into the tariffs recommended by Neuchatel real estate agents, the FCC found that the recommended prices were followed to a considerable extent and that accordingly, customers did not pay prices based on their individual cases but instead had to pay a flat-rate price. The investigation into alpine sport products revealed that an importer unlawfully limited the freedom of the retailers it supplied to set their own prices by dictating the maximum discount that they could offer.

In the report year, further cases were opened in response to allegations of suspicious activities. The LIBOR investigation related to allegations of concerted manipulation of the LIBOR interest rate. In the investigation into roads, civil engineering and construction in the Canton of Graubünden, there are suspicions of bid rigging, and in the investigation against Steinway & Sons,

[75] The annual report is available in English at the following address: http://www.weko.admin.ch/dokumentation/00226/index.html?lang=en.

there are indications that parallel imports are being prevented and that there are price-fixing agreements between Switzerland's retailers of grand pianos and other pianos.

As regards merger control, 2012 saw acquisition of Orange Switzerland by Apax Partners LLP. The preliminary investigation did not reveal any indication that the contemplated 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 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 would not change the present structure of the market. The FCC found that, following the proposed acquisition, the Swiss mobile telecommunication market will remain characterized by the presence of three large network providers, which ensures sufficient competitive dynamics and market openness for further innovation. The FCC thus decided that the contemplated transaction between Orange Switzerland and Apax did not require any further investigation and did not raise any concerns from a competition law perspective. In 2012, the FCC was called on to review six concentrations in relation to the media industry. In all six mergers, the FCC approved the concentrations in Phase I. The FCC also assessed various merger plans in the financial services sector. Worthy of mention here are the bank mergers between Julius Bär and Merrill Lynch Bank (Switzerland) SA and between Sarasin and Safra.

UNITED KINGDOM

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

Mergers and Acquisitions

CAT Upholds CC's Prohibition of AkzoNobel/Metlac Merger

On June 21, 2013, the CAT unanimously dismissed an application for review by Akzo Nobel N.V. ("AkzoNobel") seeking to quash the CC's decision (the "Decision") to prohibit its acquisition of sole control of Metlac Holding S.r.l. ("Metlac").[76] Metlac Holding intervened in the proceedings in support of the CC.

The CC had concluded that the merger would lead to a substantial lessening of competition ("SLC") in the market for the supply of metal packaging coatings for beer and beverage cans in the U.K. AkzoNobel applied under s.120 of the EA 2002 for a review of the Decision on three grounds: (i) that the CC had erred in its application of s.86(1)(c) of the EA 2002 in concluding that AkzoNobel carried on business in the U.K. and could therefore be the subject of a prohibition order; (ii) that the CC had not adduced sufficient evidence to justify its conclusion that Metlac competed more aggressively on price than other competitors; and (iii) that it had not adduced sufficient evidence that the acquisition would lead to a loss of competition in innovation.

As a preliminary point, the CAT confirmed that the principles to be applied on an application under s.120 of the EA 2002 were those that would be applied by a court on an application for judicial review. In answering statutory questions, the CAT would apply a "rationality test" to the reasoning in the Decision, in light of the totality of evidence available.

As to the first ground, the EA 2002 provides that an enforcement order may extend to a person's conduct outside the U.K. (here the acquisition of Metlac's Italian shares) only if one of three tests is satisfied. The relevant test in this case was whether the person subject to the order carries on business in the U.K. (s.86(1)(c)). The CC had concluded that s.86(1)(c) was satisfied, since AkzoNobel (i.e., the ultimate parent company) was "active in the operation and direction of the business" in the U.K. In particular, the organizational and decision-making structure of the AkzoNobel Group was based on functional units whose activities extended to the U.K., and AkzoNobel was directly and intimately involved in the operational decisions of those business units. The CAT therefore held that the CC had not erred in law nor misdirected itself in this regard, and that the CC was within its powers to conclude that AkzoNobel carried on business in the U.K. The CC did therefore have jurisdiction to prohibit the transaction.

