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 ("BCA"). Within the BCA, the Prosecutor General and its staff of prosecutors (the "Auditorate") investigate alleged restrictive practices and concentrations, and 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, comprising at the time the Directorate General for Competition and the Competition Council. Where relevant, entries in this report will refer to the former sub-bodies of the BCA.

Unilateral Conduct

The Competition College Takes Critical Approach Towards Auditorate's Draft Decision in First Decision Imposing A Fine For Abuse Of Dominance Under Book IV of the CEL

On July 18, 2014, the College of the BCA imposed a fine on Electrabel S.A., the Belgian incumbent electricity provider, for abusing its dominant position on the market for the production, wholesale, and trading of electricity. Electrabel allegedly operated a price scale including an excessive margin, for sales on the Belgian electricity exchange ("Belpex") of parts of its reserved capacity. The College however rejected most charges against Electrabel and imposed a significantly lower fine than that requested by the Auditorate.[1]

In 2009, a study conducted by the Belgian electricity and gas regulator ("CREG") concluded that Electrabel was not using all of its spare capacity and but was placing orders with Belpex at very high bid prices which contributed to price increases on the exchange.[2] The conduct was subsequently investigated by the Auditorate. In its draft decision submitted to the College on November 29, 2013, the Auditorate concluded that Electrabel had abused its dominant position by (i) withholding more capacity than needed on the Belgian market for production, wholesale, and trading of electricity between 2007 and 2010, and by (ii) conducting fictitious sales and making double use of tertiary reserves on the Belgian market for the supply of tertiary reserves between 2006 and 2007.[3]

The College agreed with the market definitions established by the Auditorate and confirmed that Electrabel held a dominant position on the relevant markets at the time. However, the College was more reluctant to confirm the findings of the Auditorate concerning the alleged abuses. It dismissed the allegation of abuse on the market for the supply of tertiary reserves and adopted a critical approach with respect to the abuses identified by the Auditorate on the market for production, wholesale, and trading of electricity.

In particular, the College found (considering case law and relevant regulations) that the mere fact of Electrabel retaining capacity reserves higher than legally or contractually required was not in itself abusive. The College further stressed that there was no evidence of any strategy or plan established by Electrabel aimed at raising prices by systematically withholding capacity.

However, the College held that the application of a pricing scale to the sale of part of the reserved capacity was abusive, as it generated an excessive margin of €60 per

1 Collège de la concurrence , décision n° ABC-2014-I/O-15 du 18 Juillet 2014, affaire CONC-I/O-09-0015 – Marché de gros de l'électricité.

2 CREG, « Etude 860 relative aux comportements sur le marché de gros de l'électricité en Belgique durant 2007 et les six premiers mois de 2008 », du 7 mai 2009.

3 Projet de décision du 29 novembre 2013, affaire CONC-I/O-09/0015 : Marché de gros de l'électricité; under Book IV of the CEL, the Auditorate submits a "draft decision" to the College and the opposing and intervening parties submit "observations" in response.

MW/hour for Electrabel. The Auditorate's draft decision found that Electrabel had sold parts of its reserve on the Belgian spot exchange ("Belpex"), rather than removing it from the market. Because this left Electrabel at risk of breaching its contractual obligations, it would sell those parts of its reserve at a price including a risk premium. Electrabel sold those parts of its reserve in three blocks—the market's rules imposed sales of blocks of a specific size—and asked its traders to apply different margins for the sale of each block, thus applying a pricing scale.

In light of relevant EU, foreign, and Belgian case-law, as well as relevant articles, and in the absence of regulation mandating selling at marginal costs, the College held that an undertaking was allowed to make a normal return on its capital and could therefore expect a margin exceeding the risk premium related to a specific transaction. The College nevertheless verified whether the pricing scale used was excessive compared to the costs actually incurred and led to a price unfair in itself, in accordance with *United Brands*.[4]

The College also found (interpreting the scope of possible abuses identified in *United Brands*) that Electrabel's dominant position on a particularly sensitive market could enable it to exert a significant impact on perceptions in the market, which conduct could amount to abuse. The College therefore decided to review the margin scale independent of any measurable effect resulting from its application, meaning that it did not have to verify whether the scale formed part of a strategy aiming to increase electricity prices.

The College compared margins under Electrabel's pricing scale with average prices on the Belpex, and Electrabel's own risk premiums, finding that Electrabel's margins were significantly higher than average Belpex prices and significantly exceeded the average risk premium applied by Electrabel. The College held that the margin resulting from the pricing scale was excessive compared to marginal production costs, and therefore unreasonable and unjustified under Article 3, 2°, sub-paragraph (1°) APEC (the former competition act) and Article 102, 2°, sub-paragraph (a) TFEU.

Having rejected most of the Auditorate's objections against Electrabel, the College reduced the suggested fine from up to €203 million to a fine of €2 million. Interestingly, the College obtained this amount by calculating the fine on the basis of the highest percentage allowed—30 per cent—despite finding that there was no intentional infringement. The College concluded that an excessive pricing practice by an undertaking with Electrabel's market power constituted a very serious infringement, given the impact of electricity prices on the national economy. In addition, the College decided not to take mitigating circumstances into account, in light of the modest amount of the fine.

Finally, the College introduced its reasoning with preliminary remarks about its role under the new competition act. The College announced that its task was to conduct a "normal" review of the facts, law, and economic analysis of the Auditorate's case, rather than to complete, redo, or correct the Auditorate's analysis. In particular, the College would "control the accuracy, the coherence, the completeness, and reliability of data" put forward by the Auditorate. Despite the College's confusing statement, the decision shows that the College carried out a critical review of the Auditorate's case, making its own substantive reasoning and drawing its own conclusions.

First Interim Measures Granted under Book IV of The CEL

On July 11, 2014, the College of the BCA imposed interim measures on BMW Belgium Luxembourg N.V. ("BMW"), in an investigation into possible infringements of Articles IV.1, IV.2 CEL, 101, and/or 102 TFEU on the markets for the distribution, repair, and maintenance of BMW and MINI cars. These were the first interim measures imposed by

[4] United Brands Company and United Brands Continentaal BV v Commission of the European Communities (Case-27/76) EU:C:1978:22.

the College under the new Competition Act (Book IV of the CEL).[5]

According to Ets. Claude Feltz N.V., a former BMW authorized car dealer, BMW had abused its dominant position by (i) mandating maximum discounts on authorized dealers' sales to the former dealer, (ii) restricting the sale of spare parts by authorized dealers to independent repairers, (iii) discouraging clients from using the services of independent repairers, (iv) impeding access to client data and technical information, and (vi) refusing to recognize him as an authorized repairer.

The College verified the three-pronged standard for granting interim measures. First, it confirmed that an investigation on the merits was ongoing. Second, the College found a *prima facie* infringement, given the credible possibility that a breach of Articles IV.1, IV.2 CEL, 101, and/or 102 TFEU would be established in this case. Third, the College concluded that there was an urgent need to avoid a situation likely to cause a serious, imminent, and difficult to remedy injury .

The interim measures essentially required BMW to grant access to its customer data and technical information, and to continue providing spare parts to the former authorized dealer. BMW was also required to inform the former authorized dealer's customers that maintenance and repairs could be performed by independent repairers without losing the benefits of the warranty.

In 2013, the legislator amended the provisions regarding interim measures in the context of the competition law reform of 2013. The third-prong requirement of a "serious, imminent, and irreparable injury" was replaced by "serious, imminent, and difficult to remedy injury." In its decision, the College held that the amendment impacted the assessment of requests for interim measures, in particular regarding the influence on the College's assessment of the extent to which an injury could be remedied by financial compensation. How the amendment influenced the College's assessment in this case is not made clear in the decision.

The procedure for interim measures was also amended. Previously, a prosecutor had to submit a preliminary report to the President of the (former) Competition Council, after an often lengthy preliminary investigation. The new regime (i) eliminates the preliminary investigation and (ii) sets mandatory deadlines for issuing a decision. The new procedure now imposes a one month deadline for a hearing, followed by another month deadline for issuing a decision on the interim measures (each may be extended by two weeks). The legislator may have succeeded in its intent: the decision was adopted in approximately a month and a half, where times for adoption often lasted over six months under the previous competition act.[6]

5 Mededingingscollege, beslissing nr. BMA-2014-V/M-14 van 11 juli 2014, zaak MEDE-V/M-14/0014: Verzoek om voorlopige maatregelen van de Ets. Claude Feltz N.V. jegens BMW Belgium Luxembourg N.V.

6 Between 2006 and 2012, under the Act on the Protection of Economic Competition of September 15, 2006 ("APEC"), it took eight months on average to obtain a decision (K. Marchand and B. Stulens, "De nieuwe procedure inzake voorlopige maatregelen: nihil novi sub sole?", TBM 2013-2, p. 169, nr. 15).

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

Finland Considers Criminalization of Cartels

At present, infringements of competition law are not subject to criminal sanctions in Finland. However, soon after Finland's new Competition Act entered into force in 2011, the government undertook in its Government Programme to "examine the possibility of imposing personal criminal responsibility on persons guilty of cartel violations". The purpose of this was to examine the feasibility of criminalization rather than its desirability, and no immediate policy changes are expected.

In accordance with the Government Programme, the FCCA has now obtained two legal expert opinions on the feasibility of cartel criminalization in Finland. The experts found no particular reason why cartels could not be criminalized, and considered that the advantages of criminalization would outweigh the disadvantages. Ensuring the efficacy of leniency was considered to be one of the main obstacles. The Ministry of Justice will next examine whether the leniency regime could be amended so as to render criminalization possible. The FCCA itself does not appear to favor criminalization.

Finland's next general election will be in April 2015. It remains to be seen whether the new government will take up criminalization on its agenda.

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").

Unilateral Conduct

FCA imposes €5.7 million fine on French company Cegedim for refusing to give access to medical database

On July 8, 2014, following a complaint from Cegedim's competitor Euris, the FCA found that Cegedim had abused its dominant position in the market for medical information databases by having implemented discriminatory access to its database, aimed at excluding Euris from the market.[7]

Pharmaceutical firms use two kinds of tools for marketing their products to doctors: (i) medical information databases, which contain the contact details and characteristics of the doctors; and (ii) customer relation management ("CRM") software, that helps marketing teams better understand the use and prescription mode of the drugs.

Pharmaceutical companies may decide to acquire the database and management software from two different service suppliers or from a single company. Whereas Cegedim offers both the database and management software, Euris is only active in the management software.

Euris claimed that by refusing to provide access to its OneKey database (the reference database in the pharmaceutical sector), Cegedim was preventing them from accessing an essential facility. Euris further claimed that Cegedim's conduct was discriminatory in that it refused to provide access to OneKey to clients using Euris's CRM software, despite providing such access to clients using the software provided by other companies.

The FCA first showed that Cegedim holds a dominant position in the market for medical information databases. The FCA made clear that after excluding from the relevant market the proprietary databases "auto-produced" by pharmaceutical companies for internal use, Cegedim's market share could be assessed at approximately 78%. The FCA further pointed out that the characteristics of the OneKey database (comprehensiveness, daily updates and quality of the services) confer significant market power on Cegedim and contribute to a reinforcement of its dominant position.

The FCA then examined whether Cegedim's behavior could be regarded as a refusal to grant access to an essential facility. It held that OneKey did not qualify as an essential facility: while it is true that it would be difficult to make profitable the creation of a comparable database in the short term, OneKey could not be regarded as indispensable since a number of pharmaceutical firms already use alternative databases (albeit they are not as efficient as OneKey). Therefore, even though OneKey is the most complete and reliable database, it cannot be regarded as indispensable such that any alternative solution is impossible.

In the absence of an essential facility, the FCA still had to examine whether Cegedim's behavior constituted a discriminatory refusal to access having the effect of restricting competition. Relying on several testimonies from client companies, the FCA found that from October 2007 to April 2013, Cegedim indeed refused, without any justification, to provide Euris's current and potential clients with access to OneKey, while granting access to companies working with software provided by another competitor.

The FCA found that such exclusionary conduct had a negative impact not only on Euris, which was prevented from competing effectively, but also on the entire CRM software market, since customers were prevented from

[7] French Competition Authority, Decision no. 14-D-06 of July 8, 2014, decision relating to implemented by Cegedim in the sector of medical information database, http://www.autoritedelaconcurrence.fr/pdf/avis/14d06.pdf.

using Euris' software together with Cegedim's database, without any economic justification. Taking into account that the conduct affected only a specific category of clients, *i.e.*, Euris' current and potential clients, the FCA applied a moderate fine of €5.7 million and ordered Cegedim to cease its discriminatory conduct.

