BELGIUM

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

Abuse of Dominance

National Lottery Fined €1.2 million for Abuse of Dominance (Case CONC-P/K-13/0013)

On September 23, 2015, the BCA imposed a fine on the Belgian National Lottery (the "National Lottery"), as part of a settlement concluding the Auditorate's investigation into various practices of the National Lottery. The National Lottery acknowledged abusing its dominant position in the context of the launch of a new sports betting product, Scooore!, in early 2013.

The National Lottery holds a legal monopoly on public lotteries, which does not include sports betting products. Following its 2013 entry into the market of sports betting, a number of competitors in this market complained to the BCA that the National Lottery had leveraged its monopoly in the public lottery market when launching Scooore!.

The Auditorate found that while a monopolist's diversification into other markets may be beneficial for those markets, the National Lottery had abused its dominant position in two ways. First, the National Lottery had made use of customers' contact details collected through its monopoly activities by sending all of the customers an email advertising the launch of Scooore!. The contact details had not been obtained as a result of competition on the merits, but rather out of its legal monopoly. Competitors could not collect similar data on potential customers under reasonable financial conditions and within a reasonable period of time, due to the volume and nature of the details in the National Lottery's database.

Second, the National Lottery had obtained commercially sensitive information about competitors from some of its retailers, both before and after its product's launch. This had reduced market uncertainty about the competitors' behavior. Both practices had a potentially distortive effect on competition, sufficient to establish an abuse of dominance, although the effect on competition was not proven.

The Auditorate dismissed the other claims raised in the complaints, which included the use of the National Lottery logo to promote Scooore!, cross-subsidization, and certain exclusivity and non-compete clauses in contracts with retailers. The two abusive practices thus consist solely of the use of data.

The decision was the first settlement decision involving an abuse of dominance and only the second settlement decision since the procedure was introduced with the Belgian Competition Act in September 2013. In exchange for acknowledging the infringements, the National Lottery received a fine reduction of 10%. The fine was further reduced due to mitigating circumstances: the absence of proof that the infringement had restricted competition and the National Lottery's full cooperation during the proceedings. The total fine was ultimately €1.19 million.

BCA Imposes Interim Measures Suspending the FEI's Exclusivity Clause (Case CONC-V/M-0016)

On July 27, 2015, the College imposed interim measures on the *Fédération Equestre Internationale* ("FEI"), the governing body for equestrian sports, provisionally

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suspending the "exclusivity clause" contained in the FEI's General Regulations.

Global Champions League SPRL and Tops Trading Belgium SPRL (together, the "Complainants") had requested interim measures in June 2015 in the context of a complaint arguing that certain FEI rules were anti-competitive. In particular, the FEI's exclusivity clause (Articles 113(4)-(6) of the General Regulations) prohibits athletes and horses from participating in non-FEI recognized events for a period of six months prior to any FEI recognized event in which they intend to participate. This prevented the Complainants from setting up the Global Champions League ("GCL"), a new equestrian team competition which was not recognized by the FEI, because athletes were effectively prevented from participating in both FEI recognized and non-FEI recognized competitions (the former being relevant for rankings).

The College held that it was not manifestly unreasonable to consider that the exclusivity rule constituted a *prima facie* infringement of Articles IV.1 and IV.2 CEL, as well as 101 and 102 TFEU. This resulted, among other things, from the fact that the FEI combines commercial activities with its status as the regulator for equestrian sports. The College further held that the infringement could potentially cause a serious and imminent harm that would be difficult to remedy. Without the interim measures, it would be impossible for the GCL to be organized in 2016 and the entire project might be abandoned.

The College therefore ordered the suspension of the exclusivity clause with respect to the GCL and prohibited the FEI from suspending or sanctioning athletes or horses for participating in a GCL competition. It also ordered the FEI to communicate these measures to its members (national federations), athletes, officials, and organizers through its website. The interim measures will be applicable until the earliest of (i) a BCA decision either closing the investigation, deciding on the merits, or resulting from a settlement, or (ii) a decision of the College reviewing the facts and terminating the suspension in whole or in part.

The decision to impose interim measures does not constitute a final decision on the merits, which will occur only after the Auditorate concludes its investigation, unless the Auditorate decides to close the investigation or to settle with the FEI. In the meantime, the decision is a signal that the exclusivity clause is anti-competitive.

The FEI has appealed the interim measures before the Court of Appeal of Brussels.

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

Review of Competition Act

In September 2015, the Ministry of Employment and the Economy set up a committee to review the Competition Act. The committee's assignment is twofold. The committee shall assess how to amend the Competition Act with a view to, first, implementing the goals of the new Government Program and, second, taking into account the recommendations of the European Competition Network ("ECN"), the uniformity of national and EU competition legislation and amendment proposals based on the practice of the FCCA and national courts. The committee's term runs until February 2017.

In May 2015, Finland's new government set a goal in its Government Program to improve the profitability of farming within the next four years. One of the actions taken to implement this goal is to review the Competition Act and to "take necessary action within the bounds of EU competition law." In practice, the government seeks to use competition law to restrict the market power of other actors in the food production and distribution chain for the benefit of farmers. This is a continuation of an earlier amendment of the

Competition Act which provided that any grocery retail chain with at least 30% market share is considered to have a dominant position.

The second part of the committee's assignment is potentially more significant as it relates generally to competition law and stems from the FCCA's wish to enhance its powers and clarify the Competition Act. The items to be reviewed include, among others, the ECN's recommendations on the power to collect digital evidence by forensic means, commitment procedures, and the power to impose structural remedies as well as the ECN's model leniency program. The right to bring an investigation order under judicial review will also be considered. The predictability and transparency of fines will be reviewed, as the FCCA has not yet published detailed guidelines on how fines are determined. Another topic for discussion will be the level of fines imposed on trade associations. Over the past few years, a number of trade associations have been fined however the fines have been very low due to the low turnover of trade associations. Subsequently, the FCCA is seeking to amend the calculation of fines for trade associations. In addition, the FCCA also intends to pursue sanctions for procedural infringements, such as the failure to provide information. Furthermore, it aims to define more clearly which documents fall under attorney-client privilege. The FCCA will also explore the possibility to supplement fines with banning infringing individuals from engaging in certain commercial activities. Finally, the FCCA plans to improve the information exchange with other national authorities such as the police, tax authorities and regional administrative authorities as well as with other Nordic competition authorities.

The list of amendments under assessment is broad and could result in significant changes to the powers of the FCCA, such as structural remedies and business prohibitions on individuals. These items were not part of the Government Program that resulted in setting up the committee and it remains to be seen how much political support any proposed amendments will ultimately receive.

FRANCE

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

Antitrust

Firms Will Now be Able to Settle Cases with the French Competition Authority

A new law which came into force on August 6, 2015 allows firms to negotiate the level of fines with the FCA. Firms may now negotiate with the FCA's investigation services the maximum fine they would accept in return for accepting not to challenge the statement of objections.[1]

The new law replaces the previous no-challenge procedure before the FCA with a settlement procedure inspired by the existing settlement procedure before the European Commission. Once it has sent a statement of objections, the FCA may contact firms with a settlement offer. Prior contacts are not excluded but the settlement will only happen after the issuance of a statement of objections. In practice, firms which are interested in a settlement are likely to inform the FCA before that date to indicate that they are open to a settlement offer. Formally, the FCA is responsible for initiating a settlement. It is free to decide whether it wants to discuss a possible settlement and determines the time period given to firms to accept its offer.

The essential condition for a settlement is that the firm gives up on its right to challenge all objections. The Parliament expressly refused amendments allowing partial settlements. Firms cannot parse out which objections they wish to settle and retain the right to contest others.

[1] Article L.464-2 III of the Commercial Code at http://www.legifrance.gouv.fr/affichCodeArticle.do;jsessionid=8BB75E094D0A959C2A44DE73946DC3C0.tpdila24v_2?idArticle=LEGIARTI000031013158&cidTexte=LEGITEXT000005634379&dateTexte=20151101.

The greatest advantage of the new procedure is that it allows firms to negotiate the level of fines. Previously, firms could give up the right to challenge objections in exchange for a 10% fine reduction (with a possible additional reduction of up to 15% if the company offered commitments) however, this percentage of fine reduction was applied to the final amount of the fine which would have otherwise been imposed. As a result, firms did not know the level of the original fine when they declined to challenge the objections, leaving little room for negotiation with the FCA and little certainty as to the final amount of the fine.

Under the new settlement procedure, the offer of the FCA consists of a range of fines with a minimum and a maximum for all objections as a whole (partial settlements being impossible). While the core of objections is defined by the statement of objections, firms may discuss the numerous determinants of the fine with the FCA, in particular, the value of sales, the gravity rate, the duration of the infringement as well as the aggravating and mitigating circumstances.

The new law also indicates that a firm may offer commitments during the negotiation in order to further reduce the fine. These commitments generally include the creation or improvement of compliance programs, but they may also relate to real changes of behaviour within the market, notably in abuse of dominance cases. Such significant commitments could enable firms to obtain greater fine reductions.

The settlement is actually concluded between firms and the general case-handler (the head of the investigation service) whereas cases are ruled on by the *Collège*, a specific body within the FCA. Under the settlement procedure, the general case-handler recommends that the *Collège* sets a level of fines within a range negotiated with firms. There is no legal guarantee that the *Collège* will not impose higher fines. In practice, however, the *Collège* of the FCA has never used this faculty to the previous no-challenge procedure and has always granted fine reductions agreed upon with the general case-handler.

The case-handler negotiates fine ranges with each firm separately and secretly. It remains to be seen how the FCA and review courts will consider settlements which are more advantageous for some firms than others, and in particular, whether such discrimination may lead to the reconsideration of the level of fines.

The Paris Court of Appeal Upheld the Fine Imposed on Cegedim by the FCA

On September 24, 2015, the Paris Court of Appeal upheld the FCA's decision to impose a €5.8 million fine on Cegedim for abuse of a dominant position in the market for medical information databases for pharmaceutical companies.[2]

On July 8, 2014, the FCA found that Cegedim held a dominant position in the market for medical information databases. From October 2007 until September 2013, Cegedim had implemented a discriminatory policy against Euris, a competitor in the related market of customer relationship management ("CRM") software. Both Cegedim and Euris appealed the FCA's decision.

In its decision, the FCA explained that pharmaceutical companies use two types of tools to optimize their sales: databases containing medical information, mainly for collecting the names and contact details of doctors, and CRM software, which uses this type of database to provide information on how drugs are prescribed, and by whom. The FCA found that Cegedim was abusing its dominant position in the market for medical information databases, by refusing to provide its database called *OneKey* to customers using Euris' CRM software.

Cegedim challenged the FCA's decision on the following grounds: (i) medical information databases do not constitute a relevant product market, and if such a market

[2] Paris Court of Appeal, Case n°2014/17586 of September 24, 2015, available at: http://www.autoritedelaconcurrence.fr/doc/ca14d06.pdf.

were to exist, it would not be related to the market for CRM software for the healthcare industry; (ii) Cegedim does not have a dominant position in the market for medical information databases; and (iii) the alleged discrimination was not proven, and was justified by an intellectual property infringement claim brought by Cegedim against Euris.

With respect to the challenge on market definition, the Court of Appeal confirmed the FCA's decision. The Court indicated that the market for medical information databases corresponds to the market in which software service providers respond to the demand of pharmaceutical companies for databases compiling contact details of doctors, and that such a product cannot be substituted by other equivalent products. In addition, the Court of Appeal also confirmed that the markets for CRM software in the healthcare industry and medical information databases are related, because the CRM software cannot function without a customer database.

Concerning Cegedim's position in the market for medical information databases, like the FCA, the Court of Appeal excluded intra-group/intra-company sales (*i.e.* use of their internal medical information database by pharmaceutical companies) from its market share analysis and concluded that Cegedim had a 78% market share in the market for medical information databases. The Court added that this strong position is reinforced by the quality of *OneKey,* compared to competitors' databases, and the very high barriers to entry into this market. Subsequently, the Court of Appeal confirmed that Cegedim held a dominant position in the market for medical information databases.

