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Belgium

This section reviews competition law developments under the Act on the Protection of Economic Competition of September 15, 2006 ("APEC"), which is principally enforced by the Competition Auditorate (the "Auditorate") and the Competition Council (the "Council").

Unilateral Conduct

Competition Council Decides That Belgacom Did Not Abuse Its Dominant Position By Way Of Margin Squeeze With Its "Happy Time" Offer

On November 29, 2012, the Competition Council decided that the "Happy Time" offer from Belgacom, the incumbent telecom operator in Belgium, did not amount to an abuse of its dominant position.

Belgacom launched its Happy Time offer in June 2005. Pursuant to the Happy Time offer, Belgacom customers receive free national fixed voice telephony calls between 5p.m. and 8a.m. on weekdays, weekends, and holidays. During peak hours, calls are priced at a fixed amount of 30 Euro cents per call, irrespective of the telephone operator of the call recipient.

Tele2, a Swedish-based operator that later became part of the Dutch KPN group, which is also active on the Belgian market under the BASE brand, filed a complaint with the Council in July 2005 regarding Belgacom's Happy Time scheme. Subsequently, the Auditorate issued a Statement of Objections in respect of the scheme. Both Tele2's complaint and the Statement of Objections alleged that Belgacom had abused its dominant position by way of a margin squeeze. According to Tele2, due to the wholesale charges that it had to pay on the upstream market to obtain access to the Belgacom network, it was unable to match the terms of the Happy Time offer on the downstream market.

The Council first concluded that Belgacom holds a dominant position on the relevant upstream markets, namely the wholesale markets for call collecting and call terminating services, and concluded that those markets are national in scope. However, the Council faced two methodological questions in its competitive analysis:

1. First, the Council had to determine the applicable margin squeeze test. The Council considered the appropriate test to be the "equally efficient *competitor*" test, which asks whether the conduct in question would foreclose competitors that can provide downstream services "as efficiently" as the dominant firm. The Council concluded that such a test is, in principle, based on the prices and cost structure of the dominant firm. However, the Council considered that in the present case the interconnection costs between networks, which Tele2 incurred to enter the market (and which are not borne by Belgacom) could also be taken into account. This modified test was referred to as the "reasonably efficient *operator*" test.

2. The second methodological question concerned the level of aggregation at which the margin squeeze test should be applied. In line with its previous practice, the Council confirmed that, in principle, the margin squeeze test should be performed at an aggregate level, *i.e.*, at the level of the whole fixed voice telephony traffic ("aggregated approach"). However, given the success of the Happy Time offer and having regard to the decision of the European Commission in *Telefónica*, the Council also held it appropriate to apply the test at the level of the individual Happy Time offer ("disaggregated approach").

Consequently, the Council performed four margin squeeze tests over the period from 2005 to 2008 in order to determine whether Belgacom had abused its dominant position. The Council concluded that none of the four tests indicated that the margin between the retail price and the wholesale charges was insufficient for an operator equally efficient as Belgacom to commercialize an offer similar to Happy Time, and that therefore Belgacom had not abused its dominant position.

Competition Council Annuls Decision Of Auditorate To Dismiss a Complaint For Lack Of Motivation

On October 2, 2012, the Competition Council held that the Auditorate failed to justify sufficiently its decision to dismiss a complaint against the Ordre des Barreaux Francophones et Germanophone, the Ordre des Avocats du Barreau de Liège et les membres des Conseils de l'Ordre des Avocats du Barreau de Liège.

The Council considered the three main grounds upon which the Auditorate may dismiss a complaint: (1) inadmissibility of the complaint on purely formal grounds; (2) lack of foundation; and (3) enforcement priorities. The last ground gives the Auditorate a degree of discretion to choose which cases it hears having regard to its resources. The Council considered that the dismissal of a complaint on this ground requires the Auditorate to undertake at least some substantive analysis of the case. Such analysis should take into account the following criteria: the interests of consumers, the economic importance of the case, and the need to take action in light of the aims and the means of the Belgian competition authority.

In the present case, the Council annulled the Auditorate's decision to dismiss the complaint, and remanded the case to the Auditorate. The Council considered that the Auditorate had failed to state the factual or legal reasons for, or the criteria that were applied in the decision to dismiss the complaint.

The Belgian Constitutional Court Decides That Cartel Fines Imposed By The European Commission Are Not Tax Deductible

On July 20, 2010, Tessenderlo Chemie received a fine of €83,752,000 from the European Commission for its participation in an animal feed phosphates cartel. Tessenderlo Chemie sought to deduct the amount of the fine as a business expense for tax purposes. However, the Belgian tax authority rejected this approach.

On December 20, 2011, in the course of ongoing tax litigation between Tessenderlo Chemie and the Belgian State on this issue, the Brussels Court of First Instance referred two questions to the Constitutional Court to seek guidance on whether cartel fines can be deducted as a business expense for tax purposes.

In its judgment of December 20, 2012, the Constitutional Court held that fines are imposed by the European Commission as a means of punishment and deterrence. The Court concluded, *inter alia*, on an analysis of EU precedents, that allowing such fines to be tax deductible would undermine both the fines' deterrent effect and the coherent application of competition law, since it would allow companies that are fined to share the burden of such a fine with the Member State in which they have to pay taxes.

As a result, the Constitutional Court held that the Belgian Income Tax Code should be interpreted so as to exclude the possibility of deducting fines imposed by the Commission as a business expense.

Denmark

This section reviews the competition law developments under the Danish Competition Act, as set out by executive order No. 972 of October 1, 2010, and enforced by the Danish Competition Council ("DCC"), assisted by the Danish Competition Authority ("DCA"), and the Danish Competition Appeals Tribunal ("DCAT").

Mergers and Acquisitions

Nykredit Realkredit A/S and Totalkredit A/S

On December 6, 2012, the Danish Maritime and Commercial Court ("DMCC") found that a commitment entered into by Nykredit Realkredit A/S ("Nykredit") had no time limit. The commitments, under which Nykredit undertook to adjust its administration margin, were given pursuant to Nykredit's merger with Totalkredit A/S ("Totalkredit"). In making its decision, the DMCC reversed previous decisions of the DCC and the DCAT.

Nykredit merged with Totalkredit in 2003. The merger was approved by the DCC on October 14, 2003. Nykredit submitted a number of commitments in connection with the approval, including a commitment to adjust its administration margin down to 0.5 %.

In February 2010, Nykredit announced in a press release that the administration margin was to be increased. In a decision of June 23, 2010, the DCC found that this would constitute a violation of the merger commitments and so ordered Nykredit not to implement the contemplated increase. In the decision, the DCC found that the commitment had no time limit, since (1) there was no fixed time limit specified in the wording of the commitment, and (2) no time limit could be inferred from either the circumstances under which the commitment was entered into, or the general principles of contractual interpretation.

The DCC's decision was subsequently upheld by the DCAT in a decision of December 2, 2010. In this decision, the DCAT stated that behavioral commitments in principle have no time limit unless such limit is explicitly stated in the commitment, or is otherwise made clear by the circumstances. Further, the DCAT held that the commitment could not be regarded as disproportionate taking into consideration the significance of the merger.

The commitment has also been the subject of a decision of November 30, 2011 of the DCC, in which the DCC refused to annul the commitment but allowed Nykredit to increase its administration margin to 0.55-0.6 % in the period from April 1, 2012 to March 31, 2017 due to increased costs of capital resulting from the financial crisis.