FCA accepts and makes binding commitments proposed by Nespresso

On September 4, 2014, the FCA accepted commitments proposed by Nespresso to address competition concerns relating to the interoperability of its coffee machines with non-Nespresso capsules, and made such commitments binding on Nespresso. The FCA is the first antitrust authority to intervene in the coffee machines sector.[8]

Following a complaint lodged by DEMB (the "l'Or Espresso" brand) and the Ethical Coffee Company against Nespresso alleging practices limiting the interoperability of Nespresso branded coffee machines with non-Nespresso brand capsules, the FCA initiated a procedure and expressed competition concerns in March 2014 regarding Nespresso's practices. The FCA's investigation considered that Nespresso likely took advantage of its dominant position in the coffee machine market to restrict the interoperability of its coffee machines with non-Nespresso capsules and strengthen its dominant position on the capsules market.

According to the FCA, espresso machines with portioned coffee, on the one hand, and the coffee portions operating in these machines, on the other hand, are likely to form complementary yet distinct markets, in particular because these products may be independently manufactured by different producers. Given that Nespresso held around 73% and 85% of the French market share in 2012 for espresso machines and portioned coffee capsules respectively, the FCA stated that Nespresso is likely to hold a dominant position in both of these markets.

The FCA found that Nespresso implemented several practices aimed at encouraging consumers to exclusively use Nespresso capsules with their Nespresso machines. Such practices consisted of: (i) technical modifications between 2007 and 2013 aimed at making capsules of competing manufacturers incompatible and non-interoperable with the new models of its machines (*e.g.*, by repositioning a seal, adding ribbing, hooks, and grooves in the extractor cage, modifying flow meter settings, and changing the capsule perforation system); (ii) encouraging the exclusive use of Nespresso-brand capsules by adding wording to that effect on its coffee machines, packaging, instructions for use and warranty; and (iii) launching a press campaign encouraging the exclusive use of Nespresso-brand capsules.

In order to eliminate the FCA's competition concerns, in April 2014 Nespresso submitted an initial series of commitments. First, Nespresso committed to provide competing capsules manufacturers with the necessary information regarding all technical modifications potentially having an impact on the compatibility between competitors' capsules and Nespresso machines. In particular, Nespresso undertook to communicate such information at the latest three months prior to their launch in the market. Second, Nespresso proposed removing any wording aimed at encouraging the exclusive use of Nespresso-brand capsules on its machines. Third, Nespresso committed to implement, prior to the issuance of the FCA's final decision, a series of measures relating to its new coffee machine model, Inissia, specifically to modify its packaging and user instructions, to communicate technical information and to refrain from commenting on competing capsules and their compatibility with Nespresso machines.

Following the market test, Nespresso reinforced these commitments, in particular with respect to the communication of technical information to competitors. The commitments will apply to all Nespresso coffee machines, which have already been put on the market or will be marketed by Nespresso in the future. Nespresso committed to communicate technical information relating to

8 French Competition Authority, Decision no. 14-D-09 of September 4, 2014, http://www.autoritedelaconcurrence.fr/pdf/avis/14d09.pdf.

its machines to its competitors at least four, rather than three, months prior to the marketing of the machines and to make available to its competitors 15, rather than three, prototypes of its new machines, so as to enable them to test the compatibility of their capsules. Nespresso further proposed to appoint a "trusted third party" who will act as an intermediary to avoid any exchange of confidential information between competitors and Nespresso when the latter communicates the required technical information. In addition, in order to dispel any doubt as to the justification of any future technical modification, Nespresso committed to communicate to the FCA, well before any decision to launch a technical modification, the reasons underlying such modifications.

FCA orders French rugby league to suspend exclusive broadcasting rights agreement with Groupe Canal Plus and organize new call for tender

By a decision on interim measures of July 30, 2014, the FCA ordered the French rugby league to suspend its exclusive broadcasting rights contract with Groupe Canal Plus, the French incumbent pay television operator, and to organize a new call for tender.[9]

In 2011, the French rugby league and Groupe Canal Plus, the French incumbent multi-content pay-television operator, entered into an agreement whereby the latter was granted the French rugby first division championship broadcasting rights for five rugby seasons. In December 2013, the French rugby league however, used a clause of the agreement enabling it to terminate the agreement early and organized a call for tender for the rights for the next four rugby seasons. Following the initiation by Groupe Canal Plus of several legal proceedings, in the beginning of 2014, the French rugby league cancelled the call for tender and awarded the broadcasting rights for five seasons to Groupe Canal Plus.

In March 2014, beIN Sports, a Qatari pay television operator focusing on sports channels which recently entered the French market, filed a complaint with the FCA, questioning the conditions of attribution of the broadcasting rights to Groupe Canal Plus. beIN Sports claimed that the clause in the 2011 agreement between the French rugby league and Groupe Canal Plus, which prevented the French rugby league from entering into negotiations with a television operator other than Groupe Canal Plus prior to the termination of the agreement, amounted to an anticompetitive agreement prohibited by competition rules. beIn Sports further claimed that the decision of the French rugby league to cancel the call for tender in 2014 and to enter into bilateral negotiations with Groupe Canal Plus and the subsequent award of exclusive rights to Groupe Canal Plus constituted an infringement of Article 102 TFEU as well as its French equivalent.

Pending a decision on the merits, the FCA decided to impose interim measures to suspend the agreement between the French rugby league and Groupe Canal Plus. The FCA made the preliminary finding that the bilateral negotiations which took place at the end of 2013 between the French rugby league and Groupe Canal Plus, as well as the agreement they reached in 2014, could be regarded as an anticompetitive agreement. The FCA pointed out that the broadcasting rights at stake, namely, the broadcasting rights for the French Top 14 matches, constituted "premium rights" (*i.e.*, rights which drive subscriptions of consumers) which, in accordance with French and EU competition law, should have been awarded through calls for tender with a four-year-duration and a lots allocation enabling competition between operators. The method actually used by the French rugby league for the attribution of such rights, *i.e.*, bilateral negotiation, and the exclusive nature of this attribution to Groupe Canal Plus, therefore constitutes a potential infringement of competition law.

The FCA further found that the criteria required for imposing interim measures were met, since the agreement entered into by the French rugby league and Groupe Canal Plus constituted a serious and immediate harm to the sector, consumers, and competitors. The agreement,

[9] French Competition Authority, Decision no. 14-MC-01 of July 30, 2014, http://www.autoritedelaconcurrence.fr/pdf/avis/14mc01.pdf.

scheduled to enter into force in August 2014, prevented a new-entrant from having access to the market for the next five years, thereby foreclosing the pay-television sector in France and depriving consumers of cheaper access to the rugby Top 14 championship.

As requested by the complainant, the FCA ordered the French rugby league and Groupe Canal Plus to suspend the execution of their agreement after the end of the 2014/2015 season, in order to avoid disrupting the championship. The FCA even went beyond beIn Sports' request and ordered the French rugby league to award the broadcasting rights for the 2015/2016 season through a transparent and non-discriminatory call for tender for a proportionate duration.

The FCA indicated that it would be necessary to pursue the investigation on the merits to determine whether the infringements were made out.

Mergers

FCA conditionally clears acquisition of Brasserie Lorraine by Antilles Glaces

On August 21, 2014, the FCA cleared, subject to commitments, the acquisition by Antilles Glaces of a majority shareholding in Brasserie Lorraine, a wholly-owned subsidiary of Heineken active in the French Antilles.[10]

The transaction involved the acquisition by Antilles Glaces from Heineken of a controlling stake of 80% in Brasserie Lorraine, with Heineken retaining a 20% shareholding in the business. Brasserie Lorraine produces and distributes Martinique's only local beer (the Lorraine beer) and imports the Heineken and Desperados brands in Martinique. Antilles Glaces is a large food industry group in Martinique, and is active in the production and distribution of beer, soft drinks, mineral water, and ice cream.

The FCA defined two relevant markets: (i) the market for the sale of beer to hypermarkets/supermarkets, and (ii) the markets for the sale of beer to hotels, cafes and restaurants ("horeca" customers). As regards the latter market, the FCA noted that supplying beer to horeca customers may require using the services of horeca wholesalers, *i.e.*, intermediaries specialized in making small deliveries at a relatively high frequency and in collecting returnable packaging. The FCA acknowledged, however, that while Brasserie Lorraine did resort to horeca wholesalers, other beer importers such as Antilles Glaces chose to directly supply horeca customers.

In view of Antilles Glaces's small market share in the beer market, the FCA took the view that the acquisition would not trigger any horizontal effect. However, with respect to vertical effects, it feared that the new entity could foreclose Antilles Glaces's competitors in the market for the sale of beer to horeca customers. The FCA found that given Antilles Glaces's strong experience in the direct sale of beer to horeca customers, the new entity would have both the ability and the incentive to stop resorting to horeca wholesalers, as such a strategy would enable it to internalize costs and to sell additional volumes of beer. It thus concluded that there was an appreciable risk that the new entity would engage in a foreclosure strategy.

Additionally, the FCA was concerned that, in view of Antilles Glaces's high market share in the market for the sale of soft drinks, whether to hypermarkets/supermarkets or to horeca customers, the new entity could use its position in these markets to leverage its position in: (i) the market for the sale of beer to hypermarkets/supermarkets; and (ii) the market for the sale of beer to horeca customers. The FCA's market test indicated that Antilles Glaces's portfolio included at least four "must-have" brands of soft drinks, in particular, Coca Cola, and that the company would thus be able to engage in tying practices.

To address these concerns, Antilles Glaces committed: (i) to offer horeca wholesalers a renewal of their distribution contracts on the basis of objective, transparent and non-discriminatory terms; and (ii) not to make tied offers for the

10 French Competition Authority, Decision no. 14-DCC-123 of August 21, 2014, decision relating to the acquisition by Antilles Glace of Brasserie Loraine, http://www.autoritedelaconcurrence.fr/pdf/avis/14DCC123decision_version_publication.pdf.

sale of beer and other products. In order to guarantee the effectiveness of the latter commitment, Antilles Glaces also agreed to entrust the sale of beer solely to dedicated subsidiaries not selling any other product.

The FCA cleared the transaction subject to these behavioral commitments, which will remain in force for a period of five years, at the end of which the FCA will consider whether they ought to be renewed.

Horizontal Agreements

Paris Court of Appeal drastically reduces fines imposed by FCA on four companies involved in Breton pork slaughtering cartel

On September 25, 2014, the Paris Court of Appeal partially reversed the FCA decision on pork slaughtering as regards to the individualization of the fines of four companies.[11]

Four slaughterers involved in the Breton pork slaughtering cartel – Abera, Bernard, Groupe Bigard and Socopa Viandes – challenged before the Court of Appeal the amount of fines imposed by the FCA in a decision of February 13, 2013 whereby the FCA found that major Breton pork slaughterers agreed for several months on their volumes of pork purchases, with the aim to lower the prices paid to pig farmers.

The Court of Appeals confirmed the FCA decision on all the modalities of the calculation of the fines—except the individualization element of the fines, which is based on the particular situation of each company. This partial reversal led to a reduction in total fines from €4.57 to €2.64 million.

The FCA's guidelines on the setting of fines of May 16, 2011, which are used by the FCA as a basis when calculating the amount of fines, provide that the FCA can adjust the basic amount of a fine on the basis of objective criteria relating to the individual situation of each company. This aims at setting proportionate and dissuasive fines. Specifically, the FCA can reduce the basic amount of the fine when the company's activities relate essentially to the sector or market concerned by the infringement (*i.e.*, when the company is deemed single-product). Conversely, the FCA can increase the basic amount of the fine when the company has considerable financial resources and/or belongs to a large and diversified group.

In the pork slaughtering case, the FCA considered Gad, Abera and Bernard to be single-product companies. However, the FCA applied lower reduction rates to Abera and Bernard than to Gad (50%, 50% and 60% respectively). In assessing the extent to which the companies' activities related to the pork sector, the FCA took into account Gad's activities relating to the purchasing, slaughtering and cutting of pork, as well as the resale activities of pork products. Yet the FCA did not look at the resale activities of pork products for Abera and Bernard. Based on the principle of equal treatment and non-discrimination, the Court of Appeal struck down the FCA decision and applied a 60% reduction rate to the basic amounts of Abera's and Bernard's fines.