As to the second ground, the CAT concluded that the CC had not erred in finding that Metlac competes more aggressively on price than its competitors. The CC had drawn on the following sources of evidence: (1) responses provided to the German Bundeskartellamt's survey of customer views, as part of that authority's investigation of the Transaction; (2) responses to the CC's own customer survey; and (3) the CC's own analysis of pricing data. The CAT considered that the CC's treatment of each of the sources of evidence was rational, and that it had properly investigated whether Metlac competed more aggressively on price than other competitors.

As to the third ground, the CAT held that the CC had a sufficient evidential basis upon which to conclude that the Transaction might lead to a loss of competition in innovation. The assessment of the evidence was a matter principally for the CC as it involved a certain amount of economic analysis. In any event, the CAT agreed that the conclusion on innovation was "not crucial to the SLC finding. It was merely part of the supporting assessment."

[76] *Akzo Nobel N.V v. Competition Commission* [2013] CAT 13, http://www.catribunal.org.uk/237-7891/1204-4-8-13-Akzo-Nobel-NV.html

The CAT therefore dismissed AkzoNobel's application in its entirety and ordered it to pay the CC's reasonable costs.

OFT refers acquisition of china clay producer to CC for further investigation

On April 3, 2013, the OFT referred Imerys Minerals Limited's ("Imerys") acquisition of Goonvean Limited's ("Goonvean") kaolin mining business to the CC for further investigation.[77] The OFT's decision raised concerns that the acquisition could substantially lower competition in the UK markets for the extraction and supply of kaolin (more commonly known as china clay) for paper filler, sanitary ware, tableware, and other specialty applications.

Imerys, a subsidiary of multinational Imerys SA, specializes in the extraction and processing of china clay in the U.K. It owns and operates six china clay quarries in Cornwall, the principle source for the mineral in the U.K. Goonvean extracted and processed china clay from the five quarries it owned in Cornwall. Additionally, Goonvean continues to operate other industrial mineral processing activities not at issue in the merger. On November 1, 2012, Imerys completed its acquisition of Goonvean's china clay mining and processing business, including its five Cornwall quarries. The OFT began its review one month later.

China clay is a mineral used as a filler in various industrial production processes. The OFT's decision identified four distinct product categories for china clay in the U.K.: (i) in paper filler to add brightness and reduce costs; (ii) in sanitaryware, such as sinks, toilettes, and tiles, and tableware to add whiteness and aid structural formation; and (iii) in specialty applications including paints, coatings, adhesives, leather processing, and rubbers to add whiteness. Additionally, the OFT identified that by-products created by china clay extraction may be sold as stock for materials used in road construction and cement.

The OFT examined the merger's impact on competition in each of these product categories, and ultimately referred all four to the CC for investigation. The OFT considered that many of the same features were present across all four categories:

- **3 to 2**. The merger created a near monopoly or reduced the number of suppliers from three to two. The OFT noted that where an additional supplier was present its market share was often small.
- **Low imports.** There was no viable alternative supplier outside the U.K. High transportation costs, small order volumes, and precise product specifications depending on end use, meant that U.K. customers relied almost exclusively on the Cornwall producers for a cost effective supply.
- **Bargaining power.** There was little balance of bargaining power as between customers and suppliers. The Cornwall china clay suppliers exported most of their product, and thus did not rely on the U.K. customers for their continued business. However, the U.K. suppliers relied entirely on the Cornwall suppliers.

Notably, the OFT made this referral despite the fact that the combined total annual market value of the parties was just over £6 million - well below the OFT's £10 million *de minimis* threshold for referral to the CC. The OFT cited a number of factors in deciding to refer the transaction, and in disapplying the *de minimis* exception. In particular, it noted the high combined market share of the parties, the potential extent of lost competition, customers' lack of access to other suppliers, and the lack of other known primary china clay resources in the U.K.

The results of the CC's investigation are expected by September 17, 2013.

The CC publishes its decision in the AG BARR/Britvic Merger

On July 9, 2013, following a referral from the OFT on February 14, 2012, the Competition Commission published its decision approving the proposed acquisition by Britvic plc of AG BARR plc. Both companies are significant in the non-alcoholic beverages ("NAB") (or still drinks) sector in the U.K.

