BELGIUM

This section reviews developments under Book IV of the Belgian Code of Economic Law ("CEL") on the Protection of Competition, which is enforced by the Belgian Competition Authority ("the BCA"). Within the BCA, the Prosecutor General and its staff of prosecutors (collectively, the "Auditorate") investigate alleged restrictive practices and concentrations, while the Competition College (the "College") functions as the decision-making body. Prior to September 6, 2013, Belgian competition law was codified in the Act on the Protection of Economic Competition of September 15, 2006 ("APEC") and enforced by the Belgian Competition Authority, then composed of the Directorate General for Competition and the Competition Council. When relevant, entries in this report will refer to the former subbodies of the BCA.

Brussels Commercial Court Dismisses Belgian Public Authorities' Claim for Damages in Elevator Cartel

On April 24, 2015, the Commercial Court of Brussels rejected a claim for damages by Belgian public authorities against parties of the elevator cartel—namely Kone, Otis, Schindler and ThyssenKrupp.[1]

On February 21, 2007, the Commission imposed a fine of €992 million on the four manufacturers of elevators and escalators for their involvement in a cartel on the markets for the sale, installation, and maintenance of elevators and escalators.[2] The anticompetitive practices included, *inter alia*, market sharing and bid rigging in Belgium, Germany, Luxembourg, and the Netherlands between 1996 and 2004. In February 2012, the Belgian State and its Office of State Buildings (*Régie des Bâtiments*), on the one hand, and the Flemish Region and the Flemish Community, on the other hand, filed follow-on actions before the Commercial Court of Brussels. The public authorities claimed almost €17 million in damages for an 12.3% overcharge they had suffered from their elevator and escalator contracts for several buildings as a result of the cartel. The Court considered the two cases together.

In accordance with Belgian civil law, the public authorities had to prove their claims met three conditions: (i) a fault on the part of the cartelists; (ii) harm suffered by the public authorities; and (iii) a causal link between the fault and the harm suffered.

The Commercial Court of Brussels dismissed the claims in their entirety. It found that the 2007 Commission decision, relied on by the public authorities, established that the elevator cartel members had engaged in a market sharing cartel, not a price fixing cartel. On this basis, the Court held that while the Commission decision served to establish a fault, the public authorities still had to prove that the market sharing cartel had resulted in higher prices, *i.e.*, harm from an overcharge. Despite a report by an economic expert, the Commercial Court held that the public authorities had not proved that the cartel had led to an overcharge, and thus had not proved a harm nor a causal link. It therefore rejected the claims.

In a November 2014 judgment, the Commercial Court of Brussels had previously dismissed a similar claim for damages by the Commission, on behalf of the European Union. This new judgment confirms the Commercial Court's approach: claimants must prove that they suffered harm resulting from a cartel. This situation will change once the Antitrust Damages Directive[3] is implemented in

1 Commercial Court of Brussels (Cases A/12/02291 & A/12/02293), judgment of April 24, 2015.

2 *Elevators and Escalators* (Case COMP/E-1/38.823), Commission decision of February 21, 2007.

3 Directive 2014/104/EU of November 26, 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ 2014 L349/1.

Belgian law because the directive provides for a rebuttable presumption that a cartel causes harm.[4]

Brussels Court of Appeal Grants Intervening Party Very Limited Access to File

On May 8, 2015, the Brussels Court of Appeal granted Link2Biz International SA ("Link2biz") access to one document in the BCA's investigation file in its case against bpost SA ("bpost"). Link2Biz and Publimail SA ("Publimail"), companies active in mail delivery, had requested access to the BCA's investigation file in the context of proceedings before the Brussels Court for Appeals but their request was largely dismissed.

In December 2012, following complaints by Link2Biz, Publimail, and Spring Global Mail ("Spring"), the former Competition Council had fined bpost, the Belgian incumbent postal operator, over €37 million for abusing its dominance by use of a rebate scheme between January 2010 and July 2011.[5] In January 2013, bpost appealed the decision before the Brussels Court of Appeals and the Competition Council, Link2Biz, Publimail, and Spring intervened in the proceedings. Link2Biz and Publimail requested access to the Competition Council's (now the BCA) file, or, in the alternative, to certain documents. Bpost opposed this request, but the parties agreed that Link2Biz and Publimail be granted a non-confidential copy of the file index.

The Court held that, while third parties may not have access to the file in principle, access may be granted for efficiency reasons, in particular where one of the appealing party's decisive ground for appeal rests on elements of the case file, unknown to the complainants. It found that Link2Biz and Publimail had not met that standard and largely dismissed their requests. The Brussels Court of Appeal however granted Link2biz access to one economic study, holding that Link2Biz's view could enlighten the Court with respect to the study.

The Court therefore requested bpost to prepare a non-confidential version of the economic study to be provided to Link2biz, and set a date for a hearing to discuss the study and decide whether the parties would need to submit new briefs.

BCA Fines 18 Companies for "Hub-and-Spoke" Cartel

On June 22, 2015, the Auditorate adopted the BCA's first settlement decision,[6] fining 7 retailers[7] and 11 suppliers[8] of drugstore, perfumery and hygiene ("DPH") products (*i.e.*, home and personal care products) a record amount of €174 million. The retailers and suppliers admitted to coordinating price increases in a "hub-and-spoke" cartel—the first such case for the BCA— between 2002 and 2007.

Colgate-Palmolive S.A. filed for leniency in late 2006. In spring of 2007, the Auditorate carried out dawn raids at the premises of major retail chains. The Auditorate's investigation revealed that between 2002 and 2007, participating retailers and suppliers had coordinated price increases for branded DPH products, in breach of Article IV.1 CEL and Article 101 TFEU. The cartelists organized the price increases through indirect information exchanges between retailers, via the suppliers. While all participants knowingly contributed to the practice, the "core of the infringement was at retail level," suppliers had only acted

4 The deadline for implementation is December 27, 2016.

5 Belgian Competition Council, Case CONC-P/K-05/0067, CONC-P/K-09/0017 and CONCP/ K-10/0016: *Publimail, Link2Biz International and G3 Worldwide Belgium / bpost*, decision 2012-P/K-32 of the Competition Council of December 10, 2012.

6 Belgian Competition Authority, Case CONC-I/O-06/0038 : *Hausses coordonnées des prix de vente de produits de parfumerie, d'hygiène et de droguerie*, decision ABC-2015-I/O-19-AUD of the Auditorate of June 22, 2015.

7 Carrefour Belgium S.A., Etn. Franz Colruyt N.V., Cora S.A., Delhaize (Ets Delhaize Frères et Cie « Le Lion » (Groupe Delhaize) – Gebroeders Delhaize en Cie « De Leeuw » - Delhaize groep), Intermarché (ITM Belgium S.A. and ITM Alimentaire Belgium S.A.), Makro Cash and Carry Belgium S.A., and Mesdagh S.A.

8 S.A. Beiersdorf N.V., Bolton Belgium S.A., Belgium Retail Trading S.P.R.L., Colgate-Palmolive Belgium S.A. ("Colgate-Palmolive"), D.E HBC Belgium B.V.B.A., GSK (GlaxoSmithKline plc and GlaxoSmithKline Consumer Healthcare S.A.), Henkel Belgium S.A., L'Oreal Belgilux S.A., Procter & Gamble (The Procter & Gamble Company, Procter & Gamble International Operations S.A. and Procter & Gamble Services Company N.V.), Reckitt Benckiser (Belgium) S.A./N.V., and Unilever Belgium N.V.

as “intermediaries and facilitators” for their respective products.

This is the first decision taken pursuant to the settlement procedure introduced by the Competition Act of 2013 (codified in the CEL). In return for acknowledging their participation in the infringement and for accepting the related sanction, the undertakings benefited from a 10% fine reduction. Unlike the settlement procedure at EU level, the settling undertakings may not appeal the settlement decision. As leniency applicants, Colgate-Palmolive received full immunity and two other undertakings were granted fine reductions.

The settlement decision also brings an end to related cases pending before the Court of Appeal of Brussels. Following the entry into force of the CEL in September 2013, most of the undertakings involved in the investigation made use of a new provision to challenge the legality of the dawn raids carried out in 2007. As part of the settlement, the undertakings agreed to withdraw their appeals and voluntary interventions in those cases.

FINLAND

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

Policy and Procedure

Implementation of Competition Damages Directive Proceeds Rapidly with Expanded Liability Proposed

In December 2014, the European Union's Directive on Antitrust Damages (2014/104/EU) entered into force. The implementation of the Directive has proceeded rapidly in Finland. On June 16, 2015, the Ministry of Employment and the Economy published a draft Government Bill for a new Antitrust Damages Act to implement the Directive. The draft was submitted for public consultation and comments.

The provisions of the draft Government Bill very closely follow the minimum required by the Directive with one major exception. The draft contains a provision to expand liability for antitrust damages to any purchaser of the infringing business activities. The test for the application of such liability is whether the purchaser knew or ought to have known about the infringement at the time it received the business. If the proposed expanded liability becomes law, it will have implications for M&A activities in Finland.

Such expanded liability has already been applied in Finnish court practice. In a cartel damages judgment, the District Court of Helsinki ruled that companies which had bought infringing businesses and continued those business activities were liable for antitrust damages whether the purchasers had continued the infringements or not (see National Competition Report Q4 2013 for further details). The District Court's decision was not based on national law but an interpretation of EU law. It seems that the government is making efforts to clarify the matter in the forthcoming Antitrust Damages Act.

No major changes are expected to the draft Government Bill during further preparation and parliamentary proceedings. It seems likely that Finland can implement the Directive before the deadline of December 2016.

FRANCE

This section reviews developments under 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”).

Antitrust

The FCA Accepts the Commitments of Booking.com to Remove MFN Clauses

In a decision dated April 21, 2015, the French Competition Authority (FCA) approved the commitments of Booking.com to remove Most-Favoured Nation clauses on hotels.[9] The implementation of these commitments aims at

[9] French Competition Authority, Decision no. 15-D-06 of April 21, 2015, decision relating to practices implemented by Booking.com, http://www.autoritedelaconcurrence.fr/pdf/avis/15d06.pdf.

strengthening competition between hotel booking channels, both online and offline.

French hotel unions and the Accor group brought a complaint to the FCA against Booking.com and other online hotel booking platforms such as Expedia and HRS for subjecting hotels to allegedly anticompetitive “parity” clauses. Under these clauses, Booking.com required hotels to make offers to Booking.com that were at least as favorable as those offered through competing online platforms, travel agencies, and hotels themselves. The parity clauses cover room prices, number of nights, and access to amenities such as breakfast, gym, spa, and internet access. According to the complainants, the parity clauses prevent booking platforms from competing against one another. Since these clauses are applied across all platforms, hotels find themselves forced to agree to identical prices, availability, and conditions for rooms.

According to the FCA, the MFN clauses raise several competition concerns. These parity clauses could be considered as anticompetitive agreements which reduce competition between online hotel booking platforms. Because hotels must offer the same rates, number of rooms, and conditions, competing platforms willing to accept lower fees are not able to attract consumers through lower retail prices or more favorable conditions. These parity clauses could also be considered as an abuse of dominant position by Booking.com leading to the foreclosure of smaller platforms and new entrants in the online hotel booking market. The standardized prices that result from the proliferation of parity clauses may limit competition by preventing rival platforms from entering the market or expanding their market share.

In order to alleviate these concerns, Booking.com offered five commitments.

First is the removal of any price parity obligation with regard to hotel booking platforms. This allows hotels to offer lower prices than those displayed on Booking.com via other online booking platforms. As a result, hotels will be able to adapt their prices to the quality of services or level of commission rates provided by booking platforms. Other platforms may display these lower prices on their own websites, comparison sites, and search engines.

Second is the removal of the price parity clause with offline channels. This allows hotels to offer lower prices than those available on booking.com and to customers who book directly with hotels. The prices offered offline shall not be published or marketed online to the public in general. However, hotels will be allowed to contact consumers directly to inform them of the prices offered via offline channels. This allows hotels to offer lower prices than those available on Booking.com to customers who benefit from a loyalty program.

Third is the removal of obligations regarding parity of conditions. This allows hotels to offer consumers, through other platforms and the hotel’s own offline channels, more favorable conditions than those offered on Booking.com. These conditions include the quality of services, terms and conditions of reservation and cancellation, as well as amenities such as breakfast, gym, spa, and internet access.

Fourth is the complete removal of any parity obligation in relation to availability. This allows hotels to freely manage their accommodations. Hotels may reserve the right to allocate different numbers of rooms across Booking.com, other online platforms, or the hotel’s own channels. Hotels will therefore have leeway to negotiate with Booking.com insofar as they may favor online reservation platforms which offer them a better service and/or a lower commission rate by offering them a greater number of rooms. They may also reserve the sale of a certain number of rooms to their direct channels, in particular during the tourist season, when the hotel has no difficulty in filling the rooms. Booking.com also commits to indicate on its website that the number of “available rooms” is the number of available rooms on Booking.com, so that consumers know that other rooms may be available from other channels when it is posting information on availability or number of rooms available for booking at an accommodation, to "on this/our site."

Finally, Booking.com will no longer prohibit hotels from contacting customers who already stayed at the accommodation at least once, whatever the means of booking used for the previous stay, including via Booking.com. This includes customers who stayed at one hotel of the chain or community of hotels which pooled their reservation services, as the case may be.

The Paris Court of Appeal Dismisses a Follow-On Damage Claim

On July 2, 2015, the Paris Court of Appeal dismissed EDF's follow-on claims requesting that contracts resulting from bid-rigging be declared null and void, or in the alternative, that subsequent harm be compensated.[10] Although the defendants were found to be liable, the Court of Appeal held that EDF, having contracted after filing a complaint to the FCA, could neither obtain the annulment of the contracts nor be awarded damages.

In November 2001, EDF and ERDF filed a complaint with the FCA against five cable companies which had allegedly exchanged information prior to responding to two distinct tender offers. Nexans and Prysmian won parts of the 2001 and the 2002 calls for tender, before which they exchanged information with the other bidders on the amount of their offers and conducted mock auctions to better control the result of both tenders. The cable companies chose not to challenge the objections and were fined a total of €19.5 million in 2007.[11]

Based on this FCA decision, EDF brought Nexans and Prysmian to the Paris commercial court in 2001 and asked for (i) the annulment of the contracts signed following the bids and on a subsidiary basis or, in the alternative, (ii) the compensation of the resulting damage. The commercial court dismissed the claims and the Paris Court of Appeal upheld this judgment.

EDF based its claim for the annulment of the contracts on two legal grounds: misrepresentation and the nullity of agreements due to anticompetitive practices.

Regarding misrepresentation, EDF claimed that Nexans and Prysmian's upholding of antitrust rules was a prerequisite to the conclusion of the contracts. Their failure to comply with the law subsequently tainted EDF's consent, rendering the agreements null and void.

Regarding the nullity of agreements due to anticompetitive practices, EDF argued that the contracts could not be considered valid because they resulted from bid-rigging, a behavior prohibited by antitrust laws. A general rule in French law provides that contracts relating to anticompetitive practices are null and void.