The Court of Appeal also reduced by 60% the basic amount of the fines imposed on Groupe Bigard and its subsidiary, Socopa Viandes. The FCA had refused to apply such a reduction rate to these fines, finding that Socopa Viandes do not segment their pork activity from their activities relating to other meat products (*e.g.,* ovine and bovine) by contrast to Gad, Abera and Bernard, whose activity is organized in separate legal entities depending on the meat products. Again, the Court of Appeal reversed the FCA decision on the basis of the principle of equal treatment and non-discrimination. Although it characterized Groupe Bigard and Socopa Viandes as mono-product companies, the Court of Appeal confirmed the application by the FCA of a 10% fine increase because they belong to large groups.

[11] Paris Court of Appeals, Case No. 2013/05595, Groupe Bigard and others, September 25, 2014, http://www.autoritedelaconcurrence.fr/doc/ca13d03.pdf.

GERMANY

This section reviews competition law developments under the Act against Restraints of Competition of 1957 (the "GWB"), which is enforced by the Federal Cartel Office ("FCO"), the cartel offices of the individual German Länder, and the Federal Ministry of Economics and Technology. 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 Imposes Fines In Several Cartel Cases

Services For Heat Exchangers

In July 2014, the FCO imposed a fine of €1.89 million on Alstom Power Energy Recovery GmbH ("Alstom"), a provider of services for heat exchangers, for entering into customer allocation agreements with Balcke-Dürr GmbH ("Balcke-Dürr").[12] The FCO initiated the proceedings based on a successful immunity application of Balcke-Dürr. Alstom's fine was reduced because it cooperated and settled with the FCO. Between December 2003 and March 2012, the companies had colluded on various tenders for services of heating surfaces of regenerative heat exchangers used in power plants. As public tenders may also have been affected by the anti-competitive agreements, the case is also investigated by the public prosecutor on suspicion of bid-rigging, which is a criminal offence under German law.

Automotive Heat Shields

On July 9, 2014, Lydall, Inc. announced in a Form 8-K report that its wholly-owned subsidiary, Lydall Gerhardi GmbH & Co. KG, a supplier to the automobile industry, is cooperating with the FCO in connection with an investigation concerning certain European automotive heat shield manufacturers.[13] The FCO has not yet reported on the proceedings.

Specialist Mining Services

In August 2014, the FCO fined five providers of specialist mining services a total of €17.4 million for price fixing and bid-rigging.[14] The proceedings were triggered by immunity applicant Operta GmbH, which escaped a fine. The participants were found to have coordinated on the submission of bids and the respective prices with respect to more than 30 projects between October 2010 and November 2012. Notably, the participants colluded on tenders for the conversion of a former iron ore mine near Salzgitter, "Schacht Konrad", into a final storage site for radioactive waste as well as tenders for three hard coal mines operated by RAG Deutsche Steinkohle AG. The net tender value for these projects was around €190 million. All five companies that received a fine also cooperated with the FCO under its leniency program and settled the case with the FCO.

Concrete Paving Stones

In September 2014, the FCO imposed further fines of €6.2 million on 14 companies and 17 individuals and concluded its cartel proceedings against manufacturers of concrete paving stones.[15] The FCO had already imposed fines on six other manufacturers and other individuals totaling around €2.3 million for price fixing in other market regions in 2012. The manufacturers of concrete paving stones fined in the present instance had engaged in price fixing in North Rhine-Westphalia and neighboring regions between the end of 2006/2007 until the beginning of 2010. One participant successfully applied for immunity, five companies cooperated with the FCO, and most of the companies involved settled with the FCO. Almost all of the cartelists participated in a market information system, which facilitated agreeing on price increases.

[12] *See* FCO press release, available in English on the FCO's website.

[13] *See* SEC Form 8-K of June 7, 2014, Commission file number: 1-7665.

[14] *See* FCO press release, available in English on the FCO's website.

[15] *See* FCO press release, available in English on the FCO's website.

FCO Fines Sausage Manufacturers

On July 15, 2014, the FCO announced that it imposed fines of around €338 million on 21 sausage manufacturers[16] as well as on 33 individuals for participating in a price fixing cartel.[17] The FCO did not publish the individual fines for each company or individual but stated that 85% of that sum (*i.e.*, around €287 million) was imposed on the companies involved.

Although the FCO imposed one of the highest fines in its history, it pointed out that the fine is still relatively moderate considering the numerous cartel participants, long cartel period, and billions of euros in turnover generated in this sector. As mitigating factors it took into account, first, that the sausage industry sector is characterized by small and medium-sized companies, and, secondly, that the sausage manufacturers are "squeezed" between the highly concentrated demand of food retailers and the likewise concentrated meat supply sector.

For the 15 small and medium-sized manufacturers, the FCO set the average fine at a low single digit million figure that accounts for, on average, 2% of their annual turnover. For individual manufacturers, the FCO also reduced the fine if the manufacturer submitted convincing evidence showing its limited financial capacity and difficult economic situation ("inability to pay").

The FCO found that the sausage manufacturers met regularly for decades to discuss and exchange information on market developments and prices. In particular, as of 2003, they additionally agreed to jointly implement price increases for selling sausage products to retailers. The infringement related to all sausage product varieties, *e.g.*, different sausage types, package sizes, etc. For this reason, the cartel participants did not fix individual product prices, but rather price ranges for certain product groups (*e.g.*, raw sausages, pre-cooked sausages, and ham). In his official press statement, the FCO's president indicated that the sausage manufacturers focused their coordination efforts on Aldi, because if Aldi raises or lowers prices, other retailers in the food sector will typically follow.

The investigation was triggered by an anonymous tip. During the proceedings, 11 sausage manufacturers cooperated with the FCO and admitted the infringement, and accordingly obtained a fine reduction. Meanwhile, other sausage manufacturers including Franz Wiltmann GmbH & Co. KG, H. & E. Reinert Holding GmbH & Co. KG/Sickendiek Fleischwarenfabrik GmbH & Co. KG, Herta GmbH (Nestlé), and Franz Wiltmann GmbH & Co. KG announced that they will appeal the decision.

DCA Imposes Fine on Liquid Petroleum Gas Supplier Despite Its Restructuring

On June 19, 2013, the DCA imposed a fine of €15 million on Tyczka Energie GmbH, now Tyczka Gase GmbH, ("Tyczka"), a legal successor of one liquid petroleum gas cartel member. The DCA confirmed that Tyczka's legal predecessor, together with other liquid petroleum gas suppliers, had allocated customers and deterred them from switching suppliers by way of competitors quoting extraordinarily high, non-competitive prices to customers considering switching suppliers. In April 2013, the DCA had already imposed fines totaling €244 million on five other liquid petroleum gas suppliers and thereby dramatically increased (in some cases by as much as 85%)

[16] Bell Deutschland Holding GmbH, Seevetal (previously Abraham/Zimbo, Coop-Gruppe); Böklunder Plumrose GmbH & Co. KG, Böklund/Könecke Fleischwarenfabrik GmbH & Co. KG, Bremen (Zur Mühlen-Group, ClemensTönnies-Group); Döllinghareico GmbH & Co. KG, Elmshorn; Herta GmbH, Herten (Nestlé); Franz Wiltmann GmbH & Co. KG, Versmold; H. Kemper GmbH & Co. KG, Notrup; H. & E. Reinert Holding GmbH & Co. KG, Versmold/Sickendiek Fleischwarenfabrik GmbH & Co. KG, Neuenkirchen-Vörden; Hans Kupfer & Sohn GmbH & Co. KG, Heilsbronn; Heidemark Mästerkreis GmbH & Co. KG, Emstek-Höltinghausen; Heinrich Nölke GmbH & Co. KG, Versmold; Höhenrainer Delikatessen GmbH, Feldkirchen-Westerham; Lutz Fleischwaren GmbH, Landsberg am Lech (Vion); Marten Vertriebs GmbH & Co. KG, Gütersloh; Meica Ammerländische Fleischwarenfabrik Fritz Meinen GmbH & Co. KG, Edewecht; Metten Fleischwaren GmbH & Co. KG, Finnentrop; Ponnath DIE MEISTERMETZGER GmbH, Kemnath; Rudolf und Robert Houdek GmbH, Starnberg; Rügenwalder Mühle Carl Müller GmbH & Co. KG; Bad Zwischenahn; Westfälische Fleischwarenfabrik Stockmeyer GmbH, Sassenberg (heristo AG); Wiesenhof Geflügelwurst GmbH & Co. KG, Rietberg (PHW-Group), and Willms Fleisch GmbH, Ruppichteroth.

[17] *See* FCO press release of July 15, 2014, available in English on the FCO's website.

the FCO's original fines, which totaled €180 million.[18] The DCA separated Tyczka's proceeding from the proceeding against these five other suppliers because it had to clarify whether Tyczka could still be held liable following the company's group's restructuring.[19]

Tyczka was restructured prior to the 8th GWB amendment ("the Amendment"), which entered into force on July 1, 2013. The Amendment introduced general liability of legal successor(s) of a company that was fined. Prior to the Amendment, liability was—in principle—limited to the specific legal entity that committed the infringement (and was fined), and did not extend to new legal entities resulting from corporate restructurings, such as intra-group mergers. However, according to the FCJ's case law, a universal legal successor could also be held liable under the previous rules if—from an economic perspective—the legal successor's assets were (nearly) identical to those of the legal entity that committed the cartel infringement.[20]

The DCA found that Tyczka could be held liable because it merged with the company that the FCO originally fined. The substantial part of Tyczka's assets consists of a 100% share in the partner with limited liability of a GmbH & Co. KG which was previously held by the company that the FCO originally fined and which was transferred to Tyczka during the group restructuring. The DCA clarified that, under the previous rules in line with the FCJ's case law, a legal successor can also be held liable, even if the transferred assets do not constitute the operating business or even the business that was involved in the cartel.

Last appellants withdraw their appeals in luxury cosmetics cartel

On June 6, 2014, the FCO announced that Clarins and two of its managers withdrew their appeals before the DCA against the FCO's fining decision of July 2008.[21] In this decision, the FCO had fined nine German subsidiaries of leading luxury cosmetics manufacturers and nine of their managers almost €10 million for engaging in illegal information exchanges.[22]

Clarins and two of its managers were the last addressees to withdraw their appeals against the FCO's decision. The decision to retreat came just after the presiding judge of the DCA's competition law chamber had informed the appellants that the fines imposed by the FCO were probably too low considering the new approach to fines in Germany following an FCJ judgment. Under German law, the 10% limit for fines is not a capping threshold (as is the case under EU law), but rather the upper limit for fines.[23]

Vertical Agreements

FCO fines €8.2 million for resale price maintenance in mattress case

On August 22, 2014, the FCO announced that it had fined Recticel Schlafkomfort GmbH ("Recticel") €8.2 million for imposing resale prices on its retailers.[24] This is the first fine imposed by the FCO in its investigation into possible resale price maintenance infringements by several mattress manufacturers.

Following complaints, the FCO initiated proceedings and conducted searches of Recticel's and other manufacturers' premises in August 2011. As a result of its investigation, the FCO found that Recticel had agreed with its retailers

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[18] *See* National Competition Report April – June 2013, p. 10.

[19] The DCA also separated the proceedings initiated by three other cartel members, namely, Drachen-Propangas GmbH, Propan Rheingas GmbH & Co. KG and Westfalen AG. In these proceedings, the DCA has clarified whether the companies participated in the cartel, *see* FCO press release of April 16, 2013, available in English on the FCO's website.

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

[21] *See* the FCO's case report of June 16, 2014 available only in German on the FCO's website.

[22] From 1995 to September 2005 companies including Chanel, Clarins, Estée Lauder, L'Òréal, Shiseido and YSL Beauté, had exchanged confidential commercially sensitive information within the so-called "castle-round" ("Schlossrunde"). They regularly reported sales data to a moderator and informed each other about planned launch dates, price increases and advertising expenditures.

[23] *See* the FCJ's judgment of February 26, 2013, case KRB 20/12; available only in German.

[24] *See* FCO press release of August 22, 2008, available in English.

that distinct products of its "Schlaraffia" product range should not be sold below a certain set price level.