[77] http://www.oft.gov.uk/shared_oft/mergers_ea02/2013/imerys.pdf

In line with its decisional practice, the CC identified two discrete markets in the soft drinks segment; still drinks, and carbonated soft drinks ("CSDs"). The preponderance of the CC's investigation focused on the parties activities in CSDs, given (i) AG-BARR's strong presence in this segment on account of its most popular brand, Irn Bru; and (ii) Britvic's long-standing bottling agreements with Pepsi for a number of its key brands, including Pepsi and 7-Up, in addition to its own brand, Orangina.

Taking this distinction as a starting point, the CC further considered a market segmentation on the basis of the retail channels through which soft drinks are sold. In particular, the CC acknowledged a distinction between "on-trade" and "off-trade" sales. On-trade refers to sales of drinks to consumed at the place of purchase, while off-trade refers to sales of drinks to be consumed elsewhere. The CC divided the off-trade sales market into the at-home and impulse segments.

As to the relevant geographic market, although the CC considered the market for CSDs to be U.K.-wide, it considered the special effects of the merger in Scotland, given AG Barr's particular strength there (due to the high sales of Irn Bru).

In its investigation, the CC considered three theories of harm:

- **Unilateral horizontal effects**. The CC considered whether the parties would raise the prices of substitutable brands post-merger. In particular, the CC looked closely at the overlaps between AG BARR and Britvic's product offerings and at the diversion ratios between these products. The CC concluded that overlaps were present but that they were slight. It also considered that the merged entity would have substantially greater bargaining power vis-à-vis its customers. This was of particular concern in Scotland, where Irn Bru is considered a 'must-stock' brand. The CC considered economic evidence and third-party views on substitutability before ultimately concluding that the merged entity was unlikely to unilaterally raise prices.
- **Portfolio effects**. The CC considered whether the combination of AG BARR and Britvic's brands might give the merged entity a substantial advantage over smaller competitors on account of being able to press more small brands on retailers. The CC noted the views of customers that supplier negotiations were brand-specific, as were purchasing decisions, as well as market analysis suggesting that there was no systematic correlation between the size of a drinks producer and the brand's distribution depth with respect to second and third tier brands. It therefore concluded that the transaction was unlikely to give rise to portfolio effects.
- **Coordinated effects.** The CC considered whether the merger would faciliate greater coordination among the undertakings active in the markets under scrutiny. The CC's analysis focussed on the possibility of coordination between the merged entity and CCE, the largest CSD bottler in the U.K. The CC considered that the three essential elements for coordination were lacking, specifically: (i) pricing practices were insufficiently transparent in the market to create a clear focal point for coordination – on the contrary the pricing of beverages in wholesale agreements is highly complex; (ii) there was no mechanism by which deviation from the coordination could be effectively curtailed –rewards for deviation were simply too great; and (iii) lagre, sophisticated buyers would be be capable of destabilising any attempts by the merged entite and its competitors to coordinate their behavior.

The CC further found that certain characteristics of the CSD market might offset the potential negative effects of the merger; the merged entity could be constrained by strong buyers and the likelihood of entry (due to low barriers to entity and past examples of undertakings successfully entering the markets in question).

As such the CC found that the merger would not give rise to a substantial lessening of competition in any market in the U.K.

Policy and Procedure

The Department of Business, Innovation and Skill publishes its consultation on reforms to the regulatory and competition appeals process

On June 19, 2013, the Department for Business, Innovation and Skills ("BIS") published its consultation on potential reforms for the streamlining of regulatory and competition appeals (the "Consultation"). The Government seeks to: (i) reduce the current length and cost of appeals; (ii) to create an appeal framework that minimizes uncertainty and provides consistency between appeal routes in different sectors; and (iii) to ensure proportionate regulatory accountability. To achieve these aims, the Government proposes to: (i) alter the standard of review in appeal cases; (ii) increase transparency and optimize incentives; and (iii) streamline the appeals process through reformation of the appeal bodies and routes of appeal.

The Government notes that appeals constitute a vital element in the regulatory decision making framework as they enable firms to seek redress against regulators and help to foster decisional consistency across sectors over time. The Government is eager to strike the correct balance between an open and effective appeals system and the costly and inefficient creation of what would amount to a second regulator at the appellate level.