The Court of Appeal based its rejection of EDF's arguments on an analysis of the timeline of events involving EDF's suspicions of bid-rigging. After having filed the complaint, EDF could have refused to continue with what it considered to be rigged tenders. Instead, EDF carried the tender offers to their term, signed the contracts and even managed to negotiate a price reduction. Because EDF chose to conclude the contracts with companies that it had accused of collusion beforehand, the Court refused to annul the agreements, finding that such a behavior deprived EDF of its right to have the contracts annulled.

The Court also refused to award damages to EDF. EDF suggested to assess the damage based on an econometric method which suggested to measure the damage based on the discrepancy between the price EDF actually paid and the price it would have paid absent the collusion. However, Nexans and Prysmian challenged EDF's econometric method by asserting that a more appropriate way to assess damages would be to compare the only non-colluding company's bid with the bids of the cartelists. They also pointed out the negligible price difference between what EDF paid and the target price set beforehand. Lastly, they argued that because EDF had not awarded the contracts to the lowest bidder, price was not a deciding factor. For those reasons and in particular the impossibility to assess

10 Paris Court of Appeal, Decision no. of July 2, 2015, https://groupes.renater.fr/sympa/d_read/creda-concurrence/CaP/2juillet2015/EdF-ErdF.PDF.

11 French Competition Authority's decision N° 07-D-26.

the damage because the econometric results were contradictory, the Court considered that it is impossible to calculate the damage and therefore plainly dismisses the damage claim.

This decision highlights two issues. First, courts may refuse to annul a contract for anticompetitive practices if the victim of the antitrust infringement suspected it prior to signing the contract. Second, when faced with complex econometric discussions about the calculation of damages, courts may well dismiss claims.

Mergers

FCA Conditionally Clears Acquisition of Totalgaz by Antargaz

After an in-depth review, the FCA cleared, subject to commitments, the acquisition by UGI-Antargaz of Total's subsidiary Totalgaz, a rival energy company. The decision was published on June 8, 2015.[12]

The transaction involved the purchase of all the shares in Totalgaz by UGI Bordeaux Holdings ("UGI"), Antargaz's parent company. Both companies are active in the French liquid fuel and gas industry, and distribute liquefied petroleum gas ("LPG") both to end-consumers and to professionals.

Within the market for LPG distribution, the FCA distinguished sub-markets for (i) the sale of bottled LPG for private use, (ii) the sale of bottled LPG for professional use, (iii) the sale of LPG in mini-bulk, typically to fill private tanks, and (iv) the sale of LPG in intermediate and large-bulk (for professional use).

Following an in-depth investigation which lasted for several months, the FCA took the view that the acquisition would create significant horizontal concerns at the national level. Pursuant to a supply agreement between UGI and Total, Antargaz was to benefit from privileged access to the Total group's refineries' propane production which, according to the FCA, would amount in practice to a *de facto* quasi exclusivity. In addition, post-merger, Antargaz would obtain control of the two largest import terminals in the north of France, namely Norgal and Cobogal. As a consequence, the FCA feared that the new entity could limit its competitors' access to adequate sources of supply.

Moreover, at the local level, Antargaz would either enjoy a monopoly or very significant market shares in the market for the sale of LPG in mini-bulk in no less than eleven geographic areas.

To address these concerns, UGI-Antargaz offered to (i) limit the duration of its supply contract with the Total group refineries to one year; and (ii) sell several assets such as import terminals or storage depots. Most notably, Antargaz offered to sell an 18% stake in the Norgal import terminal to rival company Butagaz, thus adopting a "fix it first" approach for the first time in France.

Pursuant to the French Merger Guidelines, a fix it first solution, *i.e.*, a solution whereby the notifying party identifies an acquirer for the asset which it has offered to divest prior to the adoption of the decision, may be preferred in specific circumstances, for instance when it is uncertain whether the parties will be able to transfer key agreements. In the present case, Antargaz and Butagaz had concluded a supply agreement which mobilized Antargaz's propane storage capacities in the Norgal terminal. Antargaz was thus unable to both divest a sufficient interest in Norgal to remedy the competition concerns and to continue to fulfill its contractual obligations to Butagaz. For these reasons, the notifying party offered a "fix it first" approach as Butagaz agreed to modify the supply agreement in return for Antargaz's 18% stake in the Norgal terminal.

Although the FCA has indicated in its guidelines that "fix it first" solutions could potentially favor behavioral coordination in the concerned markets, it nevertheless cleared the transaction subject to commitments. However, its decision is now under appeal before the French Council

[12] French Competition Authority, Decision no. 15-DCC-53 of May 15, 2015, decision relating to the acquisition of Totalgaz by UGI Bordeaux Holding, http://www.autoritedelaconcurrence.fr/pdf/avis/15DCC53DecisionPublication.pdf.

of State ("*Conseil d'Etat*").

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

Horizontal Agreements

FCO Confirms Compliance with Commitments Given in Electronic Cash Payment Investigation

On March 9, 2015, the FCO terminated its proceedings to supervise the implementation of commitments by the four leading German banking associations ("Spitzenverbände der Kreditwirtschaft") to discontinue charging fixed fees for the use of their electronic cash payment system.[13]

Following a Statement of Objections issued on May 28, 2013,[14] the FCO had accepted and declared binding commitments by the leading German bank associations on April 8, 2014.[15] The FCO has since completed its assessment and determined that Spitzenverbände der Kreditwirtschaft has complied with all agreed upon commitments.

The so-called electronic cash payment system is the leading card payment system in Germany. Prior to the commitments, the banks uniformly charged merchants a fixed rate of 0.3% of the transaction value with a minimum of €0.08 per transaction in return for the bank's guarantee to secure a card user's payment. Since November 1, 2014, the banking associations have to freely negotiate fees with the merchants instead of using the prior fixed rate regime.

To establish contractual relationships between the numerous individual merchants and the banks, so-called concentrators ("Konzentratoren") often act as agents on both sides. Only around a third of the fees are negotiated directly between the banks and individual merchants. Following the commitments, the FCO observed a significant reduction of the fees, although the precise effect of the free negotiation of fees has yet to be determined.

Regarding EU regulation 2015/751 on interchange fees for card-based payment transactions,[16] which imposes per transaction a 0.2% fee cap for debit cards, the FCO proposes to the German legislator to make use of the option for a temporary exception from the fixed fee cap per transaction and to apply for a transition period a more flexible 0.2% cap that takes into account all transactions of a bank in order not to restrict the competitive incentives arising from the above-mentioned commitments.

FCJ Confirms Fines Imposed on Coffee Roaster Melitta Despite Internal Restructuring

On January 27, 2015, the FCJ upheld a DCA's judgment[17] confirming that Melitta Europa GmbH & Co. KG ("Melitta Europe"), as legal successor of its former affiliate, Melitta Kaffee GmbH ("Melitta Kaffee"), is liable for a €55 million fine[18] which the FCO had imposed on Melitta Kaffee in 2009.

In December 2009, the FCO had fined Melitta Kaffee and two further coffee roaster companies for price fixing in the

13 *See* the FCO's case summary of March 30, 2015, available only in German at: http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2015/B4-94-14.pdf?__blob=publicationFile&v=2. A press release is available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/30_03_2015_ec_cash.html?nn=3591568.

14 *See* National Competition Report April – June 2013, p. 10.

15 *See* National Competition Report April – June 2014, p. 9.

16 Regulation (EU) 2015/751 of the European Parliament and the Council of 29 April 2015, Official Journal L 123, May 19, 2015, p. 1.

17 *See* DCA, judgment of February 10, 2014, case V-4 Kart 5/11 (OWi), available in German on the DCA's website, and FCO press release of February 11, 2014, available in English at http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2014/11_02_2014_OLG-Melitta.html; see also National Competition Report January – March 2014, p. 12.

18 *See* FCJ, decision of January 27, 2015, available in German on the FCJ's website.

retail coffee sector.[19] Melitta Kaffee appealed the FCO's decision and, in November 2012, merged into Melitta Europe at a time when the 8th Amendment of the GWB (the "Amendment"), which introduced a general liability of legal successors of a fined company, had not yet entered into effect. According to the FCJ's pre-Amendment case law, the legal successor can be held liable only if, from an economic perspective, its assets are (nearly) identical with those of the company that committed the cartel infringement. The DCA found that Melitta Kaffee and Melitta Europe were (nearly) identical since Melitta Kaffee's "liable" assets: (i) remained nearly undiminished and separate from Melitta Europe's other assets; (ii) continued to be used in the same way as before; and (iii) accounted for a substantial part of Melitta Europe's total assets.

On appeal, the FCJ confirmed the DCA's findings. It clarified that the "liable assets" need to remain a distinctive part of the successor in order to qualify for a substantial part of the successor's total assets. However, the other assets of the legal successor would not necessarily need to play an insignificant role. Further, the FCJ held that the DCA's findings would not contradict two recent judgments of the FCJ that both denied group liability for cartel conduct based on the European concept of a "single economic unit."[20] While these recent judgments explicitly adhered to the FCJ's pre-Amendment case-law, they do not alter the DCA's findings because in both cases, the legal successor's assets were not nearly identical with those of the predecessor.

FCJ and DCA Annul Fines Imposed on Cartel Member's Legal Successor

In two recently published cases two German courts ruled that legal successors cannot be held liable for fines imposed on their legal predecessors by the FCO.

On December 16, 2014, the FCJ ruled that St. Gobain Weber, a manufacturer of dry mortar and legal successor of the cartel member Maxit, could not be fined by the FCO.[21] On July 3, 2009, Maxit was fined €12 million, because its managing director agreed with competitors and distributors to introduce fees for dry mortar silos.[22] In June 2009, Maxit was merged into St. Gobain Weber and ceased to exist as an independent legal entity.

In contrast to European law, which enables the Commission to fine a company and its legal successors, Section 30 of the German Code of Administrative Offences (OWiG) states that a fine can be imposed on a company only if its executives have committed an infringement. As St. Gobain Weber had no relationship with Maxit's managing director, it could not be held liable. The FCJ also clarified that neither recourse nor interpretation can be based upon European law because of the strict working of the German rule and the prohibition of analogy in criminal law, as protected under the German constitution.[23]

The FCJ further clarified that the legal successor of a cartel member can only be held liable in exceptional circumstances, namely if its financial assets are (nearly) identical with those of the predecessor. The FCJ considered the conditions to be fulfilled in the *Melitta* case (see above). However, in the case at hand, the FCJ found that even if Maxit were two times larger than St. Gobain Weber in terms of revenues and employees, this would not constitute an 'overweight' of the predecessor's assets high enough to identify Maxit and St. Gobain as almost identical.

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[19] *See* FCO case report of December 18, 2009, case B11-18/08, and FCO press release of December 21, 2009, both available in English at http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2009/B11-18-08.pdf?__blob=publicationFile&v=4 and http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2009/B11-18-08.pdf?__blob=publicationFile&v=4; *see also* National Competition Report October-December 2009, p. 6-7.

[20] *See* National Competition Report October – December 2011, p. 7-8.

[21] *See* FCJ, decision of December 16, 2014, case KRB 47/13, available in German at: http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=71036&pos=0&anz=1.

[22] *See* FCO, press release of July 3, 2009, available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2009/03_07_2009_Silostellgeb%C3%BChr.html?nn=3591568.

[23] Prohibition of analogy means that, for the protection of the infringer, a legal gap in criminal law (and in the law of administrative offences) cannot be filled by applying a statutory provision beyond its wording to the detriment of the infringer.

On May 29, 2015, the DCA came to the same conclusion in appeal proceedings relating to the clay roof tile cartel.[24] Two of the nine cartel members fined by the FCO in 2008/2009 could not be held liable because they were acquired or restructured.

The German legislator tried to close the loophole in the 8th Amendment of the GWB, introducing a new Section 30(2a), which allows to fine the legal successor in cases of restructuring. However, the rule does not apply to infringements terminated before the 8th amendment went into effect, on June 30, 2015. Further, while there seems no clear rationale for such distinction, the rule only covers restructuring in form of split-ups, but does not apply to other forms of restructuring, such as split-offs, spin-offs or asset deals.

Advertising Co-operation Between Publishing Houses Terminated after FCO Investigation

Hubert Burda Media ("Burda") and Funke Mediengruppe ("FMG"), two large German publishing houses, terminated their advertising co-operation, after the FCO had found that the agreement resulted in significant restrictions of competition. Subsequently, on April 16, 2015, the FCO closed its investigation.[25]

The two companies had agreed on a co-operation allowing Burda to offer advertising space in FMG's products in addition to its own general interest magazines.[26] Burda offered advertising space both individually for each publishing house, but advertisers could also purchase combined packages comprising up to 17 magazines from both companies. According to the FCO, Burda and FMG are close competitors, in particular, on the reader and advertising market segments for women's magazines and program guides.

To assess whether this cooperation, which also provided for a joint tiered pricing system and an exchange of information, was exempt from the ban on restrictive practices, the FCO required Burda and FMG to show that: (i) their agreement resulted in efficiencies; (ii) the restrictions of competition associated with the agreement were indispensable to achieve these efficiencies; and (iii) the co-operation was beneficial to advertisers and consumers. Faced with the FCO's objections, the two companies abandoned their plans and terminated their advertising cooperation on December 31, 2014, also in view of then planned transactions between FMG and Axel Springer SE.[27]

FCO Fines Manufacturers of Concrete Prefabricated Garages

On June 16, 2015, the FCO imposed fines totaling €11 million on ten manufacturers of concrete prefabricated garages for price-fixing agreements and customer allocation in the southern and northern part of Germany.[28]

In the federal state of *Baden-Württemberg* and neighboring regions (southern part), manufacturers of concrete prefabricated garages had set up three different pricing areas and agreed on minimum sales prices, depending on the respective sales volume and the type of customer. Such agreements as well as additional agreements on the introduction and amount of various surcharges for toll, energy and raw material costs, were reached during regular meetings between the manufacturers, so called "workshops." In addition, some manufacturers agreed in

[24] *See* FCO, press release of June 15, 2015, available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/15_06_2015_Tondachziegel.html?nn=3591568; the decision has not yet been published.

[25] *See* FCO, decision of April, 16, 2015, case B6-108/12. A case summary is available in German at: http://www.bundeskartellamt.de/SharedDocs/Meldung/DE/AktuelleMeldungen/2015/17_04_2015_Fallbericht_Funke.html.

[26] Excluding the general interest magazines that FMG acquired from Axel Springer SE in 2014.

[27] On June 6, 2015, the FCO cleared a marketing cooperation joint venture between FMG and Axel Springer SE.. *See also* National Competition Report, FCO Clers Joint Venture for Newspaper Advertisement, October – December, 2014.

[28] *See* FCO case summary available only in German at http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2015/B12-015-12.pdf?__blob=publicationFile&v=3. A press release in English is available at http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/16_06_2015_Betonfertiggagagen.html;jsessionid=022984BC91CABE801E48986801E737F9.1_cid371?nn=3591286.

separate meetings to set up a further high-pricing area and to allocate customers in the south-west of *Baden-Württemberg*.

In northern Germany, two manufacturers (*Hanse-Betonvertriebs-Union GmbH* and *Rekers Betonwerk GmbH & Co. KG* ("Rekers")) fixed prices and allocated customers between 2006 and 2009.

All companies largely cooperated and settled with the FCO, thereby reducing their fines. The proceedings were triggered by a leniency application by Rekers, which was granted immunity from fines.