In order to implement this resale price level, Recticel discussed minimum resale prices with individual retailers and retail cooperatives and intervened to request compliance with the price level in the event this was undercut. Whenever a retailer failed to observe the agreed retail price and other retailers complained about it, Recticel discussed the issue with the retailer again in order to induce him to raise the price, which in most cases was successful.

The FCO found that Recticel's infringement commenced in July 2005 and ended in December 2009 and encompassed stationary and online sales. Online retailers were given the opportunity to call themselves "authorized Schlaraffia online dealers", but only if they complied with the recommended retail prices ("RRP") set by Recticel. If they sold below the RRP, Recticel penalized online retailers, in some cases by barring them from Google-Adwords or from using the Recticel brand on eBay and also threatening to delay supply.

The FCO concluded its investigation into Recticel's conduct with a settlement decision and stated that it has taken account of the company's cooperation during the proceedings. The FCO further stated that proceedings against three other mattress manufacturers are still ongoing. The FCO has apparently not (yet) initiated investigations against any mattress retailers.

Frankfurt Regional Court orders Deuter to suppl retailer selling via third-party online platforms

On June 18, 2014, the Frankfurt Regional Court issued an injunction prohibiting backpack manufacturer Deuter from refusing to supply the plaintiff, a retailer which sells Deuter products via certain open third-party online sales platforms and cooperates with price comparison websites.[25]

The plaintiff filed its action for injunction after Deuter had established a selective distribution system in March 2013 not only prohibiting sales via internet auctioning platforms (*e.g.*, eBay) and market places (*e.g.*, Amazon), but also cooperation with price comparison websites without Deuter's written consent.

The Frankfurt Regional Court granted the injunction as it found that both prohibitions restricted competition, and thus violated Article 101 TFEU and Section 1 GWB. Further, the court found that Deuter's position on the market for backpacks was so powerful that retailers such as the plaintiff were dependent on being supplied by Deuter.

In the court's view, the Vertical Block Exemption Regulation ("BER") did not apply because the clauses constituted hardcore restrictions of competition for which no individual exception could be granted. Most interestingly, the court stated that the European Commission's ("Commission") Vertical Guidelines, which many commentators consider to permit suppliers to restrict retailers' use of third-party websites carrying the third party's logo (para. 54 of the Vertical Guidelines), would not cover such conduct. The court argued that such an interpretation of the Vertical Guidelines would contradict basic principles of Article 101 TFEU and the BER's rationale. Further, the court observed that the Vertical Guidelines have no binding effect on national courts, as these are only administrative guidelines which solely bind the Commission itself.

The decision is the latest in a series of decisions by German courts and the FCO dealing with restrictions on the use of third-party online sales platforms and websites. In its critical view, the Frankfurt Regional Court represents one side of the spectrum, while other courts have previously considered similar restrictions in selective distribution agreements to be lawful.

Unilateral Conduct

FCO Rejects VG Media's Complaint Against Google

On August 22, 2014, the FCO publicly confirmed that a complaint against Google submitted by the collecting

[25] Frankfurt District Court, decision of June 18, 2014, case 2-03 O 158/13.

society VG Media did not provide sufficient evidence of abusive conduct to initiate formal proceedings.[26]

VG Media's complaint concerned Google's behavior with respect to the new ancillary copyright for press publishers. Introduced only in August 2013, this right entitles news publishers to prohibit search engines and equivalent services to use news content, except for single words or small extracts (snippets). However, the precise scope of an acceptable snippet is still unclear.

The FCO found that VG Media only referred to possible anticompetitive conduct by Google with respect to the press publishers' enforcement of their ancillary copyright *vis-á-vis* Google News services and an alleged distortion of Google's search results to force the press publishers to waive their ancillary copyrights, but not to concrete behavior that may constitute an infringement of competition law.

The FCO noted that it is closely monitoring Google's conduct and its reactions to the individual publishers' or VG Media's enforcement of the ancillary copyright and that it will examine initiating proceedings *ex officio*, if appropriate.

Higher Regional Court of Düsseldorf decides on margin squeeze damage claims against Deutsche Telekom

On January 29, 2014, the Higher Regional Court of Düsseldorf (the "Düsseldorf Court") largely confirmed the first-instance decision of the Cologne Regional Court (the "Cologne Court"), finding that Deutsche Telekom GmbH ("DT") has to pay damages to its competitor EWE Tel GmbH ("EWE") for engaging in abusive pricing, specifically margin squeezing.[27]

In 2003, the Commission fined Deutsche Telekom AG ("DT AG") for abusing its dominant position by imposing a margin squeeze, *i.e.*, through setting unfair prices for competitors' local access to its fixed telecommunications network ("local loops").[28] The Commission found that DT AG (which held a dominant position on both the upstream market for local network access at the wholesale level and the downstream market for retail access to the network in Germany) charged competitors higher fees for wholesale access than retail access to the local network. The Commission determined that the available margin determined by the difference between wholesale access cost (based on prices offered by DT AG) and retail access prices was insufficient for, in particular, new entrants to profitably offer retail access services to consumers. This would discourage new companies from entering the market, and reduce the choice of suppliers of telecoms services as well as price competition for consumers.[29]

Initially, EWE and NetCologne GmbH ("NetCologne") had sued DT before the Cologne Court, seeking damage payments of approximately €82 million plus interest and €73 million plus interest from EWE and NetCologne, respectively. The Cologne Court found that there was an obligation to pay damages, but did not rule on the exact amount.[30] Further, it rejected the grounds of the claims based on statutory limitations.

Upon the appeal of EWE and DT,[31] the Düsseldorf Court largely confirmed DT's obligation to pay damages and referred the case back to the Cologne Court to rule on the exact amount of damages.

The Düsseldorf Court explicitly confirmed that DT's breach of competition law was culpable (which is a requirement of German civil law in order to establish an obligation to pay damages). The Court rejected DT's argument that it had been subject to an unavoidable error of appraisal as to the

[26] *See* FCO press release of August 22, 2014, available in English on the FCO's website.

[27] *See* Higher Regional Court of Düsseldorf, decision of January 29, 2014, case VI-U (Kart) 7/13.

[28] *See* Commission decision of May 21, 2003, Case COMP/C-1/37.451, 37.578, 37.579 – Deutsche Telekom AG, DT was fined €12.6 million.

[29] The Commission's decision was confirmed by the General Court decision(T-271/03) EU:T:2008:101, and the Court of Justice decision (C-280/08 P) EU:C:2010:603.

[30] *See* Cologne Court, decision of January 17, 2013, 88 O 1/11.

[31] NetCologne withdrew its complaint on October 24, 2013 following a settlement agreed with DT.

legality of its actions. In particular, the Court found that DT could not rely on the approval of its wholesale prices by the German telecommunications regulator, as DT was aware that domestic price approvals were still subject to review by EU bodies and therefore not final.

Mergers and Acquisitions

FCO Clears Cruise Ship Builder Merger

On September 10, 2014, and after an in-depth investigation, the FCO cleared the acquisition of cruise ship builder STX Finland Oy ("STX Finland") by a joint venture of its competitor Meyer Werft GmbH ("Meyer") and Finnish Industry Investment Ltd. ("Finnish Industry Investment").[32]

The FCO found that the worldwide market for building cruise ships is highly concentrated, both on the demand and the supply side. There are only three additional suppliers, namely Fincantieri, STX France (which, like STX Finland, is part of STX Europe), and Mitsubishi. On the demand side, there are only six large companies owning cruise ship lines. The FCO took into account that building cruise ships is a very complex process and differs significantly from building other ships such as container ships. Cruise ships are built in close consultation between ship builders and ship line owners based on the latter's specifications and preferences. There is thus no large-scale standard production, meaning that building a cruise ship is very expensive and takes several years. For cost reasons, shipyards need to be run at full capacity. Further, cruise ship builders mainly compete for building prototypes, because the serial production of ships is typically subsequently awarded to the same shipyard that built the prototype.

The FCO found that, despite high market shares, the concentration will not lead to a significant impediment of effective competition. In particular, the FCO did not find coordinated effects, because there was no effective retaliation mechanism if suppliers were to deviate from a collusive market outcome. Since cruise ships are very expensive and new orders very rare, competitors could only react to their rivals' conduct several years later. Further, even though barriers to entry are high and there are no potential competitors effectively constraining the suppliers, the FCO found that the large and sophisticated customers exert effective countervailing buying power. In addition, the customers supported the merger, as they feared a lack of capacity to meet their demand if STX Finland would leave the market due to its ongoing economic difficulties.

FCO Clears Acquisition Of Veyance By Continental

On September 12, 2014, the FCO cleared the acquisition of Veyance Technologies, Inc. ("Veyance") by Continental AG ("Continental") after an in-depth investigation.[33] Both companies are active in the automotive supply sector.

The transaction primarily affected the EEA-wide market for air springs for heavy-duty utility vehicles. The FCO held that, despite high market shares and a reduction from four to three major suppliers, the transaction would not lead to a significant impediment of effective competition.

The FCO found that Continental was the clear market leader, followed by Vibracoustic CV Airsprings GmbH and Firestone, whereas Veyance was the least significant of the four major suppliers, given that its activities over the past years had largely been limited to the supply of its existing customers. An extensive tender analysis showed that Veyance and Continental were not each other's closest competitors. Further, the FCO found that smaller players would continue to exert competitive pressure and several new Turkish suppliers, which had so far only been active on the spare parts market, have been entering the primary supply market.

Policy and Procedure

DCA Rejects Access To The File By Third Party

[32] *See* FCO, decision of September 10, 2014, case B9-112/14; a case summary in German is available at the FCO's website.

[33] *See* FCO's press release of September 12, 2014, available in English at the FCO's website.

On October 28, 2013, the DCA rejected a request for access to the file by a third party in appeal proceedings relating to a public procurement case regarding the awarding of a concession for a local power supply network operation.[34]

The DCA found the request to be admissible. Although the applicant was not *de lege* party to the FCO's proceedings according to Section 54 GWB, the Court considered it to be a *de facto* party to the administrative proceedings because the FCO treated it as such.

On the merits, the DCA held that the applicant had no right of access to the file, because its admission to the FCO proceedings—which is a prerequisite for an access right and is generally at the discretion of the FCO—was not mandatory. For that to be the case, it does not suffice that the third party demonstrates economic interests, in particular the interest to be successful in a subsequent renewed tender. The outcome of the proceedings needs to—at least in theory—cause legal consequences for the third party, which was not the case here.

Further, the Court held that the applicant's interests were not substantially affected by the FCO decision. The Court has to balance the third party's interests against the interests of the parties to the proceedings in protecting sensitive facts and information. In the DCA's view, the parties' interests outweighed the applicant's interest. The file contained trade and business secrets, the knowledge of which would have conferred an unfair competitive advantage on the applicant in a subsequent re-tender.

Higher Regional Court of Frankfurt dismisses application for reconsideration of Romano Pisciotti's extradition

On April 2, 2014, the Higher Regional Court of Frankfurt (the "Frankfurt Court") dismissed Italian citizen Romano Pisciotti's application to reconsider the decision on the legitimacy of his extradition to the United States.[35] In January 2014, the Frankfurt Court had ruled that Mr. Pisciotti could be extradited as requested by the US Department of Justice.[36] In the United States, Mr. Pisciotti is accused of having participated in a global bid rigging cartel among major marine hose manufacturers.

Initially, Mr. Pisciotti had filed an action for damages against the Federal Republic of Germany, as well as an application for interim measures with the Berlin Court of Appeal (the "Berlin Court"), aimed at stopping the extradition. However, the Berlin Court had referred the latter application to the Frankfurt Court, which had the exclusive jurisdiction for the decision on this application pursuant to Section 13 and 33 of the German Act on International Cooperation in Criminal Matters (Gesetz über die internationale Rechtshilfe in Strafsachen, IRG).

The Frankfurt Court rejected the application as the requirements to reconsider the decision pursuant to Section 33 IRG were not met: Mr. Pisciotti had failed to advance any new facts compared to those in the Frankfurt Court's previous decision in the same matter, which was subsequently confirmed by the Federal Constitutional Court.[37]

In an *obiter dictum*, the Frankfurt Court also held that the Federal Government's authorization—and subsequent communication to the US authorities—of the extradition was legally binding under public international law, therefore the Court was not entitled to issue a new decision in this matter. Given that the requirements of Section 33 IFG were not met (see above), the Court had no reason to evaluate if and when such a legal obligation under public international law can be circumvented.