The Court of Appeal also determined that there was sufficient evidence to prove that Cegedim had refused to grant Euris customers access to its database as part of an established commercial policy. As a result, the Court of Appeal considered that Cegedim distorted competition in the market for CRM software in the healthcare industry, and hampered Euris' development. Lastly, regarding Cegedim's justification of the discrimination based on an existing claim of intellectual property infringement against Euris, the Court explained that even if it were Cegedim's right to file a complaint due to this alleged intellectual property violation, it did not give them the right to violate antitrust rules and set-up a discriminatory practice against Euris' customers.

Euris appealed the FCA's decision on the grounds that: (i) the FCA should have qualified *OneKey* as an essential facility; and (ii) the FCA should have found that Cegedim was abusively tying the sales of *OneKey* with the sales of its CRM software.

On the first ground, the Court of Appeal explained that Euris had no legal interest in that claim. The FCA followed Euris' initial complaint and sanctioned the refusal to give *OneKey* access to Euris' customers on the basis of discrimination, and therefore did not need to qualify *OneKey* as an essential facility for that purpose. With respect to the second claim, the Court of Appeals found the mere fact that a large proportion of Cegedim's customers bought its CRM software and *OneKey* together, was insufficient to prove illegal tying.

Mergers and Acquisitions

The FCA Clears Acquisition of Comexposium Subject to Commitments

After the Minister for the Economy conditionally approved the acquisition of joint control of Comexposium by the Chamber of Commerce and Industry of Paris and Unibail in 2007, the FCA cleared the transfer of Unibail's shares to Watling Street subject to the previously-imposed commitments.[3]

The transaction involved the purchase by Watling Street Capital Partners LLP ("Watling Street"), a private equity firm belonging to the Charterhouse group, of 50.1% of the

[3] French Competition Authority, Decision n° 15-DCC-82 of July 8, 2015 concerning the acquisition of Unibail by Watling Street Capital Partners LLP available at http://www.autoritedelaconcurrence.fr/pdf/avis/15DCC82decisionversionpublication.pdf

shares in Comexposium from Unibail, a commercial property investments company. Prior to the transaction, Comexposium was jointly controlled by Unibail and the Chamber of Commerce and Industry of Paris ("CCIR"), which retained 49.9% of the shares.

Both CCIR, through its subsidiary Viparis, and Comexposium, are active in the event organization sector, although at different levels. Comexposium specializes in the organization of fairs or trade shows, whereas CCIR's activities consist of managing convention and exhibition centers. In addition, both companies offer optional event management services, such as reception or food and beverages services.

In its competitive analysis, the FCA referred to a prior decision issued by the Minister for the Economy in 2007, when CCIR and Unibail acquired joint control of Viparis and Comexposium, in which the Minister took the view that the transaction raised a number of competition concerns. The Minister found that the transaction would not only create a quasi-monopoly in the market for the management of exhibition centers, but also create risks of vertical foreclosure, as Viparis and Comexposium would be able to, *inter alia*, (i) exchange strategic information that would enable discriminatory tactics in favor Comexposium as the organizer of fairs and trade shows; (ii) discriminate against competitors of Comexposium with respect to rental rates, attribution of locations or exhibition dates; and (iii) tie the offer of optional event management services to the offer of site maintenance services.

To address these concerns, CCIR and Unibail had offered a series of commitments, both structural and behavioral, aimed at preventing risks of foreclosure. In particular, the two companies had undertaken to: (i) limit the rental rates paid by exhibitors; (ii) refrain from tying the offer of optional event management and site maintenance services; and (iii) limit their market shares in the occupation of their own convention centers by their own events to 40–50% (the "ventilation commitment"). These commitments were scheduled to expire once CCIR and Unibail ceased to hold a quasi-monopoly in the market for the management of convention and exhibition centers, except for the third commitment, which would become obsolete once CCIR and Unibail ceased to hold the majority of Comexposium's share capital.

In the present case, the notifying parties alleged that the transaction would be pro-competitive because it would end the vertical integration between Viparis and Comexposium. However, the FCA rejected the argument pointing out that CCIR would retain joint control of both undertakings.

As a consequence, on July 8, 2015 the FCA declared that the Minister for the Economy's analysis would remain valid following the transfer of Unibail's shares to Watling Street, and that all the prior commitments should continue to apply. Interestingly, the FCA seemed to overlook the fact that since Comexposium's share capital is now majority-owned by Watling Street, the ventilation commitment ought to expire.

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

German Federal Constitutional Court Confirms FCJ's Rulings on Fines Imposed After Restructuring

On August 20, 2015, the German Federal Constitutional Court refused to hear the complaint brought by Melitta Europa GmbH & Co. KG ("Melitta Europe") as legal successor of its former affiliate Melitta Kaffee GmbH

("Melitta Kaffee") against several court decisions confirming fines imposed on Melitta Europe despite its restructuring.[4]

The FCJ[5] upheld a DCA judgment[6] confirming that Melitta Europa as legal successor of Melitta Kaffee is liable for a €55 million fine,[7] which the FCO had imposed on Melitta Kaffee in 2009. The FCJ decided repeatedly that even after a company has merged with or into another company, and therefore ceases to exists, it is possible to impose a fine on the new entity provided that the old company's assets have been transferred to the new company and, from an economic standpoint, the two companies are nearly identical.

According to the Federal Constitutional Court, the FCJ's case law stays within the ambit of constitutional principles. In particular, the legal provision allowing the imposition of fines (Section 30(1) of the German Act on Misdemeanors) can be interpreted in such a way as to encompass the imposition of fines on successor companies while remaining comfortably within constitutional boundaries. Furthermore, it would certainly be constitutional to apply the provision where a lay person would view the new company and old as the same undertaking. Fining the new company is also congruent with legislative intent, namely to prevent companies which can only act via management from escaping sanctions while simultaneously benefiting from their management's misdeeds.

Following the imposition of the fine in this case, the German Act on Misdemeanors was amended. Fines can now also be imposed in the case of universal legal succession or partial universal legal succession, achieved by splitting up a company (Section 30(2a) of the German Act on Misdemeanors). However, the new law still leaves loopholes therefore the FCO is pushing for broader legislative changes that would bring the German system in line with the EU system.

FCJ Confirms Cable Network Operator's Obligation to Broadcast Public Broadcasting Programs But Denies General Duty to Pay Feed-In Fees For This Under Broadcasting and Antitrust Laws (Kabel Deutschland and Unitymedia)

On June 16, 2015, the FCJ held in two cases that a cable network operator is obliged to broadcast public broadcasting programs but cannot necessarily charge public broadcasters for this, thereby overturning decisions by the Higher Regional Courts of Munich and Stuttgart.[8]

The two largest German cable network operators, Kabel Deutschland and Unitymedia, requested feed-in fees (*Einspeisegebühren*) for broadcasting the programs of public broadcasters in the federal states of Bavaria and Rhineland-Palatinate. Pursuant to a contract in 2008 between the public broadcasters and the network operators, the public broadcasters had paid annual feed-in fees of €27 million to the network operators. After the termination of this agreement at the end of 2012, network operators continued to broadcast the public broadcasters' programs without receiving any feed-in fees. They therefore brought actions against the public broadcasters.

Upon appeal, the FCJ held that the public broadcasters are obliged to provide the program signals to the operator due to their public service function, and that the operators are, under the German Broadcasting Treaty, obliged to distribute them. However, while the FCJ referred the case back to the lower courts in Munich and Stuttgart for further investigation, it held that an operator cannot necessarily request feed-in fees for this distribution.

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4 *See* German Federal Constitutional Court decision of August 20, 2015, case 1 BvR 980/15, available in German at the Court's website.

5 *See* FCJ judgment of January 27, 2015, case KRB 39/14, available in German on the FCJ's website.

6 *See* DCA judgment of February 10, 2014, case V-4 Kart 5/11 (OWi), available in German on the DCA's website, and FCO press release of February 11, 2014, available in English at http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2014/11_02_2014_OLG-Melitta.html.

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

8 *See* FCJ, decisions of June 16, 2015, cases KZR 3/14 and KZR 83/13.

According to the FCJ, the public broadcasters have a dominant position in the market for feed-in capacities. They are not facing competition from other broadcasters since network operators are obliged to reserve free capacities ("Must Carry") only for public broadcasters. However, the public broadcasters do not abuse this dominant position nor do they discriminate in their selection because they do not pay feed-in fees to any of the network operators. The FCJ determined that the fact that public broadcasters pay feed-in fees to providers which use other transmission technologies (satellite or terrestrial) cannot be considered discriminatory because the other providers limit their services to the transmission performance and do not receive any remuneration from end consumers.

Furthermore, there is no obligation for the network operators to continue the contract or enter into a similar new contract under applicable broadcasting or antitrust laws.

However, the FCJ referred the cases back to the Higher Regional Courts' to assess whether the notices of termination were void, clarifying that any coordination between the public broadcasters to jointly terminate the contracts with the cable network operators would have infringed Section 1 ARC, rendering the termination of the contracts void.

FCO Prohibits Joint Marketing of Round Timber in Baden-Württemberg

On July 15, 2015, the FCO largely prohibited the federal state of Baden-Württemberg from jointly marketing wood from its own state forest and at the same time from communal and private forests.[9]

Through its state company *Forst BW Baden-Württemberg*, the federal state of Baden-Württemberg, sold and invoiced wood on behalf of other forest owners and carried out several services directly related to the marketing of round timber. The FCO held that this would qualify the federal state of Baden-Württemberg as an undertaking for competition law purposes, given that the activities would focus on economic objectives rather than on the responsibilities of public administration.

According to the FCO, the agreements between the federal state and the other forest owners would fix prices and restrict sales, and thus qualify as hardcore restrictions. These restrictions could not be exempted under Article 101(3) TFEU (or the German equivalent), because they would not contribute to improving the production or distribution of goods or to promoting technical or economic progress, and, in particular, they were not indispensable. According to the FCO, any benefits provided by the agreements could also be achieved through independent cooperation between communal and private forest owners. The FCO determined that an exception could be made for owners of less than 100 hectares because they were not in a position to market the wood themselves, and as such it was acceptable for them to engage in joint marketing.

The FCO's decision ends proceedings that started in 2002 with a complaint by the Sawmill Industry's Association. In 2008, the FCO had accepted binding commitments by the federal state of Baden-Württemberg and other federal states to not engage in marketing with forest owners with less than 3,000 hectares, although this decision prompted further complaints. In the case at hand, the FCO decided that these commitments were no longer sufficient to remedy competition concerns, and that new market conditions would constitute a new factual basis, thereby justifying the revocation of the 2008 decision.

Interestingly, the FCO provided for interim periods in its decision, saying that it expects the federal state of Baden-Württemberg to appeal the decision, and that it wanted to give the forest owners sufficient time to reorganize their forest management.

9 *See* FCO press release, available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/15_07_2015_Rundholz.html?nn=3599398. The complete text of the decision is available only in German at the FCO's website.

FCO Fines Container Transport Service Providers €4.56 Million For Participating in Concerted Practices

On August 25, 2015, the FCO imposed fines totaling €4.56 million on seven container transport service providers for participating in concerted practices in the maritime container transport sector.[10] It also fined a number of responsible individuals and an association of companies, the FCDS committee, which represents the interests of container transport service providers in the German sea transport industry. The FCO initiated the investigation *ex officio* in April 2014 after the FCDS members had jointly announced that they would introduce a "*Hamburg traffic congestion surcharge*." This announcement had led to several media reports expressing antitrust concerns.

The FCO found that the FCDS members had reached a general understanding to pass on cost increases in the container transport industry to their customers to the widest extent possible. Starting in 2001, the companies regularly discussed and coordinated possible reactions to different cost increases at FCDS general assemblies and at other occasions. Further, they agreed to introduce or increase several surcharges on the basic freight rate, different incidental charges and mutual settlement rates in cases where an order was carried out on behalf of another FCDS member, and to introduce the "*Hamburg traffic congestion surcharge.*"

All companies, individuals, and the FCDS, cooperated with the FCO under its leniency program and settled with the FCO. With the exception of one case, all decisions are final.

FCO Fines Armaments Suppliers

In July 2015, the FCO imposed €1.3 million in fines for price-fixing on three suppliers of rubber protection pads and vibration dampers for military vehicles.[11] A fourth supplier was also involved, but was granted full immunity in accordance with the FCO's leniency program.