FCO imposes Substantial Fines on Automotive Suppliers for Price Fixing

In June 2015, the FCO imposed fines of €75 million on five manufacturers of acoustically effective components for cars[29] for price fixing. It also fined a number of responsible individuals.[30] The FCO found that the manufacturers had agreed not to target each other's existing business and also not to compete for new follow-up orders. For this purpose, they had coordinated their bids for tenders and orders by the car manufacturers. The companies had also agreed on minimum price levels, rebate volumes, and passing on raw material price increases and tool costs to their customers.

All companies cooperated with the FCO under its leniency program, settled the case and obtained a fine reduction. A sixth manufacturer involved was granted full immunity, as it was the first to cooperate with the FCO. Proceedings against a seventh company are still ongoing.

This was the first time the FCO concluded proceedings with a fining decision in a case triggered by an anonymous notification to the FCO's electronic whistleblowing system ("BKMS"), although the FCO has received numerous tip-offs since the system was introduced in 2012. In case of an anonymous notification via the BKMS, the FCO first examines the accuracy of the information and makes sure that there is a sufficient level of detail and conclusive evidence provided by the whistleblower. If these conditions are met, the FCO might carry out a dawn raid to find and secure further evidence.

Continued Focus on Parity Clauses in Online Services

On April 2, 2015, the FCO issued a Statement of Objections against internet booking platform Booking.com for their continued use of parity clauses.[31] The clauses in question provide for an obligation of hotels to offer Booking.com their most favorable conditions available online, in particular the lowest room prices, the maximum room capacity as well as the best booking and cancellation conditions.

The Statement of Objections against Booking.com follows FCO and DCA decisions prohibiting parity clauses used by online booking platform competitor HRS. On January 9, 2015, the DCA had confirmed the FCO's findings that HRS's parity clauses restricted competition on the booking portal market as well as on the market for hotel rooms.[32] HRS has since refrained from using parity clauses. However, Booking.com, as well as its competitor, Expedia, have continued to use similar parity clauses in their contracts.

In the course of several proceedings by competition authorities across the EU, Booking.com offered to abolish price parity clauses with regard to online platforms but to keep them with respect to hotels' direct sales. The competition authorities in France, Italy and Sweden accepted these commitments.[33] Booking.com has since

29 Such as flooring, car mats, hat racks, trunk trims, textile wheel house shells, engine compartment insulations, front shock absorbers and trunk shock absorbers.

30 *See* FCO press release of June 24, 2015, available in English at http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/24_06_2015_Automobilindustrie.html.

31 *See* FCO press release of April 2, 2015, available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/02_04_2015_Booking.html;jsessionid=7E953CF4FF5E886681BB43A8472C21B7.1_cid362?nn=3591568.

32 *See* National Competition Report January – March 2015.. The DCA judgment, case VI – Kart 1/14 (V), is available in German at: http://www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2015/VI_Kart_1_14_V_Beschluss_20150109.html.

33 *See* Swedish Competition Authority press release and agreement documentation in English at

amended its terms and conditions to reflect these commitments.

However, in light of the legally binding DCA decision against HRS, the FCO rejected these less restrictive commitments offered by market leader Booking.com in order to create a level playing field in Germany.

In the markets for energy product comparison and tariff optimization services, Verivox, an energy price comparison website, agreed to refrain from using parity clauses of any kind after the FCO had started an investigation. Consequently, the FCO terminated its investigations against Verivox.[34]

Vertical Agreements

FCO Fines Manufacturer of Portable Navigation Devices

On May 12, 2015, the FCO imposed a fine of €300,000 on United Navigation GmbH ("United Navigation"), a producer of portable navigation devices for resale price maintenance.[35]

Between 2009 and 2014 (and occasionally in 2007), United Navigation agreed with several retailers for its portable navigation devices on minimum retail prices, the so-called "street prices," that United Navigation provided to retailers alongside with its recommended end-consumer prices. Further, United Navigation monitored retail prices, in particular of online sellers. If prices fell below the "street price" level, United Navigation contacted the sellers concerned to persuade them to increase prices by using a variety of methods from threatening legal action over copyright infringement to offering incentives such as bonuses.

The FCO carried out dawn raids after having been informed about the conduct by the Austrian Competition Authority. United Navigation cooperated and reached a settlement with the FCO. The FCO further lowered the fine because of the company's limited economic viability.

Higher Regional Court of Frankfurt Rules on Impact of Illegal Resale Price Maintenance Clause on Validity of Distribution Agreement

On September 16, 2014, the Higher Regional Court of Frankfurt (the "Frankfurt Court") ruled that a clause in a distribution agreement, which obliged the retailer to resell products at a specific price and, thus, infringed antitrust law, did not have an impact on the validity of the other provisions of the contract.[36] With its judgment, the Frankfurt Court confirmed the first-instance decision of the Regional Court of Frankfurt.[37]

The dispute concerned a claim for money due under a distribution agreement and an acknowledgment of debt, which the defendant had signed after the claimant had terminated the contract. The defendant had argued that both contracts were void because, amongst other reasons, one of the clauses allegedly infringed antitrust law.

Even though the contract included a resale price maintenance provision infringing Section 1 GWB, the Frankfurt Court ruled that the invalidity of the resale price clause had no impact on validity of the acknowledgment of debt nor on the validity of the other provisions of the original contract. The Frankfurt Court found that the acknowledgment of debt was related to the claimant's individual claims against the defendant, which, in turn, were based on the defendant's purchase prices. Contrary to the resale prices, these prices had not been determined in an anti-competitive manner and remained unaffected by the invalidity of the resale price clause.

http://www.konkurrensverket.se/en/news/commitments-given-by-booking-com-benefit-consumers/.

34 *See* FCO press release of June 3, 2015, available in English at http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/03_06_2015_Verivox.html?nn=3591568.

35 *See* FCO, press release of May 12, 2015, available in English at http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/12_05_2015_Navigation.html.

36 *See* Higher Regional Court of Frankfurt, judgment of September 16, 2014, case 11 U 46/13 (Kart), available only in German at http://www.lareda.hessenrecht.hessen.de/jportal/portal/t/s15/page/bslaredaprod.psml?&doc.id=KORE209532015:juris-r01&showdoccase=1&doc.part=L..

37 *See* Regional Court of Frankfurt, judgment of March 26, 2014, case 2-26 O 176/12.

Further, the Frankfurt Court found that the distribution agreement as such was still valid as the void clause could be separated from the other provisions of the contract and provided that the parties would have concluded the contract without the void clause in the first place. Given that the claimant had in the meantime amended its contracts with all other distributors, and deleted the respective resale price clauses, the Frankfurt Court found that the agreement with the defendant would have been concluded without the valid clause as well.

FCO Fines Several Manufacturers and Retailers in the Grocery Sector for Vertical Resale Price Maintenance

In December 2014 and June 2015, the FCO imposed fines totaling €151.6 million on manufacturers and retailers in the grocery sector.[38] With these fining decisions—all settlement decisions—the FCO has completed the majority of its proceedings relating to vertical resale price infringements on the national markets for body care, baby food, coffee, confectionaries, beer and animal food. So far, the FCO has imposed fines on five manufactures of branded grocery products (including Alfred Ritter GmbH & Co. KG and the successor company of the former Haribo GmbH & Co. KG) and seven retailers in the grocery sector (including *inter alia* EDEKA Zentrale AG & Co. KG and EDEKA Zentralhandelsgesellschaft mbH ("Edeka"), REWE-Zentral-Aktiengesellschaft and REWE-ZENTRALFINANZ eG ("Rewe"). Several companies were granted either full leniency or substantial fine reductions for providing relevant information to the FCO.

The FCO initiated its investigation by conducting dawn raids at the premises of several manufacturers and retailers in 2010 after it had found evidence of vertical resale price agreements in a parallel investigation concerning horizontal infringements on the markets for confectionaries and coffee.

During the course of its investigation, the FCO identified several illegal practices between manufactures and retailers that had occurred in the period from 2004 until 2009. In particular, the FCO found that manufacturers granted financial incentives to retailers, *i.e.*, reimbursements or rebates, in order to maintain a certain resale price level or to increase the resale price for consumers. Some manufactures also had monitored the retailers' resale prices and intervened where resale prices fell below a certain level. In the most cases, retailers not meeting the "target price"[39] were simply confronted in conversations in which the manufacturers' representatives tried to convince the retailer not to instigate a "price war." In some cases, the suppliers threatened not to pay agreed fees or grant rebates, and in some instances even threatened to completely cut off their supply. Some of these threats were implemented. The FCO found that one manufacturer, Melitta, had informed retailers of their competitors' planned resale price increases.[40]

Unlike most other vertical cases that the FCO or other European competition authorities have handled in the past, fines were not only imposed on suppliers, but also on retailers. In vertical cases, competition authorities have usually refrained from fining companies on the retail level, as they consider the relevant suppliers to be the driving force behind the infringement. However, in this case, the FCO found that the retailers in question were also active participants in the infringement. They had not only complied with the suppliers' requests and constant pressure, but also requested suppliers to provide for a minimum resale price-level on the market by monitoring and influencing the resale prices of other retailers. In the case of Haribo products, retailers like Rewe and Edeka, made their compliance subject to the condition that a

[38] FCO press release of June 18, 2015, available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/18_06_2015_Vertikalfall.html?nn=3591568.

[39] *Ibid.*

[40] *See* the case summary, only available in German at: http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2015/B10-50-14.pdf?__blob=publicationFile&v=2.

competing discount retailer would also raise its resale prices. [41]

The FCO announced that is has now concluded its investigation into the markets for animal food and body care products and almost concluded its investigation with respect to confectionaries, coffee and beer. The FCO imposed no fines for behavior on the market for baby food.

Unilateral Conduct

Karlsruhe Court of Appeals Rules on the Compulsory License Objection After the Advocate General's Opinion in Huawei

On April 23, 2015, the Karlsruhe Court of Appeals suspended the enforcement of a Mannheim District Court judgment by an interim order which was requested by a mobile telecommunications operator ("MTC"). [42] In its decision, the District Court had granted a patent holding company ("PHC") an injunction against several operators, *inter alia*, MTC, preventing them from marketing mobile phones which allegedly make use of one of PHC's standard-essential patents ("SEPs"). When the patent was declared essential in 2001, PLA's legal predecessor had made a commitment to the European Telecommunications Standards Institute ("ETSI") to grant licenses to third parties on fair, reasonable and non-discriminatory ("FRAND") terms.

Under German law, a court may grant such a suspension by an interim order only under exceptional circumstances, *inter alia*, where the court—based on a summary examination—considers it likely that the first instance judgment will be annulled on appeal. In the Court of Appeals' view, an annulment was likely because the District Court erred in law by granting PHC injunctive relief, the seeking of which was abusive under Article 102 TFEU and Sections 19 and 20 GWB.

In order to reach this conclusion, the Court of Appeals first distinguished the case from the famous *Orange-Book-Standard* judgment of the FCJ. [43] In contrast to the case at hand, the *Orange-Book-Standard* case concerned a *de facto* essential patent (rather than an SEP) and the FCJ, in its holding, did not rely on a commitment to license on FRAND terms. The Court of Appeals then referred to the Advocate General's Opinion in the *Huawei* case, [44] a case with a very similar factual background, and applied the legal test employed therein. According to this test, a patent holder has to furnish to the licensee-to-be a written offer on FRAND terms before bringing an action for injunction. If the patent holder does not furnish such an offer, even though the licensee-to-be was (potentially) willing and able to enter into a license agreement, the patent holder is considered to have abused its dominant position.

The Court of Appeals considered it likely that PHC abused its dominant position *vis-à-vis* MTC because it only furnished an offer—in accordance with the criteria mentioned above—to MTC, which was not willing to enter into a license agreement with PLA, but made no such offer to MTC's supplier, a mobile phone manufacturer that was willing to enter into a license agreement. In a situation where a patent holder has made a FRAND commitment and has usually concluded license agreements with

[41] In Haribo, see the case summary, only available in German at: http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2015/B10-40-14.pdf?__blob=publicationFile&v=2.

[42] Karlsruhe Court of Appeals, decision of April 23, 2015, 6 U 44/15, available only in German at: http://lrbw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&Art=en&sid=0d177af6cd40884774f96b70b861db5a&nr=19370&anz=1&pos=0&Blank=1.

[43] *See* FCJ, decision of May 6, 2009, KZR 39/06; also referring to this case: Düsseldorf District Court, decision of March 21, 2013, National Competition Report, January – March 2013, p. 18 et seq. In that decision, the FCJ had found that a claimant seeking injunction on (*de facto*) essential patents only abuses its dominant position if (i) the defendant (the would-be licensee) unconditionally offers to enter into a license agreement with the plaintiff for the patent at a rate that is so high that the plaintiff cannot reasonably refuse or at a rate to be determined by the plaintiff but being subject to court review and adjustment, and (ii) the defendant behaves as if it was an actual licensee, in particular by paying royalties into an escrow account and rendering accounts in the meantime.

[44] *See* Advocate General *Wathelet*, opinion of November 20, 2014, C-170/13 – *Huawei Technologies Co. Ltd v ZTE Corp., ZTE Deutschland GmbH*; see also EU Competition Quarterly Report October – December 2015, p. 11 et seq.

manufacturers of mobile phones, it could well be expected that the patent holder furnishes an offer not only to the operators as resellers but also to the manufacturers themselves. Generally, where a manufacturer seeks to enter into a comprehensive license agreement with the patent holder, it would be abusive from an antitrust perspective if the patent holder excluded supplies to a particular customer (like MTC) from the agreement in order to conclude a direct license agreement with the customer. Further, the enforcement of an injunction against one of its main customers would put additional pressure on the manufacturer by jeopardizing its business. Negotiations between the patent holder and the manufacturer could be distorted, leading to license terms which the manufacturer would not have accepted otherwise.

In the meantime, the Court of Justice has rendered its decision in the *Huawei* case.[45] In order to avoid an abuse of a dominant position, prior to seeking an injunction, the patent holder has to: (i) alert the alleged infringer of the infringement by designating the patent and specifying the way in which it has been infringed; and, if the alleged infringer has expressed its willingness to conclude a licensing agreement on FRAND terms, (ii) present the infringer with a written offer for a license on FRAND terms, specifying, in particular, the royalty and the way in which it is to be calculated.

FCO Terminates Proceedings Concerning National Interchange Fees for MasterCard and Visa Transactions in Germany

On June 3, 2015, the FCO terminated the antitrust proceedings concerning national interchange fees for MasterCard and Visa transactions in Germany.[46] The investigation had been triggered by a complaint from the German Retail Association (*Handelsverband Deutschland*, "HDE").

The proceeding concerned interchange fees payable by the bank of the card-accepting merchant (the merchant bank) to the card-issuing bank (the issuer) for national transactions with MasterCard or Visa. Interchange fees are to cover the issuer's services (*e.g.*, authorization, payment guarantee) and are charged as part of the mostly turnover-based fee that a merchant has to pay to the merchant bank for each card payment transaction. The multilateral interchange fee can be negotiated multilaterally between the issuer and several merchant banks or bilaterally between the issuer and a single merchant bank.