[34] *See* DCA, decision of October 28, 2013, Case VI-2 Kart 4/13 (V), available in German.

[35] *See* Higher Regional Court of Frankfurt, decision of April 2, 2014, case 2 Ausl A 104/13.

[36] *See* Higher Regional Court of Frankfurt, decision of January 22, 2014, case 2 Ausl A 104/13.

[37] *See* Federal Constitutional Court, order of February 17, 2014, case 2 BvQ 4/14; *see* also National Competition Report January – March 2014, pp. 19-20.

Finally, the Frankfurt Court dismissed Mr. Pisciotti's additional applications for (i) a preliminary ruling of the European Court of Justice under Article 267(3) TFEU, as there was no question which was eligible for a preliminary ruling, and (ii) annulment of the Federal Office of Justice's authorization of the extradition, because there is no legal basis to challenge a decision of the Federal Government.

Sectoral Investigations

Publication of FCO's Sector Inquiry Into Food Retail Sector

On September 24, 2014, the FCO published the results of its three year–long inquiry into the German food retail sector.[38] In September 2011, the FCO had launched its investigation to better understand the competitive conditions between food retail store chains and their producers.[39] The FCO conducted the inquiry in two stages. In the first stage, the FCO investigated the structure of the procurement market.[40] In the second stage, which started in June 2012, it looked at the outcome of the negotiations between the food retail store chains and the producers of 250 branded products to assess whether and to what extent the leading retail chains enjoy structural advantages compared to their smaller competitors.[41]

The inquiry first concluded that the food retail sector in Germany is highly concentrated. The FCO defined the procurement "product" markets by product group (and excluded the existence of "portfolio markets"), and as national in scope, as most products in the sector are purchased within Germany rather than at European level. It found that the four retail chains Edeka, Rewe, Aldi and the Schwarz Group (Lidl, Kaufland) are the leading purchasers in the sector.[42] These four chains account for approximately 85% of sales, and purchase roughly 85% of the volume of stock sold in German food retail markets. Among the four, Edeka was identified as the one with the most stores, sales floor space and sales by volume and, hence, as the leading chain in Germany. The FCO indicated that Aldi has a prominent position offering private labels, while Edeka still also accounted for the largest private labels procurement volume. According to the FCO, the high concentration demand of food retailers leads to a concentration process in the food industry, whereby usually four leading food companies account for a substantial proportion of food supplies.

The FCO is concerned that the market structure will further deteriorate, among other reasons, because of so-called "new generation" purchasing cooperatives between the leading chains and smaller food retailers. While these purchasing cooperatives improve the conditions of the smaller retailers in the short-term, they typically entail that smaller retailers offer the large retailer's private labels, align their product portfolios, and grant the larger retailer territorial exclusivity, which, in the FCO's view, can be a first step towards a later merger between the smaller and the large retailer.

The FCO further confirmed a number of structural advantages that the leading chains use to their benefit when negotiating contracts with producers of branded products. Due to their strong buyer power, the leading chains were considered to have a structural advantage, since they pay less for branded products than smaller competitors, and because these smaller retailers are not viable alternative customers for producers. Therefore, the FCO found that the full-range providers Edeka, Rewe, and the Schwarz Group constitute a "bottleneck" if a producer wants to distribute its products in Germany.[43] The leading chains use this dependence in their favor when negotiating

38 FCO, Final Report of the Sector Inquiry into the food retail sector, September 24, 2014 available in German on the FCO's website. A summary of the Final report in English is also available at the FCO's website.

39 *See* National Competition Reports January – March 2011, p. 12, July – September 2011, p. 10, and April – June 2012, p. 12.

40 *See* National Competition Report July – September 2011, p. 10.

41 *See* National Competition Report April – June 2012, p. 12.

42 The FCO found that the Metro-Group does not (quite) belong to the leading chains because of its structural differences.

43 The FCO also found that private label producers likewise depend on Aldi.

prices and conditions. Only an insignificant share (about 6%) of branded products was identified to be a 'must stock' that even the four leading chains would incur disproportional losses without, giving the producers a stronger bargaining position. In addition, private labels constitute a further factor strengthening the market position of a retail chains.

With respect to future transactions in the retail sector, the FCO announced that it will conduct an in-depth analysis of mergers between one of the leading chains and a food retailer and, in doing so, will use the sector inquiry's findings as a basis for its competitive analysis.

Further, according to the FCO, the sector inquiry's results suggest that the leading retail chains are dominant market players within the meaning of German competition law. The FCO announced that in individual cases it will closely scrutinize whether one of the leading retail chains is abusing its buyer power based on its findings in the sector inquiry. In a recent decision, the FCO already found that Edeka had abused its buyer power on the market for sparkling wine, on which, amongst other things the FCO had focused its sector inquiry.[44]

Finally, the FCO intends to thoroughly review all new purchasing cooperatives as well as existing purchasing cooperatives when a new member joins, if one of the leading chains is involved or becomes a member, and whenever the food retailers have a combined market share exceeding 15% on both the affected purchasing and the selling market(s).

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

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").

Policy and Procedure

HCC Issues Guidelines to Public Procurement Authorities

In September 2014, the HCC issued a guide to Public Procurement Authorities, whose stated objective is to safeguard the integrity of public procurement procedures. The guide is titled "Guidelines to Public Procurement Authorities" (the "Guide") and aims to serve as a tool for the authorities and their employees to assist in identifying and preventing anticompetitive practices. It offers definitions and examples of anticompetitive practices, as well as advice on the detection of such practices and measures to discourage them.

Cartels and collusion

According to the Guide, a cartel exists when undertakings agree to act in a concerted manner instead of competing. Collusion is planned in such a way as to increase the profits of the participating undertakings to the detriment of the public award authorities, while creating the impression that they are truly competing amongst themselves. The Guide identifies four basic methods of collusion: (i) bid rigging; (ii) market allocation; (iii) price fixing; and (iv) limitation of supply.

Bid rigging exists when the participants agree in advance on the winner. One type is cover bidding, where certain participants agree to submit more expensive offers than that of the pre-determined winner, with terms which will not be accepted by the award authority, the purpose being to avoid the procedure declared sterile and thus annulled. The same result is achieved with certain offers which are not supported by the necessary documentation or certificates and will certainly be rejected. Other types include bid suppression, which occurs when competitors either agree not to submit offers or withdraw those already submitted, as well as bid rotation, aimed at allocating the contracts to be awarded to the colluding undertakings in turn.

Market allocation occurs when participants divide amongst themselves clients, products or geographical areas and agree not to compete in each other's "territory".

Price fixing exists when participants agree on a minimum price, on the elimination of discounts, on the increase of prices, or on the maintenance of the price at a stable level. Limitation of supply may be achieved when each of the participants offers different types of products, so that the prices offered are not comparable and can thus be set at a higher level.

Market conditions favoring collusion

According to the Guide, there are certain market conditions which facilitate collusion. These include, the small number of undertakings active in the relevant product market, the call by the authority for products with particular specifications (as these create difficulties in product substitution), the standardization of products, and the frequent participation of the undertakings in the bid process, since this facilitates the creation of channels of communication.

Indicators of collusion

The Guide recognizes the difficulty of detecting the existence of collusion since negotiations between undertakings to that effect occur in secrecy. Although it lists some indicators, it advises the authorities that these should not be perceived in themselves, as evidence of collusion, since there may exist legitimate reasons for the adoption of the demonstrated behavior.

More specifically, the Guide suggests that following an examination, award authorities may detect that a particular pattern is emerging over time, for example, a rotation of winners or the award of a contract to the same undertakings for a particular category of products. They may also notice that some undertakings submit expensive offers for the same products in some procedures and low offers in others or that they systematically participate in award procedures without success.

Other types of behavior which should attract the authorities' attention include those where an undertaking which usually participates in an authority's tenders is missing, or one or more submitted offers are suddenly withdrawn. Other indicators include offers with identical content, handwriting or paper being submitted by different undertakings simultaneously, offers missing basic information, or where the successful bidder awards the work to a subcontractor who had also participated in the procedure as a bidder. Finally, the authorities should look for signs of communication between the participants (*e.g.*, when one participant appears to be aware of the content of the offer of another participant). In terms of offered prices, signs of collusion may include exceptionally high prices or exceptionally low discounts, or prices substantially exceeding previously offered prices for the same product without objective justification (for example, no increase in raw materials).

Suggested action

To prevent collusion practices, the Guide suggests that specific measures should be adopted by the authorities, the aims being: to differentiate the values and types of products, because predictability facilitates the allocation of markets; to attract participation of new participants, because it is difficult to implement a secret agreement when new entrants make their appearance; and to avoid divulging the identity of the participating undertakings before the contest, because this facilitates contacts among them. In addition, the authorities should have very good knowledge of the relevant market and the values of the products/services to be procured, as this will enable them to identify overpriced offers and they should draft the terms of tenders in a precise and simple manner, so as to attract the biggest possible number of participants. They should also train their personnel to detect signs of collusion and keep analytical data from previous contests, so as to be able to detect suspect price patterns more easily.

Finally, the Guide suggests that the tender document should inform participants that any suspicion of anticompetitive practice will be reported to the Competition Commission and that the legislation grants the power to the authorities to end the procedure in case such practices are detected.

IRELAND

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

Policy and Procedure

New Irish Merger Regime Adopted

The Competition and Consumer Protection Act 2014 (the "2014 Act"), which provides for a new merger regime in Ireland, was signed on July 28, 2014 and entered into force on October 31, 2014. The 2014 Act creates the new Competition and Consumer Protection Commission ("CCPC"). Other key reforms include those relating to: (i) media mergers; (ii) merger thresholds; and (iii) timescales.

Media Mergers

Media mergers must be notified twice. First, for substantive competition review by, as appropriate, either the Commission or the CCPC (media mergers should be notified to the CCPC regardless of whether the transaction meets the national monetary thresholds); and second, to the Communications Minister, for review of whether the transaction would cause media plurality concerns, either in relation to diversity of ownership or diversity of content.

A media merger is a merger or acquisition in which at least one of the companies involved carries on a media business in Ireland, by either (i) having a physical presence in Ireland and making sales to Irish customers, or (ii) having made sales in Ireland of at least €2 million in the most recent financial year.

The 2014 Act broadens the definition of media business so that it now includes (i) the physical and online publication of newspapers or news and current affairs periodicals; (ii) transmitting, re-transmitting or relaying broadcast services; (iii) the provision of programme material consisting of news and comment on current affairs to a broadcast service and lastly; (iv) "The making available on an electronic communications network any written, audio-visual or photographic material, consisting substantially of news and comment on current affairs, that is under the editorial control of the undertaking making available such material."

Given that the manner in which these aspects will be interpreted by the CCPC is unclear, case-by-case analysis of proposed transactions in the media sector should be undertaken. In light of the review periods provided for the plurality review, review by the Communications Minister may take considerably longer than review by the CCPC.

Thresholds

The 2014 Act contains new financial thresholds which should reduce notifications of foreign-to-foreign transactions. Under the new regime, a transaction must be notified to the CCPC where:

(i) the companies' aggregate turnover in Ireland is not less than €50,000,000, and

(ii) the turnover in Ireland of each of two or more of the companies involved is not less than €3,000,000.

Timescales

Under the 2014 Act, mergers can be notified from when there is "a good faith intention to conclude an agreement". The review timescales have been increased: Phase I may take up to 30 working days, and Phase II up to 120 working days. The 2014 Act also provides for standstill periods for formal information requests during Phases I and II.

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").

Policy and Procedure

The ICA calls on the Italian government and parliament to introduce more competitive provisions in sector-specific regulations

competitive provisions in sector-specific regulations

Pursuant to Article 47 of Law 99/2009, the Italian government and parliament, within 60 days of receipt of the ICA's annual report on its activities over the previous calendar year, are required to adopt a law aimed at developing and supporting competition and protecting consumers. Pursuant to Articles 21 and 22 of Law No. 287/1990 and Article 47(2) of Law 99/2009, the ICA can contribute to this law through a specific communication to the Italian government and parliament, whose purpose is to highlight the most relevant issues that should be addressed in this context and propose possible solutions.

The ICA has recently exercised this prerogative by means of a communication issued on July 4, 2014. This communication singles out the main obstacles to effective competition still affecting different key sectors of the Italian economy. Additionally, the communication puts forward detailed proposals in order to promote competition and benefit consumers.