The German Armed Forces source rubber protection pads and vibration dampers on a continual basis through tenders. The four companies engaged in a pattern of agreements between 2010 and 2014 to determine who should submit the best bid and thus win the tender. The companies further agreed on who would supply the winner and for what price in case cross-supplies were necessary.

The fines, which are final, were reduced because all suppliers cooperated with the FCO. As bid rigging is a criminal offence under the German Criminal Code,[12] proceedings against the natural persons involved were transferred to the Public Prosecutor's Office in Koblenz.

Vertical Agreements

FCO Decides That Sports-shoemaker Asics Unlawfully Restricted Online Sales

On August 28, 2015, the FCO concluded its proceedings against sporting goods producer, Asics, and decided that certain clauses in the company's selective distribution agreements unlawfully restrict online sales.[13] The FCO prohibited the use of these clauses.

According to the FCO, Asics, the market leader for running shoes in Germany, has established a selective distribution system for its products. It only accepts retailers that fulfill distinct qualitative criteria. Among other things, Asics prohibits its authorized retailers from using online price comparison websites such as idealo.de or billiger.de. Further, the manufacturer does not allow its resellers to use Asics's trademarks and brands on third-party websites in order to direct customers to their own online stores. The FCO found these clauses to constitute excessive resale restrictions, limiting the visibility of small and medium sized

[10] *See* FCO press release of August 25, 2015, available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/25_08_2015_Container.html.

[11] *See* FCO press release of July 16, 2015, available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/16_07_2015_Laufpolster.html?nn=3591568.

[12] Section 298 German Criminal Code.

[13] *See* FCO press release of August 27, 2015, available in English at http://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2015/27_08_2015_ASICS.html;jsessionid=359759310B4DDA72FF33EDACD6FB42F3.1_cid387.

retailers in the market and impeding their ability to reach new customer groups. In the authority's view, the manufacturer's primary aim for this was to restrict price competition in both online and offline sales markets.

The FCO also criticized Asics's complete ban of sales via third-party online sales platforms such as eBay and amazon marketplace, but did not arrive at a final decision with regard to the clause's legality. Similar clauses have recently been scrutinized by German courts and, in many cases, been found to constitute unlawful restrictions of online sales. The FCO previously looked into the comprehensive ban of third-part online sales platforms (*e.g.*, in the case of Asics's competitor Adidas), however, it ultimately abstained from reaching a final decision on this issue. According to the FCO's press release, the authority wants to initiate further discussion on this subject also at a European level.

Recently, the FCO has conducted several investigations that focus on vertical restrictions of online sales by selective distribution systems. While most affected producers of branded products immediately changed their policies to accommodate to the FCO's demands, Asics's case has so far been the only one where the FCO rendered a decision, prohibiting the use of certain clauses. The FCO's decision has not yet been published. While Asics may still appeal the FCO's decision before the Düsseldorf Court of Appeals, it has changed its selective distribution system.

Unilateral Conduct

FCO Finds Google's De-Snippeting Practice in Compliance with Competition Law

On September 8, 2015, the FCO decided not to take any action against Google for discontinuing to display snippets of search results of news publishers who had not agreed to Google using their content free of charge.[14] The FCO held that it was "highly likely" that Google did not engage in abusive conduct.

In August 2014, the FCO confirmed that a complaint against Google submitted by the collecting society, VG Media, did not provide sufficient evidence of abusive conduct to initiate formal proceedings.[15] VG Media's complaint concerned Google's behavior with respect to the new ancillary copyright for news publishers. Introduced in August 2013, this right entitles news publishers to prohibit search engines and equivalent services to use their news content, except for single words or small extracts (snippets). However, the precise scope of an acceptable snippet has remained unclear and litigation between Google and VG Media is still on-going. Google refused to pay for any content that it displays in its search results and therefore decided not to purchase any licenses for news publisher content. Instead, Google asked German news publishers for their consent to use their content free of charge—to which the majority of them agreed. After VG Media had initiated legal proceedings, Google requested the news publishers in VG Media to renew their consent, which all of them eventually did.

Following the FCO's informal refusal to open an investigation in August 2014, Google requested the FCO to take a formal decision pursuant to Section 32c of the GWB.

According to the FCO, Google acts as a two-sided platform: one side for end consumer search and the other for (search-related) online advertising. As for consumer search, it is questionable whether there is a relevant market for antitrust purposes, considering the lack of monetary payment flows. The FCO, however, ultimately left this question open as it found that there were insufficient indications for an abuse in the case at hand. As

[14] *See* FCO, decision of September, 8, 2015, case B6-126/14, available in German at: http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Missbrauchsaufsicht/2015/B6-126-14.pdf?__blob=publicationFile&v=2. A press release is available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/09_09_2015_VG_Media_Google.html?nn=3591286.

[15] *See* FCO's press release of August 22, 2014, available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2014/22_08_2014_VG_Media.html?nn=3591568.

for online advertising, the FCO distinguished between markets for online and offline advertising. The FCO considered to further subdivide the market for online advertising according to whether the advertisement is search-related or not, but left the exact market definition open. In geographic terms, the FCO assumed there are good arguments for national markets (or along language lines).

Given the high usage shares and high user loyalty, the FCO stated that Google likely has a dominant position but ultimately left this question open. The FCO found that even if one assumed Google were dominant, there were insufficient indications of an abuse as Google (i) did not discriminate against VG Media in an unjustified manner, (ii) was not obligated to purchase VG Media's licenses, and (iii) did not force news publishers to let it use their content free of charge.

According to the FCO, the fact that Google discontinued to display snippets of VG Media's member is not an unlawful discrimination but rather a reasonable reaction to pursue its legitimate interests which outweigh those of VG Media. The FCO highlighted that like any other company, search providers are free to design their product within the limits of competition law and therefore, have broad discretion in terms of how they assemble, rank, and present their search results. By not displaying snippets without the consent of news publishers, Google sought to preserve its legitimate business model—that is based on the free linking of online content (which excludes the idea of having to take any licenses for content)—and to reduce the risk of liability for damages. The FCO deemed these motives justified, in particular given the fact that it remains unclear how courts will interpret the new ancillary copyright law for news publishers.

The FCO also held that the ancillary copyright law does not prescribe an obligation to take a license as every company has a wide margin of discretion as to what products it wants to purchase, and it cannot be forced to purchase products that do not fit into its business model. The FCO further held that VG Media could not rely on the essential facility doctrine pursuant to Section 19(2)(4) GWB in order to demand that snippets had to be displayed against payment from Google as part of the search results. The FCO pointed out that Google, irrespective of whether a search engine could be considered an infrastructure facility, had not denied VG Media members access to its services, but only reduced the extent to which their content is displayed. Moreover, according Section 19(2)(4) GWB, access to the essential facility has to be granted typically only against payment by the company seeking access (and not by the operator of the essential facility, as requested by the claimant).

Finally, the FCO held that Google did not act abusively by asking VG Media members to give their consent to allow Google to use their content for free. Such a request cannot be considered as an exploitative abuse because Google needed consent to refrain from infringing the new ancillary copyright.

While the FCO has not found any reasons to further probe, it points out that it might nonetheless start an investigation, in particular if Google further reduces the extent to which it displays content from news publishers which do not allowing Google to display snippets for free.

FCO Finds That Deutsche Post AG Abused Its Dominant Position in Letter Post Services

On July 2, 2015, the FCO declared that incumbent postal service provider, Deutsche Post AG ("DPAG"), had abused its dominant position in the market for licensed letter post services by imposing a margin squeeze and granting illegal loyalty rebates.[16]

DPAG owns and manages the only postal network with nationwide universal coverage in Germany. Despite the liberalization of the postal markets in 2007, DPAG still

[16] *See* FCO, decision of July 2, 2015, case B9-128/12, and FCO, case report of July 30, 2015, case B9-128/12, both available in German on the FCO's website; *see also* FCO, press release of July 7, 2015, available in English on the FCO's website.

holds a dominant position on both the downstream market for end-to-end mail delivery and the upstream market for partial postal services in Germany. As a dominant postal service provider, DPAG is legally obliged to grant competitors partial service access to its postal network. This means that against a fee, DPAG is obliged to deliver mail that competitors have collected from senders, pre-sorted and brought to DPAG's sorting centers.

The FCO found that DPAG had agreed so-called "target prices" for end-to-end delivery with four bulk mail senders that were lower than the partial services fee DPAG demands from its competitors. In particular, DPAG had reduced the standard postal charges by granting volume discounts as well as remuneration for advertising services (*i.e.*, printing DPAG's logo on mail to be delivered) and for providing DPAG with (undefined) "quality data." According to the FCO, the remuneration was only granted to the extent necessary to reach the agreed target prices. It did not have the economic value DPAG claimed. The FCO further held that the granted volume discounts alone resulted in prices that were below or at least just as high as the partial services fee.

The FCO held that this pricing practice constituted a margin squeeze that prevented competitors (in particular mail consolidators) from profitably offering end-to-end delivery services to customers and thereby competing with DPAG. With reference to the European Court of Justice's *TeliaSonera* judgment,[17] the FCO held that the indispensability of the relevant upstream input is not a necessary criterion to demonstrate likely negative effects. In any event, contrary to DPAG's claim, the FCO held that DPAG's postal network would still be indispensable. Finally, the FCO found that the pricing practice in question was not necessary to guarantee universal postal coverage on geographically uniform prices. Even if DPAG ended up in a situation in which it would not be able to provide profitably universal postal coverage, postal law would guarantee compensation to DPAG.

In addition, the FCO found that in three cases, the target prices were subject to the condition that the bulk mailer uses DPAG for more than 90% of its entire mail volume. According to the FCO, such loyalty rebates additionally foreclosed actual and potential competitors and constituted a separate abuse of dominance.

The investigation was triggered by several complaints. After the FCO had initiated its proceedings in 2012, the objected target price agreements were not extended and expired by the end of 2013. However, since DPAG still takes the position that such agreements were admissible, the FCO considered a declaratory decision necessary, but also sufficient to prevent it from renewing such or comparable agreements. DPAG has appealed the decision to the DCA.[18]

FCJ Once Again Overturns Ruling On Price Control Tests in the Wasserpreise-Calw Case

On July 14, 2015, the FCJ overturned a second ruling by the Stuttgart Court of Appeals regarding price control tests applied by the Cartel Office of Baden-Württemberg (the "Cartel Office") in the *Wasserpreise-Calw* case.[19]

Initially, the Cartel Office had found that a local monopolist water supplier in Calw, a city in Baden-Württemberg, had charged excessive prices, and consequently ordered it to reduce its prices and refund customers the overcharge. To calculate the overcharge, the Cartel Office examined relevant price factors to determine a reasonable reference price. The Stuttgart Court of Appeal held that the Cartel Office should have applied other price control tests, namely

[17] *Konkurrensverket v. TeliaSonera Sverige AB* (Case C-52/09) EU:C:2011:83, para. 72.

[18] *See* FCO case report of July 30, 2015, case B9-128/12, p. 4, available in German on the FCO's website.

[19] FCJ decision of July 14, 2015, case KVR 77/13 – *Wasserpreise Calw II*, available in German at: http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&Sort=3&Seite=13&nr=72263&pos=394&anz=471&Blank=1.pdf. A press release is available in German at: http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2015&Sort=3&nr=71668&pos=0&anz=122.

a comparison of the prices under scrutiny with those charged on similar markets with effective competition (the comparable market principle).[20] On May 15, 2012, the FCJ annulled this first ruling and referred the case back to the Stuttgart Court of Appeals.[21] In its decision, the FCJ held that the comparable market principle was only one of many legitimate tests to be applied in determining excessive pricing. On September 5, 2013, the Stuttgart Court of Appeals again ruled on the test and annulled the decision, referring it back to the Cartel Office.[22] However, on further appeal by the Cartel Office, the FCJ annulled the second ruling by the Stuttgart Court of Appeals on procedural grounds.