In its proceedings, the FCO examined if a joined determination of fees by the card-issuing banks may infringe Articles 101, 102 TFEU and Section 1, 19 GWB. The FCO terminated its proceedings in anticipation of the new Regulation (EU) 2015/751 on interchange fees for card-based payment transactions,[47] which entered into force on June 8, 2015 and will become effective as of December 9, 2015. According to Article 4 of the Regulation, interchange fees for consumer credit card transactions are limited to 0.3% of the transaction value. The Regulation contains further provisions improving competitive conditions for card-based payments. The FCO found that its competitive concerns will be resolved by the interchange fee cap and that significant shifts in the market share at the expense of card payment systems are improbable until the effective date.

In its report, the FCO noted that it is still possible for affected distributers to take further civil law actions based on past and future infringements caused by interchange fees.

45 *See* ECJ, decision of July 16, 2015, C-170/13 – *Huawei Technologies Co. Ltd v ZTE Corp., ZTE* Deutschland GmbH, a more detailed analysis of the decision will follow in the forthcoming EU Competition Quarterly Report July – September 2015.

46 *See* FCO case summary available only in German at http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2015/B4-22-06.pdf?__blob=publicationFile&v=2.

47 Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions, an English version of the Regulation is available at http://eur-lex.europa.eu/legal- content/EN/TXT/PDF/?uri=OJ:L:2015:123:FULL&from=DE.

Mergers and Acquisitions

Federal Court of Justice Terminates Proceedings After Settlement in Cable Merger Case

On March 16, 2015, the FCJ terminated its proceedings relating to the FCO's conditional clearance of Liberty Europe Holding's ("Liberty") acquisition of regional cable network operator Kabel Baden-Württemberg ("Kabel BW").[48] In addition to Kabel BW, Liberty operates a number of regional cable networks in Germany via its subsidiary Unitymedia.

Deutsche Telekom and NetCologne, both interveners in the FCO proceedings, appealed the conditional clearance decision to the DCA, which annulled the clearance decision in August 2013, because it considered the commitments insufficient to remedy competition concerns.[49] By the time of this decision, the parties had already implemented the transaction.

Liberty lodged a further appeal to the FCJ against the DCA's decision.[50] In parallel, Liberty negotiated and reached a settlement with Deutsche Telekom and NetCologne by paying them €183.5 million, which caused Deutsche Telekom and NetCologne to withdraw their appeals with the approval of the FCO.[51] The withdrawal rendered the DCA's annulment decision irrelevant and the FCO's clearance decision final. Thus, the FCJ terminated the proceedings and ordered Deutsche Telekom and NetCologne to bear the costs incurred in connection with both court proceedings.

FCO Clears Acquisition of Frigoblock by Ingersoll-Rand

On February 26, 2015, the FCO cleared the acquisition of sole control of Frigoblock Grosskopf GmbH and Frigoblock UK Limited ("Frigoblock") by Ingersoll-Rand GmbH ("Ingersoll") in Phase I proceedings.[52]

Ingersoll is a German subsidiary of Ingersoll-Rand plc, a group producing a variety of industry products, including transport temperature control systems for a range of utility vehicles through its subsidiary Thermo King (USA). The target Frigoblock also operates in the transport refrigeration industry.

Based on differences in the production technology, the FCO considered the market for truck transport temperature control systems to be separate from the markets for air-conditioning systems and stationary refrigeration plants, as well as transport temperature control systems for other means of transport (*e.g.* ships and trains). It further narrowed down the market by vehicle type and distinguished between single-zone and multiple-zone cooling systems as well as the different refrigeration capacities for single-zone cooling systems. The FCO left the geographical market definition open, since none of the market definitions raised any competition concerns.

In most of the concerned markets, there was no or only a marginal increase in market shares. Other markets were so-called *de-minimis* markets in Germany, *i.e.*, with total annual sales of less than €15 million, which the FCO cannot use as a basis for a prohibition decision. In the few non-*de-minimis* markets with high increases in market shares the FCO did not expect any significant impediment

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48 *See* FCJ, order of March 16, 2015, case KVR 75/13. The decision is available in German at: http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=70725&pos=0&anz=1. For the FCO decision, *see* National Competition Report October-December 2011, p. 11. The decision of the FCO is available in German at: http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Fusionskontrolle/2011/B7-66-11.pdf?__blob=publicationFile&v=3. A press release is available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2011/15_12_2011_Liberty_Kabel-BW_Freigabe.html;jsessionid=89651D3D635A536F8F2DF6BE57A24CD9.1_cid378?nn=3591568.

49 *See* DCA, order of August 14, 2013, case VI Kart 1/12 (V). The decision is available in German at: https://www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2013/VI_Kart_1_12_V_Beschluss_20130814.html. *See* also National Competition Report July-September 2013, p. 11.

50 The DCA did not permit to appeal, however the parties are entitled to appeal against denial of leave to appeal with the FCJ.

51 *See* FCO Activity Report 2013/2014, p. 94 *et seq.* available at: http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Taetigkeitsberichte/Bundeskartellamt%20-%20T%C3%A4tigkeitsbericht%202014.pdf?__blob=publicationFile&v=2.

52 *See* FCO, report of the decision of February 26, 2015, case B9-29/15, available in German on the FCO's website: http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Fusionskontrolle/2015/B9-29-15.pdf?__blob=publicationFile&v=2.

of effective competition for three reasons: (1) the parties' scope of action would still be very limited after the merger, with many other active competitors offering a sufficient number of alternatives for customers; (2) the products of the parties were not the closest substitutes; and (3) the buyers of the products enjoyed a strong position, enabling them to restrict the conduct of the merging parties. Therefore the transaction was not expected to lead to unilateral or coordinated effects between the parties and was cleared.

FCO Clears Merger In the Durum Wheat Sector

On March 24, 2015, the FCO unconditionally approved the acquisition of the durum wheat business division of Pfalzmühle Mannheim by GoodMills Deutschland GmbH ("GoodMills") after an in-depth (Phase II) investigation.[53] Both companies are active in the durum wheat processing and supply sector.

The FCO defined a separate product market for the production and distribution of ground durum wheat products, including flour, semolina and dunst, predominantly used for the production of pasta, and excluded durum wheat by-products like bran used as feedstuff as well as products derived by non-milling processing like cut durum used as cereals. From a geographic perspective, it considered a regional market in southwest Germany, but ultimately left the exact market definition open.

Although the merged entity's market share would exceed 40%, meeting the statutory presumption of single market dominance, the FCO held that GoodMills would continue to face effective competition from domestic and foreign durum wheat suppliers. Customers apply a multiple sourcing strategy and could still sufficiently constrain GoodMills' market conduct by reallocating purchase volumes between suppliers post-transaction. Further, due to relatively low transport costs and overcapacities in the market throughout Germany, which considerably exceed GoodMills' increment in market share, GoodMills' competitors could easily increase their supply.

FCO Clears Joint Venture for Newspaper Advertisement

On June 11, 2015, the FCO cleared the Media Impact joint venture ("JV") between the publishers Axel Springer SE ("Springer") and the Funke Mediengruppe ("FMG") in an in-depth (Phase II) investigation.[54] The JV, which will be under sole control of Springer, will sell both parties' advertising space in newspapers and magazines and online advertising space in Germany. While Springer publishes the largest German newspaper *Bild* as well as several magazines and websites, FMG mainly publishes regional newspapers, program guides and women's magazines.

The FCO found that the JV will not lead to a significant impediment of effective competition on any relevant market. In defining the relevant markets, the FCO distinguished between advertising in different media, for example, newspaper, TV, and online advertising. It further found that advertising in nationwide subscription newspapers (such as *Die Welt, FAZ, Süddeutsche Zeitung, Die Zeit*) and over-the-counter newspapers (such as *Bild*) should be separated because of the differences of their reader coverage and target groups. The market for advertising in over-the-counter newspapers includes, however, not only advertising in nation-wide newspapers, such as *Bild*, but also advertising combinations in several daily regional newspapers.[55] While FMG offers such advertising combinations for its regional newspapers, these combinations were explicitly excluded from the relevant market as their coverage was not comparable to the

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53 *See* FCO, decision of March 24, 2015, case B2-112/14, available in German and FCO press release of March 25, 2015, available in English on the FCO's website.

54 *See* FCO, decision of June 11, 2015, case B6 - 22/15, available in German at: http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Fusionskontrolle/2015/B6-22-15.pdf?__blob=publicationFile&v=2; FCO, press release of June 11, 2015, available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/11_06_2015_Media_Impact.html?nn=3591568.

55 Advertisers can book advertising space through so called general agents in different combinations of regional daily newspapers, which allows them to achieve a supra-regional or even nationwide coverage.

coverage of *Bild* and other combinations of regional newspapers.

Springer's market share in the market for advertising in nationwide over-the-counter newspapers was below 40% and therefore below the presumption of dominance threshold. Further, the transaction did not result in a market share increment as FMG's advertising combinations in its regional newspapers were not considered to be part of the relevant market and therefore there was no overlap.

The JV did not raise any concerns in markets for advertising in magazines and in online advertising markets as the parties' magazines did not attract the same customer groups and the parties' combined market share for online advertising was too small. Further, the market for advertising in regional newspapers was not directly affected by the cooperation.

In 2013, Springer and FMG had already notified a joint venture in a slightly modified form to the FCO in relation with the acquisition of several newspapers and women's magazines of Springer by FMG, but withdrew the part of the notification concerning the JV.

Frankfurt Court of Appeals Rules on the Consequences of Gun-Jumping for the Period Between the 7th and 8th Amendments to the GWB

On May 12, 2015, the Frankfurt Court of Appeals rejected the appeal[56] against a decision of the Frankfurt District Court, which had found the transfer of shares in a German limited liability company to be effective. The question of (non-)effectiveness of the transfer was of relevance for a potential damages claim against the defendants, both former directors of the limited liability company, which were held liable by the company itself. Given that the transaction was not notified to the FCO at the time of the acquisition in June 2006, but only more than 5 years later, the question was whether or not the transfer became valid after the FCO's termination of its dissolution proceedings in November 2011.

The Court of Appeals held that even though the parties "jumped the gun" by putting the transaction into effect before clearance, this violation of procedural merger control law only led to a provisional invalidity of the transfer which was later remedied retroactively by the FCO's decision to terminate its dissolution proceedings.

Before the 7th amendment to the GWB came into force in 2005, in an instance of a post-merger filing, the FCO had to open proceedings and to assess the competitive effects of the notified transaction on substance. At that time, it was the prevailing view that a gun-jumping transaction was only provisionally invalid and that this flaw could be remedied by the FCO's formal decision to clear the transaction.

One of the main features of the 2005 amendment pertaining to post-merger filings was that it required the FCO to carry out dissolution proceedings, the termination of which did not require formal decision. Against this background, the defendants argued that—due to the lack of a formal decision—the invalidity of a gun-jumping transaction could not be remedied anymore and is thus definitive. The defendants argued that without a formal decision, the invalidity of a gun-jumping transaction could not be rectified. The Court of Appeals rejected the defendants' argument and based its decision on the functioning and ratio of the merger control rules, according to which a transaction which fulfills all substantive conditions should not be invalid on the sole ground of formal or procedural flaws.

Since the 8th amendment to the GWB came into force in 2013, Section 41(1)(2) of the GWB now expressly provides that a gun-jumping transaction is remedied in case the FCO terminates its dissolution proceedings.

FCO Clears Acquisition of Immowelt AG by Axel Springer SE and the Creation of a Joint Venture between Immowelt AG and Immonet GmbH

On April 20, 2015, the FCO approved the acquisition of

[56] Frankfurt Court of Appeals, decision of May 12, 2015, 11 U 71/13 (Kart), available only in German at: http://www.lareda.hessenrecht.hessen.de/jportal/portal/t/1cv3/page/bslaredaprod.psml?doc.hl=1&doc.id=KORE214322015&documentnumber=2&numberofresults=5&showdoccase=1&doc.part=L¶mfromHL=true#focuspoint.

sole control of Immowelt AG by Axel Springer SE and the creation of a joint venture between Immowelt AG and Immonet GmbH (a subsidiary of Axel Springer SE) in Phase I proceedings.[57]

The new joint venture brings together the second and third largest online real estate portals in Germany, though the market leader Immobilien Scout GmbH will remain the largest portal post-merger.

The online real estate portals market was defined as a two-sided market. It brings together sellers and buyers of real estate, with the successes of both sides of the market being interdependent in that the attractiveness for the buyers will increase with the number of properties on offer and vice versa (so-called indirect network effects). The FCO looked at the market as a whole (*i.e.*, they did not examine separately the two sides of the market, regardless as to whether the portals offered their service free of charge to one side of the market (typically the buyers)).

The FCO found that the transaction would not significantly impede effective competition through non-coordinated or coordinated effects. Despite reducing the number of main competitors from three to two, the FCO held that the new joint venture could have a positive effect on the competitive conditions in the market. A new, stronger competitor was believed to reduce the probability of customers from both sides of the market joining the leading portal Immobilien Scout GmbH (so-called tipping probability). Coordinated effects were also considered unlikely to arise: while the two remaining portals were similar in size (increased symmetry), the transaction overall was unlikely to lead to coordinated effects in particular, because the probability of collusion between the two portals was considered remote as they are subject to extensive indirect network-effects. This case shows that, in examining transactions involving the online world, the is willing to set aside old assessment tools and take a new approach..[58]

Policy and Procedure

Monopolies Commission Publishes Special Report on Competition in Digital Markets

On June 1, 2015, the Monopolies Commission, an independent expert committee advising the German government and legislature in the areas of competition law and regulation, published its Special Report on "Competition policy: The challenge of digital markets".[59]

In this Special Report, the Monopolies Commission puts particular emphasis on the analysis of multi-sided markets and describes how "big data" contributes to the success of the online economy. The report deals in depth with online advertising markets—given that online business models are often based on advertising revenues with services offered free of charge to consumers—and focuses further on search engines, social media networks, as well as e-commerce.

While regulation of internet search is currently being discussed, the Monopolies Commission opposes any special regulation and deems the existing legal framework largely sufficient to deal with competition concerns that may arise in this area. It further advocates strengthening copyrights, data protection, and consumer rights—both nationally and EU-wide—to address exploitation of data in violation of individual rights and urges the German Federal Government to work towards the implementation of stringent data protection standards.

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[57] *See* FCO, Decision of April 20, 2015, Case B6-39/15, decision available in German on the FCO's website: http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Fusionskontrolle/2015/B6-39-15.pdf?__blob=publicationFile&v=2; press release available in English on the FCO's website: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/21_04_2015_Immonet_Immowelt.html?nn=3591568.

[58] *See* interview with president of the FCO, Andreas Mundt in the newspaper „Welt am Sonntag", p.1, available in German on the FCO's website: http://www.bundeskartellamt.de/SharedDocs/Interviews/DE/2015/WaS_Unbeliebtheit_gehoert_Job.html.

[59] *See* Monopolkommission, Special Report 68 on "Competition policy: The challenge of digital markets". The full text of the Special Report is available in German at: http://www.monopolkommission.de/images/PDF/SG/SG68/S68_volltext.pdf. A summary is available in English at: http://www.monopolkommission.de/images/PDF/SG/SG68/S68_summary.pdf.

GREECE

This section reviews competition law developments under the Greek Competition Act (Law 3959/11)703/1977(the "Competition Act"), enforced by the Hellenic Competition Commission ("HCC").