Nykredit appealed both the DCAT's decision that the commitment had no time limit, and the DCC's decision that the commitment was not to be revoked to the DMCC.

Concerning the question of whether the commitment had no time limit, Nykredit claimed that the commitment merely required Nykredit to reduce the administration margin initially, and not to uphold it thereafter. Nykredit presented a number of arguments in support of this, including:

1. That it is not specified in the wording of the commitment that the commitment has no time limit and that it consequently cannot be interpreted as such according to the general administrative law principle of transparency in decisions;
2. That the DCC was aware that the administration margin constitutes Nykredit's only source of revenue and so would have known that Nykredit would be unwilling to a margin freeze in perpetuity;
3. That the available information relating to the negotiations between Nykredit and the DCC on the commitments showed that both the DCC and Nykredit had been of the opinion that the commitments were limited in time;
4. That the commitment cannot be interpreted as having no time limit when it only comprises Nykredit, and not Totalkredit, which would mean that Nykredit could freely circumvent the commitment by issuing mortgage loans through Totalkredit, and;
5. A number of other arguments concerning lack of legal basis, lack of connection to the purpose of the commitment, lack of proportionality, and conflict between this interpretation and general principles of contract law.

In its decision, the DMCC found that the commitment could not be interpreted as being unlimited in time. The DMCC emphasized that Nykredit's interpretation of the commitment was not contrary to the wording of the commitment and that a commitment concerning a freeze of the administration margin with no time limit would lack any business rationale, making it highly unlikely that Nykredit's representatives had the intention of offering such a commitment. The DMCC further stressed that an inquiry into the pre-commitment negotiations did not bear out any intention that the commitment was to be unlimited in time. In any event, the DMCC found that such a commitment would lack meaning or efficacy in circumstance where Totalkredit—wholly owned by Nykredit—was able to adjust its administration margins freely.

Consequently, the DMCC revoked the two decisions of the DCC and the DCAT interpreting the commitments as having no time limit, and ordered the DCC and the DCAT to acknowledge that Nykredit had fulfilled the commitment and was therefore no longer bound by it. Accordingly, the DCC's decision on altering/revoking the commitment was also voided without it being necessary for the DMCC to review this matter separately.

Agnete Gersing, Director General of the DCCA, has stated that the DCCA will appeal the decision of the DMCC to the Supreme Court.

Horizontal agreements

On November 16, 2012, the DCAT upheld a decision of the DCC that the estate agents behind the property search portal Boligsiden.dk violated the Danish Competition Act by refusing to let Boliga.dk, another property search portal, show photos of the estate agents' properties for sale. However, the DCAT has limited a part of the injunction issued by the DCC to the estate agents, as the DCAT found it excessive.

In January 2012, the DCC found that the Danish Association of Chartered Estate Agents, as well as a number of estate agency chains (collectively "the estate agents") had violated section 6 of the Danish Competition Act (similar to Article 101 TFEU) by refusing to let Boliga.dk display photos of the estate agents' properties for sale. Consequently, the DCC ordered the estate agents to bring any such agreement or concerted practice to an end immediately. They further ordered the estate agents to refrain from entering into any agreement or concerted practice that directly or indirectly has the object or effect of preventing other independent estate agents (and chains) from displaying their photos on other property portals, including Boliga.dk. The injunction also applied to any type of chain internal requirements, decisions, or requests made by the estate agency chains.

The estate agents appealed this decision to the DCAT in February 2012, seeking an annulment of the decision. They claimed that the boycott of Boliga.dk did not have the object of restricting competition, and therefore did not constitute a violation of the Danish Competition Act, as it had not been demonstrated to have anti-competitive effects. Furthermore, the estate agents claimed that their behavior was in fact pro-competitive, as it was motivated by their legitimate interests as participants in Boligsiden.dk (and thus as competitors to Boliga.dk) and was ancillary to this cooperation. In addition, a number of chains claimed that their participation in the alleged boycott of Boliga.dk was unproven.

In its decision, the DCAT upheld the finding of the DCC that the concerted practice constituted a violation of section 6 of the Danish Competition Act.

The DCAT considered that the practice had the object of restricting competition so the DCC was not obliged to demonstrate that the arrangement had anti-competitive effects. The DCAT stated that the opportunity to show photos of the offered properties was a major competitive factor on the market for property search portals and that the concerted practice had impaired the quality of the product which Boliga.dk could provide on this market. Secondly, the DCAT emphasized that the concerted practice had led to coordination with respect to the estate agents' marketing operations.

The DCAT also found that the estate agents' legitimate interest in Boligsiden.dk did not override the fact that such behavior violated competition rules. Furthermore, it found that the behavior could not be regarded as ancillary to the estate agents' cooperation, as it could not be regarded as necessary for this cooperation. Finally, the DCAT found as a matter of fact that the estate agents had participated in the concerted practice, and that they had implemented this concerted practice internally within their chains.

However, the DCAT found that a part of the DCC's injunction was disproportionate as its scope extended beyond the concerted practice under scrutiny to any agreement or concerted practice (as well as any chain internal requirements *etc.*) of a similar nature. In support of its finding, the DCAT highlighted that the DCC's decision did not specifically consider whether any concerted practice or internal agreement falling outside of the conduct under scrutiny would violate the Danish Competition Act. Thus, the DCAT chose to limit the injunction to the specific concerted practice at issue.

Policy And Procedure

Amendment to the Danish Competition Act

The Danish Parliament passed an amendment to the Danish Competition Act on December 19, 2012. The amendment will enter into force on March 1, 2013 and will entail the following notable changes:

1. **The possibility of imprisonment for cartel activity**: Individuals (as a rule, members of management) involved in cartel activities may be sentenced to up to 18 months imprisonment. If the matter involves particularly aggravating circumstances, the sentence may be increased to up to 6 years imprisonment.
2. **Only the first applicant for leniency will be able to obtain immunity from imprisonment.** Subsequent applicants will only be able to obtain sentence reductions based on the normal rules of the Danish Criminal Code (*i.e.*, if there are mitigating circumstances or if the individual in question has cooperated with the public prosecutor).
3. **Significantly increased fines for violations of the Danish Competition Act**: The fine for minor infringements is currently DKK 10,000-400,000 (approx. €1,350-53,700) and will be increased by introducing a maximum fine of DKK 4 million (approx. €537,000). The range of fines for serious infringements is currently DKK 400,000-15 million (approx. €53,700-2,010,000), whereas the new range will be DKK 4 million-20 million (approx. €537,000-2,684,000). Finally, the fines for very serious infringements will be increased from a minimum of DKK 15 million (approx. €2,010,000) to a minimum of DKK 20 million (approx. €2,684,000). There are currently no guidelines in the Danish Competition Act as to the level of fines for individuals, but the highest fine imposed on an individual by a Danish court to date has been DKK 25,000 (approx. €3,350). The amendment introduces minimum fines for infringements by individuals of DKK 50,000 (approx. €6,700) for minor infringements, a minimum of DKK 100,000 (approx. €13,400) for serious infringements and a minimum of DKK 200,000 (approx. €26,800) for very serious infringements.
4. **Suspensive effect for complaints concerning merger proceedings**: Complaints to the DCAT by any of the merging parties concerning decisions of the DCC with relation to merger review proceedings (*e.g.*, decisions concerning access to file) will cause a suspension of the time limits for review of the merger until the complaint has been processed.