The FCJ held that a court may only annul those parts of an administrative decision that it considers to be *ultra vires* as long as the administrative decision is divisible in fact and law. In the case at hand, the FCJ found that the Stuttgart Court of Appeals should not have fully annulled the Cartel Office's decision but rather investigated the facts of the case to determine the appropriate price level to be charged

In an *obiter dictum*, the FCJ further elaborated on the tests to be applied to determine the appropriate price level to be charged, underscoring that the comparable market principle is only one of numerous tests applicable in excessive pricing cases. It further held that a mix-and-match approach of economic theories was permissible to take account of special market conditions.

As to the facts of the case at hand, the FCJ held that a relevance margin (as opposed to a safety margin to be applied for uncertainties in the assessment) is needed to differentiate reasonable deviations in pricing from what could be considered excessive. Yet, it held that this relevance margin may be as low as 3% (or lower) in monopolistic markets.

Mergers and Acquisitions

Monopolies Commission Opposes EDEKA's Proposed Acquisition of Kaiser's Tengelmann

On August 3, 2015 the Monopolies Commission (*Monopolkommission*), the German government's advisory body on competition issues, published a special report on the proposed acquisition of Kaiser's Tengelmann supermarket chain ("Tengelmann") by its competitor, EDEKA.[23] The Monopolies Commission made a recommendation to the Federal Minister for Economic Affairs not to grant (even with commitments) the ministerial authorization requested by EDEKA and Tengelmann.

On March 31, 2015, the FCO had blocked the proposed acquisition of 450 Tengelmann branches by EDEKA because it would significantly impede effective competition in several already highly concentrated regional food retail markets.[24] On April 29, 2015, the parties applied for a ministerial authorization, an exceptional instrument by which the Federal Minister for Economic Affairs can overrule an FCO prohibition decision if the negative effect on competition caused by the transaction is outweighed by benefits to the economy as a whole, or the transaction is justified by an overriding public interest.[25]

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[20] Stuttgart Court of Appeals decision of August 25, 2011, case 201 Kart 2/11, available in German at: http://lrbw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&nr=14702.

[21] *See* National Competition Report July – September 2012, p. 9. The FCJ decision, case KVR 51/11 – *Wasserpreise Calw*, available in German at: http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&Sort=12288&Seite=0&nr=61242&pos=27&anz=656&Blank=1.pdf.

[22] Stuttgart Court of Appeals decision of September 5, 2013, case 201 Kart 1/12, available in German at: http://lrbw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&nr=17800.

[23] *See* Monopolies Commission press release of August 3, 2015, available only in German at: http://www.monopolkommission.de/images/PDF/SG/presse_s70.pdf

[24] *See* FCO case summary from March 31, 2015, case B2-96/14, available at http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Fusionskontrolle/2015/B2-96-14.html?nn=3591568.

[25] Section 42 GWB.

The Monopolies Commission found that the competitive restraints caused by the transaction on both the retail and procurement markets in the food retail sector would be substantial. The acquisition of Tengelmann would strengthen and secure EDEKA's leading market position in the German food retail market. Further, EDEKA's buyer power *vis-à-vis* branded goods manufacturers would be enhanced if Tengelmann were eliminated as an independent purchaser.

The Monopolies Commission stated that there is not enough evidence that these negative competitive effects would outweigh the possibility of securing roughly 5,700 full-time jobs, or other public welfare benefits, and commitments would not change its assessment. In the case of a complete acquisition of all of Tengelmann's 450 branches by EDEKA, restructuring measures would be necessary and due to considerable synergies in production, logistics, and administration, result in job cuts. In particular, the acquisition would lead to duplicate locations of EDEKA's subsidiaries in certain locations, providing incentives to close branches.

Further, the Monopolies Commission held that there is insufficient evidence that an acquisition by EDEKA would secure more jobs than an (partial) acquisition by one or more alternative acquirer(s) (*e.g.*, REWE), which would lead to less substantial competitive restraints.

Although the non-binding deadline of four months from the application expired August 2015, the final decision of the Minister is still awaited.

FCO Clears Participation of German Red Cross in Charité Blood Donation Service

On June 30, 2015, the FCO cleared the proposed acquisition of the Charité Blood Donation Service ("Charité BDS") by a joint venture of Charité—Universitätsmedizin Berlin ("Charité") and DRK-Blutspendedienst Nord-Ost gemeinnützige GmbH ("DRK-B NO").[26] Following an investigation, the FCO found that the acquisition would not strengthen DRK-B NO's dominant position in the supply of red blood cell concentrate within the relevant geographic market of Berlin and Brandenburg.

The FCO distinguished between regional markets for the production and sale of red blood cell concentrate,[27] platelet concentrate, and plasma for clinical application, where both Charité BDS and DRK-B NO are active. As for platelet concentrate, plasma for clinical application and out-patient red blood cell concentrate, the (potential) markets in the relevant geographic market are *de minimis* (defined as total sales of less than €15 million), and therefore under the GWB cannot be prohibited.[28]

Regarding the sale of red blood cell concentrates—the largest market concerned—DRK-B NO holds a share of over 80% and Charité BDS has sales of less than 10%. However, the FCO held that the acquisition of Charité BDS would not render the joint venture dominant (as it is currently only active in the distribution of concentrate and plasma), nor strengthen the dominant position of DRK-B NO as a controlling parent company. According to the FCO, Charité BDS's sales are modest and apart from emergency supply to other hospitals, its sales are primarily to the Charité. This is not expected to change post-transaction Therefore Charité BDS will not compete actively against DRK-B NO for the supply of other hospitals or doctors. Further, Charité BDS's production does not even fully cover Charité's requirements which as a public body has to issue invitations to tender blood products. Consequently, the FCO concluded that DRK-B NO's indirect share in Charité BDS would not give it an advantage when competing for Charité's additional demand.

[26] *See* FCO decision of June 30, 2015, case B 3 – 60/15 available in German at: http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Fusionskontrolle/2015/B3-60-15.pdf?__blob=publicationFile&v=2.

[27] The FCO further considered whether the market for red blood cell concentrate would have to be sub-divided into an in- and out- patient market, but ultimately left this question open for lack of relevance to the present case.

[28] *See* GWB Section 36(1) sentence 2 no. 2.

FCO Takes Stand on the Treatment of Platform Markets in Recent Merger Decision

On July 24, 2015, the FCO unconditionally approved the acquisition of Verivox by ProSiebenSat.1 Media AG.[29]

Verivox is a leading online comparison website with a strong focus on electricity and gas markets. Verivox's business model is the mediation of contracts between consumers and suppliers (*e.g.*, electricity and gas suppliers) in return for a fee paid by the suppliers. ProSiebenSat.1 is one of two major providers of television advertising space in Germany.

While ultimately leaving the exact market definition open, the FCO provided important insight as to its understanding and legal assessment of platform markets.

According to the FCO, platform markets are typically two-sided markets, but differ from other two-sided markets (*e.g.*, advertising based online search markets) as remuneration requires both user groups (*i.e.*, consumers and suppliers) to have a contract. Therefore both sides of the platform should generally be considered as being parts of one coherent market.

The FCO found it unlikely that preferable access to television commercial time for Verivox post-merger would increase the likelihood for Verivox to become the only platform serving the market, partly because offering Verivox more favorable conditions for television advertising would result in missed earnings from other advertisers and also due to the multi-homing strategy of suppliers and sufficient competing offerings by other platform providers.

Finally, the FCO found that platform markets are generally less prone to coordinated effects due to the need to coordinate multiple parameters on two sides of the coherent platform market. Based on this unique characteristic of the platform market, as well as the different focus of Verivox and competitor Check24, the FCO determination that coordinated effects would be unlikely, despite high barriers to entry and combined shares of these two companies on several hypothetical "markets" of more than 95%.

FCO Clears Merger Between Automotive Spare Parts Wholesalers Subject to Conditions

On August 13, 2015, the FCO cleared the acquisition of Trost Auto Service Technik SE ("Trost") by Wessels & Müller SE ("W&M") subject to conditions after an in-depth investigation.[30]

The parties are active in the market for the sale of automotive spare parts to independent car repair shops. The FCO found this market constituted a separate market from the market for automotive spare parts for OEMs, given that independent repair shops do not exclusively work for one specific car manufacturer and hence need to be provided with a wide range of spare parts for all brands and types of vehicles. Further, the FCO distinguished between a spare parts market for passenger cars and for utility vehicles. The FCO found the geographic market to be regional in scope because due to their limited storage capacities, the independent repair shops rely on quick and regular delivery of spare parts through wholesalers' local branches.

The FCO held that the acquisition of Trost's local branches by W&M would cause a significant impediment to effective competition between wholesalers in the regional markets of Frankfurt, Darmstadt, Heilbronn, Braunschweig and Magdeburg. W&M would have become the undisputed leader in most of the affected markets (with market shares exceeding 40%) and the transaction would remove Trost as one of W&M's most important competitors. Moreover, the FCO held that the merger would further strengthen W&M's access to supply and procurement markets where W&M is

[29] *See* FCO Activity Report on case B8-67/15, decision of July 24, 2015, available in German at: http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Fusionskontrolle/2015/B8-67-15.pdf?__blob=publicationFile&v=2.

[30] *See* FCO decision of August 13, 2015, case B9-48/15; a case summary in German is available at: http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Fusionskontrolle/2015/B9-48-15.pdf?__blob=publicationFile&v=3.

already today cooperating with Stahlgruber/PV, its strongest competitor in Germany, through the purchasing group "Auto Teile Ring." Finally, according to the FCO, internet traders are not a significant competitive force because they mainly target retailers and consumers and cannot provide just-in-time deliveries.

The merger was cleared subject to the condition that the parties divest one or more of their local branches to an independent third party, thereby removing overlaps in all regional markets except for Stuttgart where the incremental increase in market shares is low. Further, WM committed to exit the purchasing group "Auto Teile Ring."

DCA Confirms the FCO's Decision to Block the Acquisition of a Slaughterhouse Operator By a Competitor

On July 1, 2015, the DCA rejected meat producer's Tönnies Holding GmbH & Co. KG's ("Tönnies") appeal against the FCO's decision to block its acquisition of competing slaughterhouse operator, Heinz Tummel GmbH & Co. KG ("Tummel").[31] The FCO had prohibited the takeover as it would have strengthened Tönnies's dominant position in the German market for the purchase of cull sows and for the distribution of sow meat to meat processors.

In its decision, the DCA largely agreed with the FCO's reasoning. The court found that Tönnies alone already holds high market shares on the affected markets that are characterized by only a few large players, in addition to a number of medium-sized companies. Further to Tönnies's lead over its competitors in terms of market shares, Tönnies also possesses far superior financial strength and is also the only completely vertically integrated producer. In the court's opinion, the merger would have further strengthened Tönnies's position while at the same time further weakening its competitors' position.

The DCAs did not grant Tönnies leave for appeal to the FCJ therefore the decision is binding.

Policy and Procedure

Monopolies Commission Publishes Special Report on Competition in the Railway Sector

On July 22, 2015, the Monopolies Commission published its fifth Special Report on competition on railway markets (the "Report")[32] reviewing the pending railway regulation bill[33] and giving policy recommendations. The Report concludes that Deutsche Bahn AG ("DB")'s business divisions should be unbundled.

The Report identifies access to rail infrastructure as the main impediment for competition in the railway sector. In Germany, DB acts as both the most important provider of rail infrastructure and the biggest transportation provider for the segments of passenger transport (both long-distance and regional services) and rail cargo.

The Monopolies Commission stresses that the only way to establish undistorted competition in the German railway sector is to completely unbundle the infrastructure and transport divisions of DB. The Report recommends to adapt laws for the financial and organizational separation of rail infrastructure and transport divisions in the short term and to disintegrate and privatize the globally active transport and logistics divisions DB Schenker Logistics and DB Schenker Rail GmbH as a first step.

Other policy recommendations focus on the regulation of the prices for the use of the rail infrastructure and other access conditions. The Report also emphasizes that the legislator should strengthen the Federal Network Agency's powers to obtain information and to monitor in particular the terms of use of rail infrastructure and service facilities.

[31] *See* DCA decision of July 1, 2015, available in German only at: https://www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2015/V_2_Kart_1_2_13_OWi_Urteil_20150529.html.