Decision of the Hellenic Competition Commission no. 581/VII/2013 Imposing Fines to PROCTER & GAMBLE Hellas for Competition Law Infringements in the Market of Children's Diapers

Following complaints filed by consumers regarding substantial price differences for "Pampers" between Greece and other member states, the HCC launched an investigation into possible competition law infringements by "PROCTER & GAMBLE HELLAS Ltd" (hereinafter "P&G").

The relevant product market was defined as the market of children's diapers. The HCC found that both branded and private label diapers fall into the same product market, and that the relevant geographic market was Greece. Since the majority of sales of P&G, both in volume and value, was effected through supermarkets, the examination of P&G's behavior was focused on that channel and in particular the agreements concluded between P&G and supermarkets.

The relevant market was found to be oligopolistic, with three competitors making up most of it. The HCC established found P&G is dominant in this market based on the following factors. Regarding market share, it held that throughout the investigated years (2003-2011), P&G's share exceeded 55–65% in value and 45–55% in volume, while the second largest competitor had a share of 10–15% in value and volume, and the third had an even smaller share. Its market power resulted from its significant economic and financial resources, allowing for extensive advertisement, as well as from its ability to provide substantial benefits to its supermarket customers in exchange for preeminent shelf positioning and share. It possessed a wide range of products with powerful brands, with "Pampers" being considered as a "must have/must stock" product. P&G was found to be an unavoidable trading partner for supermarkets and its pricing policy was determined independently of its competitors. During the 9 investigated years, not one new competitor entered the Greek children's diapers market, despite the presence of well-established competitors in other member states, and one smaller Greek competitor actually exited the market.

The Competition Directorate had requested P&G to provide the commercial agreements which it had concluded with its supermarket customers from 2003–2011. These were annual agreements which provided for a target rebates system and benefits for shelf positioning. The former was termed as "collaboration incentive" and provided for a rebate system based, among others, on the increase of total purchases by each super market of all P&G products during a reference period. The increase in purchases during such period, resulted from a comparison with the respective semester of the previous year. The rebate was variable and its percentage increased when purchases increased. The rebate had a retroactive character, as it was granted on all purchases of all P&G products affected by the supermarket during the reference period. A maximum threshold of purchases triggered a maximum rebate which was also individualized. According to the HCC, due to these characteristics of the rebate system the eventual rebate was not dependent on the quantity of purchases, as there were incidents where one super market could get a smaller rebate for the purchased quantities if it did not achieve the targeted percentage increase of its purchases, while another supermarket which bought smaller quantities could get a bigger rebate because it had achieved its target.

In addition, the commercial arrangements between P&G and the supermarkets provided for the granting of rebates/benefits to the latter in case a shelf share and a SKU (stockkeeping unit) share was achieved. According to the applicable P&G policy on the matter, the objective was to achieve a share of SKU and a shelf share for each P&G product equal to the share of such product in volume in the Greek market. If such objective was achieved by the super market, P&G would grant an extra rebate on the invoiced value.

The HCC decided by majority that P&G had abused its dominant position in the children's diapers market through implementation of individualized retroactive target rebates, whose aim was to build customer loyalty. The incentive of supermarkets to apply the system was intensified due to the fact that the percentage of the rebate was applied on all purchased P&G products, of which Pampers occupied an important part. The other competitors could not offer similarly attractive rebate systems because they had a much smaller percentage in the diapers market, more limited portfolios of products, and much smaller annual turnover than P&G. The logic of the applied system was not to grant an objectively justified reward to P&G's customers with an agreed percentage of rebate for the profits P&G achieved as a result of its increased sales, but to encourage customers to increase their purchases in P&G products on the basis of a specially drafted plan for each customer based on its individual capabilities and characteristics. In fact, during the negotiations with each supermarket, the anticipated growth rate of the customer was discussed, so that P&G could easily and accurately predict the needs and purchasing capability of each customer and set, for each one of them, an achievable rate of growth. With this information at hand, P&G could set the individualized target for the application of the rebate. The system led to an increased pressure on the supermarket to achieve the increase of purchases as the end of the reference period was approaching, because with a last order the customer could ascend to a higher rebate level and thus achieve a higher profit. The HCC underlined the effect of this system by stressing that approximately 90% of P&G products were sold though the supermarket channel.

A minority of two members of the HCC, however, considered that the Statement of Objection ("SO") had not sufficiently established P&G's abusive behavior. The two members suggested that the SO had evaluated the rebate system only under the angle of a single-product rebate, while the rebate under examination was an across-the-board or multi-product rebate system, affecting the whole basket of P&G products whose compatibility with article 2 of the Greek Competition Act and 102 of the TFEU had not been examined in depth. The facts of the present case were different from those in the jurisprudence invoked by the SO as a basis of its findings, namely Hoffman la Roche, Michelin I, Michelin II, Tomra and British Airways. They therefore concluded that there was an insufficient causal link between the children's diapers and the abusive behavior attributed to P&G, as no obligation was found to exist on the customers to purchase the total or the biggest part of their needs in diapers from P&G.

The HCC then examined the use of slotting allowances granted by suppliers to supermarkets so as to achieve the introduction of new products on the shelf, the maintenance of a preeminent position for a longer period of time, or the occupancy of a desired façade on the shelf (facing allowances). It found that P&G had abused its dominant position by offering allowances so as to block a disproportionately big percentage of available shelf space, usually 60% of the total available space, and as a matter of policy a percentage analogous to its national market share in this product, a practice which barred access to actual or potential competitors. This practice had a foreclosure effect on competition similar to a single branding obligation or an exclusivity obligation imposed by a dominant undertaking to its customers. Two members of the HCC however, cast a dissenting vote, arguing that the SO had not examined this issue in depth, and on the basis of the specific facts, that the blocked space was too large and had an actual foreclosure effect on competing products.

The HCC further decided that, given that P&G's market share in diapers exceeded 30%, as did the aggregate market share of its customers/buyers, the agreements between P&G and supermarkets on slotting allowances, which produced anticompetitive effects similar to single branding obligations, could not be exempted under the Block Exemption Regulation 330/2010, so any effects thereof in the relevant product market should be subject to individual assessment. The HCC by majority concluded that the resulting foreclosure on competition could not be exempted under article 1 para 3 of the Greek Competition Act or article 101 para. 3 of the TFEU. Two members of the HCC considered that such effects had not been clearly established by the SO.

The HCC by majority imposed to P&G a fine of €4.2 million for breach of article 2 of the Greek Competition Act and 102 of the TFEU, as well as a fine of €1 million for infringement of article 1 of the Greek Competition Act and 101 of the TFEU. The basis for the assessment of these fines were the total sales of P&G diapers for the years 2003 up to 2011.

ITALY

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

Horizontal Agreements

Recognition of the Quasi-Criminal Nature of Antitrust Sanctions and Reduction of an Antitrust Fine Based on Principles Enshrined in the European Convention on Human Rights

On July 29, 2004, the ICA levied on Calcestruzzi S.p.a. ("Calcestruzzi") a fine of €10.2 million for its participation in a cartel in the sector of ready-mixed concrete in the Milan area.[60] As is customary, the decision established a 90-day deadline for the payment of the fine with, pursuant to Article 27(6) of Law no. 689/91, a surcharge fee for each semester of delay if the payment was not made within six months after the deadline.

Before the expiry of the first semester of delay, Calcestruzzi's appeal against the decision was upheld by the TAR Lazio, which established that the fine was disproportionate because the cartel had been erroneously qualified as "very serious" rather than "serious," and thus the fine should be recalculated by the ICA.[61] The TAR Lazio's judgment was upheld by the Council of State,[62] which also reduced the duration of the infringement (1999–2000). As a result, according to the Council of State, Article 15 of the Italian antitrust law ("Law no. 287/1990") had to be applied in its formulation before the 2001 reform, which obliged the ICA to apply a fine not lower than 1% of the relevant turnover.

After four years, on December 10, 2013, the ICA handed down a new decision levying on Calcestruzzi a fine of around €8.1 million. In addition, the ICA ordered Calcestruzzi to pay the unpaid surcharge fees that, according to the ICA, were due from the expiry of the first original semester of delay until the adoption of the judgment by the Council of State, and amounted to around €7.3 million.[63] Calcestruzzi appealed the new ICA decision before the TAR Lazio on multiple grounds, many of which were upheld by the TAR Lazio.[64]

In particular, the TAR Lazio recalled that antitrust sanctions are of a quasi-criminal nature and as a result the principle of *favor rei* and that of retroactivity in *bonam partem*, enshrined in Article 7 of the European Convention on Human Rights, are applicable. In recalculating the fine, the ICA could (and should) have taken into account the less penalizing parameters set forth in the new formulation of Article 15 of Law no. 287/1990 and gone below the 1% turnover floor (even though the application of the precedent formulation of Article 15 of Law no. 287/1990 was *res judicata* under the Council of State judgment). Moreover, the ICA had violated the principle of proportionality in recalculating the fine, as it did not adequately take into account the requalification of the cartel conduct from "very serious" to "serious," the shorter infringement period, the

60 Mercato del Calcestruzzo (Case I559).

61 *Calcestruzzi S.p.A. v. ICA*, judgment of December 2, 2005, no. 12835; the dispositive part of the judgment (no. 73/2005) was published on March 23, 2005.

62 *ICA. v. Calcestruzzi S.p.A.*, judgment of September 29, 2009, no. 5864.

63 *Mercato del Calcestruzzo-rideterminazione sanzione* (Case I559B), ICA decision of December 10, 2013.

64 Calcestruzzi S.p.A. v. ICA, judgment no. 5759.

generally unfavorable market conditions, and Calcestruzzi's critical financial situation at the time of the adoption of the new decision. Accordingly, the TAR Lazio recalculated the fine, reducing it by 60%, for a total amount of around €3.2 million. It also cancelled the payment of the surcharge fee on the grounds that the first TAR Lazio judgment had annulled the ICA decision before the expiry of the semester of tolerance granted for the payment of the fine.

The ICA Fines Two Manufacturers of Flexible Polyurethane Foam a Total of Over €8.5 Million for an Anticompetitive Agreement, But Significantly Reduces the Fine Levied on One Undertaking in Light of its Difficult Financial Situation

With a decision of June 10, 2015,[65] the ICA found that two companies specializing in the production and marketing of flexible polyurethane foam, Orsa Foam and Olmo, infringed Article 101 TFEU by taking part in a single, complex anticompetitive agreement with the purpose of coordinating their respective commercial strategies, and of allocating customers through, *inter alia*, the exchange of sensitive business information. The exchange of information was enacted through three joint ventures controlled by the parties, as well as by means of an agreement for the allocation of the respective clientele between them. The investigation initially involved three other companies active on the same market, which were subsequently cleared of charges.

Although it rejected Orsa's arguments that it was unable to pay, the ICA took into account evidence showing the exceptionally difficult financial and economic conditions of Orsa Foam's parent company (Orsa S.r.l.), which was party to a debt restructuring agreement that required Orsa to allocate dividends in order to repay its debts. Orsa argued that, were the ICA to impose a full fine, it would be forced to use the dividends earmarked for the recovery plan, thereby suspending its parent company's financial recovery and creating a serious risk of bankruptcy for the whole group. According to the ICA, such an outcome would have been disproportionate in view of the deterring effect that a fine should have in the specific case. Therefore, the ICA applied paragraph 34 of its new fining guidelines, which allows it to take into account the specific circumstances of the case and, accordingly, reduced the fine by 75% (*i.e.*, from €6.2 million to €1.5 million).

The ICA Fines Twelve Companies Active in the Railway Industry a Total of Almost €2 Million for Bid-Rigging in a Case Opened in the Wake of Separate Criminal Proceedings

With a decision of May 27, 2015,[66] the ICA found that twelve companies active in the railway industry were involved in an anticompetitive horizontal agreement with respect to several public tender procedures launched by the main railway transportation operator in Italy, Trenitalia, for the procurement of electromechanical goods and services. According to the ICA, the twelve companies engaged, at least between 2008 and 2011, in a secret bid-rigging agreement implemented by means of concerted practices, which consisted in the systematic allocation of public procurement contracts covering the whole national territory, as well as in price fixing. In the ICA's view, the coordination covered every aspect of the bidding procedures, and was achieved through systematic contact among the companies leading to the exchange of sensitive information.

Interestingly, the alleged existence of the anticompetitive agreement first emerged in the context of separate criminal proceedings, and the ICA opened an investigation after news of the criminal proceedings was published. The ICA obtained permission from the Deputy Public Prosecutor to acquire relevant documentation belonging to the criminal file, and used some of these documents (in particular, transcripts of the wiretapping of telephone calls between the companies involved) as evidence of the existence of the anticompetitive agreement. The ICA rejected objections raised by several companies against this *modus operandi*, including that it violated Article 8 of the European Convention of Human Rights which provides for the right to

[65] Mercato della produzione di poliuretano espanso flessibile (Case I776).

[66] Forniture Trenitalia (Case I759).

respect for one's "private and family life, his home and his correspondence."

This case is noteworthy also because the ICA applied a reduction of 15% to the fine imposed on one of the undertakings involved (Firema), because of its difficult financial situation. Its condition, though not justifying a finding of inability to pay, was a mitigating circumstance justifying at minimum a fine reduction. The ICA explained that the list of mitigating circumstances in its fining guidelines is not exhaustive, and that it could take into consideration additional circumstance in setting the amount of the fine.

Abuse of Dominant Position

The Italian Council of State Upholds the TAR Lazio's Ruling, Which Confirms the ICA's Decision to Fine the Italian Telecommunications Incumbent Operator

On May 9, 2013, the ICA levied a €103.8 million fine on Telecom Italia ("Telecom") for abusing its dominant position in the provision of wholesale access to the local network and broadband internet by hindering the expansion of its competitors (known as "OLOs").[67]

According to the ICA, the abusive conduct consisted of two distinct activities: (i) in the period 2009–2011, Telecom rejected an unjustifiably high number of OLO requests for the activation of wholesale services, treating them in a discriminatory fashion as compared to those coming from its own internal divisions (constituting refusal to supply); and (ii) during the period of 2009 up until July 2011, Telecom designed a policy of discounts to large business clients which did not allow an equally efficient competitor to operate profitably in the retail market, constituting a margin squeeze.

Telecom brought an appeal before the Regional Administrative Tribunal of Lazio (the "TAR Lazio") against the ICA's decision. Telecom argued: that it (1) always complied with the pervasive sector-specific regulation set forth by the Italian Telecommunications Authority ("AgCom"), and that the ICA's claims were not supported by evidence; and (2) never implemented the contested discount policy which, even if it had it done so, would not have constituted a margin squeeze. Telecom's appeal against the decision was rejected.[68] The TAR Lazio determined there was no conflict between the ICA's decision and the regulatory framework, and that the investigation's findings supported the ICA's conclusions with respect to both abusive behaviors. The TAR Lazio's judgment was appealed before the Council of State which, in its judgment of May 15, 2015, upheld the finding of the lower court.[69]

Regarding the first abusive conduct, according to the Council of State, the constructive refusal to supply consisted in the specific procedures set forth for the activation of services to OLOs, which were structurally different from those applicable to the requests coming from Telecom's own divisions. The former were, *inter alia*, managed by an intermediary Telecom division and subject to a preliminary formal verification; the latter, instead, directly reached the division responsible for wholesale services and were based on more updated databases (allegedly resulting in a lower number of rejections of requests). In addition, in some instances, requests coming from OLOs were rejected (called "KO"), and had to be renewed, while Telecom's own requests were simply suspended. Thus, the alleged complexity and higher costs specific to the OLO activation procedures amounted to discriminatory treatment against competitors. The Council of State also rejected Telecom's defense based on the alleged compatibility of its procedures with the telecommunications regulatory framework, maintaining that competition and regulatory intervention are complementary, and that sector-specific *ex ante* regulation plays a different role from the ex post enforcement of competition law.