As to the standard of review, the Government proposes altering the standard of review for regulatory and competition decision from an appeal heard "on the merits" to either a judicial review standard, or to closely specified grounds of appeal:

- **Judicial Review.** Bodies hearing appeals would apply a judicial review standard to competition and regulatory decisions, so that decisions could only be challenged on grounds of illegality, irrationality or procedural impropriety. Unlimited jurisdiction would remain for determining the level of penalty itself. Under this standard, appeals would more closely mirror the approach taken in the European Union, where the General Court has unlimited discretion to review penalties, but may only assess infringement decisions on grounds of 'lack of competence.'
- **Specified Grounds**. The alternative proposed by the Government is the adoption of closely specified grounds of appeal. These might include as grounds of appeal: a material error of fact or law, material procedural impropriety, unreasonable exercise of discretion, and unreasonable judgments or predictions. The Government has suggested that the merits of such a system would include discouraging parties from adducing extraneous evidence, and would narrow the questions addressed on appeal, saving time and costs.

The second set of changes relate to the constitution of appellate bodies. In particular, although the Government recognizes the complementary roles of the CAT and the High Court, it considers that appeals could be more efficiently allocated between the various appeal bodies. In particular:

- **CAT.** The Government has proposed two technical changes to the CAT, namely extending the tenure of experienced judges, and allowing for judges to sit simultaneously on the High Court (or equivalent) and the CAT. More controversially, the Government proposes allowing judges to sit alone on the CAT, rather than requiring a tribunal of 3 to hear every case. The Government has set a deadline of three months for a full review of the CAT's rules.
- **Appeal Routes**. The Government has proposed a number of alterations to the appeal process, so as to route more cases through the appropriate body. For example, it proposes that price control appeals in the communications sector should be heard directly by the CC, and energy code modification appeals by the CAT. Further, the Government proposes that the CAT should hear judicial review of cases that would currently be brought in the High Court.

As to incentives to appeal, the Government has proposed altering the regime so as to discourage unmeritorious appeals, and to dissuade appellants from adducing irrelevant evidence. In particular:

- **Confidentiality Rings**. Competition authorities would be given increased power to institute lawyer-only confidentiality rings.
- **Evidence.** The Government proposes codifying the circumstances in which new evidence will be admissible in competition and regulatory appeals. Appellants would need to show good reason, and to show that the evidence could not reasonably be expected to have been put before the administrative authority, before new evidence is admitted.
- **Costs.** The Government proposes to encourage regulators to claim their full costs for unsuccessful appeals. The Government is also consulting on whether the administrative bodies' exposure to costs orders pursuant to successful appeals might be limited. Similarly, the CAT might reject grounds of appeal that stand little chance of success at an earlier occasion.

The Government's proposals for streamlining appeals include imposing tighter deadlines on cases. For example, the Government proposes decreasing the CAT's target timescale for straightforward cases from 9 to 6 months, and all other appeals to the CAT to 12 months. Further, the Government has proposed creating a fast-track procedure in which the amount evidence adduced is limited, and cost-caps are agreed in advance by the parties.

The Government is accepting responses to its consultation until September 11, 2013.

Chapter II/Article 102

CAT Grants Follow on Damages in Albion Water Limited v Dŵr Cymru Cyfyngedig

The CAT has ordered water provider Dŵr Cymru Cyfyngedig to pay follow-on damages under s. 47A of the CA 1998 to competing provider Albion Water Limited. The decision follows a number of findings by the CAT that Dŵr Cymru had abused its dominant position, in breach of a Chapter II prohibition. This marks the second time (and in under twelve months) that such an award for follow-on damages has been granted by the CAT.

In its judgment of March 28, 2013, the CAT ordered Dŵr Cymru to pay Albion Water Ltd. more than £1.8 million in damages related to revenues lost from an existing customer, as well as a potential future customer.[78] The CAT dismissed Albion's claims for exemplary damages.

Section 47A of the CA 1998 enables the CAT to award compensatory and exemplary damages to private parties that have suffered losses due to the anti-competitive behavior of an undertaking which is found to have violated U.K. or EU competition law. Albion's Section 47A claim arose out of three related judgments issued by the CAT between 2006 and 2008 that found Dŵr Cymru had abused its dominant position when providing water to certain newspaper producers in North Wales via both excessive pricing and margin squeezing.[79]

Albion has acted as a supplier of water to a newspaper producer in North Wales since 1999; it purchases water from Dŵr Cymru as well as the right to transmit that water through their pipes. Since 2000, Albion had been negotiating an alternative agreement with Dŵr Cymru under which it would still purchase pipe access from Dŵr Cymru (which arrangements carried a separate "carriage price," or First Access Price ("FAP")) but could purchase the water from another source.