[32] *See* the Monopolies Commission's Special Report, available in German at: http://www.monopolkommission.de/images/PDF/SG/s69_volltext.pdf; press release available in English at the Monopolies Commission's website: http://www.monopolkommission.de/images/PDF/SG/press_s69_eng.pdf.

[33] Gesetz zur Neuordnung der Regulierung im Eisenbahnbereich, Draft of January 21, 2015.

FCJ Further Strengthens Customer's Right of Access to the File in Cartel Proceedings

On July 14, 2015, the FCJ[34] upheld a 2014 Higher Regional Court of Frankfurt judgment[35] by which the Frankfurt Court had quashed a decision by the Hessian federal state cartel authority for energy and water ("the Authority"), which in proceedings against a drinking water supplier had rejected access to the file requested by a customer of this supplier.

In 2009, the Authority initiated proceedings against the drinking water supplier, accusing the supplier of an abuse of its dominant position and of overcharging prices by 39%. In September 2013, following the supplier's offer to reduce prices by 20%, the Authority reached a settlement with the supplier and subsequently issued a commitment decision. The customer requested access to the file in order to gather information for a potential civil damages claim only a few days after the settlement was concluded.

The FCJ affirmed the Frankfurt Court's finding that although the customer—as a third party—had no specific right of access to the file stemming from a potential admission to the cartel proceedings, the GWB, or the German Federal Freedom of Information Act, he had indeed a right to a lawful discretionary decision by the Authority. The Authority is required to exercise its discretion—which it had not done before—by balancing the customer's interests against its own interests as well as those of the parties involved in the cartel proceedings.

The FCJ confirmed that the customer's intention to launch a civil damages action constitutes a legitimate interest. Getting access to the file would be pivotal for him because in contrast to a prohibition decision, a commitment decision does not have any binding effect in civil proceedings under German law. In the FCJ's view, such access in a pre-trial setting affords the opportunity to gather proof without having to launch an unsubstantiated action and bear the associated cost risk. Further, the FCJ held that in contrast to the CJEU's case law on access to the European Commission's files,[36] a third party applicant is not required to identify individual documents to be revealed given that he is normally not aware of the file's specific content.

The customer's interest needs to be weighed against the authority's interest to minimize efforts and expenses when granting access and, in particular, the drinking water supplier's interest in the protection of business secrets. While such opposing interests cannot *per se* hinder access to the file, they might well call for the implementation of protective measures such as the partial disclosure of documents (in this respect, the FCJ refers to measures foreseen in the new EU Damages Directive for the absolute protection of leniency statements)[37] or the redaction of sensitive information.

Sectoral Investigations

Publication of FCO´s Report on Divestitures in the Rolled Asphalt Industry

On July 17, 2015, the FCO published a report on the status of the divestiture and dissolution proceedings it had initiated following a sector inquiry into the market for rolled asphalt.[38] The report provides an overview of the

[34] *See* FCJ decision of July 14, 2015, case KVR 55/14, available in German at: http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=72306&pos=0&anz=1.

[35] *See* Higher Regional Court of Frankfurt decision of September 9, 2014, case 11 W 3/14 (Kart), available in German at: http://www.lareda.hessenrecht.hessen.de/jportal/portal/t/g76/page/bslaredaprod.psml?doc.hl=1&doc.id=KORE222472014&documentnumber=2&numberofresults=4&showdoccase=1&doc.part=L¶mfromHL=true#focuspoint.

[36] *See Commission v. EnBW Energie Baden-Württemberg AG* (Case C-365/12 P) EU:C:2014:112, paras. 101 *et seq.*

[37] *See* Article 6(6) of the Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

[38] *See* FCO report of July 17, 2015, available in German at: http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Sektoruntersuchungen/Sektoruntersuchung_Walzasphalt_Bericht_Entflechtungen.pdf?__blob=publicationFile&v=3; press release available on the FCO's website: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/17_07_2015_Walzasphalt.html.

objective, the progress and the results of the proceedings, as well as the criteria applied in the assessment of the individual cases.

Upon completion of its inquiry in 2012, the FCO concluded that the rolled asphalt sector was characterized by a dense network of corporate links between competitors. Reciprocal shareholdings were a common feature of the industry. Approximately 50% of all asphalt plants were set up as joint ventures ("JVs"): The four major suppliers, Werhahn, STRABAG, EUROVIA, and KEMNA, accounted for a combined market share of approximately 60% and held stakes in 405 of the 550 asphalt plants, of which 60% were JVs.

The FCO had investigated 130 JVs and applied the rebuttable presumption that the JV agreement was restrictive (under s.1 GWB) if the JV and at least two of its shareholders operated in the same product and geographical market. More than half of the investigated rolled asphalt JVs fell into this category and the four major competitors held stakes in nearly all of them. Even where all conditions of the presumption were not formally met, the FCO found that, under certain circumstances, some of the JVs increased the likelihood of coordinated behavior. This was the case, for instance, where only one of the shareholders was active in the same market as the JV and another shareholder held a non-controlling stake in another company operating in the same market, or where it could be evidenced that the shareholders and the JV in fact exchanged competitively sensitive information. The FCO requested the companies concerned to self-assess compliance with competition law and to bring any infringements to an end (*e.g.*, to dissolve JVs) within 15 months.

As a consequence of its findings, the FCO opened proceedings relating to 104 JVs with the aim of introducing more effective competition in the rolled asphalt market by dissolving anticompetitive company interlocks. Ninety-six proceedings have been completed thus far and the corporate links were eliminated in 71 cases. The FCO identified and terminated numerous exchanges of information and anticompetitive contracts between competitors. In 25 cases, the FCO closed the proceedings without eliminating links. This was possible due to the positive effects resulting from the restructuring of other JVs. In the eight remaining cases unbundling measures were either non-existent or unsatisfactory and therefore have yet to be completed. The improved market structure should notably benefit small regional road constructors by improving their choice of suppliers.

GREECE

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

Decision of the Hellenic Competition Commission no. 612/2015 Rejecting Complaints on Horizontal Collusion Among the Five Tobacco Companies in Greece

In July 2015, the Hellenic Competition Commission issued its Decision no. 612/2015, rejecting the complaints made by a number of tobacco wholesalers and their associations regarding alleged horizontal collusion among the five tobacco companies in Greece, *i.e.* PAPASTRATOS (Philipp Morris), BRITISH AMERICAN TOBACCO, KARELIAS, ATHANASIOU (distributor of Japan Tobacco) and IMPERIAL TOBACCO.

Towards the end of the year 2012, the market leader, PAPASTRATOS, announced a change in its distribution system whereby the longstanding commercial collaborations between approximately 100 tobacco wholesalers in the area of Athens and Piraeus were terminated, and a handful of wholesalers were appointed as exclusive distributors within this area. This represented the biggest market for tobacco products within in the Greek territory. Within a span of a few weeks, the other four tobacco companies, also terminated their long standing collaboration with the same 100 wholesalers in this area, and concluded distribution agreements (some companies

concluded exclusive and some non-exclusive) with a small number of common wholesalers (different from those of PAPASTRATOS). A small number of common distributors were also appointed by them in the big cities of Patras and Thessaloniki. According to the complaints, these actions were attributable to collusion.

Upon examination of the evidence, the HCC concluded that no collusion had taken place between the tobacco companies. Since then, however, each tobacco company has submitted agreements with the new distributors which have raised certain competition concerns. The HCC applied its recent "Commitments Procedure" and requested that the tobacco companies amend certain terms of their distribution agreements. Following these amendments, the HCC decided not to open an investigation.

As regards horizontal collusion, the HCC examined the aforementioned wholesalers' allegations and the evidence collected during dawn raids at the tobacco companies' offices. It came to the conclusion that only isolated and sporadic evidence existed which was not sufficient to establish the existence of coordination among the tobacco companies.

On the contrary, it found that the selection of the same distributors by the four tobacco companies could constitute a reasonable business reaction to the decision of the market leader, PAPASTRATOS, to change and modernize its distribution network. The appointment of the same distributors for their networks had an economic reasoning in that none of the four tobacco companies held a sufficient market share capable of sustaining a dedicated distribution network. The tobacco companies had called on interested wholesalers to submit a business plan. The same distributors were chosen from the wider pool because of their business plans, evidenced by the fact that other tobacco companies had selected to use their services, thereby demonstrating confidence in their economic soundness. This was important because the previous regime, whereby all tobacco companies collaborated with all wholesalers, was considered ineffective and also exposed the tobacco companies to considerable financial risks.

Moreover, the HCC found that the establishment of the new network neither aimed to, nor resulted in, the imposition of similar prices or credit policies from the tobacco companies to the distributors, or from the distributors to the retail points (kiosks, etc.). In addition, the HCC did not find that similar terms were used by the tobacco companies in their new distribution agreements concerning the supply, marketing, and distribution of their products. There were no terms on exchange of information regarding production volumes, prices etc. In fact, the agreements entered into by each of the four companies and the common distributors contained significant differences.

In terms of the commitments, the HCC examined the possible restrictions on competition arising from the new distribution agreements entered into by each of the four companies with the common distributors, *i.e*. restrictions of a vertical nature, and whether the commitments procedure established by virtue of its Decision 588/2014 could apply to them.

Following a preliminary examination of the agreements submitted by the tobacco companies, the HCC concluded that some terms could indeed restrict competition. Concerns were raised regarding customer and territorial limitations on distributors, as well as the opportunity of other tobacco companies to exchange sensitive information.

To address the aforementioned concerns, the HCC requested that the four tobacco companies propose commitments with the aim of ensuring that exclusive distributors would be able to perform passive sales outside their territory and also to sell to all customers therein (wholesalers, authorized distributors and retailers). As far as the non-exclusive distributors, it wanted to ensure that they would be able to perform both active and passive sales to any customer (wholesaler, authorized distributor or retailer). For both categories, it wished to make certain that

any exchange of information between the company and its distributors would exclude sensitive information about the company's competitors.

The commitments were found to sufficiently address the concerns raised by the HCC and accepted as binding. Although not part of the complaint, the companies also agreed to amend existing agreements with their distributors in other areas of Greece *i.e.*, regions outside of Athens, Patras, and Thessaloniki.

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 Council of State Partially Annuls a TAR Lazio Judgment Concerning the Calculation of the 10% Turnover Cap Applicable to Antitrust Fines

On July 2, 2015, the Council of State partially annulled a judgment by the TAR Lazio, which had reduced the sanction imposed by the IICA on Metalmeccanica Fracasso S.p.A. ("MF") for its direct participation in a cartel.[39]

The ICA had calculated the amount of the fine with reference to MF's sales in the market affected by the cartel during the last year of the infringement (*i.e.*, in 2006).[40] However, in calculating the 10% turnover cap, the ICA made reference to the turnover of the legal entity which was the recipient of the infringing assets transferred in December 2007, Fracasso S.p.A. ("F"), a wholly owned subsidiary of MF.

The TAR Lazio found that the ICA had wrongly considered F's turnover for the purposes of the application of the 10% turnover cap.[41] It maintained that the 10% turnover cap had to be calculated taking into account the turnover of the mother company (MF), which in this case had been directly responsible for the infringement, even if the infringing assets had been subsequently transferred to a subsidiary (F).

The Council of State partially annulled the judgment as regards the quantification of the fine. It determined that the ICA was correct to refer to F's turnover for the purpose of calculating the 10% turnover cap, considering this compliant both with Italian competition law and the Commission's guidelines on the method of setting fines.[42] The Council of State determined that only taking into account only the turnover of the legal entity that transferred the infringing assets (which, in the case at hand, was significantly lower than that of the subsidiary, to which the infringing assets had been transferred), would encourage elusive behavior. It further asserted that when calculating the fine, all business activity related to the infringement must be considered irrespective of any formal restructuring or change in legal ownership of the infringing assets.

The Council of State's approach differs from EU case law and decisional practice, according to which the 10% ceiling applies to the consolidated turnover of the group to which the infringing company belongs (*i.e.* it is calculated against the total turnover of all companies constituting the economic entity acting as an single "undertaking" for antitrust purposes). The consolidated turnover achieved at the global level is an indicator of the overall size and economic capacity of the undertaking. Anchoring the maximum threshold amount to this value results in an effective deterrent,, preventing the "screen" of the formal

[39] Council of State, Judgment No. 3291 of July 2, 2015.