Other than the above, the amendment will entail changes to the sanctioning of illegal state aid; increased transparency and the right to be heard for the parties in competition law infringement cases; additional rights for the DCC to publicize documents related to competition and merger cases; and the introduction of clarifying injunctions (aimed at ensuring compliance with previously issued injunctions) and interim injunctions (aimed at ceasing perceived anti-competitive conduct until infringement proceedings can be completed).

The imposition of sanctions will require the case to be transferred to the Public Prosecutor for Serious Economic Crime ("PPSE"). In this case, the matter will be subject to the rules of criminal procedure. The PPSE has increased powers of investigation compared to the competition authorities, in particular in matters involving the possibility of prison up to 6 years (such as bugging and phone tapping).

Finland

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

Unilateral Conduct

Competition Authority proposes fines for predatory pricing in the milk market

On December 20, 2012, the FCA ordered Finnish dairy company Valio to end an allegedly abusive pricing practice and proposed that the Market Court impose a €70 million fine on Valio. According to the FCA, Valio made a strategic decision to reduce the wholesale price of fresh milk below cost in order to prevent milk importers entering the Finnish fresh milk market. The FCA found that Valio continued this practice for almost three years.

Valio, the biggest milk processor in Finland, is owned by dairy co-operatives, which in turn are owned by dairy farmers. According to the FCA, Valio collects over 80% of all raw milk in Finland. It is the market leader in nearly all-dairy products in Finland and has a market share above 50% in the fresh milk market. Valio's main competitor in Finland is Arla Ingman, which since 2008 has been part of the Arla Foods group.

The FCA considered that Valio's senior management made a strategic decision in February 2010 to significantly reduce the wholesale prices of fresh milk so as to foreclose entry to the Finnish fresh milk market. The FCA based its finding on e-mail correspondence and internal documents discovered during inspections. According to the FCA, the evidence demonstrated that the purpose of the price cuts was predatory; Valio aimed at rendering the importation of milk into Finland unprofitable. By means of this strategy, Valio would be able to increase its market share and raise prices.

The FCA found that after the price cuts in March 2010, Valio's wholesale prices did not cover the variable costs of production and sale of fresh milk. The FCA also stated that the price set by an equally efficient competitor active in the production of raw milk could be relevant in the assessment of Valio's pricing behavior with respect to the foreclosure of competitors.

Valio claims that its price cuts were motivated by its desire to meet competition from Arla Ingman, which had substantially increased sales through selling in certain large stores of the S Group retail chain. The FCA rejected this claim. According to the FCA, the criteria of an efficiency defense were not satisfied in this case, and Valio's pricing behavior was not justified by its supposed aim of avoiding short-term loss. In this regard, the FCA noted that Valio offered additional price discounts to the S Group (on top of those offered to other customers (which were below cost)), an important customer of Arla Ingman, meaning that its pricing policy was simply responding to competitive pressure from Arla Ingma.

The FCA ordered Valio to end its abusive pricing policy and proposed that the Market Court impose a fine of €70 million. The FCA justified the high fine on the basis of the serious nature of the infringement and Valio's intent to foreclose access to the market. The FCA also made reference to Valio's recidivism; in 1998, Valio was found to have abused its dominant position in the milk market. Other aggravating features of Valio's behavior included: (1) offering conditional volume rebates to Arla Ingman's important customers, thereby forcing Arla Ingman to sell at an even lower price than Valio, thus incurring greater losses; and (2) Valio's failure to terminate the abusive pricing behavior during the investigation.

France

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

Horizontal Agreements

French Courts reject Canal+'s appeals in the TPS matter

Both the Constitutional Court ("Conseil constitutionnel") and the Administrative Supreme Court ("Conseil d'Etat") rejected Canal+'s action against the French Competition Authority's 2011 withdrawal decision and 2012 revised authorization regarding the acquisition of TPS.[1]

In 2006, the French audiovisual group Canal+ acquired TPS, its main competitor in the French pay-TV sector, subject to commitments. However, in 2011, the FCA withdrew the 2006 authorization for breach of commitments and last year issued renewed authorization, this time imposing stricter obligations on Canal+.

In its first action before the Constitutional Court, Canal+ argued that the FCA's procedural rules infringed the principle of impartiality. It gave the following reasons: (1) the members of the Authority had already (and repeatedly) ruled on the acquisition of TPS, the first authorization decision was adopted in 2006 (which was subsequently withdrawn in 2011) and a second authorization decision (imposing stricter obligations) was adopted in 2012; and (2) it was inappropriate for the members of the Authority to combine powers to initiate an investigation with powers to impose sanctions based on that investigation.

On October 12, 2012, the Constitutional Court dismissed Canal+'s action. It found that it is in the very nature of an antitrust agency to combine regulatory and sanctioning powers. Furthermore, it found that the FCA must be in a position to sanction companies that do not comply with merger decisions. The Court concluded that procedural rules in place are sufficient to ensure the FCA's impartiality, in particular: the members of the Authority abide by rules ensuring independence; the head of the investigation services is independent from the members of the Authority and the investigations are conducted independently; the Authority initiates investigations only upon the request of the head of the investigation services; and an opening decision does not prejudge the FCA's final ruling.

Canal+ also appealed both the withdrawal decision and the new clearance decision before the Administrative Supreme Court. On December 21, 2012, the Administrative Supreme Court upheld the FCA's 2011 decision that had withdrawn the 2006 authorization decision. The Court confirmed that Canal+ had indeed committed six out of the eight breaches of commitments found by the Authority. The Court found fault with only two of the FCA's findings and consequently reduced the fine imposed on Canal+ from €30 million to €27 million.

In a separate ruling, the Administrative Supreme Court conducted a detailed review of the FCA's new assessment of the pay-TV market and fully upheld the 2012 revised authorization that imposed stricter obligations on Canal+'s acquisition of TPS by (1)making provision for the possibility of all TV distributors to include Canal +'s cinema channels in their offerings (subject to non-discriminatory fees); (2) imposing measures to limit the financial incentives for independent thematic channels to be broadcast exclusively on CanalSat; and (3) imposing measures to separate Canal+'s production, and distribution of channels).

Unilateral Conduct

The FCA fines SNCF for several abuses of its dominant position in the railway freight sector

On December 18, 2012, following the opening of ex officio proceedings in 2008 and a complaint filed by Euro Cargo Rail in 2009, the French Competition Authority issued a decision imposing on the State-owned rail operator SNCF a fine of €60.9 million for several abuses of its dominant position in the railway freight sector. The FCA also imposed on SNCF a mandatory injunction requiring it to change its accounting system and pricing practices.[2]

The French rail incumbent, SNCF, operates in the freight sector through its subsidiary "SNCF Géodis," which enjoyed a

1 Constitutional Court, Decision n°2012 -280 QPC of October 12, 2012, Société Groupe Canal Plus, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/cc2012280qpc.pdf; Administrative Supreme Court, Decision n° 362347, 363542, 363703 of December 21, 2012, Société Groupe Canal Plus, http://www.conseil-etat.fr/media/document/CONTENTIEUX/decision_362347.pdf; Administrative Supreme Court, Decision n° 353856 of December 21, 2012, Société Groupe Canal Plus, http://www.conseil-etat.fr/media/document/CONTENTIEUX/decision_353856.pdf.