In its 2006 and 2008 judgments, the CAT found that the carriage price Dŵr Cymru offered for this alternative agreement was abusive:

[78] *Albion Water Limited v Dŵr Cymru Cyfyngedig* [2013] CAT 6 (28 March 2013), Case No. 1166/5/7/10.

[79] *Albion Water Limited & Albion Water Group Limited v Water Services Regulation Authority* (Dŵr Cymru/Shotton Paper, Case No. 1046/2/4/04): The Main Judgment [2006] CAT 23 (6 October 2006), The Margin Squeeze Judgment [2006] CAT 36 (18 December 2006), and The Unfair Pricing Judgment [2008] CAT 31 (7 November 2008).

- The FAP “bore no reasonable relation”[80] to Dŵr Cymru’s costs for providing the service, and thus was unfair and excessive; and
- It resulted in margin squeezing as Albion Water could not achieve a profit by sourcing from another water supplier without raising the retail price beyond that set by Dŵr Cymru.

In its March judgment, the CAT ordered Dŵr Cymru to pay more than £1.69 million in compensatory damages for Albion’s losses resulting from its inability to establish the common carrier arrangement. The court employed the same “but-for” counterfactual analysis used in two recent follow-on damages judgments, *Enron Coal* (2011)[81] and *2 Travel* (2012) (i.e., it asked what net profits would have been earned if the abuses had not occurred).[82] As to the relevant period for calculating damages, the court held that the damages period only ended once Dŵr Cymru proposed a fair price directly to Albion, the victim of its abuse.[83]

The court also ordered Dŵr Cymru to pay Albion £160,000 in compensatory damages on account of Albion’s loss of profit from not being able to realize sales to a potential customer. Albion Water had been considering tendering for a water carriage contract with another paper producer. The CAT found that, absent the abusive conduct, Albion would likely have issued the tender; Albion had a substantial (not just speculative) chance to win the bid given the customer’s demonstrated desire to change suppliers. Applying the lost chance test set out in *Allied Maples* (1995)[84] and *Enron Coal* (2011), the court held Albion was “highly likely” to secure the bid, and thus awarded Albion 67% of the profits that the contract would have yielded Albion Water.[85]

Finally, the CAT dismissed Albion’s claims for exemplary damages, on the bases that Dŵr Cymru did not cynically or recklessly disregard Albion’s rights. Though the calculation of the carriage price was done without “any effective mechanism for ensuring compliance with the law”[86] and was delegated to employees deemed by the CAT as unfit to do so effectively, the court found no evidence that the Board knew or intended the price to be unlawful.

Sectoral Investigations

CC Publishes Its Provisional Findings in Its Investigation of the Aggregates, Cement and Ready-mix Concrete Market

Following a reference by the OFT made on January 18, 2012, on May 23, 2013, the CC published its provisional findings in its Market Investigation into the aggregates, cement, and ready mix concrete (“RMX”) markets in the Great Britain (“Provisional Findings”).[87] The context of this Investigation is unusual as it overlapped with the CC’s Inquiry into the merger of the UK businesses of Lafarge and Tarmac and it comes at a time when the European Commission is investigating suspected anti-competitive practices by manufacturers of cement and related products in the EU.

The CC’s investigation sought to discover whether any feature (or combination of features) of the aggregates, cement, and RMX markets gave rise to an adverse effect on competition (“AEC”) in the U.K. Although the CC has

80 *Albion Water Limited v Dŵr Cymru Cyfyngedig* [2013], ¶48 (quoting The Unfair Pricing Judgment [2008] CAT 31(7 November 2008), ¶274).

81 *Enron Coal Service Ltd (In Liquidation) v English Welsh & Scottish Railway Ltd* [2011] EWCA Civ 2 (19 January 2011), Case No. 1106/5/7/08.

82 *2 Travel Group plc (In Liquidation) v Cardiff City Transport Services Limited* [2012] CAT 19 (5 July 2012), Case No. 1178/5/7/11.