[40] *Intesa nel mercato delle barriere stradali* (Case I723), ICA decision of September 28, 2012.

[41] TAR Lazio, Judgment No. 8674/2013.

[42] In particular, Article 15 of the Competition Law of October 10, 1990, No. 287; European Commission, Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003, OJ 2006 C 210/02.

articulation in distinct companies, each with its own legal personality, from clouding an accurate perception of the undertaking's real economic dimension.

The Council of State Annuls Two Judgments by the TAR Lazio on the ICA's Powers to Re-determine Fines and Impose Penalties for Delay in Fine Payment

On September 12, 2012, following two judgments by the TAR Lazio confirming the existence of an infringement of competition law, but ordering the ICA to re-determine the original fines imposed on Italsempione S.p.A. and Albini&Pitigliani S.p.A. for their participation in a cartel, the ICA re-determined the fines by deducting from the fine calculation an aggravating circumstance previously included.[43] The amount of the fines, as re-determined by the ICA, remained unchanged because, notwithstanding the above-mentioned deduction, the final amount continued to exceed the 10% statutory cap. Furthermore, the ICA applied fine increases for delay in the fine payment because it considered that the deadline for their payment was the one set forth in the original administrative decisions imposing them. Pending the TAR judgments, the companies had not yet paid the fines.

Both companies challenged the ICA's new decisions before the TAR Lazio, contesting the re-determined amount of the fines and the imposition of fine increases. The TAR Lazio upheld the appeals stating that the ICA had failed to follow the order set in the TAR judgments, according to which the aggravating factor should have been deducted from the *final* amount of the fine, which did not emerge expressly capped at the 10% turnover in the first decision.[44] It also held that the ICA was not entitled to impose an increase for delay in payment, as any delay could only start running from the expiry of the deadline set in the decision re-determining the fines for the payment of the latter.[45]

On August 14[46] and September 4, 2015,[47] the Council of State reversed the judgments by the TAR Lazio, stating that, if a fine is not annulled but only re-determined, delay in payment can be sanctioned from the expiry of the deadline for payment set in the original decision. It also found that, if the second decision reduces the fine, the basis for the calculation of the penalty for late payment is the amount as re-determined. According to the Council of State, the fact that the fine amount is re-determined does not mean that the companies are allowed to delay payment for the part of the fine still due according to the final decision. On the other hand, delay in payment of the part of the fine annulled has no legal consequences, as nothing is due for that portion of the original fine.

The Council of State further stated that the 10% turnover cap is an upper limit aimed exclusively at correcting excessive fines in their final amount, and thus the last step in their quantification. When re-determining fines, it appears "preferable" to deduct aggravating circumstances from the basic amount of the fine (rather than from the final capped amount) with the consequence that the final re-determined amount can lawfully remain unchanged compared to the original amount.

However, on this specific issue, the companies asked the Council of State to refer the case to the ECJ for a preliminary ruling on the compatibility of this practice taking

[43] Logistica internazionale-Albini & Pitigliani/Rideterminazione sanzione (Case I722C), ICA decision of September 12, 2012; Logistica internazionale-Italsempione/Rideterminazione sanzione (Case I722D), ICA decision of September 12, 2012.

[44] In particular, the TAR Lazio held that the original ICA decision did not expressly mention the application of the 10% cap, and thus the final amount of the original fine simply resulted from the application of the aggravating and mitigating circumstances to the basic amount (in contrast with the view taken by the ICA in its decision re-determining the fine). The re-determination should have therefore been applied to this amount.

[45] TAR Lazio, Judgment No. 3718 of April 11, 2013, annulling the decision re-determining the fine for Albini&Pitigliani S.p.A.; TAR Lazio, Judgment No. 876 of January 24, 2013, annulling the imposition of the fine increase on Albini&Pitigliani S.p.A.; TAR Lazio, Judgment No. 3724 of April 11, 2013, annulling the decision re-determining the fine and the imposition of the fine increase on Italsempione S.p.A.

[46] Council of State, Judgment No. 3944 of August 14, 2015, *ICA v. Italsempione S.p.A.*

[47] Council of State, Judgment No. 4114 of September 4, 2015, *ICA v. Albini&Pitigliani S.p.A.*

into consideration the principle of proportionality enshrined in Article 49(3) of the Charter of Fundamental Rights of the European Union. The Council of State accepted the request and consequently ordered suspension of the proceedings and transmission of the case documents to the ECJ.

The TAR Lazio Annuls Three Decisions of the ICA Applying an Increase in Antitrust Fines for Delay in Payment

On July 13[48] and August 17, 2015,[49] the TAR Lazio annulled three decisions[50] of the ICA ordering three companies to pay a penalty for delay in payment of their antitrust fines pursuant to Article 27, paragraph 6, of Law No. 689/1981. In two of these cases, the original fines had been reduced by the TAR Lazio,[51] and then again increased on appeal by the Council of State.[52] The companies concerned then paid the difference between the amount imposed by the TAR Lazio (which they had already paid) and the higher amount subsequently set by the Council of State. In the third case, the company concerned had not paid the original fine, which had been annulled by the TAR Lazio,[53] but paid it only when the ICA re-determined its amount according to the indications provided by the Council of State in its appeal judgment confirming the existence of the infringement and reinstating the fine.[54]

In all three cases, the ICA ordered the payment of penalties for delay in payment of the main fines and, on the basis of a principle stated by the Italian Supreme Court in Judgment No. 23318/2009, considered the delay to run from the expiration of the deadline set in the decisions imposing the original fines. According to the Supreme Court's judgment, fining powers exclusively belong to public administrative bodies, and fine revisions by administrative courts do not constitute exercise of such power. In the judgments under examination, the TAR Lazio set aside these new ICA decisions imposing the penalties. The TAR Lazio maintained that a fine increase for delay in payment, considering its sanctioning nature, can only be imposed when the delay is attributable to the company concerned—a condition which was not satisfied for the companies in this case. The companies involved could not have known the final amount of the fines, nor of their very existence (and consequently pay them), before the conclusion of the appeal judgments (in the first two cases) or before the adoption of the new ICA decision re-determining the fine according to the criteria fixed by the Council of State (in the third case).

According to the TAR Lazio, the Supreme Court's judgment was not a relevant precedent because it referred to the different case in which the fine had been reduced (not increased) on appeal, and nothing had been paid by the undertaking in regards to pending litigation. Furthermore, the TAR Lazio found that the Supreme Court's view on fining powers had been superseded by the entry into force of the new Italian Code of Administrative Procedure,[55] which confers to administrative courts a wider jurisdiction which in certain circumstances can also extend to the

48 Boat Boero Attiva Marine & Protecting Coating Genova SpA v Italian Competition Authority (Judgment 9352/15) and PPG Italia Sales & Services Srl v Italian Competition Authority (Judgment 9353/15).

49 Piombifera Bresciana Srl v Italian Competition Authority (Judgment 10843/15).

50 Respectively, ICA, Note No. 52809 of December 5, 2012 for Boat Boero Attiva Marine & Protecting Coating Genova SpA; Secretarial Office of the ICA, Communication No. 52806 of September 5, 2012, for PPG Italia Sales & Services Srl; ICA, Payment Solicit No. 34724 of June 28, 2013, for Piombifera Bresciana S.r.l.

51 TAR Lazio, Judgment No. 14157 of December 29, 2007.

52 Council of State, Judgment No. 3189 of May 29, 2012.

53 TAR Lazio, Judgment No. 4403 of May 16, 2012.

54 *Riciclaggio delle batterie esauste-Rideterminazione sanzione* (Case I697B), ICA decision of November 30, 2011; and Council of State, Judgment No. 3013 of May 20, 2011.

55 Legislative Decree No. 104 of July 2, 2010, Articles 7, 34 and 134.

merits of the case, including the imposition of pecuniary sanctions.

Accordingly, the judgments of the Council of State re-determining the fines (in the first two cases) or the new ICA decision re-determining the fine according to the criteria set out by the Council of State (in the third case), replaced the ICA's original administrative decisions, the consequence being that any delay for payment could run only from the expiration of the deadline for payment fixed in the last relevant decision (in the present cases, the two judgments of the Council of State or the new ICA decision based on the Council of State's judgment).

Abuse of Dominance

The ICA Accepts Commitments Offered by Two Consortiums Active in the Management of Plastic Packaging Waste with Respect to Potentially Exclusionary Conduct

With a decision of September 3, 2015,[56] the ICA accepted commitments offered by CONAI and COREPLA, two consortia active in the management of packaging special waste (*i.e.*, waste produced by non-domestic users). The ICA thereby closed the proceedings which it had initiated on the basis of Article 102 TFEU. The case is noteworthy because the illegal conduct identified by the ICA comprised, *inter alia*, abuse by the dominant undertaking of its role in an administrative procedure necessary for allowing a competitor to enter the market. This type of conduct has recently gained the attention of competition authorities as a novel means for an incumbent to abuse its position in the market.

CONAI is a consortium (mandated by law) which brings together packaging manufacturers and users, with a view to financing and organizing the collection and recycling of packaging waste. With respect to plastic packaging, CONAI carries out its activities through COREPLA, a consortium representing plastic packaging manufacturers and users.

The ICA initiated proceedings following a complaint by Aliplast, a company specializing in the collection, recycling and recovery of plastic packaging. Aliplast had created an autonomous system for managing its own packaging waste (the "Sistema P.A.R.I."), with the exception of a small portion that still needed to be processed through CONAI's infrastructure. In its complaint, Aliplast reported that the consortia were abusively hampering the entry of Sistema P.A.R.I. into the market for the management of plastic packaging special waste by creating obstacles to Sistema P.A.R.I.'s recognition by the Ministry of the Environment. In fact, autonomous systems need to be duly authorized by the Ministry of the Environment in the context of an administrative procedure featuring CONAI as an advisor.

In its decision to open an investigation, the ICA found that CONAI had seemingly enacted the exclusionary strategy reported by Aliplast in three ways. First, CONAI had abused its advisory position by raising a number of objections with the exclusive purpose of hindering Sistema P.A.R.I.'s authorization. Second, CONAI had refused to quantify the fee owed to it by Aliplast for its residual recycling activities. According to the ICA, this refusal to deal was instrumental because an agreement with Aliplast on this matter was an essential condition for recognition. Third, CONAI had disseminated disparaging remarks concerning Sistema P.A.R.I., which could negatively influence consumers.

CONAI and COREPLA offered a number of commitments which the ICA considered sufficient to address its concerns. First, the consortia committed to appointing an independent monitoring trustee to advise the Ministry of the Environment in the context of the recognition procedure. Second, the consortia committed to begin negotiations with the autonomous systems in order to determine the fee for the portion of their packaging activities that continued to be handled by CONAI. Third, they committed to publishing on CONAI's website detailed information regarding the

[56] Conai-Gestione rifiuti da imballaggi in plastica (Case A476).

autonomous systems, and to avoid influencing users on the legitimacy of such systems.

NETHERLANDS

This section reviews developments under the Competition Act of January 1, 1998 (the "Competition Act"),[57] which is enforced by the Netherlands Authority for Consumers and Market (Autoriteit Consument & Markt, "ACM").[58]

Decisions

First ACM Cartel Settlement Decision in Natural Vinegar Case

On June 25, 2015, the ACM issued its decisions on the natural vinegar cartel—its first-ever cartel settlement decisions modelled on European Commission practice.[59] The ACM found that two manufactures of natural vinegar, Carl Kühne KG (GmbH & Co.) and Kühne GmbH (together "Kühne"), as well as De Burg B.V., Burg Groep B.V., Burg Beheer B.V., and Groenland Invest B.V. (together "Burg"), had participated in a cartel from October 2001 until July 2012.

Kühne and Burg, the two most important suppliers of industrial natural vinegar in the Netherlands, agreed to maintain the status quo regarding seven customers, and to this end, made an arrangement as to the price they would offer to each other's customers. Additionally, in case of customers' unexpected volume shifts, Kühne and Burg agreed to compensate each other.