Regarding the second abusive conduct, the Council of State confirmed the ICA's view that, based on the margin

67 Wind-Fastweb/Condotte Telecom Italia (Case A428).

68 *Telecom Italia S.p.A. v. ICA*, judgment of May 8, 2014, no. 4801.

69 *Telecom Italia S.p.A. v. ICA*, judgment of May 15, 2015, no. 2479.

squeeze test, Telecom's rebate policy to large business clients could not be replicated by an as efficient competitor. Finally, the Council of State dismissed Telecom's claim that the discount policy had not been concretely implemented and, thus, could not amount to an abuse. It recalled Court of Justice case law according to which not only a concrete effect of foreclosure of competitors on the market, but also the mere possibility of such an effect, is sufficient for an abusive conduct to be contested under Article 102 TFEU.

Vertical Agreements

The ICA, Acting in Consultation with the French and Swedish Competition Authorities, Accepts Commitments Offered by Europe's Largest Online Hotel Booking Platform with Respect to Parity Clauses Contained in its Agreements with Hotels

With a decision of April 21, 2015,[70] the ICA accepted commitments offered by Booking, one of the world leading online travel agencies ("OTAs"), thereby closing proceedings with respect to this undertaking for a possible violation of Article 101 TFEU.

The decision to open proceedings targeted not only Booking, but also Expedia, another leading online booking platform, and focused on their use of "Most favored nation" ("MFN") clauses in standard contracts with hotels that wished to be included on their online booking platforms. Through the MFN clauses, the parties required hotels to offer them the same, or better, rates and conditions than those offered to any other client (including other OTAs). The scope of these clauses was particularly wide, given that it encompassed all other possible booking channels, online and offline (*e.g.*, reservations made through traditional travel agencies as well as directly with hotels). According to the ICA, the restrictive effect of the MFN clauses was strengthened by the use of "Best price guarantee" ("BPG") clauses, through which the parties guaranteed customers that the prices featured on their platforms were in fact the best available, failing which hotels were required to refund the difference. In the ICA's view, the parties used BPG clauses as a system to monitor deviations by hotel partners and punished such deviations in terms of ranking of hotels on their platforms. The ICA was also concerned by the parties' market share (which amounted jointly to 75%). In light of the above, the ICA took the view that the parties' conduct could seriously hamper competition, in particular by raising barriers to entry and by determining an artificial alignment of prices in the whole sector.

After a first round of commitments proposed by Booking, and following a market test run in December 2014, Booking amended its initial proposals in order to limit further its use of MFN clauses. In particular, Booking mainly undertook to apply a restricted version of the MFN clause, which required hotels to guarantee parity only with respect to terms and conditions offered on the hotels' direct online channels. In the ICA's view, the commitments were sufficient to address its concerns. Similar commitments were accepted by the French *Autorité de la concurrence*[71] and the Swedish *Konkurrensverket*[72] in the context of parallel proceedings initiated against Booking in the respective Member States. The investigations continue against Expedia.

The decision is of particular significance because it was taken in consultation with two other National Competition Authorities ("NCAs"), within the framework of unprecedented cooperation. The Commission assisted the three NCAs, but did not commence its own proceedings. The positive aspect of this joint action is that identical commitments were made binding in three different Member States, with important gains in terms of legal certainty. However, cooperation was not fully achieved because another NCA, the German *Bundeskartellamt*, which was also dealing with an investigation against the parties for their use of parity clauses, refused to accept Booking's commitments and on April 2, 2015 issued a Statement of

[70] Mercato dei servizi turistici-Prenotazioni alberghiere on line (Case I779).

[71] (15-D-06) Autorité de la concurrence decision of April 21, 2015.

[72] (Ref. no. 596/2013), Konkurrensverket decision of April 15, 2015.

Objections. The divergent approach taken by the German Authority follows from the voluntary nature of the cooperation between NCAs in the framework of the European Competition Network.[73]

NETHERLANDS

This section reviews developments under the Competition Act of January 1, 1998 (the "Competition Act"),[74] which is enforced by the Netherlands Authority for Consumers and Market (Autoriteit Consument & Markt, "ACM").[75]

Regulation

ACM Gives Guidance on Distribution Agreements

On April 20, 2015, the ACM published a paper titled "Supervision of vertical agreements by the Authority for Consumers and Markets (ACM)" (the "Guidelines") which provides insight into its strategy and prioritization regarding agreements between two or more undertakings that operate at different levels of the same distribution chain of goods or services ("vertical agreements"), *e.g.*, resale price maintenance, exclusive purchasing obligations, or territorial protection. It also published accompanying flowcharts for undertakings' self-assessment.[76] Previously, neither the ACM nor its predecessor (the NMa) have given much attention to vertical agreements. However, market developments, in particular the growth of online sales, and the supervision activities of the European Commission (the "Commission") and other national competition authorities when it comes to vertical agreements, have prompted the ACM to provide guidance on this matter.

The key starting point for the ACM's strategy in the supervision of vertical agreements is the "effect on consumer welfare of undertakings' behavior in the market," *i.e.* the ACM will opt to investigate vertical agreements where the expected harm to consumer welfare is highest. Such harm to consumer welfare shall be assessed based on economic insight, taking into account that vertical agreements may generate efficiencies often passed on to consumers. The Guidelines reiterate that, in the absence of market power, vertical agreements more often than not benefit consumer welfare. Nevertheless, on certain occasions, vertical agreements will be scrutinized.

In an initial substantive investigation, the ACM will assess whether (i) a vertical agreement has a potential adverse effect on consumer welfare, (ii) there is a social or public interest that would merit an investigation (such as clarifying a legal standard), and (iii) the ACM is able to act effectively and efficiently. Generally, the ACM will only elect to further investigate a case if these criteria are met. Exceptionally, the ACM may decide to further investigate a vertical agreement of which the likelihood of consumer harm is not clear from the initial assessment, but which has a high social interest, such as clarifying a legal standard ("standard-setting effect").

In addition, the Guidelines highlight several factors that the ACM shall consider during the initial substantive investigation when assessing the effects on consumer welfare. The ACM will look at: (i) the degree of the undertakings' market power within a single distribution chain for the assessment, of which the degree of competition between distribution chains ("inter-brand competition") is an important factor; (ii) whether comparable vertical agreements are applied within several distribution chains ("market-wide application"); (iii) if retailers enforce a vertical agreement against the wish of the manufacturer; and (iv) whether there are potential efficiencies. The ACM provides several scenarios in order to illustrate how these assessment factors will be applied, while emphasizing that they are very case-specific.

Although the Guidelines suggest that the ACM remains relatively lenient towards vertical agreements, the ACM hereby signals that it will dedicate part of its capacity to

[73] Commission Notice on cooperation within the Network of Competition Authorities (OJ 2004 C 101), para. 13.

[74] Decisions of the ACM are available at www.acm.nl, case-law is available at www.rechtspraak.nl.

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

[76] Both documents can be retrieved from the ACM's website: https://www.acm.nl/nl/onderwerpen/concurrentie-en-marktwerking/kartels/toezicht-acm-op-verticale-overeenkomsten/.

target vertical restraints which are (most) harmful to consumer welfare.

Judicial Appeals

Court of Appeals Partly Allows Damages Claim Against ACM Over Illegal Fine

On February 10, 2015, the The Hague Court of Appeals (the "Court of Appeals") ruled that the ACM must partly compensate an installation company for damages suffered as a result of a fine which had been annulled on formal grounds and was therefore illegal.[77] The exact amount of damages is to be determined in separate proceedings.

On August 31, 2006, the NMa (ACM's predecessor) issued a decision imposing a fine of about €350,000 on installation company ETB Vos B.V. ("ETB") for four years of participation in a cartel in the installation sector, forming part of a larger construction industry fraud investigation.[78] On administrative appeal, the NMa lowered this fine to about €190,000.[79]

However, ETB initiated court proceedings and on April 28, 2009, the Rotterdam District Court annulled the NMa's decision on appeal on formal grounds (the NMa had failed to clearly separate its factual, investigative work from its decision-making process).[80] This annulment was confirmed in an August 30, 2011 judgment of the Dutch Trade and Industry Appeals Tribunal ("CBb"),[81] the highest administrative court in the Netherlands.

Following the CBb judgment, ETB brought civil proceedings and requested the The Hague District Court (the "District Court") to declare that the NMa was responsible for the damages suffered by ETB because it had unlawfully caused negative publicity for ETB—in particular, by (i) having attached to its statement of objections, sent to about 150 suspected offenders, a list of names of all those undertakings suspected to have participated in the cartel (including ETB), and (ii) having commented in an interview published in a sector-specific magazine that because of the procedural errors, the CBb did not even get to establish whether ETB had indeed participated in cartel. ETB requested the District Court to order the NMa to pay damages and to adjust its archives so as to remove ETB from the category of fined undertakings. In its April 3, 2013 judgment, the District Court held that the ACM was indeed responsible for damages suffered by ETB, but rejected ETB's negative publicity claims.[82]

On appeal brought by ETB, the Court of Appeals confirmed, on February 10, 2015,[83] the District Court's judgment that the illegality of the NMa's decisions was established by their annulment by the administrative court—the CBb—which meant that the damages that ETB suffered were attributable to the state. However, the Court of Appeals rejected ETB's negative publicity claims as well because (i) by analogy to criminal law, fellow suspects are also informed of each other's names, and (ii) the NMa's comment published in a magazine was as such neither incorrect nor, absent substantiated claims by ETB which might lead to a different conclusion, unlawful. Moreover, the Court of Appeals confirmed the District Court's rejection of full compensation of lawyers' fees. The exact amount of damages and questions of causality shall be dealt with in separate damage assessment proceedings.

District Court Rejects Passing-On Defense and Orders Follow-On Damages

On June 10, 2015, the Gelderland District Court (the "District Court") ordered French engineering company, Alstom, to pay €14.1 million in follow-on damages to Dutch electricity grid operators for overcharges imposed as a result of its participation in the gas-insulated switchgear

77 The Hague Court of Appeals, Judgment of February 10, 2015, ECLI:NL:GHDHA:2015:145 (only published on April 22, 2015).

78 Case 4897, NMa decision of August 31, 2006.

79 Case 4897, NMa decision on appeal of October 1, 2007.

80 Rotterdam District Court, Judgment of April 28, 2009, ECLI:NL:RBROT:2009:BI3337.

81 Trade and Industry Appeals Tribunal, Judgment of August 30, 2011, ECLI:NL:CBB:2011:BR6737.

82 The Hague District Court, Judgment of April 3, 2013, Case number C/09/427864.

83 The Hague Court of Appeals, Judgment of February 10, 2015, ECLI:NL:GHDHA:2015:145.

(“GIS”) cartel.[84] The District Court applied a reasonableness test to determine whether the passing-on defense could be successfully invoked.

In 2007, the Commission fined eleven groups of companies, including Alstom, over €750 million for participating in the gas-insulated switchgear cartel from 1998 to 2004.[85] Alstom’s customers, Dutch electricity grid operators TenneT TSO B.V. and Saranne B.V. (jointly referred to as “TenneT”), Alstom brought an action for damages in the Gelderland District Court based on alleged overcharges.

In an earlier interim judgment of September 24, 2014,[86] the District Court had already established Alstom’s civil liability for damages suffered by TenneT, but requested more information, including regarding Alstom’s passing-on defense, in order to assess the amount of damages to be paid. Alstom failed to produce documents explaining its price calculations, and as a result the District Court relied on an estimated overcharge based on a comparison of cartel and post-cartel prices paid by TenneT to Swiss engineering company, and Alstom’s fellow cartel member and whistle-blower, ABB.[87]

Alstom’s arguments may suggest that TenneT did not incur any losses as a result of higher GIS prices because it had passed on the overcharge to its customers (even though Alstom did not argue so explicitly). The District Court held that, even if there had been a benefit for TenneT, *i.e.*, by having passed on (part of) the overcharge to its own customers, that benefit may only be subtracted from the damages claim “*in so far as this is reasonable.*”[88] The District Court noted that Alstom had neither proven nor sufficiently explained why (part of) the passed on overcharge should be subtracted from the damages claim. Moreover, Alstom did not contest TenneT’s arguments that (i) chances that end customers would sue Alstom for damages were almost nil and that (ii) the damages it would receive from Alstom would ultimately benefit end customers through lower energy prices (or lower taxes—because the State is TenneT’s sole shareholder).

The District Court held that a cartel participant should not be required to pay the same damages more than once to different customers in the chain, although due to the arguments put forth by TenneT, this would not have occurred in the present case. The District Court further held that, under these circumstances, it was not unreasonable that TenneT be overcompensated because in an alternative scenario, Alstom would retain its benefit, which would constitute an unreasonable and unjust enrichment.

Therefore, the District Court confirmed its earlier interim finding that the overcharge amounted to 54–63 %, *i.e.*, to €14.1 million (as TenneT had requested), and ordered Alstom to pay the full amount. Alstom has three months from the date of the judgment to file an appeal.

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”).

[84] Gelderland District Court, Judgment of June 10, 2015, ECLI:NL:RBGEL:2015:3713.

[85] Gas-insulated Switchgear (Case COMP/F/38.899), Commission decision of January 24, 2007. GIS is heavy electrical equipment used to control energy flows in electricity grids, and is the major component of turnkey power substations (auxiliary power stations where electrical current is converted from high to low voltage or the other way around).

[86] Gelderland District Court, Judgment of September 24, 2014, ECLI:NL:RBGEL:2014:6118.

[87] Arnhem-Leeuwarden Court of Appeals, Judgment of September 2, 2014, ECLI:NL:GHARL:2014:6766.

[88] Gelderland District Court, Judgment of September 24, 2014, ECLI:NL:RBGEL:2014:6118, 4.38.

Vertical Agreements

PCA Accepts Controlinveste's Commitments After an Investigation on Restrictive Practices

On June 1, 2015, the PCA ended proceedings against Controlinveste Media group upon the offering of commitments, which became legally binding conditions on the undertaking.[89]

The PCA started an investigation on April 11, 2013, following a complaint by the Portuguese Professional Football League. It was found that the agreements between Controlinveste and the football clubs led to a risk of market foreclosure in the market for national football television broadcasting rights. The agreements concerned were vertical exclusivity agreements and their suspension mechanisms and right of first refusal clauses raised particular concerns.

Controlinveste reacted by offering commitments that would lead to the end of such practices and the competition concerns they raised. These were subject to a public consultation, following which the PCA concluded they were sufficient to eliminate anticompetitive concerns thereby protecting consumers' interests, as well as remove barriers to entry and expansion.

Under the accepted commitments, Controlinveste shall no longer enter into agreements with: (i) exclusivity obligations exceeding three years; (ii) a right of first refusal; and (iii) clauses identical to the suspension clauses in the previous agreements that extend the duration of the agreements beyond three years. As to the agreements already in force, Controlinveste must grant to the football clubs: (i) the right to terminate their agreements without any penalty or compensation, with effect as of the end of the 2015/2016 season, provided that it is notified until November 30, 2015; (ii) the right to opt-out from the suspension mechanism; and (iii) the right to waive the right of first refusal.