Banking

With respect to the banking sector, the ICA believes that transparency and access to information should be enhanced, and procedural requirements should be simplified, so that the transfer of an account from one bank to another does not require more than 15 days. The ICA also recommends that an independent search engine be developed in order to allow customers to browse and compare offers made by different banks.

Telecommunications

The ICA notes that it is necessary first of all, to renew and further develop the Italian telecommunications systems in line with the principles set forth in the European Union Digital Agenda. The ICA, in particular, is concerned with the significant digital divide which characterizes the Italian infrastructure as compared to other Member States, as well as different geographic areas within the Italian territory.

New regulatory solutions should be developed in order to, *inter alia*: (i) promote mobile and landline services based on complementarity; and (ii) develop ultra-wide band networks in accordance with a national strategic plan to be sketched in cooperation with regional administrations.

The ICA also notes that respect of the non-discrimination principle in access to telecommunications systems should always be fully guaranteed. The simplification of current administrative procedures is also recommended, especially in the case of the modernization of telecommunications infrastructures.

In addition, the cadastres of telecommunications infrastructures shall be rationalized. In order to reduce the costs for realization of new networks, the establishment of distinct or overlapping databases run by different public agencies should be avoided.

Moreover, efficient utilization of the radio spectrum should be guaranteed by promoting flexibility in frequency allocation and, when possible, a shared utilization of resources. In particular, the frequencies' rates of utilization should be periodically reviewed, and reallocation or shared utilization should be allowed and even encouraged in cases of under-utilization.

Electricity and Gas

With respect to energy infrastructures, the ICA recommends reducing the duration of authorization procedures for those infrastructures which are considered priorities. Litigation concerning the realization of these infrastructures should be avoided by anticipating and tackling any possible objection before the authorization procedure begins. To this end, full transparency and access to information concerning new infrastructures should be granted in advance to local administrations.

As regards the retail supply of gas and electricity, the ICA notes that a system of regulated prices (set by the Italian Regulatory Authority for Electricity Gas and Water) still applies to those consumers who have not switched from the past incumbent supplier to the new players that entered the market following the recent liberalization. Given that regulated prices inevitably represent a focal point in market price dynamics, the ICA proposes to abolish this system gradually, except as to particularly vulnerable users. Although this might bring about a temporary increase in prices, such an increase would be outweighed by an even more significant decrease in the medium term due to a higher degree of competition in the market.

Finally, the ICA denounces several recent decrees which unduly postponed calls for bids in the gas distribution segments notwithstanding the liberalization package adopted in 2000.

Pharmaceuticals

Currently, Italian pharmacies operate on the basis of specific licenses whose maximum number for a given territory is fixed by sector-specific regulation. In order to strengthen competition at the retail level in the pharmaceutical sector, the ICA suggests abolishing this scheme, and allowing a more rational and effective distribution of pharmacies based on the consumers' actual needs. Moreover, according to the ICA, pharmacy owners should not be prevented, as they currently are, from operating more than four pharmacies.

The ICA also proposes to abrogate the provisions which make the refund of a generic drug conditional upon the expiry of the original drug's patent protection. Indeed, such patent linkage delays the entry into the market of generic drugs and facilitates abusive behaviors by dominant patent holders.

Finally, in order to further promote the distribution of cheaper drugs, the ICA believes that drug distributors should be remunerated on a lump-sum basis irrespective of the prices of the products they deal with.

Postal-Services

According to the ICA, the Italian postal sector has not yet reached an adequate degree of liberalization.

Firstly, it is submitted that certain aspects of the universal postal service regulation are intrinsically discriminatory, especially with respect to its scope (which also encompasses non-retail services provided to business customers) and funding.

Moreover, certain activities continue to be exclusively entrusted to the main operator and former monopolist, Poste Italiane S.p.A., although they could be profitably opened up to competition. For instance, the notification of judicial documents should be liberalized.

The ICA welcomes the Italian government's intention to sell a part of its shareholding in Poste Italiane S.p.A. In order to maximize the positive effects of this divestiture and avoid any risk of cross-subsidization, BancoPosta *i.e.*, Poste Italiane S.p.A.'s banking services division, should be carved out as a distinct company fully compliant with regulations applicable in the banking sector.

Other Sectors

Other sectors analyzed in the communication of the ICA to the Italian government and parliament are: fuel and petroleum product distribution; airport facilities and services; health care services; professional services, in particular those offered by lawyers and notaries; public local transport; and waste management.

NETHERLANDS

This section reviews developments under the Competition Act of January 1, 1998 (the "Competition Act"),[45] which is enforced by the Netherlands Authority for Consumers and Market (Autoriteit Consument & Markt, "ACM").

Horizontal Agreements

ACM Upholds Decision in Laundry Cartel

On July 2, 2014, the ACM issued its decision on appeal in the Industrial Laundry cartel.[46] In its decision of December 2011, the ACM had imposed fines totaling €18 million, for competition law violations, on four laundries.[47] The ACM found that the undertakings were involved in illegal cartel arrangements that resulted in the regional partitioning of the Dutch market for laundry services provided to health care establishments. The undertakings had agreed not to enter each other's regions (prohibition of active acquisition), and, until 2002, not to respond to requests from potential customers outside their own region (prohibition of passive acquisition).

This partitioning was part of a wider cooperation between the laundries which they labeled as a 'soft franchise'. This soft franchise existed since the 1970's under the name 'Rentex'. The laundries also set up a jointly controlled subsidiary (holding equal shares) as their franchisor ('Rentex Nederland B.V.'). The four laundries thus had far-reaching influence on the policy of the franchise, *e.g.*, they decided whether a new franchisor was allowed to join the franchise, the content of the franchisor-franchisee relationship, as well as the relationship of the franchisees among themselves. The ACM qualified this cooperation as a horizontal agreement, spanning from 1998 to 2009.

All four laundries lodged an administrative appeal with the ACM. The parties successfully argued that the gravity factor had to be reconsidered as, since April 2002, the arrangement only included a prohibition of active acquisition. In its decision on appeal, the ACM upheld the contested decision, but applied a gravity multiplier of 1 instead of 1.5. The fines were therefore reduced by 30% to €12.8 million.

Rotterdam District Court Rules On "Start Of Investigation"

On July 17, 2014, the Rotterdam District Court (the "District Court") issued its judgment following an appeal from flour producers against a decision of the ACM.[48] In its decision of December 16, 2010, the ACM fined fourteen Dutch, Belgian, and German flour producers for participating in a cartel (from 2001 to 2007) which consisted of: (i) an agreement not to compete for each other's customers; (ii) the acquisition of a competitor that refused to participate in the cartel, as well as the dismantling of a factory; and (iii) the compensation of a cartelist for lost revenues due to its participation in the cartel.[49] The ACM fined nine flour producers for a single and continuous infringement, and the other five for participation in dismantling a flour factory. On March 14, 2012, the ACM issued its decision on appeal in which it upheld the contested decision, but imposed lower fines.[50]

Eleven of the flour producers subsequently lodged a judicial appeal with the District Court seeking to prove the following: (i) seven of the flour producers participated in the single and continuous infringement; and (ii) only one flour producer participated in dismantling the factory. The judgment is also interesting for another reason—the District Court ruled on the validity of the document used by the ACM to prove that it had started to investigate the cartel before a leniency application was submitted.

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

46 Case 6855 (Wasserijen), ACM decision on appeal of July 2, 2014.

47 Case 6855 (Wasserijen), ACM decision of December 8, 2011.

48 Rotterdam District Court, Judgments of July 17, 2014, ECLI:NL:RBROT:2014:5822; ECLI:NL:RBROT:2014:5830; ECLI:NL:RBROT:2014:5849; and ECLI:NL:RBROT:2014:5884.

49 Case 6306 (Meel), ACM decision of December 16, 2010.

50 Case 6306 (Meel), ACM decision on appeal of March 14, 2012.

On February 27, 2008, one undertaking that applied for leniency was granted a marker to reserve its ranking for immunity, or for a fine reduction. According to the then applicable Leniency Guidelines, the first undertaking to apply for leniency, prior to the start of the ACM's investigation, would receive immunity from fines. Moreover, the start of an investigation was defined as the first moment the ACM recorded its suspicion of a cartel in writing. Based on the ACM's "initial memorandum" of March 4, 2008, the undertaking claimed that the investigation started after it had applied for leniency. However, based on a "draft investigation proposal" of February 22, 2008, sent by one ACM official to another, the ACM claimed that the investigation started prior to the leniency application. The District Court held that pursuant to the wording of the then applicable Leniency Guidelines correspondence between ACM officials is not enough to initiate an investigation. Instead the ACM must refer to its management board. On this basis, the District Court concluded that the ACM should have granted the applicant full immunity.

Appeals Court Allows The "Passing-On" Defense In Private Damages Claims

On September 2, 2014, the Arnhem-Leeuwarden Court of Appeals (the "Appeals Court") overturned the January 16, 2014 judgment that rejected the "passing-on" defense. The judgment clarifies that the "passing-on" defense is available in the Netherlands, and can be used by cartel members. It is however important to note that this judgment is fact specific.

The case concerned an action for damages by Tennet against different entities of the ABB Group, for damages resulting from ABB's participation in the EEA-wide gas insulated switchgear cartel.[51] In its January 16, 2014 judgment, the Arnhem District Court dismissed the use of the "passing-on" defense and held that just because a certain amount of cartel damages had been passed-on does not change the fact that Tennet had incurred damages by overpaying at the time.[52]

In its judgment, the Appeals Court held that damages should, in principle, be calculated in reference to the moment when they were incurred. However, this does not mean that later circumstances should not be taken into account. The Appeals Court continued to hold that damages are awarded with the purpose of compensating damages suffered, and that such damages would not exist if the claimant had in fact "passed-on" such damages. The Appeals Court therefore held that the passing-on defense ensured that the claimant–Tennet would not be overcompensated, and that ABB would be prevented from compensating the same damages multiple times. In its judgment, the Appeals Court took into account the Commission's directive on damages actions and previous cases of the EU courts.

Policy and Procedure

Streamlining Act Market Regulation Is Adopted

On August 1, 2014, the Streamlining Act Market Regulation ("Streamlining Act") came into force.[53] Following the 2013 merger of different regulators into the ACM,[54] the Streamlining Act harmonizes the ACM's enforcement methods. The Streamlining Act includes three important changes for competition law enforcement.

First, it increases merger notification thresholds in the Netherlands from €113.45 million to €150 million worldwide

[51] *Gas Insulated Switchgear* (Case COMP/38.899), Commission decision of January 24, 2007. The decision was appealed by Toshiba and Mitsubishi Electric. In two separate judgments (*Toshiba v. Commission* (Case T-113/07) EU:T:2011:343 and *Mitsubishi Electric v. Commission* (Case T-133/07) EU:T:2011:345, when the General Court annulled the fining decision for a breach of equal treatment in setting of the two companies' fines. The Commission readopted the respective fining decisions. The judgments are currently under appeal before the Court of Justice (Case C-498/11P and Case C-489/11P).

[52] Arnhem District Court, judgment of January 16, 2013, LJN: BZ0403.

[53] Wet van 25 juni 2014 tot wijziging van de Instellingswet Autoriteit Consument en Markt en enige andere wetten in verband m, et de stroomlijning van het door de Autoriteit Consument en Markt te houden markttoezicht, Official Journal of the Dutch Government, 2014 Nr. 247.

[54] The Dutch Competition Authority (*NMa*), the Independent Post and Telecommunication Authority (*OPTA*), and the Consumers Authority (*Consumentenautoriteit*).

turnover. As of August 1, 2014, a notification is required where the companies' (i) combined worldwide turnover in the previous calendar year exceeded €150 million, and (ii) each of at least two companies' turnover was at least €30 million in the Netherlands.[55] These thresholds also apply to insurance companies, for which there used to be a lower national threshold of €4.54 million of credited insurance premiums received from Dutch residents.

Second, the Streamlining Act specifies that only current employees have the right against self-incrimination for questions concerning their employer, where their answers are incriminating with respect to themselves or their employer.[56] This overrules the Trade and Industry Appeals Tribunal's ("CBb") December 2012 judgment, where this right was extended to former employees. At present, former employees can only invoke their right against self-incrimination if they are suspected of having instructed or carried out the infringement.