The ACM found these practices to be in breach of Article 6 of the Dutch Competition Act and of Article 101(1) TFEU. On that basis, it imposed a €1.8 million fine on Burg. Kühne however obtained 100% reduction and escaped a €4.6 million fine because it was the first undertaking to file a leniency application. Individual decisions have been issued in respect of five (former) employees of Kühne and Burg for their involvement in the cartel.

The ACM applied its "simplified settlement procedure." This procedure entails a fine reduction of 10% for the undertakings involved in exchange of their written acknowledgement of the facts and legal assessment as found by the ACM. The procedure typically speeds up the process and results in a shorter simplified decision.

During the Annual Conference on Developments in Competition Law in October 2015, Chris Fonteijn, the chairman of the board of the ACM, said that both the ACM and undertakings under investigation benefit from the simplified settlement procedure because it offers efficiency gains to all parties by way of a swift handling of the decision.[60]

Judgments

Trade and Industry Appeals Tribunal allows ACM to Use Evidence From Wiretaps From Other Government Agencies in Cartel Investigations

The Dutch Trade and Industry Appeals Tribunal ("CBb") decided, in two separate judgments of July 9, 2015, that the ACM is entitled to use evidence obtained through wiretaps by other government agencies, in its own cartel investigations and fining decisions, even though it lacks this investigative tool itself.[61]

During the course of an anti-corruption investigation in South Limburg in 2007, the Public Prosecutor contacted the ACM (at that time NMa) because it had uncovered evidence via wiretapping that raised a reasonable suspicion of the existence of pricing agreements between construction companies. The Public Prosecutor shared

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

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

[59] ACM, Case 14.0705.27 (Natuurazijn) decisions of June 25, 2015.

[60] The speech of Mr Fonteijn is available at: https://www.acm.nl/nl/publicaties/publicatie/14807/Speech-Chris-Fonteijn-Congres-Ontwikkelingen-Mededingingsrecht-2015/ (last visited October 31. 2015).

[61] Trade and Industry Appeals Tribunal Judgments of 9 July 2015, ECLI:NL:CBB:2015:193 and ECLI:NL:CBB:2015:192.

these recordings with the ACM which, in December 2008, launched a cartel investigation in the construction sector. In March 2012, the ACM imposed fines totalling €3 million on two companies and their executives for pricing agreements which involved the submission of cover bids for tenders in construction contracts during the period of March to December 2008.

On June 13, 2013, the Rotterdam District Court (the "District Court") overturned the ACM's decisions on appeal.[62] The District Court found that the recordings were criminal records and that sharing such records with third parties needed to be justified by "necessity in view of an important public interest." Since it was unclear if the Public Prosecutor had considered this in the public interest, the District Court held that the ACM was not allowed to use the recordings as evidence.

On higher appeal, the CBb agreed with the District Court finding that the recordings constituted criminal records. However, unlike the District Court, the CBb held that the requirement of an important public interest (in this instance, the economic well-being of the country) had been met. The CBb also held that while a Public Prosecutor's written motivation on sharing the wiretap recordings facilitates the assessment as to whether there was "necessity in view of an important public interest," the lack of such a written statement cannot be construed as denying that this requirement had been met. Furthermore, the CBb dismissed the claim that Article 8 ECHR protecting the right to privacy had been violated; the phones had been tapped with the approval of a judge and the Public Prosecutor was legally entitled to provide recordings to the ACM, as there was no other way in which the ACM could have reasonably obtained this information since price agreements are not usually made in writing. Additionally, the CBb held that by considering the principles of due process in its fining decisions, the ACM had fulfilled its duty to assess the legality of the evidence it received and was entitled to assume it had been gathered legally. Lastly, the CBb held that even though the ACM may not tap phones itself, it may use the recordings received from other bodies that possess this investigative tool.

Interestingly, on the same day, the CBb handed down another judgment, which though differing in facts demonstrated the same analysis as above.[63] This second case concerned wiretap recordings from the information and investigation service of the Ministry of Housing, Spatial Planning and the Environment (VROM-IOD) collected during an investigation into violations of environmental law. These wiretap recordings gave rise to a reasonable suspicion of pricing agreements in the waste-collection sector and were therefore shared with the ACM. In November 2011, the ACM imposed fines on seven companies totalling €3 million. The CBb referred both cases back to the District Court for a substantive assessment of the appeal.

District Court Strictly Interprets the Notion of "Public Undertaking"

In an August 19, 2015 judgment, the The Hague District Court (the "District Court") rendered the first interpretation of the notion of "public undertaking" as laid down in Articles 25j and 25g of the Dutch Competition Act and introduced on July 1, 2012 by the Public Enterprises Market Activities Act (*Wet Markt en Overheid*).[64]

De Koornmolen (the "applicant"), a swimming pool in the municipality of Zuidplas (the "municipality"), had initiated a civil procedure before the District Court claiming that the municipality violated the prohibition of favoring public undertakings over other undertakings when it granted operating subsidies to two competing swimming pools that had been denied to the applicant, resulting in a distortion of competition.

[62] Rotterdam District Court, Judgment of 13 June 2013, ECLI:NL:RBROT:2013:CA3079.

[63] Trade and Industry Appeals Tribunal, Judgment of 9 July 2015, ECLI:NL:CBB:2015:192.

[64] The Hague District Court, Judgment of 19 August 2015, ECLI:NL:RBDHA:2015:9797.

First of all, the District Court noted that the applicant failed to contest the municipality's decision via administrative or judicial appeal procedure. As a result, the District Court relied on the binding force of the municipality's decision. It was undisputed that the foundation operating one of the competing swimming pools was a public undertaking. However, with regard to the foundation operating the other competing swimming pool, the answer was not as clear-cut; it required an assessment of whether the municipality was able to "determine the policy" of the this particular undertaking. According to Article 25g(2) of the Dutch Competition Act, a governmental body is only able to determine the policy of a public undertaking if: (i) it has a majority of the voting rights; (ii) it appoints the majority of the management; (iii) the undertaking is a subsidiary of undertakings falling under (i) or (ii); and lastly, (iv) in other cases laid down by general administrative measure.

Even though in the case at hand, none of the above options were applicable, De Koormolen argued that the articles of association of the other competing swimming pool could not be amended, nor certain contracts entered into, without the municipality's approval, and that the municipality was involved in the undertaking's financial reporting. However, according to the District Court, the list of Article 25g(2) is exhaustive and must be interpreted strictly. Accordingly, the District Court rejected the applicants claims.

SPAIN

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

Anticompetitive Practices

The CNMC Fined DTS and Telefónica €15.5 Million for Their Agreements and Concerted Action Relating to the Acquisition, Resale and Exploitation of Football Broadcasting Rights

On July 23, 2015, the CNMC imposed a €10 million fine on Telefónica de España, S.A.U. ("Telefónica") and a €5.5 million fine on DTS Distribuidora de Televisión Digital, S.A. ("DTS"), for engaging in anticompetitive practices in relation to the acquisition, resale, and exploitation of football broadcasting rights for the 2012–2013 and 2014–2015 seasons, thereby infringing Article 1 of the LDC and Article 101 of the TFEU.

In August 2012, Telefónica and DTS concluded two agreements for the commercialization of the Canal+ Champions League and Canal+ Liga channels.

With regard to the Canal+ Champions League agreement, the CNMC found that DTS informed Telefónica, before its competitors, of its intention to commercialize the Champions League broadcasting rights exclusively to a single telecoms operator. As a result, Telefónica had more time than any other potential buyer to consider and evaluate the possibility of acquiring these rights, and to plan its commercial strategy. Furthermore, according to the CNMC, DTS drafted the terms and conditions of the auction to favor Telefónica and limit competition between pay-TV operators.

As regards the Canal+ Liga agreement, the CNMC established that DTS designed its Liga wholesale offer in a way that favored Telefónica. In addition, as in the Canal+ Champions League agreement, Telefónica was informed of DTS's commercial strategy before its competitors. Also, DTS informed Telefónica of its own Canal+ Liga downstream retail prices. This conferred an advantage upon Telefónica, enabling it to design a commercial and promotional strategy before the start of the football season, in contrast to its competitors.

The CNMC found that DTS favored Telefónica over other pay-TV operators by granting Telefónica preferential treatment for the acquisition of Canal+ Champions League and Canal+ Liga broadcasting rights. In exchange,

Telefónica did not compete with DTS in the upstream market for the acquisition and resale to pay-TV operators of broadcasting rights.

Taking into account the Supreme Court judgment of January 29, 2015,[65] the CNMC concluded that the infringement should be deemed "very serious," which justifies the imposition of a fine of up to 10% of the total turnover of the participating undertakings.

It is noteworthy that these fines were imposed on Telefónica and DTS only three months after the CNMC's conditional approval of the acquisition of DTS by Telefónica. In its authorization decision, the Commission imposed on Telefonica the obligation to enable all its pay-TV competitors to acquire up to a maximum of 50% of the merged entity's premium sports channels, including Canal+ Champions League and Canal+ Liga.

The CNMC Imposed Its Highest Fine Ever for Anticompetitive Practices in the Car Manufacturing and Distribution Sector

On July 23, 2015, the CNMC imposed a €171 million fine—the largest fine it had ever imposed—on 21 car manufacturers and distributors, and 2 consultancies, for a cartel in the Spanish car manufacturing and distribution sector. The CNMC found that the companies exchanged current and future strategic and commercially sensitive information relating to business management, after-sales services, and marketing.

Following a leniency application in June 2013, made by SEAT, S.A. ("SEAT"), the CNMC carried out several dawn raids throughout July, which culminated in the opening of infringement proceedings under Article 1 of the Spanish Competition Act.

[65] Case 2872/2013, Judgment of the Supreme Court of January 29, 2015. According to this judgment, the 5/10 per cent upper limits for fines set out in Article 63(1) LDC do not constitute a capped ceiling, applicable ex post once the fine has been calculated, but rather, they act as the upper limit of a range or scale within which the fine must be determined based on the gravity and the duration of the specific infringement.

In its decision, the CNMC found that the exchanging of information during the period of February 2006 to August 2013, which took place in three different exchange forums and concerned three different areas—business management, after-sales, and marketing—amounted to a single and continuous infringement of Article 1 of the Spanish Competition Act and of Article 101 TFEU.

The CNMC established that the anticompetitive exchanges of information began in the so-called "Brands Club," a forum where business management information was exchanged. In particular, the participants started sharing commercially sensitive information on their distribution strategy, the market performance of their brands, and the margins obtained by the dealers of their respective networks. The participants in this forum later extended the scope of the information exchange to after-sales services and activities, and finally to marketing.

The CNMC characterized the conduct as a restriction of competition by object, and qualified it as a very serious infringement due to its nation-wide geographic scope and the high combined market shares of the participants in the cartel.

Twenty-one car manufacturers and distributors were fined for participating in the cartel. Due to the differences in the degree and the duration of their participation, the fines ranged from 0.10% and 1.30% of their total turnover in the affected market. As leniency applicants, SEAT, as well as Volkswagen Audi España, S.A. and Porsche Ibérica, S.A., (which belong to the same business group), were exempt from their total fine of €39,443 million.

The CNMC also found that two consultancies took part in the infringement, because even if they were not active in the relevant market, they acted as cartel facilitators. By collecting disaggregated commercially sensitive information and elaborating in monthly, quarterly, and annual reports, they acted as intermediaries in the exchange of information, and contributed to sustaining the conduct over time. The key role they played was deemed an

aggravating circumstance in the calculation of their fines, which were set at 2% of their total turnover in 2014.

SWITZERLAND

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

Merger Control

The FCC Clears the Acquisition of Ricardo by Tamedia as well as the Acquisition of JobScout 24 by JobCloud, a Joint Venture Company Held By Tamedia and Ringier

On June 9 2015, the FCC announced that it had opened an in-depth investigation into the purchase of Ricardo by Tamedia. According to the FCC's press release,[66] there were indications that this acquisition might create or strengthen a dominant position in the area of job advertisements. In addition, there were indications that Tamedia/Ricardo and Ringier might be collectively dominant in German-speaking Switzerland in the field of car sales ads. Since 2008, Ricardo has belonged to the South African media group, Naspers, operating the online platforms ricardo.ch and ricardoshops.ch, the car sales platform autoricardo.ch platform, as well as the classified ads platform olx.ch.