2 French Competition Authority Decision, n°12-D-25 of December 18, 2012, freight sector, http://www.autoritedelaconcurrence.fr/pdf/avis/12d25.pdf.

legal monopoly in France until the railway freight sector was opened to competition in 2006. Although SNCF Géodis continues to hold a dominant position across the various freight markets (with, for instance, a 77% market share in the full-train-load market segment in 2009), several companies have made headway into the sector, including Euro Cargo Rail, a subsidiary of Deutsche Bahn, which has become SNCF's main competitor in France. In addition to its commercial activities, SNCF is also a Delegated Infrastructure Manager for Réseau Ferré de France (the French Rail Network, "RFF"). As such, it gathers information on the strategy and business of its rivals (paths used, train length, transported tonnage, schedule, traffic origin and destination, *etc.*).

The FCA determined that SNCF had abused its dominant position by exploiting confidential data it had gained through its operation of RFF to advance its own commercial interests.

The FCA also considered that SNCF had engaged in practices designed to prevent its competitors from accessing rail capacities that were essential to their businesses. In particular, it observed that SNCF had delayed (or refused) the release of important information concerning the conditions of access to freight yards, making it more difficult for its rivals to canvass customers and rapidly design tailored commercial offers. The FCA also found that SNCF retained exclusive use of certain wagons constituting essential infrastructures, namely the EX wagons, which are used for large tonnage transportation, and are managed by an SNCF subsidiary called SGW. The FCA further uncovered a practice whereby SNCF had deliberately pursued a train paths overbooking policy which prevented its rivals from participating in certain calls for tender or honoring certain contracts.

The FCA finally concluded that SNCF had followed a below-cost pricing policy with respect to certain markets and customers (*i.e.*, the "block train" business), in order to prevent its competitors from entering the market.

The FCA found that SNCF's infringements caused substantial damage to the economy, due to SNCF's market power and the regularity with which it engaged in restrictive practices. On this basis, the FCA imposed on SNCF a fine totaling €60.9 million. However, the fine did not take into account the price-based exclusionary conduct, for which the FCA considered, in view of "particular circumstances", that SNCF should not be fined but only required to change its pricing policy.

In addition to the fine, the FCA required SNCF to: (1) set up, within 18 months, an analytical accounting system which would enable precise cost identification; (2) draft a report within the same period identifying the costs that could be avoided within three years if SNCF would terminate its "block train" business; and (3) ensure, within three years, that the prices it offers to its clients for "block-train" services cover these average available costs. The three-year duration is the time the FCA deemed necessary in order for SNCF's pricing policy to comply with antitrust law, given that contracts are usually three-years long and SNCF cannot determine precisely its average avoidable costs in the absence of an analytical accounting system.

The FCA fines Orange and SFR for abuse of a dominant position

On December 13, 2012, the French Competition Authority imposed a total fine of €183 million on Orange and SFR, the two main French telecom operators. The FCA found that Orange and SFR abused their dominant positions by marketing mobile offerings allowing their customers to make unlimited calls to subscribers within their respective networks. [3]

This case resulted from a complaint filed in 2006 by Bouygues Télécom, the main competitor of Orange and SFR. Bouygues Télécom denounced as anticompetitive new mobile offerings simultaneously launched by Orange and SFR allowing their customers to make unlimited calls to subscribers within their respective network ("on net" unlimited offerings). Bouygues Télécom alleged that these arrangements created a "network effect" which damaged its operations.

In line with its prior decisions, the FCA segmented the French mobile telephony sector into four separate markets: (1) three upstream wholesale markets for call termination corresponding to the interconnection services offered by each of the three operators (Orange, SFR and Bouygues Telecom) to connect to their respective network in order to convey cross-network calls; and (2) one retail market downstream, common to all operators, corresponding to the telephony services offered to final customers.

Orange, SFR and Bouygues Télécom separately held (by construction) a dominant position (monopoly) on their respective call termination markets. The FCA found that Orange's and SFR's "on net" unlimited offerings in the retail

3 French Competition Authority, Decision n°12-D-24 of December 13, 2012, mobile telephony, http://www.autoritedelaconcurrence.fr/pdf/avis/12d24.pdf.

market constituted an abuse of their respective dominant positions in the upstream call termination markets.

The FCA considered that the "on net" unlimited offerings damaged the fluidity of the retail market by creating incentives for close groups of relatives to use the same operator. This increases the exit costs for other subscribers and their relatives. The FCA also held that these offerings favored large operators over small ones, like Bouygues Télécom (Orange and SFR held 83% of the retail market, respectively 47% for Orange and 36% for SFR), since small operators do not have the critical size to offer similar unlimited offerings. According to the FCA, the "on net" unlimited offerings of Orange and SFR obliged Bouygues Télécom to market "cross net" unlimited call offerings (*i.e.*, offerings allowing their subscribers to make unlimited calls to customers of all operators, not only subscribers of its own network), which considerably increased its costs.

The FCA emphasized that the specific circumstances of the case justified the application of Articles L. 420-2 of the French Commercial Code and 102 TFEU. With the monopolies that they held on their respective upstream call termination markets, Orange and SFR could charge other operators supra-competitive call termination prices by aligning with the maximum fees set by ARCEP (the French Telecommunication and Post Regulator), which were significantly higher than the actual costs incurred by these operators to provide the call termination services. By contrast, in a normal competition situation, smaller operators could have commercialized "cross net" offerings while bearing limited call termination costs, close to the costs incurred internally for "on net" call termination. The larger operators would then have had no incentive to commercialize "on net" offerings because such offerings would have been less attractive than the "cross net" offerings marketed by smaller operators. Thus, in the absence of a dominant position upstream, the practices in question would not have been likely to increase significantly the costs of the smaller competitors nor to have a foreclosure effect on the retail market.

Finally, the FCA found that the price differentiation between "on net" calls and "off net" calls (calls to another network) was not justified since SFR and Orange could not demonstrate that it was the result of cost differences between both types of calls, nor that it would create efficiency gains that would be sufficient to offset its anticompetitive effects.

As a result, the FCA imposed fines of €65,708 million on SFR and €117,419 million on Orange.

The FCA imposes a fine and an injunction on Bang & Olufsen for preventing authorised distributors from selling its products online

On December 12, 2012, the French Competition Authority found that the ban on online sales imposed by the hi-fi manufacturer Bang & Olufsen on its authorized distributors constituted a hard-core restriction on competition. The FCA therefore imposed a fine of €900,000 on Bang & Olufsen and ordered Bang & Olufsen to modify its selective distribution agreements within three months.[4]

The decision of the FCA originated in an enquiry conducted by the French Ministry of Economy in 2001. The inquiry report evidenced that four hi-fi and home cinema equipment suppliers, Bose, Focal JM Lab, Triangle Industries and Bang & Olufsen France, prevented their distributors from selling their products online. The Ministry of Economy had referred the case to the FCA in 2002.

In 2006, Bose, Focal JM Lab, and Triangle Industries submitted binding commitments and the FCA closed the case for those three companies. With respect to Bang & Olufsen, which had refused to offer commitments, the case handler had decided to open separate proceedings and to continue the investigation.