Third, the Streamlining Act limits the suspensory effect of an appeal against the ACM's fining decision to 24 weeks.[57] A fine will thus be payable within 24 weeks of its imposition, irrespective of whether further judicial appeal is lodged.

ACM Introduces New Fining Guidelines

On August 1, 2014, the 2014 ACM Fining Policy Rule ("2014 Fining Guidelines") came into force.[58] These guidelines are modeled on the European Commission Fining Guidelines. The 2014 Fining Guidelines are applicable to all new cases, as well as to present cases in which the ACM has not yet issued a statement of objections.

The ACM's fines for competition law infringements are statutorily limited at €450,000 or 10% of the undertaking's turnover in the preceding business year, whichever is higher.[59] Fines are calculated as follows. First, the fine's basic amount is based on the relevant turnover (*i.e.*, in the last year of committing the infringement),[60] and determined by the infringement's seriousness, duration, and the circumstances in which it was committed.[61] The basic amount will be set between 0 and 50% of the undertaking's relevant turnover.[62] Second, the ACM will consider any mitigating or aggravating circumstances, and will accordingly increase or reduce the basic amount. Aggravating circumstances include: where the undertaking (i) has been fined in the past for the same or a similar infringement, here the basic amount of the fine will the doubled; (ii) obstructed the ACM's investigation; (iii) had a leading role in the cartel or coerced others to join; or (iv) used or provided for a control and sanctioning mechanism for cartel violations.[63] Mitigating circumstances include: where the undertaking (i) provides further-reaching cooperation than required by law (cooperation in the context of a possible leniency application is not covered); or (ii) has compensated damages of injured parties.

ACM Introduces New Leniency Guidelines

On August 1, 2014, the 2014 ACM Leniency Policy Rule ("Leniency Guidelines") entered into force,[64] specifying that immunity applicants can receive (i) full immunity, even after

55 These thresholds also apply to insurance companies, for which there used to be a lower national threshold of €4.54 million of credited insurance premiums received from Dutch residents.

56 Article 12i Establishment Act of the Authority for Consumers and Markets ("Establishment Act") and Article 5:10a Dutch General Administrative Law Act (*Algemene wet bestuursrecht* "Awb").

57 Article 12p(2), Establishment Act in conjunction with Article 6:7 Awb.

58 Beleidsregel van de Minister van Economische Zaken van 4 juli 2014, nr. WJZ/14112617, met betrekking tot het opleggen van bestuurlijke boetes door de Autoriteit Consument en Markt (*Boetebeleidsregel ACM 2014*).

59 Article 57, Competition Act. Wet van 22 mei 1997, houdende nieuwe regels omtrent de economische mededinging (*Mededingingswet*).

60 Article 1.1, 2014 Fining Guidelines.

61 Article 2.2, 2014 Fining Guidelines.

62 Under the former fining guidelines, the basic amount was set at 10% of the relevant turnover, and a gravity multiplier was applied.

63 Article 2.9, 2014 Fining Guidelines.

64 Beleidsregel van de Minister van Economische Zaken van 4 juli 2014, nr. WJZ/14112586, tot vermindering van geldboetes betreffende kartels (*Beleidsregel clementie*).

the ACM has started its investigation; or (ii) bigger fine reductions.

Under the new Leniency Guidelines immunity can be obtained in two ways. First, immunity is granted to applicants who provide information that enables the ACM to perform a targeted inspection for a cartel that has not yet been investigated. Second, in cases where inspections have already taken place, immunity continues to be available until the ACM issues its statement of objections. In these cases, the information provided must enable the ACM to prove the cartel's existence, and should not already be in the ACM's possession. For both routes to immunity, the applicant must: (i) be the first to submit the information; (ii) not have coerced others into the cartel; and (iii) must comply with the obligations to cooperate.

Prior to issuance of the statement of objections, leniency applicants may also apply for a fine reduction if they (i) provide information of significant added value; (ii) cannot apply for immunity; and (iii) comply with the obligations to cooperate. The first applicant to meet these criteria receives a 30-50% reduction, the second a 20-30% reduction, and the third or subsequent a reduction of up to 20%.

SPAIN

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

Horizontal Agreements

THE CNMC Fined Six Fire Extinguishing Equipment MANUFACTURERS OVER EUR 2 MILLION FOR OPERATING A CARTEL

On June 26, 2014, the CNMC issued a decision imposing a €2,136,975 fine on six companies, active in the market for the manufacturing of fire extinguishing equipment, for operating a cartel. The CNMC found that the companies hadentered into price fixing and market sharing agreements between 2010 and 2012.

Following a leniency application by one of the participants in the cartel, *i.e.*, Todoextintor, on July 26, 2012, the CNMC carried out several simultaneous dawn raids in November 2012, which led to the opening of infringement proceedings under article 1 of the Spanish Competition Act.

The CNMC found a single and continuous infringement of article 1 of the Spanish Competition Act, which took place between January 2010 and January 2012. The CNMC characterized the conduct as a very serious infringement due to its nation-wide geographic scope and the high combined market shares of the participants in the cartel.

Nevertheless, not all of the companies participated in the infringement during the entire period nor did they have the same role in the infringement The CNMC found that the cartel was initiated by three companies (Macoin Extinción, Gruinsa Grupo de Incendios and Extintores Faex) which then pressured the other participants into joining the cartel by threatening them with expulsion from the market. The role of instigators of the cartel was considered an aggravating circumstance in the calculation of the fine.

Todoextintor was exempted from a €265,411 fine for filing for leniency, and for providing evidence that allowed the CNMC to investigate the cartel, both of which ultimately led to the finding of an infringement. Extintores Faes also provided evidence, but its request for a reduction of the fine was rejected by the CNMC as it did not provide sufficient new information in its application.

Unilateral Conduct

The CNMC Fined The Spanish Electricity Utility Company Endesa €1.18 Million For Abuse Of Dominant Position In The Market For Electrical Installations In Its Distribution Network

On July 10, 2014, the CNMC issued a decision finding that Endesa, a Spanish electricity utility company controlled by full name (ENEL), had abused its dominant position in the market for electrical installations in its distribution network between 2009 and 2012.

The abuse consisted of charging users excessive fees for the execution of works aimed at extending the distribution network, *i.e.*, connecting new properties to the national grid. In particular, Endesa had charged amounts which were significantly higher than those established in the sector-specific regulation, Royal Decree 222/2008, which regulates the extension of distribution networks.

According to the CNMC, this had a direct impact on consumer welfare, and even prevented some consumers from accessing the electricity network. The CNMC noted that such abusive conduct had taken place, in particular, in the Region of Andalucía and in the Balearic Islands.

The CNMC established that since 2009, this kind of abuse was "systematic and regular". According to the CNMC, Endesa had not fulfilled the duties associated with the special resposibility it derived from its dominant position in the market for electrical installations in its distribution network. The CNMC established that Endesa's privileged position in that market had enabled Endesa to breach and apply the sector-specific regulation in an arbitrary manner.

As a result, the CNMC imposed a fine amounting to €1.18 million on Endesa. In determining this fine, the CNMC took into account recidivism by Endesa as an aggravating circumstance. Indeed, Endesa had already been fined for abusing its dominant position on two occasions in the past on the same market.[65]

[65] Case 606/05 *Asinem-Endesa*, December 14, 2006, and Case S/0211/09 *Endesa Instalación*, February 21, 2009, CNC.

SWITZERLAND

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

Horizontal Agreements

FCC closes investigation against AMAG Automobiles et Moteurs SA concerning distribution of new Volkswagen group brand vehicles.

The investigation was opened on May 22, 2013 for possible agreements restricting competition against the Swiss dealers of Volkswagen group brand cars, *i.e.*, VW, Audi, Skoda and Seat, along with AMAG. The object of the investigation is the possible fixing of rebates and price reductions for the retail sale of new vehicles.

By decision dated August 8, 2014, the FCC approved the amicable settlement between the Secretariat and AMAG, and closed the investigation against AMAG. According to the amicable settlement, AMAG undertakes not to apply any agreements regarding fixing rebates and price reductions and not to exchange sensitive pricing information with its competitors. As AMAG spontaneously reported its involvement in possible restrictions on competition, no sanctions were imposed.

The investigation concerning the other involved parties is continuing according to ordinary procedure.

Unilateral Conduct

FCC imposes CHF 1.88 million fine against Agence Télégraphique Suisse SA (ATS).

The investigation revealed that, between the end of 2008 and the beginning of 2010, ATS had entered into subscription agreements including exclusive rebates with a select number of Swiss German companies. The rebates were linked to the condition that the concerned companies exclusively use the standard news services of ATS, and do not enter into a subscription for the corresponding service provided by AP Schweiz. Before the cessation of AP Schweiz's activities at the beginning of 2010, ATS was already the dominant dispatch agency on the Swiss market. Its standard news services were used by almost every media company in Switzerland. As from 2010, ATS is the only company to propose a standard news service for media in Switzerland. As a result of its investigation, the FCC found that, through ATS's exclusive rebates, ATS abused their dominant position and illicitly hindered theircompetitor, AP Schweiz, from accessing the market.

By decision dated 14 July 2014, the FCC approved the amicable settlement between its Secretariat and ATS, and imposed a fine for CHF 1.88 million. ATS undertakes to refrain from entering into exclusive subscription agreements with its clients. ATS also undertakes to apply a transparent rebate system, and to provide non-discriminatory access to its services. These measures should allow equal treatment by ATS of all media in Switzerland, as well as avoiding any distortion of competition in the downstream media and advertising markets.

From the start, ATS cooperated with the competition authorities. The FCC took this cooperation into account, showing leniency in the determination of the amount of the fine.

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").

Vertical Agreements

Competition Appeal Tribunal quashes Office of Fair Trading decision to accept binding commitments in hotel online booking case

On September 26, 2014 the Competition Appeal Tribunal ("CAT") delivered its judgment allowing the appeal of a third party, Skyscanner Limited ("Skyscanner"), against the Office of Fair Trading's ("OFT's") decision of January 31, 2014 accepting commitments (the "commitments decision") from Booking.com B.V, Expedia, Inc., and InterContinental Hotels Group Plc pursuant to section 31A of the Competition Act 1998. These commitments had been offered in order to alleviate the OFT's concerns that the practice of restricting discounts offered by online travel agents was anticompetitive, and follows the OFT opening an investigation into the online supply of room-only hotel bookings.

Skyscanner appealed the OFT's decision on three grounds: (i) the OFT failed to take account of representations made by Skyscanner during the consultation procedure on the potential impact of the commitments; (ii) the OFT acted contrary to the objectives of the Competition Act by accepting commitments without considering their potentially anticompetitive consequences; and (iii) in issuing its decision, the OFT acted beyond the scope of its powers because the commitments bound third parties. Although Skyscanner was unsuccessful on ground (iii), the CAT allowed the appeal on the other two grounds.

Regarding the first ground, the CAT found that the OFT had not fully considered its (and third-party) objections to an aspect of the commitments that allowed the parties to limit their disclosure of certain price information to third-parties.

As concerns ground (ii), it was undisputed that the Competition Act was intended to promoting competition for the benefit of consumers. Skyscanner contended that this was breached when the OFT unjustifiably ignored the potential anticompetitive effects of the commitments (*i.e.*, the reduction of price transparency) and that, the OFT therefore acted illegally. The CAT found that the effects of the commitments were a matter for expert factual determination so the CAT could not substitute its assessment for that of the OFT. But the CAT did accept Skyscanner's alternative argument that the OFT's decision was irrational because it has failed to take account of factors necessary for it to investigate the potential impact of the commitments (in particular, the restriction of disclosure) on competition.

The CAT therefore quashed and remitted the decision of the OFT to the Competition and Markets Authority ("CMA") for reconsideration. This is a notable judgment as it is the first time the CAT has been called upon to consider a commitments decision made under section 31A of the Competition Act.

Mergers and Acquisitions

CMA makes final order to implement Eurotunnel/SeaFrance remedies

On September 18, 2014, the Competition and Markets Authority ("CMA") made a final order to implement remedies designed to address the substantial lessening of competition ("SLC") resulting from the acquisition of certain assets of former SeaFrance S.A. ("SeaFrance") by Groupe Eurotunnel S.A. ("GET").

On June 27, 2014, following remittal by the Competition Appeals Tribunal ("CAT"), the CMA confirmed the initial determination of the Competition Commission ("CC"), that the Eurotunnel/SeaFrance transaction would lead to a SLC necessitating remedies. Pursuant to that decision, the CMA consulted on a draft order to implement the original remedies on July 23, 2014. Following consideration of the representations made on the draft order, the CMA made minor modifications and issued the final order.