89 Portuguese Competition Authority, PRC 2013/2, decision of June 1, 2015.

SPAIN

This section reviews developments under the Laws for the Defense of Competition of 1989 and 2007("LDC"), which are enforced by the regional and national competition authorities, Spanish Courts, and, as of 2013, by the National Markets and Competition Commission ("CNMC"),which comprises the CNMC Council ("CNMCC") and the Competition Directorate ("CD").

Mergers

The CNMC Cleared the Acquisition of DTS By Telefónica Subject to Commitments

On April 22, 2015, the CNMC approved the acquisition of sole control by Telefónica de Contenidos, S.A.U. ("Telefónica") of Distribuidora de Televisión Digital ("DTS"), the main pay-TV operator in Spain, subject to commitments.[90] The transaction had initially been notified to the Commission, which referred it to the CNMC under Article 4(4) of the EC Merger Regulation[91] because its effects were limited to Spain.[92]

The CNMC concluded that the transaction would lead to the disappearance of Telefónica's main competitor in the Spanish pay-TV market, as well as in the market for the wholesale supply of media content. In addition, as a result of the larger customer base resulting from the transaction, according to the CNMC, the merged entity could cease selling broadcasting rights to competing pay-TV providers. Finally, the CNMC concluded that the strong position of the merged entity in the pay-TV market, as well as in the market for broadcasting and for the wholesale supply of TV channels, could reinforce Telefónica's position in the markets for electronic communications in fixed and mobile telephony.

90 *Telefónica/DTS* (Expte. C/0612/14), CNMC decision of April 22, 2015.

91 Council Regulation (EC) No 139/2004 of January 20, 2004, on the control of concentrations between undertakings.

92 *Telefónica/DTS* (Case COMP/M.7313), Commission decision of August 25, 2014.

The Commission approved the transaction subject to the following commitments.

First, with regard to the pay-TV market, Telefónica committed not to apply contractual conditions which would prevent its pay-TV customers from switching to one of its competitors. In particular, Telefónica committed to: (i) terminate contracts with its pay-TV customers, upon request, during a limited period of time; (ii) eliminate permanence obligations in current and future contracts with its pay-TV customers; and (iii) honor the existing contacts between DTS and other competing telecom operators thereby enabling the latter to distribute YOMVI content.[93] In addition, Telefónica agreed to refrain from attempting to recover pay-TV customers within two months after termination, or making active sales of pay-TV series to customers of other competing telecom operators which have a subscription to YOMVI.

Second, as regards the markets for the wholesale supply of media content and of TV channels, the merged entity undertook to provide all its competitors with wholesale access to its own premium channels under fair, reasonable, objective, transparent, and non-discriminatory terms. According to the CNMC, this would enable competitors to effectively replicate Telefónica's retail offer, thereby preventing Telefónica from engaging in margin squeeze. In particular, as a result of the commitments, each pay-TV competitor would be able to acquire up to a maximum of 50% of the merged entity's own premium channels at its own choice. In addition, the merged entity's ability to enter into exclusive contracts for the commercialization of TV-broadcasting rights would be limited to specific categories of content (*e.g.* non-sport TV content), and the duration of such contracts could in any case not exceed three years. Also, Telefónica committed to broadcast TV channels of its competitors on its own pay-TV platform under certain conditions.

Finally, Telefónica undertook to provide access to its internet network, to companies who provide pay-TV OTT services to Telefónica's fixed internet broadband and mobile telephony customers, of the same quality as that enjoyed by customers of the merged entity's own OTT services.

Policy and Procedure

The CNMC Published a Report on the New Football Broadcasting Rights System

On May 28, 2015, the CNMC made public a report on the exploitation and the commercialization of broadcasting rights for Spanish football competitions. This report was issued by the CNMC in December 2014 and was taken into account by the Spanish Government in adopting Royal Decree-Law 5/2015 of April 2015 (the "Royal Decree-Law").[94] The Royal Decree-Law introduced a collective selling system for broadcasting rights for Spanish football competitions, in line with the system which exists in the majority of EU Member States.[95]

Prior to the Royal Decree-Law, each local football club owned the broadcasting rights for all matches of national competitions hosted in Spain and commercialized such rights individually, subject to the consent of the visiting football club. However, under the new system, clubs are forced to transfer the commercial rights to the entities organizing such competitions, *i.e.* the Spanish League ("LNFP"), and the Spanish football federation ("RFEF"). In addition, the revenue generated is distributed among the clubs following predefined criteria such as the performance and social influence of each club.

In its report, the CNMC analyzed the Spanish Government's proposal to adopt a collective selling system for broadcasting rights for Spanish football competitions, under Spanish and EU competition law.

First, the CNMC concluded that such a system could constitute a price fixing agreement, thereby infringing Article 101(1) of the TFEU and Article 1(1) of the LDC.

93 YOMVI is an over the top ("OTT") service operated by DTS.

94 Royal Decree-Law 5/2015 on the exploitation and commercialization of broadcasting rights of professional football competitions.

95 For instance, in the UK, Germany, Italy and France.

According to the CNMC, there are two main risks associated with a collective selling system: (i) market foreclosure, where all of the rights are sold to only one broadcaster in the downstream market; and (ii) restrictions on the utilization of the broadcasting rights, for example, if a broadcaster impedes the broadcasting of football matches for which demand could exist. The CNMC stated, however, that these restrictions may be justified under Article 101(3) of the TFEU and Article 1(3) of the LDC. The CNMC noted that, according to the Commission, such a system could: (i) produce a better and wider offer, increasing consumer welfare; (ii) improve the value of the final product; and (iii) result in cost efficiencies and in the reduction of transaction costs.[96]

Second, even though the Commission has in previous decisions[97] exempted joint selling arrangements under Article 101(3) of the TFEU, the CNMC was skeptical as to the compatibility of a collective selling system with competition law. The CNMC argued that given this system would impede increased competition, the reduction of transaction costs would be attained at the expense of consumers,. Also, according to the CNMC, a collective selling system is not indispensable for match scheduling purposes, or to establish a strong brand. Neither is such a system necessary, in the CNMC's view, to secure financial solidarity and/or equality between clubs.

Finally, the CNMC proposed certain measures in order to improve the collective selling system which the Spanish Government intended to adopt, notably: (i) the contracts for the exploitation and the commercialization of broadcasting rights should have a maximum duration of three years; (ii) broadcasting rights should not be sold to a single buyer; (iii) the rank of the clubs in the national football competition should be taken into account for the purposes of distributing revenue between the clubs; and (iv) the clubs should be obliged to cover their overdue debts with the Spanish tax authorities on a preferential basis once they have received their share of revenue for the commercialization of broadcasting rights. Measures aimed at achieving (i), (ii) and (iii) above, were reflected in the final version of the Royal Decree-Law, adopted in April 2015.

SWEDEN

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

Unilateral Conduct

SCA Brings Abuse of Dominance Action Against Nasdaq OMX to the Stockholm City Court

On May 27, 2015, the SCA submitted a summons application to the Stockholm City Court with a claim for Nasdaq OMX Stockholm AB, Nasdaq OMX Clearing AB, OMX AB and OMX Technology AB (together "Nasdaq OMX") to pay €3.3 million in administrative fines for abusing their dominant position, in breach of Swedish competition rules, on the market for services relating to the trade of Swedish, Danish and Finish equities in 2010.

Nasdaq OMX operates the Stockholm Stock Exchange, Copenhagen Stock Exchange and Helsinki Stock Exchange. Since the EU-wide deregulation of the financial markets in 2007, Nasdaq OMX competes with newly started multilateral trading platforms.

In December 2010, following a complaint by Nasdaq OMX's competitor, Burgundy AB ("Burgundy"), the SCA opened an investigation into whether Nasdaq OMX had abused its dominant position in order to prevent Burgundy from placing its matching engine, a component used to match bids and offers to complete trades, in the data centre of Verizon Sweden AB ("Verizon"). The Verizon data centre hosts Nasdaq OMX's matching engine, in addition to the trading equipment of a large number of securities traders. According to the SCA, Verizon initially agreed to

96 Joint selling of the commercial rights of the UEFA Champions League, COMP/C.2-37.398, Commission Decision of July 23, 2003; Joint selling of the media rights to the German Bundesliga, Case COMP/C-2/37.214, Commission Decision of January 19, 2005.

97 Joint selling of the commercial rights of the UEFA Champions League, COMP/C.2-37.398, Commission Decision of July 23, 2003.

host Burgundy's matching engine but ultimately did not uphold the agreement after Nasdaq OMX threatened to relocate its matching engine. Burgundy was left to place its matching engine at another location which did not host any actual or potential clients.

The SCA claims that Nasdaq OMX's actions intended to place Burgundy at a competitive disadvantage. The market investigation conducted by the SCA showed that a shorter cable length between the trading and market engines provides for faster communication in high-frequency equities trading. The remote location of the matching engine therefore resulted in slower trading communication and higher costs for actual and potential clients to connect on Burgundy's trading equipment. The SCA further found that Burgundy's clients were exposed to a higher financial risk in relation to certain latency-sensitive trades because of the location of the matching engine. In its application to the Stockholm City Court, the SCA claimed that Nasdaq OMX's actions prevented or intended to prevent the development of effective competition in the market for services relating to equities trading.

The ruling of the Stockholm City Court is expected in early 2016 and may be further appealed to the Stockholm Market Court, which is the highest court of appeal in matters of administrative fines in competition cases.

SCA Accepts Binding Commitments from Booking.com BV and Bookingdotcom Sverige AB

On April 15, 2015, following an investigation into the online booking agency sector, the SCA accepted Booking.com BV's ("Booking.com") and Bookingdotcom Sverige AB's ("Bookingdotcom") voluntary commitments to alleviate anticompetitive concerns in relation to certain "best price" clauses. The commitments are associated with a fine of approximately €3 million for Booking.com and a fine of approximately €0.5 million for Bookingdotcom.

Booking.com, a Dutch registered company, hosts Europe's largest online hotel booking platform and Bookingdotcom is a Swedish company which provides support functions for Booking.com in the Nordic market.

In 2013, the SCA launched an investigation relating to the so-called parity clauses contained in Booking.com's hotel agreements. The parity clauses require the hotels to offer the same or lower room prices via Booking.com as they offer via any other online or offline sales channels, including the hotels' own booking platforms. The SCA had concerns that the parity clauses may restrict competition between Booking.com and other online booking agents and restrict market entry of new online booking platforms in breach of Swedish and EU competition rules.

Hotels provide online booking agents with hotel rooms who offer the rooms to customers on behalf of the enlisted hotels. The market survey showed that hotels often sign up with several competing online booking platforms. The hotel only pays a commission once the a booking has been completed. The SCA expressed concern that the parity clauses allowed Booking.com to increase the commission rate while restricting the hotels from off-setting that cost by offering higher room prices via Booking.com than through competing online booking platforms.

Booking.com therefore lacks the incentive to compete with other online booking platforms by charging lower commission rates to hotels. The SCA concluded in its preliminary finding that the parity clauses may lead to a restriction of competition between existing online booking platforms and, ultimately, result in higher consumer prices.

The SCA also expressed concern that the parity clauses may restrict market entry of new online booking platforms and constitute a barrier for existing online booking agents to expand on the market. The parity clauses prevent current or potential competitors to Booking.com from competing with low commission rates in exchange for hotels offering lower room prices on their online booking platforms.

In order to accommodate the authority's concerns, Booking.com and Bookingdotcom voluntarily offered commitments to stop applying the parity clause which requires hotels to offer better or equal room prices via Booking.com than they do via competing online booking platforms. This will enable hotels to offer different room prices to different online booking agents. The commitments further prevent Booking.com and Bookingdotcom from restricting hotels to offer discounted prices via the hotels' own offline sales channels or to members of their loyalty schemes via their own online channels.

The SCA accepted the commitments and ultimately left the question open whether Swedish or EU competition rules had been breached. On April 21, 2015, the competition authorities of Italy and France accepted identical commitments by Booking.com. The Commission assisted the three authorities in coordinating the investigations but did not open its own investigation.

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").

Merger Control

The Competition Commission Opens In-Depth Investigation into Ricardo/Tamedia

On June 9, 2015, the FCC announced that it has opened in-depth investigation of the purchase of Ricardo by Tamedia. According to the FCC's press release,[98] there are indications that this acquisition may create or strengthen a dominant position in the area of job advertisements. In addition, there are indications that Tamedia/Ricardo and Ringier might be collectively dominant in German-speaking Switzerland in the field of car sales ads.

With JobCloud, Tamedia operates a number of Internet portals in the field of job ads. Among other portals, Jobs.ch and jobup.ch belong to JobCloud. Ringier and Tamedia each hold 50% of JobCloud. Since 2008, Ricardo has belonged to the South African media group Naspers. Ricardo operates the online platforms ricardo.ch and ricardoshops.ch, the car sales platform autoricardo.ch platform, as well as the classified ads platform olx.ch. Ricardo is also active in this area through olx.ch.

Since JobCloud already has a strong position in the relevant area, there are indications that the contemplated concentration may strengthen a (possibly already dominant) position of JobCloud. In addition to this concern, the proposed acquisition will result in a concentration involving two major car sales platforms providers, which together cover most of the market. For these reasons, the FCC has decided to conduct an in-depth examination of the effects on competition of the proposed concentration in the areas aforementioned. The review must be completed within the statutory period of four months.

The Competition Commission Opens In-Depth Investigation into JobCloud/JobScout 24

On June 16, 2015, the FCC announced that it will conduct an in-depth investigation into the purchase of JobCloud by JobScout24. According to the FCC's press release,[99] there are indications that this acquisition may create or strengthen a dominant position in the area of job advertisements. JobCloud operates several Internet portals in the field of job ads, such as jobs.ch and jobup.ch. Ringier and Tamedia each hold a 50% stake in JobCloud. With jobscout24.ch, JobScout24 also operates an Internet portal for job ads. Since JobCloud already has a strong position, there are indications that the contemplated concentration may strengthen a (possibly already dominant) position of JobCloud. For these reasons, the FCC has decided to conduct a phase II examination of the effects on competition of the proposed concentration. The review must be completed within the statutory period of four months.

JobScout24 belongs to Scout24 Switzerland and is controlled by Ringier. In addition to jobscout24.ch, Scout24

[98] A version in German or French is available at: https://www.news: admin.ch/message/index.html?lang=fr&msg-id=57582.

[99] A version in German or French is available at: https://www.news. admin.ch/message/index.html?lang=fr&msg-id=57683.

Switzerland operates other Internet portals in the field of cars and motorcycles (autoscout24.ch and motoscout24.ch), real estate (immoscout24.ch), and classified ads (anibis.ch). These platforms are not affected by the concentration and remain the property of Scout24 Switzerland.

Cartels

The Competition Commission Imposes Fines on Wholesalers of Sanitary Products for Price-Fixing

On March 7 2015, the FCC announced that it has imposed fines totaling 80 million Swiss francs on wholesalers of the sanitary industry (bathroom fixtures and fittings). The FCC found that since the 90s, these wholesalers (who are all industry leaders) have entered into prohibited horizontal agreements on prices and quantities.