In 2009, considering the preliminary ruling referred by the Paris Court of Appeal to the ECJ regarding a similar issue in *Pierre Fabre*, the FCA decided to suspend the proceedings. In *Pierre Fabre*, a question for a preliminary ruling had been referred to the ECJ in the context of the appeal of a decision in the para-pharmaceutical sector, by which the FCA ruled that Pierre Fabre Dermo-Cosmétique breached competition law by prohibiting its authorized distributors from selling its products online. In its preliminary ruling decision dated October 13, 2011, the ECJ emphasized that in the context of a selective distribution system, a contractual clause resulting in a ban of Internet sales amounts to a restriction of competition by object unless that clause can be objectively justified. In this respect, the ECJ stated that neither the need to provide individual

4 French Competition Authority Decision, n°12-D-23 of December 12, 2012, relating to a conduct implemented by the company Bang & Olufsen in the sector of selective distribution of hi-fi and home cinema equipment, http://www.autoritedelaconcurrence.fr/pdf/avis/12d23.pdf.

advice to the customer nor the aim of maintaining a prestigious image were sufficient objective justifications.

In its decision of December 12, 2012, the FCA found that Bang & Olufsen implemented a policy designed to prevent its authorized distributors from selling its products online since 2001. The practice concerned all of the 48 authorized distributors in France, and as such the FCA found that by preventing so many from selling online, competition was significantly weakened at the distribution level. Furthermore, the FCA found that the online sale prohibition limited intra-brand competition.

When assessing the gravity of the conduct, the FCA took into account the fact that the conduct represented a restriction by object. The FCA also stressed that the conduct took place in the context of an existing selective distribution network which already limited competition between distributors. On these bases, the FCA imposed a €900,000 fine on Bang & Olufsen.

In addition to the fine, the FCA ordered Bang & Olufsen France to change its selective distribution agreements or to circulate a note to its authorized distributors allowing them to sell online within three months.

Germany

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

Satellite Signal Finders. On August 28, 2012, the FCO fined two online distributors of digital satellite signal finders for price fixing practices during October and November 2011.[5] In addition to aligning their prices, one of the distributors used ebay's information system, 'Member2Member', in order to communicate a proposed price increase for satellite signal finders to other ebay distributors. That distributor also threatened to reduce its own price if the others did not implement the price increase. The FCO was informed of the alleged infringement by another distributor who received these communications. The FCO found that both participants infringed Section 1 of the GWB by fixing their prices. The FCO found further that the threat of predatory pricing was an infringement of s.21(2) of the GWB as it was intended to procure the commission of a prohibited activity. Both participants settled the case with the FCO.

TV-Encryption. On December 28, 2012, the FCO imposed a fine of €55 million on the broadcasting groups Pro7/Sat1 and RTL, and two individuals, for anticompetitive horizontal agreements. The companies agreed to encrypt their standard definition ("SD") digital free TV programs and to charge a fee for the use of those programs.[6] They also implemented technical measures such as anti-ad blockers and copy protection to limit the use of their program signals. Although the agreements were in force at least until the FCO's inspections in May 2010 the measures continued to be implemented on other broadcasting networks after that date. The broadcasting groups settled the case with the FCO, and in doing so committed to waive the encryption of their free SD TV programs in Germany for at least ten years starting from 2013. This case underscores the FCO's conservative stance on program encryption, especially in the cable TV sector. For example, in December 2011 the FCO cleared the acquisition of the cable network operator Kabel Baden-Württemberg by Liberty Global Europe only after the parties agreed to "far-reaching commitments"[7] including the cessation of encryption of digital free TV programs.[8]

FCO Prohibits Continuation of Chemicals Distribution Joint Venture For Violation of Section 1 GWB

On November 12, 2012, the FCO prohibited the continuation of CVH Chemie-Vertrieb GmbH & Co. KG ("CVH"), a joint venture ("JV") active in the distribution of chemicals, after having found that it violated Section 1 GWB because it led to coordination between its parent companies, Brenntag Germany Holding GmbH ("Brenntag") and CG Chemikalien GmbH & Co. Holding KG ("CG").[9]

The FCO found that the joint venture restricted competition based on a presumption provided in FCJ case law;[10] as CVH's parent companies operated on the same regional markets for basic and specialty chemicals as the JV, and as they had a combined market share of up to 70%, the conditions of the presumption were satisfied. Furthermore the FCO found that, beyond the operation of the presumption, the facts of the case indicated that the JV had in fact restricted competition. For example, Brenntag has access to sensitive CVH information, one of its competitors in the basic and specialty chemicals markets.. The FCO also found that the JV helped to align its parents' economic interests, making anti-competitive coordination more likely.

Interestingly, the creation of the JV had been cleared by the FCO in 1996 under the GWB's merger control regime. Unlike

5 *See* FCO case summary available only in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell12/Kartell_Fallberichte_12/B07-115-11_endg.pdf.

6 *See* FCO press release, available in English at: http://www.bundeskartellamt.de/wEnglisch/download/pdf/Presse/2012/20121228_TV-Encryption-E.pdf.

7 *Andreas Mundt*, President of the FCO, press release, available in English at: http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2011/2011_12_15.php.

8 *See* FCO press release, available in English at: http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2011/2011_12_15.php.

9 FCO, decision of November 12, 2012, Case B3-19/08, available in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell12/B3-19-08.pdf; See also FCO press release of November 21, 2012, available in English at: http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2012/2012_11_22.php.

10 See FCJ, judgment of March 4, 2008, Case KVZ 55/07, Nord-KS/Xella, available in German at: http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=d71b680d635083e44aa7410d9d49efc2&nr=44882&pos=0&anz=1; FCJ, Decision of May 8, 2001, KVR 12/00 (Ost-Fleisch).

under EU competition law, a JV that has been cleared by the FCO under its merger control regime may still be subject to review (and possibly a prohibition) pursuant to Section 1 GWB.. CVH, Brenntag, and CG have appealed the FCO's decision.

Mergers and Acquisitions

FCJ Clarifies Standard Of Proof For Prohibition Of Concentrations Due To Strengthening Of Dominant Position Through Acquisition Of A Potential Competitor

On June 19, 2012, the FCJ affirmed a decision of the DCA dealing with the standard of proof for prohibiting a concentration because it would strengthen a dominant position by way of acquiring a potential competitor.[11]

In April 2009, the FCO blocked the acquisition of Neue Pressegesellschaft mbH & Co KG ("NPG") by Zeitungsverlag Schwäbisch Hall GmbH ("ZSH"). Both NPG and ZSH publish regional newspapers. They are not active in the same markets, but the geographic markets in which they are active are neighboring, and the two undertakings cooperate closely. In particular, NPG supplies the national and international section for ZSH's newspapers. The FCO concluded that each of the parties represented the other's most credible potential competitor, meaning that the merger would result in a substantial reduction in potential competition which would strengthen each party's dominance in their respective markets. The FCO acknowledged that should the cooperation agreements between ZSH and NPG be maintained, ZSH would be unlikely to become a competitor to NPG. However, the FCO found that, but for the merger, a different buyer would likely acquire ZSH, following which the cooperation agreements would cease and ZSH would become a likely potential competitor to NPG..[12]

The DCA annulled the FCO's decision in December 2010.[13] The DCA held that the transaction would not strengthen the parties' dominant positions, as NPG and ZSH were neither actual nor potential competitors. According to the DCA, the FCO would have had to show that there was a high probability of future potential competition between the parties based on concrete facts.