According to the final order, GET is prohibited from operating ferry services at the Port of Dover. Under the terms of the final order, the prohibition applies for two years to any vessel, and for ten years as concerns two of the vessels acquired under the transaction. Alternatively, GET may divest two of the acquired vessels within a six month period, provided that they are not re-acquired within ten years.

The final order came into force on September 18, 2014. The interim undertakings given by GET pursuant to section 80 of the Enterprise Act 2002 (such as ensuring the maintenance of (i) the MyFerryLink business as an independently operating entity, and (ii) all inter-availability agreements involving Eurotunnel regarding transport operators of passenger services across the English Channel in the same form as at July 2, 2012) were applicable immediately from that date. However, the final order will not apply until after the determination of the action brought by GET and Société Coopérative de Production SeaFrance S.A. ("SCOP") before the CAT to challenge the CMA's decision of June 27, 2014.

Policy and Procedure

Supreme Court dismisses appeal in Healthcare at Home Limited v The Common Services Agency, relating to standards in public tenders

In its opinion dated July 30, 2014, the Supreme Court dismissed an appeal by Healthcare at Home Limited against a decision by the Scottish Court of Session (2012 CSHO 75). Healthcare at Home was the incumbent supplier of certain medical services in Scotland, but lost its contract in a competitive tender process. Healthcare at Home alleged that the Common Services Agency in Scotland, the agency responsible for allocating medical services contracts, breached requirements of clarity and fairness enshrined in Directive 2004/18/EC when considering bids. They alleged that the agency's tender contained insufficiently clear criteria, and that its reasons for rejecting Healthcare at Home's bid were unclear and undetailed. Healthcare at Home's appeal to the Supreme Court challenged whether the lower court had applied the correct standard to determine whether the Common Services Agency had fulfilled its legal requirements.

Directive 2004/18/EC concerns the coordination of public works contracts, public supply contracts, and public service contracts.[66] Recital 46 of the Directive explains that such contracts "should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination, and equal treatment and which guarantee that tenders are assessed in conditions of effective competition."[67] Article 41 entitles unsuccessful candidates to be informed of the reasons why their bid was rejected.

In identifying the appropriate test for determining whether a public authority had complied with the Directive, the Supreme Court referred to the Court of Justice's analysis in *SIAC Construction Ltd v. County council of the county of Mayo (SIAC)*.[68] In *SIAC* the Court of Justice found that contractual documents or a contract notice, must be formulated "so as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way" (emphasis added), this is known as the RWIND criteria.

As to whether the test is objective, the Supreme Court referred to the Advocate General Jacob's opinion in *SIAC* that if an irregularity in the tender process could be shown to disadvantage tenderers, a further requirement that the tenderer be shown actual or subjective knowledge of this irregularity would "run counter to legal certainty."[69] The Advocate General opined that only an objective approach using the RWIND criteria would enable a consistent and uniform approach that preserved legal certainty. The

66 OJ L 134, 30 April 2004, p. 114.

67 Similarly, Article 2 of the Directive requires contracting public authorities to treat potential tenderers equally, without discriminating, and in a transparent way.

68 *SIAC Construction Ltd v. County council of the county of Mayo* (Case C-19/00) EU:C:2001:553.

69 *Id.*, paragraph 66.

Supreme Court further noted that other Court of Justice judgments are consistent with the objective approach, including *EVN AG v. Austria* (Case C-448/01) and others.[70]

When the case originally came before the Court of Session, the Lord Ordinary—Lord Hodge—interpreted the RWIND criteria as requiring the Court to determine what a tenderer might "reasonably foresee" as being encompassed by stated tender criteria. During the course of their submissions Healthcare at Home sought to present evidence from actual tenderers, which they submitted shed light on how an objective tenderer viewed the contract in question. On this basis, the Court of Session eventually found that the Common Services Agency's criteria were sufficiently clear (*i.e.*, they met the RWIND criteria).

On considering whether to grant an appeal, the Inner House disagreed as to the relevant test. Lord Justice Clerk and Lord Carloway affirmed the analysis in *SIAC*, that tender criteria be formulated "in such a manner as to allow all reasonably well informed and diligent tenderers to interpret them uniformly," but they rejected Lord Hodge's additional requirement of reasonable foreseeability.

The Supreme Court affirmed the principles in *SIAC*, as they had been interpreted by the Court of Session. In particular, it affirmed that the criteria are objective, and that, so long as the Court is suitably informed to do so (*i.e.*, they are aware of any technical terminology), it must "put itself in the position of the RWIND tenderer" rather than conducting an extensive empirical enquiry into the interpretations of actual tenderers. Lord Justice Clerk noted that decisions by the Court, especially in circumstances where the contract's performance may be delayed pending the Court's decision, must be expeditious (the instant case by contrast entailed an eight day proof).

The Supreme Court found that the Court of Session had correctly established that the Common Services Agency's contract met the RWIND criteria. They also disregarded Lord Hodge's additional "reasonable foreseeability" criterion as unnecessary, and dismissed the appeal.

Sectoral Investigations

CMA consults on whether a Market Investigation Reference should be made in relation to the retail banking markets for personal current accounts, and banking services to small and medium-sized enterprises

On July 18, 2014, the CMA issued a consultation into its provisional decision to pursue a Market Investigation Reference ("MIR") into the markets for personal current accounts ("PCAs"), and banking services to small and medium-sized enterprises ("SMEs") in the UK. The consultation follows market investigation studies conducted by the CMA in conjunction with the Financial Conduct Authority ("FCA"),[71] and a history of inquiries conducted by the government, the former Competition Commission, and the OFT into various aspects of the retail banking sector, since 2000 (most recently, the OFTs review of SMEs and PCAs in 2007).[72]

Following separate market investigations, the CMA proposes to pursue an MIR into the PCA and SME markets together, for reasons including that the same large banks are prominent in each market, and there are links between the PCA and SME markets (*e.g.*, in the way that consumers engage with banks in each market, and cross selling between BCA and PCA products). The CMA gave until September 17, 2014 for third-parties to give their comments on the consultation paper.

The CMA may pursue an MIR into a given sector where it has "reasonable grounds to suspect that any feature, or combination of features, of a market in the UK for goods or services prevents, restricts or distorts competition" (this is

[70] *EVN AG and Wienstrom GmbH v.Republik Österreich* (Case C-448/01) EU:C:2003:651.

[71] https://www.gov.uk/government/news/personal-current-account-and-small-business-banking-face-full-competition-investigation.

[72] Sumaries of these reports can be found at p.12 of the consultation document.

the so-called "reference test").[73] On the basis of its investigation, the CMA considered that the reference test was met and in particular becuase:

- Both PCAs and SMEs were marked by persistent levels of concentration and relatively stable market shares among providers.
- There were close linkages in the provision of PCAs and business current accounts (BCAs).
- There were continuing high barriers to entry in the supply of BCAs and PCEs.
- There were low levels of consumer switching by SMEs, due in part to an unavailability of relevant information on the product offerings available.
- The markets were marked by a lack of transparency as to charging structures, particularly for overdrafts.

The CMA was particularly concerned that these features perpetuate, despite the CMA's finding that only 13% of SMEs 'trust their bank to act in their best interests' and only 25% felt supported by their bank. Similarly, for PCA's, 2013 saw 600,000 complaints in the UK. To compound these statistics, the CMA noted that SMEs gave low satisfaction scores for banks, dropping as low as 42%. In the CMA's view "these overall rankings reflect[ed] deeper and specific concerns about at least some banks."

Having determined that the reference test was met by the above factors, the CMA had regard to four discretionary criteria. Firstly, the CMA considered that the scale of the suspected problem was sufficient to justify a MIR. This was because the banking sector has a significant enough effect upon welfare that it justifies scrutiny, and that the problems provisionally identified by the CMA had largely persisted for some time.

Second, the CMA considered that appropriate remedies might only be available through an MIR, particularly structural or behavioral measures aimed at improving transparency and the regulation of banking conduct. Although the CMA does not require that structural remedies would be the likely result of the MIR, it cannot rule them out at this stage.

The third criterion is whether undertakings in lieu of an MIR (UILs) would be sufficient to address the competition concerns identified, without the need for an MIR. The CMA has considered whether proposals put forward by the four largest retail banks in the UK in relation to the SME sector sufficiently address competition concerns. The CMA concluded that the proposals "could not provide as comprehensive a solution as is 'reasonable and practicable'" to remedy competition concerns. In particular, the CMA has stated that it is unwilling to accept the UILs when to do so might obviate further structural remedies, the need for which only an MIR would identify. Again, the CMA explicitly denied that it considered structural remedies "probable", only considering them "possible".

The CMA did note that negotiating UILs offers a potentially much quicker solution than pursuing an MIR, and so particularly welcomes any analysis of its provisional findings on ILs.

Finally, the CMA did not find that any other powers available to it or the FCA would be sufficient to address the competition concerns it had identified.

On the basis of these considerations, the CMA proposes to open an in depth (Phase 2) investigation into the markets for SME and PCA banking in the UK and invited third-party responses until September 17, 2014.

The CMA publishes its final report on investigations into the motor insurance market.

On September 24, 2014 the Competition and Markets Authority published a report on its investigation into a number of areas of the motor insurance market.74 The authority structured its investigation around five theories of

73 *See* CMA "Consultation: Personal current accounts and banking services to small and medium-sized enterprises", July 18, 2014, paragraph 5.

74 https://www.gov.uk/cma-cases/private-motor-insurance-market-investigation

harm, two of which—namely market concentration and the under–provision of services to those involved in accidents—were dismissed (except with regards to practices which also fell under other categories). The three remaining theories were: (i) separation of cost liability and cost control, (ii) the sale of add-on products, and (iii) motor insurance price comparison websites and most favored nation clauses.

The distinction in tort law between cost liability and cost control relates to the differing obligations on insurers acting for each party in an accident. The law splits the liability for repaying an innocent driver's costs into two components. The primary liability to repay the innocent driver (so-called "cost liability") is borne by the at-fault party's insurance. But the duty to estimate those costs is often borne by the innocent driver's insurer, (who usually manages the claim and repairs) and is known as "cost control". The cost-control responsibility requires the innocent driver's insurer to assess (and charge) an amount equal to what it considers a court would deem 'reasonable' costs, but this may differ from the actual cost of repair.

The report found that the way this distinction is treated by the industry lead to an adverse effect on competition. This CMA found evidence that the not-at-fault driver' insurer may be able to claim a higher amount than the actual price of repairs, and keep the difference (or some part) as a 'rent'. This translated into higher insurance prices for consumers. On account of the relatively low impact of the effect on competition, and the difficulty of remedying it in a proportionate manner, the CMA has opted not to take action on this point.

The second theory of harm concerns the sale of add-on products to motor insurance policies. Add-on products offer additional cover to those included in a basic motor insurance policy and are usually sold at a premium. These products vary in type and content from one insurer to another.

The CMA found that information asymmetry caused an adverse effect on competition. The CMA was particularly concerned with No Claims Bonuses and suggested several remedies aimed at improving information for consumers. The CMA also made two recommendations to the FCA to examine price and content transparency relating to add-on products: The first was that the FCA consider requiring motor insurance providers to provide price comparison websites with pricing information about add-ons (the CMA suggested ways that this information could be provided so as to enable consumers to compare policies with equivalent packages of add-ons); The second recommendation was that the FCA work with the main players in the motor insurance market to improve the descriptions of the various add-on products.

Third, the CMA's Report examined certain clauses contained in contracts between motor insurance providers and price comparison websites. Clauses containing 'Most Favored Nation' ("MFN") elements were of particular concern. Such clauses were sub-divided by the CMA into 'wide' and 'narrow' categories. 'Narrow' MFN clauses prevent insurers from listing their policies on their own website at a price lower than that listed on the price comparison website. 'Wide' MFN clauses prevent insurers from listing their policy with other websites altogether (or, in some cases, with other sales channels more generally) or at a lower rate. This conduct ultimately lead to higher insurance premiums as it limited incentives to innovate and reduced price competition between sales channels such as price comparison websites. Such websites were thus prevented from undercutting each other's prices. The CMA remedied these issues by forbidding wide MFN clauses as well as practices by large price comparison websites that created *de facto* similar restrictions.

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