83 *Albion Water Limited v Dŵr Cymru Cyfyngedig* [2013], ¶175 (“where a dominant undertaking offers an unlawfully abusive price, the loss caused by that price may continue until the dominant undertaking withdraws that price and offers a new price *directly* to the victim of the abuse. It is not sufficient to discuss alternative prices with a third party (such as a regulator), *even if the undertaking expects that the third party will pass that price onto the victim*.” (emphasis added).)

84 *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602 (12 May 1995).

85 *Albion Water Limited v Dŵr Cymru Cyfyngedig* [2013], ¶191.

86 *Albion Water Limited v Dŵr Cymru Cyfyngedig* [2013], ¶286.

87 Available at: http://www.competition-commission.org.uk/assets/competitioncommission/docs/2012/aggregates-cement-and-ready-mix-concrete/130523_provisional_findings_report.pdf

not identified any features giving rise to an AEC in the aggregates, or RMX markets, it has provisionally found that "there was a combination of structural and conduct features that gave rise to an AEC in the GB cement markets through coordination."[88]

The Provisional Findings identified five "Majors", i.e. the five largest heavy building materials producers in the U.K., namely: Aggregate Industries (although not a manufacturer of cement in the UK),[89] Cemex,[90] Hanson,[91] HCM,[92] and Lafarge Tarmac.[93]

The CC investigated four theories of harm: (i) unilateral market power (i.e., whether individual suppliers could set higher prices); (ii) tacit coordination (whether the market structure was conducive to competition between suppliers); (ii) vertical integration (i.e., whether vertical integration provides advantages to certain suppliers, or enables them to prejudice non-vertically-integrated competitors); and, (iv) whether existing policy and regulation had anti-competitive effects.

The CC has concluded that there were no anti-competitive effects on the aggregates, RMX, and cement markets arising from vertical integration, or policy and regulation. As to the other theories:

- **Aggregates.** Notwithstanding certain features of the aggregate markets, such as the concentration of supply by Majors in certain local markets, and high barriers to entry, the CC provisionally determined that it had not found evidence indicating widespread competition problems across multiple local markets. It also considered that the formation of Lafarge Tarmac, to become the largest producer of aggregates in the U.K., only slightly increased the number of local markets with high degrees of concentration.
- **RMX.** The CC provisionally found, *inter alia*, that concentration of supply by the Majors in local markets for RMX was low, barriers to entry were low, Majors' returns on capital employed ("ROCE") were deteriorating, and Majors' margins were decreasing. As a result, the CC did not find competition concerns in relation to RMX.

The CC has, however, provisionally found that competition in the U.K. cement market is not working effectively. The CC identified a number of structural and conduct features of the cement market:

- **Structural** features, including high market concentration, price transparency, high barriers to entry, product homogeneity, customer characteristics (such as preferences for local sourcing), and the prevalence of vertical integration within the Majors.
- **Conduct Features**, including a strategic focus on maintaining market share, the use of price announcement letters, and retaliatory behavior.
- **Ground Granulated Blast Furnace Slag ("GGBS").** In addition, the CC identified that the structure of GGBS supply in the market for (a partial substitute for cement) raised prices, giving rise to an AEC.

The CC has stressed that "[t]he CC's finding does not relate to explicit collusion between these producers."[94]

As a result of its provisional AEC finding, the CC has published a Notice of Possible Remedies. In this notice, the CC proposes: wide-ranging remedies including the divestiture of cement production capacity, or RMX plants, by one or more of the top three producers of each; the creation of a cement buying group; prohibitions on

88 Provisional Findings p.1.

89 Aggregate Industries UK Limited.

90 Cemex UK operations Limited.

91 The UK construction and buildings materials businesses of Hanson and HeidelbergCement AG.

92 HeidelbergCement AG.

93 "Lafarge Tarmac" has only been in existence since 2013 and comprises Lafarge Aggregates Limited, Lafarge Cement UK Limited, and The UK and international operations of Anglo American's construction and building materials arm.

94 May 21, 2013 press release.

producers making price announcements; and structural measures to address the AEC in GGBS in the U.K. The CC invited responses until June 12, 2013 and its final report is due by January 17, 2014.

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