On appeal by the FCO, the FCJ upheld the DCA's decision.

However, the FCJ stressed that the lower court had applied an erroneous legal standard in requiring a high probability that the parties would become potential competitors in the future. The FCJ emphasized that in highly concentrated markets it is sufficient if a transaction leads to a minor reduction of actual or potential competition (*e.g.,* if the transaction would simply discourage potential competitors from entering the market). The FCJ clarified that where one or all of the parties in question are dominant, only "some degree of probability" ("*einige Wahrscheinlichkeit*"), based on concrete facts, is required to show that a concentration enhance dominance through reduction in potential competition. In contrast, a finding that a transaction would enhance dominance due to future changes in market conditions would require the relevant changes to be proven to be highly probable.

The FCJ confirmed the DCA's conclusion that there were no indications in this case that the merging parties would likely become competitors in the future.

DCA and FCJ deny standing for target company in case of FCO clearance decision

In 2008, Akzo Nobel NV ("Akzo") acquired ICI and thereby indirectly acquired a 49% shareholding in Metlac Holding S.r.l. ("Metlac") and a call option to acquire the remaining 51%. After Akzo exercised the call option in December 2011, Metlac, the target company, notified the transaction to the FCO and on April 24, 2012, the FCO unconditionally approved the transaction.[14] (Interestingly, the U.K. Competition Commission decided to prohibit the transaction.[15])

Metlac and its majority shareholder appealed the FCO's clearance decision to the DCA. As appeals against FCO merger decisions do not have a suspensory effect under German law, Metlac and the majority shareholder also applied for interim relief. They argued that the transaction would create or strengthen Akzo's dominance in the metal packaging

11 FCJ, Decision of June 19, 2012, Case KVR 15/11, Haller Tagblatt, available in German at http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=34760ebf373310ac1dfa522bbe1814b1&nr=61945&pos=19&anz=25.

12 FCO, Decision of April 21, 2009, Case B 6 – 150/08 available in German at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion09/B6-150-08.pdf.

13 DCA, Decision of December 22, 2010, Case VI-Kart 4/09 (V) available in German at http://www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2010/VI_Kart_4_09__V_beschluss20101222.html.

14 See National Competition Report April – June 2012, p. 11.

15 See National Competition Report October – December 2012.

coatings sector in the EEA, and that the exercise of the call option was tantamount to a hostile take-over which negatively affected Metlac and its majority shareholder.

On June 6, 2012, the DCA rejected the application for interim relief as inadmissible.[16] The Court found that Metlac and its majority shareholder had no standing in the main (appeal) proceedings since the FCO's clearance decision did not impact them negatively. According to the DCA, any negative effects would emanate from the underlying transaction agreement. By contrast, a clearance decision has no negative effect for the parties involved, and only gives the parties the *opportunity* to proceed with the merger if they so wish: it does not compel the transaction. Metlac and its majority shareholder applied to the FCJ for permission to appeal the DCA's decision. On October 9, 2012, the FCJ rejected the application.[17] The FCJ confirmed the DCA's finding that Metlac and its majority shareholder have no standing since the FCO's clearance decision entailed no negative effects for them.

FCO Blocks Acquisition Of Kelheim Hygiene Fibres GmbH By Lenzing AG

On November 22, 2012, the FCO prohibited the acquisition of 90% of Kelheim Hygiene Fibres GmbH, a supplier of tampon fiber material, by its competitor Lenzing AG.[18]

The parties had notified the concentration only on a precautionary basis, arguing that they were exempt from the filing obligation because the transaction only concerned markets with a total German turnover below €15 million (*de minimis* markets exception).[19] After the FCO found that turnover exceeded this threshold, the parties withdrew their notification and filed an appeal against the FCO's finding, which was held inadmissible by the DCA.[20] Subsequently, the parties re-notified the concentration.

With respect to the jurisdictional question, the FCO held that turnover should be allocated in accordance with criteria established in Article 5 EUMR, as elaborated in the Commission's Consolidated Jurisdictional Notice.[21] Accordingly, the turnover should be attributed to the locus of competition, normally the place of delivery of the goods or services in question. Specifically, turnover should be allocated to the Member States where the subsidiaries of a customer that receive the relevant goods are located, even if the goods have been ordered by a central purchasing organization domiciled elsewhere.

The FCO's market test confirmed this. It indicated that customers evaluated suppliers at the place of delivery on two main criteria, namely, product quality and timeliness of deliveries. However, the market test suggested that the principal criterion for central purchasing organizations was price. Thus, goods delivered to German subsidiaries of a customer, but ordered by its central purchasing organization domiciled abroad had to be included in the relevant domestic turnover. Since, on this basis the *de minimis* threshold was exceeded, the concentration was deemed notifiable.

Following its substantive assessment of the transaction, the FCO then held that the concentration would create or strengthen a dominant position as the parties would, under any conceivable market definition, have combined market shares of at least 85%, and market entry by new competitors was unlikely.

The role of the *de minimis* threshold provision will change with the proposed 8th amendment of the GWB.[22] Under the new law, the parties will have to notify a concentration irrespective of whether it only concerns a *de minimis* market. However, concentrations may not be prohibited for impeding competition only on a *de minimis* market.

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16 Decision available in German at: http://www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2012/VI_Kart_6_12__V_beschluss20120606.html.

17 Decision available in German at:

http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2012-10-9&nr=62109&pos=26&anz=30.

18 FCO decision of November 22, 2012, case B3-64/12, available in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion12/B3-64-12.pdf?navid=92. A case summary in German is available at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion12/-Fallberichte_2012/B03-064-12-endgueltig.pdf?navid=108. A press release in German is available at: http://www.bundeskartellamt.de/w-Deutsch/download/pdf/Presse/2012/2012-11-23_PM_Lenzing_Final.pdf.

19 Section 35 (2) No. 2 GWB.

20 National Competition Report, April – June 2012, p. 10.

21 Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008 O.J. C95/1), paras. 196 and 198.

22 BT-Drs. 17/9852, Article 1 No. 20 (p. 10), available in German at: http://dipbt.bundestag.de/dip21/btd/17/098/1709852.pdf.

Policy and Procedure

Regional Courts Of Gießen And Mannheim Rule On Exemption Of Documents From Seizure

On June 25, 2012, the Gießen Court of Appeal[23] ruled on the seizure of attorney-client correspondence. The court held that documents found at the client's premises and drafted by their defense attorney are exempt from seizure even if no criminal investigation had been initiated at the time of their creation.

Since he envisioned being charged with criminal breach of fiduciary duty and corruption in commercial transactions, the appellant had retained a defense attorney. The attorney drafted documents that outlined the facts and assessed the appellant's criminal liability. The public prosecutor then initiated proceedings and had the appellant's premises searched. The client claimed that certain documents were subject to the attorney-client privilege and were exempt from seizure. Accordingly, he appealed against the Gießen District Court's finding that the seizure of the documents was legal.

The court held the documents seized at the premises of the appellant were exempt from seizure even if they had been prepared before the initiation of the criminal proceedings. In line with previous case law,[24] it found that documents located at the client's premises were exempt from seizure only if the documents were created for defense purposes. It further held that the initiation of proceedings is not a necessary requirement for the application of the attorney-client privilege if the attorney's advice is sought in a specific criminal matter. The court noted that in order to guarantee an effective criminal defense attorney-client privilege must be guaranteed at all times.