According to the FCC's press release,[100] between 1997 and 2011 most of the wholesalers concerned had agreed on elements of the price or factors affecting the price, such as margins, gross prices, the exchange rate with the euro, the costs of transport, or discounts or rebates categories. They also agreed to exclude from their catalog items produced by manufacturers who did not opt to distribute exclusively through their distribution channels. These agreements prevented the manufacturers from entering the market. The FCC found that such agreements amounted to a prohibited agreement on prices and quantities. The FCC has imposed penalties for a total of about 80 million Swiss francs.

Most of the wholesalers concerned are members of the Swiss Union of Wholesalers of the Sanitary Branch,[101] which served as a platform for the conclusion of the illicit agreements. As the only non-member of the association, the market leader, Sanitas Troesch AG, participated in some of the arrangements that have been found to be illicit by the FCC. The following entities have been sanctioned by the FCC: Swiss Union of Wholesalers of the Sanitary Branch, Cement Roadstone Holdings plc (BR Bauhandel AG [Richner], Gétaz-Miauton SA, Reco Regusci SA), Sanitas Troesch AG, SABAG Holding AG, Bringhen AG, SAB Sanitär Burgener AG, SANIDUSCH AG, Kappeler AG, and Innosan SA. The procedure was closed without further action concerning Späer AG Chur and San Vam SA.

Some of the companies concerned have provided the authorities with a large set of data and thus benefited from a substantial reduction in fines. As a mitigating circumstance, the FCC has taken into account the fact that it had launched preliminary investigations in the past regarding the sanitary industry, which never prompted a formal investigation. However, the duration of the cartel and the repeated violations of the Cartel Act have been seen as aggravating factors.

Horizontal agreements on prices and quantities are serious offenses under article 5 para. 3 of the Swiss Cartel Act. The investigation was initiated following information received from consumers. No self-denunciation was made.

Presently, the FCC has yet to publish the basis of its findings however it is expected to do so within the next four months, at which time the wholesalers will have the option to appeal the decision to the Federal Administrative Tribunal.

UNITED KINGDOM

This section reviews developments under the Competition Act 1998, and the Enterprise Act 2002, which are enforced by the Competition and Markets Authority (the "CMA").

Market Investigation

CMA Closes Mastercard and Visa Interchange Fee Investigations

On May 6, 2015, the CMA decided to close its investigations into MasterCard's and Visa's multilateral interchange fee ("MIF") arrangements for consumer credit and debit card payments on the grounds that it no longer

[100] A version in German or French is available at: https://www.news.admin.ch/message/index.html?lang=fr&msg-id=58001.

[101] Union Suisse des Grossistes de la Branche sanitaire USGBS / Schweizerischer Grosshandelsverband der Sanitären Branche SGVSB.

fitted within its casework priorities.[102] This decision stemmed from the incoming Regulation on Interchange Fees for Card-Based Payment Transactions[103] ("the Regulation"), which was published in the Official Journal of the European Union on May 19, 2015.

Previously, on November 4, 2014, the CMA had announced that it was not going to progress its investigations into MasterCard's and Visa's interchange fee arrangements on the basis of the Commission's proposed interchange fees Regulation. The status of this investigation depended on whether the proposed Regulation would address the suspected harm caused by excessive MIFs.

This Regulation will now enter force on June 8, 2015. Within the UK, the Payment Systems Regulator will be the competent authority for the monitoring and enforcement of compliance with the Regulation.

Six months after it comes into force, the Regulation will apply a cap on the MIFs charged by cardholders' banks to merchants' banks whenever a consumer makes a card based purchase. MIFs will be capped at 0.3% of the value of a credit card transaction, and 0.2% of the value of a debit card transaction. There will be limited discretion for national governments to implement certain variations to these caps. Twelve months after it comes into force, the Regulation will prevent payment card schemes using "Honor all Products" rules which tie a merchants' acceptance of low-fee cards to its acceptance of high-fee cards.

The CMA has stated that the Regulation will address the alleged harm (increased merchants' costs and higher consumer prices) caused by MIF arrangements quicker than the CMA could progress its investigations onto statements of objections and infringement decisions. Further CMA enforcement action in this area would require significant expenditure of resources, and is unlikely to have much or even any direct impact.

The Office of Fair Trading ("OFT") had first investigated MIFs in 2000, when MasterCard had applied to the OFT for exemption from the Chapter 1 prohibition of the Competition Act 1998, regarding matters that included its rules on MIFs.

On September 6, 2005, the OFT announced its decision that a collective agreement on the MIF applicable to certain MasterCard cards infringed Chapter 1 and Article 101 of the TFEU. In October 2005, the OFT issued a statement of objection regarding Visa's agreement on the MIFs applicable to UK domestic transactions. However, the MasterCard decision was set aside by the Competition Appeal Tribunal (CAT) in June 2006, and the Visa statement was subsequently withdrawn.

In February 2007, the OFT announced an expanded investigation into MasterCard and Visa's interchange fee arrangements, but this was put on hold pending the outcome of MasterCard's appeals against a Commission decision in December 2007 finding that MasterCard's EEA fallback MIFs infringed Article 101 of the TFEU. On September 11, 2014, the ECJ dismissed MasterCard's appeal and upheld the Commission's decision.

CMA Announcement of Criminal Investigation into the Supply of Products to Construction Industry

On May 6, 2015, the CMA updated its website to state that the next milestone in its criminal cartel investigation into the supply of products to the construction industry will be April 2016. The investigation, performed under the Enterprise Act 2002, was opened in February by the OFT and is being continued by the CMA.

Previously, in March 2013, seven were arrested in the Midlands. The group were allied to three companies; two family-owned businesses and a larger privately traded company. The arrests came alongside investigation searches at various locations across the UK, and were the first arrests revealed by the OFT since 2010.

Significant changes were made to the criminal cartel

[102] CMA Statement regarding its decision to close the investigation at http://bit.ly/1h9d6s1.

[103] Regulation (EU) 2015/751 of the European Parliament and of the Council.

offence through the Enterprise and Regulatory Reform Act 2013, which removed the requirement to prove "dishonesty" with regard to arrangements made on or after April 1, 2014. Now, prosecutors just have to show that the accused was not open in their dealings. For arrangements made prior to April 1, 2014, "dishonesty" must still be shown for the offence to be made out.

This change stemmed from the lack of arrests and progress made by the OFT, and from criticism over how the OFT handled a high-profile price-fixing trial against executives of British Airways, which collapsed in 2010.

A UK Government Consultation noted that proving dishonesty in criminal cartel cases was particularly difficult, and this barrier weakened the strength of the cartel offence as a deterrent. The dishonesty requirement was also not seen in similar economic offences which carried a comparable sentence.

The decreasing number of available contracts within the construction industry, stemming from cuts in large-scale public and private infrastructure projects, has put pressure on companies and made an increase in anti-competitive practices more likely.

CMA Intends to Appeal Court of Appeal ruling that CAT Erred in Upholding a CMA Decision that SeaFrance Assets Constituted an "Enterprise"

An important feature of the UK's merger control regime is that it only covers a transaction if it involves two (or more) "enterprises" merging. The question here is whether, when a purchaser buys assets previously used to carry on a business, it has bought an "enterprise" or merely a collection of assets.

SeaFrance, a well-known Channel ferry operator, went into liquidation in early 2012. Its ships were put into "hot lay-up" and the majority of its employees were made redundant. Under a "job saving plan," the SNCF agreed to pay an "indemnity" to certain employers who engaged former SeaFrance employees.

By June 2012, Eurotunnel had made a bid for the old SeaFrance assets, which it planned to operate as a cross-channel ferry business in partnership with a worker's cooperative (SCOP). It implemented this as the MyFerry Channel ferry service, using SeaFrance's old ships and a large number of SeaFrance's former employees.

The CMA was concerned that Eurotunnel, who already competed with cross-Channel ferries, had acquired a ferry business using the assets of a former competitor, thereby substantially reducing competition. It therefore sought to assert jurisdiction to review.

The CAT initially held that the CMA had not established that what was bought was an enterprise, and remitted the matter to the CMA.[104] The CMA came to the same conclusion that there had been the acquisition of an "enterprise." This was challenged by Eurotunnel, but their appeal to the CAT was rejected.[105]

The SCOP then appealed to the Court of Appeal, who held by a 2:1 majority that the CMA's conclusion was unsustainable.[106] The question here was whether the CMA had acted rationally. The SCOP did not challenge the legal guidance given in the first CAT decision, although the soundness of this was also questioned in obiter.

At the core of the majority's ruling was an emphasis on the lapse in time between SeaFrance's cessation of activities and the acquisition by Eurotunnel. Sir Colin Rimer observed that the key element of "enterprise" was the word "activities." The CMA faced a logical difficulty in saying there were continuing activities at the date of acquisition—there was actually a gap without activity, or the prospect that SeaFrance would resume activities.

The CMA's also relied irrationally on the idea that the ex-SeaFrance workforce were "effectively transferred" to MyFerry, which could not be reconciled with the fact that almost all SeaFrance employees were made redundant

104 [2013] CAT 30.

105 [2015] CAT 1.

106 [2015] EWCA Civ 487 – Tomlinson LJ and Sir Colin Rimer in the majority, Arden LJ dissenting.

long before Eurotunnel became involved. They had really obtained employment in a new business. The job-saving plan to secure their re-employment could not be characterized as an intention to continue the SeaFrance business.

The majority also expressed “respectful doubts” in obiter about the correctness of the approach in the first CAT decision. ‘Acquisition of an enterprise’ was limited to where a business is acquired as a going concern, a much narrower approach.

On May 19, 2015, the CMA announced that it will seek permission to appeal this decision to the Supreme Court[107] so as to retain jurisdiction to review the merger, which was granted on July 27, 2015.

The CMA’s grounds are that its competition assessment was not challenged and that its decision on jurisdiction was upheld by the CAT. It is also seeking greater clarity about what constitutes an “enterprise” in this context.

Court of Appeal Dismisses HCA’s Appeal Against CAT Ruling, Remitting Healthcare Sector Inquiry Back to Original CMA Group[108]

On April 2, 2014, the CMA issued its Final Report on the private healthcare market, in which it decided, *inter alia*, that HCA should divest two of its hospitals in London.[109] HCA appealed the decision before the CAT which, on December 23, 2014, quashed the CMA’s decision in part, remitting it to the CMA’s investigation group originally responsible for the decision.[110] HCA contested the decision on procedural grounds, requesting that the case be remitted to a fresh inquiry group.

As the Court of Appeal states in its decision, cases will be remitted to the original decision maker, unless doing so would ‘cause reasonably perceived unfairness (such as to contravene the public law duty of fairness) to the affected parties’ or ‘would damage public confidence in the decision making process.’[111] HCA’s appealed the decision on several grounds, including allegations that…

- The ‘public confidence ground’: HCA argued that the CAT had not given sufficient regard to the public interest in maintaining confidence in the CMA’s decisions;
- The ‘mishandling ground’: according to HCA the CAT should have found the CMA’s investigations to be wholly flawed and mishandled;
- The ‘bias ground’: HCA claims that the CAT had wrongly conflated the issues of appearance of bias and confirmation bias and concluded that neither was present;
- The ‘practicalities ground’: the CAT would have wrongly taken into account the CMA’s practical difficulties if it were to be required to establish a new inquiry group.

At oral hearings in May 2015, HCA raised additional arguments to substantiate the unfairness and bias grounds:

- The ‘revised IPA concealment ground’: At an oral hearing in February 2014, HCA made various submissions on the substance of an outdated IPA. Unlike other parties, HCA was never informed by the CMA that the IPA had been revised and even received messages in the days before the hearing that materially misled it in this regard.
- The ‘realisation of unfairness ground’: HCA pointed to a statement of one of the inquiry group members explaining the alleged unfairness that would show the individual nor the CMA fully understood why the procedure had been unfair.
- The ‘UKTI ground’: HCA pointed to another statement made *vis á vis* the UK Trade and Investment division of

[107] CMA announcement of appeal to the Supreme Court - https://www.gov.uk/cma-cases/eurotunnel-seafrance-merger-inquiry.

[108] Judgment of the Court of Appeal of 21 May 2015, [2015] EWCA Civ 492, Case No: C3/2015/0628.

[109] *See* National Competition Report, April – June, 2014.

[110] CAT judgment. See also the National Competition Report of 2014, ch. XIV, p. 347-348.

[111] Judgment of the Court of Appeal of 21 May 2015, recital 68.

the Foreign and Commonwealth Office ('UKTI'), indicating that the CMA did not believe the conclusions it had reached were affected by the errors in the revised IPA (contrary to its earlier statements to review all errors).

As to the 'IPA concealment ground,' the Court found that the CMA's failure to inform HCA about the revised IPA does amount to unfairness. However, the Court stated that "a single instance of unfairness will not automatically lead to the need to remit to a fresh decision maker."[112] The Court also addressed the 'mishandling' and the 'bias' ground, and found that the errors in the IPA and the instances of unfair behaviour did not amount to mishandling, or a 'wholly flawed approach,' nor were they sufficient to conclude that there was a risk of confirmation bias in the inquiry group. Further, the Court rejected HCA's 'UKTI ground,' ruling that the CAT had been entitled to accept the CMA's explanations of the alleged contradictory and misleading statements, and did not attach much significance to the 'realisation of unfairness ground.'

The Court of Appeal further found that HCA's arguments did not lead to the conclusion that the public could not have confidence in the inquiry group's future decision making, and held that the CAT had given sufficient consideration to this 'public confidence ground.' Lastly, the Court of Appeal concluded that the CAT acted correctly in considering the practical aspects of a remittal to a fresh group only after having dealt with the main questions and having established there was no risk of bias.

Snee Sentenced to 6 Months in Prison, Dean and Stringer Acquitted in Galvanized Steel Tanks Cartel Offence Case

Peter Nigel Snee, the former Managing Director of Franklin Hodge Industries, has been sentenced to six months' imprisonment, suspended for 12 months, and sentenced to 120 hours of community service, on September 14, 2015. The CMA announced on June 17, 2014 that Mr. Snee had pleaded guilty to the criminal cartel offence of Section 188 of the Enterprise Act 2002, having been charged with dishonestly fixing prices, dividing customers and bid rigging.[113] The infringements concerned the supply of galvanised steel tanks for water storage, which are used for sprinkler systems, and took place between 2005 and 2012.

Initially, Judge Goymer found a 2-year prison sentence appropriate for this case, however, taking into account Mr. Snee's cooperation in the investigation and early guilty plea, the sentence was reduced.

In the galvanized steel tanks case, the same charges were brought against Clive Dean, former Director of Kondea Water Supplies Ltd., and Nicholas Stringer, former Director of Calglass Ltd. They both pleaded not guilty, and have been acquitted of the charges on June 24, 2015, as the jury found that Mr. Dean and Mr. Stringer had not acted dishonestly. The CMA stated on July 17, 2015 that its civil cartel investigation of the same case was still ongoing, and is scheduled to decide in September 2015 whether or not to proceed with this investigation.

This is likely to be one of the last cases to be dealt with under the former law, which requires dishonesty as an element of the cartel offence. Since April 1, 2014, dishonesty no longer has to be proven, which is expected to make it easier for the CMA to enforce the prohibition of the cartel offence.

[112] *Ibid*. recital 78.

[113] *See* National Competition Report, April – June, 2014, p. 336-337.

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