On June 16 2015, the FCC announced that it would conduct an in-depth investigation into the purchase of JobCloud by JobScout24. According to the FCC's press release,[67] there were indications that this acquisition would create or strengthen a dominant position in the area of job advertisements. JobCloud operates several Internet portals in the field of job ads, such as jobs.ch and jobup.ch. Ringier and Tamedia each hold a 50% stake in JobCloud. In conjunction with Jobscout24.ch, JobScout24 also operates an Internet portal for employment ads. JobCloud already has a strong position and there were indications that the contemplated concentration might strengthen the (possibly already dominant) position of JobCloud. As a result, the FCC decided to conduct a phase II examination of the effects on competition of the proposed concentration.

The Swiss merger control regime features a very high standard of assessment compared with other jurisdictions, which is sometimes called the "dominance-plus test". According to this test, the FCC can either prohibit or authorize a concentration subject to conditions and obligations, (only) if the investigation indicates that the concentration creates or strengthens a dominant position, is capable of eliminating effective competition, and causes harmful effects that cannot be outweighed by any improvement in competition in another market. On August 25, 2015, the FCC announced that it had cleared the abovementioned concentrations. According to the FCC's press release,[68] while Tamedia and JobCould have been found to hold a dominant position in the area of employment advertising, the contemplated transactions are not capable of eliminating effective competition and subsequently may not be prohibited.

Policy and Procedure

The Revised Notice Regarding the Competition Law Treatment of Vertical Agreements in the Motor Vehicle Trade – Selected Aspects

On June 29, 2015, the FCC reviewed the Notice of October 21, 2002 regarding the Competition Law Treatment of Vertical Agreements in the Motor Vehicle Trade ("MVT-NOT") and its guidelines ("Guidelines to the MVT-NOT"). According to the FCC, the revision takes into account the case law of the FCC, new developments in the market and with regard to the technology, and

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

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

[68] A version in German of French available at: https://www.news.admin.ch /message/index.html?lang=fr&msg-id=58426.

modifications in European and Swiss competition laws. Contrary to the situation in EU law, the revised MVT-NOT ("revised MVT-NOT"), which will come into force on January 1, 2016, will still regulate the sale of new motor vehicles, maintenance and repair services, and the distribution of spare parts (primary and secondary markets).

The cartel prohibition under Swiss law is based on Art. 5 of the Cartel Act. According to this provision, agreements that appreciably restrict competition are prohibited, unless they are justified on grounds of economic efficiency. By contrast, agreements that eliminate competition are prohibited and cannot be justified on grounds of economic efficiency.

The FCC has released a number of Notices on specific subjects, which have de facto force of law, but do not bind courts. Among other Notices, the FCC has released the Notice of 28 June 2010 on the Competition Law Treatment of Vertical Agreements ("Vert-NOT"). This Notice, which is of significant practical relevance, borrows heavily from the 2010 EU block exemption regulation and the respective guidelines.

The current (and the revised) MVT-NOT lists competition restrictions that are not part of the more general Vert-NOT. According to Art. 13 of the revised MVT-NOT, the MVT-NOT has primacy over the Vert-NOT. However, as long as the revised MVT-NOT does not state otherwise, the rules of the Vert-NOT are applicable.[69] Therefore, the regulations of the revised MVT-NOT have to be read within the context of the Vert-NOT and more particularly in connection with selective distribution systems.

The MVT-NOT regulates the admissibility of vertical agreements between different market participants regarding the distribution of motor vehicles, the provision of repair and maintenance services for motor vehicles, and the distribution of spare parts. It indicates, in particular, which agreements will be seen by the FCC as a qualitatively serious impediment to effective competition. The following agreements are examples of agreements that will be deemed as qualitatively serious impediments to effective competition:

- Agreements between motor vehicle dealers and authorized distributors,
  - that limit the sales of motor vehicles by authorised distributors to final consumers, either (a) because they provide that the remuneration of the authorised distributor is varied in accordance with the vehicle's destination or the final consumer's place of residence, or (b) because premium schemes or other arrangements of a financial nature or about the product delivery are made dependent on the vehicle's final destination (Art. 15 (1) revised MVT-NOT);
  - that commit the authorized distributor of new motor vehicles to additionally offer repair and maintenance services or the supply of spare parts (Art. 16 (b) revised MVT-NOT).
- Agreements between motor vehicle dealers and authorized repairers,
  - not to undertake repair services, or grant the legal supplier warranty, cost-free maintenance or any services in the context of a product recall on all vehicles of the affected brand sold in Switzerland or in the EEA. (The provision of these services can therefore not be made dependent on the purchase location (Art. 15 (2) revised MVT-NOT));
  - that oblige authorized repairers to sell new motor vehicles or spare parts (Art. 16 (a) revised MVT-NOT).

In the context of the distribution and purchase of spare parts, the revised MVT-NOT qualifies as qualitatively serious impediments to effective competition:

69 *See* consideration VI revised MVT-NOT.

- Agreements by which the authorized distributors of spare parts are also obliged to provide repair and maintenance services (Art. 16 (d) revised MVT-NOT);
- Agreements that limit the sale of spare parts by members of a selective distribution system to independent repairers (Art. 16 (f) revised MVT-NOT);
- Agreements that limit the sale of spare parts by the spare part producer to members of a selective distribution system, independent market actors or the final consumers (Art. 16 (g) revised MVT-NOT);
- Agreements that limit the free choice of the members of a distribution system to purchase original or equivalent spare parts from a manufacturer or a distributor of these goods, and to use these parts for the repair or maintenance of motor vehicles. (However, the motor vehicle supplier may prescribe the use of original spare parts provided by him for any work in the context of a warranty, free client service or a product recall (Art. 16 (h) revised MVT-NOT)).

Finally, a qualitatively serious impediment to effective competition exists in the event of restrictions on so-called multi-brand sales. In effect, members of a distribution system must be allowed to sell vehicles and spare parts of other brands and provide repair and maintenance services also with regard to vehicles of other brands.

The new guidelines do not contain any notable substantive modifications in comparison to the current MVT-NOT. However, particular attention must be paid to the following aspect: while under the current Guidelines to the MVT-NOT, motor vehicle suppliers are permitted to base their selective distribution system on qualitative criteria only, which consequently gives repairers a right to be part of the garage network if they fulfil these criteria,[70] the revised MVT-NOT gives suppliers the right to select their members exceptionally on quantitative criteria as well. To be allowed to do so, the suppliers have to prove that the feasibility and proper execution of repair and maintenance work could be endangered by the admission of new repairers in their network.[71]

The motor vehicle supplier's obligation to contract with genuine spare part dealers who fulfil the qualitative criteria of the selective distribution system has been deleted in the revised MVT-NOT.

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").

CMA Adopts Infringement Decision on Information Sharing and Price Fixing in the Ophthalmology Sector

On August 20, 2015, the Competition and Markets Authority ("CMA") issued a final infringement decision in which it imposed fines against the Consultant Eye Surgeons Partnership ("CESP") Limited for anti-competitive information exchange and price fixing in the ophthalmology sector. CESP is the largest organization of consultant eye surgeons in the United Kingdom, representing around 200 consultants grouped into 37 limited liability partnerships ("LLPs").

Based on a complaint submitted in mid-2013, the Office of Fair Trading ("OFT") initiated a probe into the alleged behavior. In May 2015, CESP expressed to the CMA its willingness to cooperate with the investigations, and entered into settlement discussions. In July 2015, a settlement agreement was signed and the CMA subsequently addressed its statement of objection to CESP.

In its final decision, the CMA identifies three infringements: First, CESP circulated among its members information concerning their respective price lists to be adopted towards insurers for the most common ophthalmic

[70] So-called obligation to contract; *see* paragraph 6 of the current Guidelines to the MVT-NOT.

[71] Paragraph 26 of the revised Guidelines to the MVT-NOT.

procedures. This allowed the different LLPs to predict with certainty their respective pricing policies and resist downward pressure on prices exerted by insurers. Moreover, this price-setting policy prevented the passing on of cost savings to insurers, and ultimately consumers. Secondly, CESP coordinated the reaction of all LLPs against a particular insurer's initiative aimed at reducing price for ophthalmic procedures and increasing the pool of fee-assured consultants. CESP recommended that members delist this insurer and charge its' insured patients higher self-pay fees. Finally, CESP facilitated the exchange of commercially sensitive information among LLPs concerning a proposal presented by a private hospital group, and ultimately recommended they reject it.

Dismissing CESP's arguments, the CMA held that these actions could not be considered as objectively necessary to enter the relevant market, and therefore fell within the scope of Article 101(1). With respect to the assessment of possible efficiencies which could have exempted CESP from liability under Article 101(3), the CMA found that CESP had not been able to provide sufficient evidence in support of its claims.

In light of these findings, the CMA imposed on CESP a fine of GBP 500,000. However, this amount was reduced to GBP 382,500 in consideration of the cooperation offered by CESP during the investigation, the efficiencies for the CMA resulting from the conclusion of the settlement agreement, as well as the adoption by CESP of a comprehensive antitrust compliance program.

CMA Provisional Findings in the Energy Market Investigation

On July 7, 2015, the Competition & Markets Authority ("CMA") issued a report of provisional findings concerning its investigation into the supply or acquisition of gas and electricity in Great Britain.[72] The investigation was instigated in June, 2014, following a reference by the Gas and Electricity Markets Authority.[73]

The CMA found that in the wholesale gas market, the scope to exercise unilateral market power was low and the lack of price transparency did not create a barrier to entry. It did not find any features which could lead to an AEC.

In the electricity market, the CMA found that no single generator of electricity could exercise sufficient unilateral market power to raise wholesale spot prices and earn excessive profits. It also concluded that there was no systemic technical inefficiency arising from market rules concerning self-dispatch (the process by which individual operators optimize output to meet overall demand).

The CMA did find, however, that the absence of locational pricing for losses arising from the current regulatory regime may constitute an AEC.

As regards imbalanced price reforms, and the move to a reserve scarcity pricing system, the CMA did not find evidence that these would be problematic. As to the Capacity Market, the CMA provisionally considered that a capacity mechanism was likely to increase investment incentives and would thus be procompetitive.

The CMA found that the current Contracts for Difference ("CfD") allocation process could constitute an AEC, as a large proportion of the available CfD budget was allocated outside the competitive process and better monitoring of the division of technologies into pots was necessary.

The CMA also considered, and on the basis of its investigation, dismissed, three ways in which vertical integration could represent a distortion of competition: (i) favoring vertically integrated supplies to the detriment of independent generators; (ii) refusal to supply to independent suppliers; and (iii) raising barriers to entry by

[72] CMA Summary of provisional findings report (7.7.15): http://assets.digital.cabinetoffice.gov.uk/media/559ad883e5274a155c00001b/EMI_PFs_Summary.pdf.

[73] Gas and Electricity Markets Authority's terms of reference (26.6.14): http://assets.digital.cabinet-office.gov.uk/media/53ccfb08ed915d106e00000d/Energy_Terms_of_reference.pdf.

preventing new suppliers from securing sufficient wholesale energy.

The CMA provisionally concluded that competition is adversely affected by some features of the gas and electricity markets, including:

- The lack of quality differentiation of gas and electricity in the domestic retail energy markets;
- Difficulties in switching between suppliers caused by information barriers;
- Technical constraints imposed by prepayment meters;
- Unilateral market power held by energy suppliers due inter alia to weak customer engagement/responsiveness;
- A regulatory framework that reduced retail suppliers' ability to innovate and design new tariff structures;
- In the electricity market, the CMA provisionally found the absence of a plan for moving domestic customers to half-hourly settlements represented.

The CMA found a lack of robustness and transparency in regulatory decision-making, particularly relating to financial reporting, communication on the forecast and impacts of policies over bills, Ofgem's statutory objectives, and the absence of a formal mechanism which could address disagreements between Department of Energy & Climate Change ("DECC") and Ofgem. Moreover, the CMA found an AEC in the wholesale and retail gas and electricity markets, insofar as innovation is limited, and energy markets cannot keep up with regulatory developments.

The CMA's report was accompanied by a notice of possible remedies. Stakeholders have been invited to comment on the provisional report and the notice of possible remedies until August 5, 2015.

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