With regard to the seizure of documents created for an internal audit, on July 3, 2012, the Regional Court of Mannheim considered a legislative amendment[25] establishing equal treatment of criminal defense attorneys and other attorneys with respect to the attorney-client privilege.[26] From the Mannheim court's point of view, the amendment suggests that defense documents located at the client's premises are exempt from seizure in criminal proceedings regardless of whether they stem from an attorney-client relationship that was entered into for criminal defense or other purposes. This view would likely also suggest that the attorney client privilege in antitrust proceedings should prevent the seizure of internal audit documents even before the FCO has initiated antitrust proceedings.

Both decisions depart from the current case law of the District Court of Bonn in antitrust cases.[27] In contrast with EU law on legal privilege, the District Court of Bonn has consistently held that by definition, only documents created after the initiation of antitrust proceedings can be prepared for defense purposes so as to be exempt from seizure at the client's premises. A pending complaint with Germany's Supreme Court (*Bundesverfassungsgericht*) will force the court to consider whether this position should be reversed.

In any event, the decisions illustrate the substantial uncertainty as to the scope of legal privilege under German law. It remains to be seen whether the decision of the Gießen court and the amendments in the criminal procedural law will have an impact on the District Court of Bonn's jurisprudence.

DCA Clarifies Method For Setting Fines In The Dry Mortar Cartel Case

On October 29, 2012, the DCA clarified several issues concerning the setting of fines for cartel infringements, in a cartel case against a number of manufacturers of dry mortar.[28] As under Article 23(2) EU Regulation 1/2003 German law limits the fine on a cartel participant to 10% of the company's total annual turnover in the preceding year.[29] This rule entered into

23 Gießen Court of Appeal, Decision of June 25, 2012, Case 7 Qs 100/12, only available in German at: http://www.lareda.hessenrecht.hessen.de/jportal/portal/t/2cm3/page/bslaredaprod.psml?pid=Dokumentanzeige&showdoccase=1&js_peid=Trefferliste&documentnumber=1&numberofresults=1&fromdoctodoc=yes&doc.id=KORE218882012&doc.part=L&doc.price=0.0&doc.hl=1#focuspoint.

24 Bonn District Court, Order of March 27, 2002, Case 37 Qs 91/01; Bonn District Court, Order of September 29, 2005, Case 37 Qs 27/05; Bonn District Court, Order of September 10, 2010, Case 27 Qs 21/10.

25 Following the amendment of Section 160a(1) of the German Code of Criminal Procedure, any investigatory measure directed at an attorney – prior to the amendment, this was limited to criminal defense attorneys – shall be inadmissible if it is expected to produce information in respect of which the attorney would have the right to refuse to testify.

26 Regional Court of Mannheim, Decision of July 3, 2012, 24 Qs 1/12; only available in German at: http://lrbw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&nr=15848.

27 *See, e.g.,* National Competition Report, July – September 2012, p. 10.

28 DCA, Decision of October 29, 2012, Case V-1 Kart 1 – 6/12 (OWi), available in German at: www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2012/V_1_Kart_1_6_12_OWi_Urteil_20121029.html.

29 Section 81 (4) GWB.

force in mid-2005 and was slightly amended at the end of 2007 in order to remedy some of the uncertainties that arose due to the former's imprecision.

Because of the principle of *lex mitior* the most favorable law is to be applied if fining provisions are amended after an infringement. Accordingly the DCA reviewed the fines both under the 2005 and 2007 legislation.[30] Thus, the former version of the law may still be applied if an infringement ended before the 2007 legislation came into force. In any event, case law under the 2005 law may continue to be relevant in future proceedings.

The DCA confirmed its earlier ruling in the cement cartel case in 2009[31] that the 10% limit must be viewed and applied as the upper end of the possible fine range.[32] Accordingly, the maximum fine should be set only for the most serious infringements.

In addition, the DCA clarified that under the former version of the law, the annual turnover relates only to the turnover of the company directly involved in the infringement, not the turnover of the company's entire group or ultimate parent company. Since the current version explicitly takes into account the entire corporate group's turnover in determining the maximum fine, the Court applied the former version as the law that is more favorable to the defendant. In this respect, the DCA deviated from its own ruling in the cement cartel case,[33] where it had found that both versions of the fining provisions referred to the entire corporate group's turnover. As a result it concluded that the former version did not constitute a more favorable law. Interestingly, the DCA did not refer to its own, conflicting decision. The FCO has appealed the decision to the FCJ.

30 Section 4 (3) of the Law on Administrative Offences (*Ordnungswidrigkeitengesetz*).

31 *See* FCO, press release of February 23, 2010, available in English at: www.bundeskartellamt.de/wEnglisch/download/pdf/Presse/2010/PM_Bussgeldpraxis_final-E.pdf.

32 *See* DCA, Decision of June 26, 2009, Case VI-2a Kart 2 – 6/08 OWi, only available in German at: www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2009/VI_2a_Kart_2___6_08_OWiurteil20090626.html; *see* National Competition Report, January - March 2010, p. 8 - 9.

33 *See* DCA, Decision of June 26, 2009, Case VI-2a Kart 2 – 6/08 OWi, only available in German at: www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2009/VI_2a_Kart_2___6_08_OWiurteil20090626.html, *see* National Competition Report, January - March 2010, p. 8 - 9.

Sectoral Investigations

FCO Publishes Final Report On The Sector Inquiry Into The Market For Rolled Asphalt

On October 1, 2012 the FCO published the final report on the sector inquiry into the market for rolled asphalt.[34] The FCO found that the rolled asphalt sector is characterized by a dense network of corporate links between competitors, through reciprocal shareholdings in jointly owned asphalt plants, and set out the measures required to eliminate the competition concerns arising from this market structure.

The production of rolled asphalt in Germany is concentrated; four major suppliers account for a combined market share of approximately 60%. Approximately half of all asphalt plants are operated by joint ventures. The major competitors hold stakes in more than 85% of these JVs. On the basis of FCJ precedents,[35] the FCO applies a rebuttable presumption that an agreement is restrictive (under s.1 GWB) if the joint venture and at least two of its shareholders operate in the same product and geographical market.[36] The FCO found that more than half of the investigated rolled asphalt joint ventures fall into this category, and that the four major competitors hold stakes in nearly all of them. Even where all conditions of the presumption are not formally met, the FCO found that, under certain circumstances, some of the joint ventures increased the likelihood of coordinated behavior. This is the case, for instance, where only one of the shareholders is active in the same market as the joint venture and another shareholder holds a non-controlling stake in another company operating in the same market, or where it can be shown that the shareholders and the joint venture in fact exchange competitively sensitive information. In the FCO's opinion, a number of other joint ventures in which the four major competitors hold stakes were likely to raise such concerns.

The FCO called upon the companies involved to self-assess their and their joint ventures' compliance with antitrust rules and to bring any infringements to an end (*i.e.*, to terminate the joint ventures) within 15 months. The FCO announced that it

34 The report is available in German at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Stellungnahmen/2012-10-01_SU_Walzasphalt_Abschlussbericht.pdf.

35 FCJ, Decision of March 4, 2008, Case KVZ 55/07 (Nord-KS), para. 14; FCJ, Decision of May 8, 2001, KVR 12/00 (Ost-Fleisch), para. 34.

36 See also the report on the FCO's prohibition of the continuation of a chemicals distribution joint venture, above.

would, if necessary, initiate proceedings and order the dissolution of any anti-competitive joint ventures.

Ireland

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

Sector Investigations

Public consultation on the Irish ports sector launched by the ICA

In a paper published on December 14, 2012 (the "Paper"), the Irish Competition Authority (ICA) announced the launch of a public consultation to examine competition in the Irish ports sector. Section 30(2) of the Irish Competition Act 2002 grants the Minister for Jobs, Enterprise and Innovation the power to request the ICA to carry out market studies in respect of competition. The current Minister called for such a study because of a perception that Irish ports represent one of several areas of the economy currently sheltered from competition. The findings of the consultation will inform a subsequent market study of the sector.

In its Paper, the ICA explains that ensuring competition in the ports sector is particularly necessary in the case of Ireland, which, as an island nation, is heavily dependent on ports for trade. Port efficiency has an important influence on transport costs and the country's major exporting sectors are heavily reliant on sea transport. The ICA also notes the importance of ensuring that Irish ports operate competitively given that continental European ports are exposed to a higher level of competition.

The ICA then outlines its views as to how competition in the ports sector currently works. In particular, the Authority discusses: the level of competition between ports in the State and between Irish ports and ports in other countries; the impact of competition from ports in Northern Ireland; international experience of competition and efficiency in port services; the impact of developments in other transport modes in Ireland and developments in competition between ports; whether changes in port ownership and structures could enhance competition in port services; and possible future actions the State could take to promote competition in Irish ports.

Interesting preliminary findings outlined by the Authority in its Paper include the fact that the degree of specialization among major Irish ports limits the level of inter-port competition, and that Ireland's geographical location as an island in western Europe limits supply-side substitution as compared to many other European ports. As well as port specialization, the ICA notes that other factors limiting inter-port competition include switching costs, the population in the port area, and historical relationships between shipping companies and ports.

The pending consultation aims to confirm whether the ICA's preliminary analysis of such issues is correct and to identify ways of making the Irish ports sector more efficient.

Policy and Procedure

ICA published guidance on preferred repairers' arrangements in the insurance market

On December 19, 2012, the ICA published a Guidance Note (the "Note") to express its views as to the compatibility of preferred repairers' arrangements with Irish and EU Competition law. The Note focuses, in particular, on the home and motor insurance markets since this type of agreement arises most often in those markets. The ICA recalls that the Note is not a definitive interpretation of the law, but is merely intended to provide guidance to those affected by such agreements.

Preferred repairer agreements are agreements entered into between insurance companies and service providers, whereby the insurance provider agrees to provide repair, restoration or replacement services when an insurance claim is submitted to the insurance provider. The ICA highlighted certain advantages regarding these arrangements for all involved: the policyholder has easy access to repairs and so does not have to incur the additional costs associated with searching for a repairer; the policyholder also benefits from the Central Bank's Consumer Protection Code 2012, which ensures a certain quality of any repair work done; the insurer can reduce the cost of settling claims in a number of ways, including by agreeing the price and level of service in advance; and finally, the repairer has a steady flow of work by entering such agreements, as compared to working on an ad hoc basis.

The ICA explained that, as preferred repairers' arrangements are nationwide, they fall to be examined, not only under section 4 of the Competition Act 2002, which relates to agreements affecting trade within the State, but also under Article 101 TFEU. In support of this, the ICA cited the Commission's Guidelines on the concept of "appreciable effect" on trade between Member States, which state that agreements that impact the whole of a Member State usually meet this criterion.

Two different markets are affected by preferred repairers' arrangements: the market for the purchase of insurance policies, and the market in which service providers are active. However, the ICA considered that there was no need to analyse each of these markets in detail since the general analysis would remain the same in either case.

Preferred repairers' arrangements could potentially fall foul of Irish and/or EU Competition law because they limit the choice of policyholders to have work done by their own chosen repairers. Often, for example, there is a cost disincentive (such as a reimbursement limit) included in the policy agreement. However, the ICA felt that this limitation of choice is outweighed by the benefits that accrue to consumers (reduced costs and time sourcing a repairer and protection of the Consumer Code). The fact that certain consumers may feel their choice of repairer is unduly restricted is not the relevant parameter for the Competition law analysis, which must take account of consumers as a group. As a result, the fact that the process is simplified for most policyholders outweighs the negative effects on those policyholders who would rather choose their repairer.

The ICA also considered anticompetitive foreclosure as a possible effect of the preferred repairer arrangements but decided that there was no evidence of such an effect. Insurers could contract with whichever repairers they wished. Similarly, repairers were free to compete in the competitive tendering process organized by the insurance providers for the preferred repairers' arrangements. The Authority thus found no evidence that the agreements were capable, either individually or collectively, of having the effect of limiting access to a significant portion of the relevant market(s). On this point, the ICA recalled that the ultimate aim of Article 101 TFEU is to protect the competitive process, not the firms wishing to compete.

While the Authority's Note provides welcome guidance in this area, it does not attempt to suggest that preferred repairers' arrangements will always be immune from legal challenge. Aside from the fact that the Note is not a definitive legal interpretation of these arrangements and the courts may well have more to say on the matter, the Authority itself leaves open the possibility that preferred repairers' arrangements may be found to infringe Irish or EU Competition law. This is particularly so if it is shown that those arrangements resulted in cost increases for consumers or were not essential to achieving efficiencies.

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 ("Consiglio di Stato").

Mergers and Acquisitions

Bolton/Simmenthal

On December 5, 2012, the ICA conditionally authorized the acquisition of Kraft's Simmenthal business unit, active in the production and commercialization of canned beef, and canned tripe with tomato sauces, by Bolton Alimentari S.p.A. ("Bolton"), a company active in the same sectors (through the Manzotin brand), as well as in the production and commercialization of canned fish (with brands such as 'Rio Mare' and 'Palmera').

The ICA found that the transaction would have resulted in the merged entity entity holding a dominant position, and would have substantially lessened competition, in the national markets for the production and commercialization of (1) canned beef and (2) canned tripe with tomato sauces. In particular, the ICA held that, in those markets, the transaction concerned the acquisition of the market leader (Simmenthal) by its fiercest competitor, Manzotin. According to the ICA, the transaction would have given rise to harmful horizontal, unilateral, as well as conglomerate effects.

In particular, the ICA highlighted that the merged entity's market share would have amounted to 70-80% in the canned beef market (80-90% in the modern distribution segment) and to 70-85% in the canned tripe with tomato sauces market. In each of the above markets the closest competitors to the merged entity would have held much lower market shares. With respect to unilateral effects, the ICA first examined the substitutability between Simmenthal and Manzotin branded products. In its analysis, the Authority considered the diversion ratios between Simmenthal and Manzotin branded products *i.e.*, it measured the degree to which consumers of product A that would have switched to product B in the event of a price increase for product A: the higher the diversion ratio, the more substitutable the relevant products are.

The ICA found that in this case, the diversion ratios between the produces Simmental and Manzotin were higher than the standard thresholds of 14-15%. Generally, mergers between undertakings with diversion rations above these thresholds are deemed likely to cause harmful effects on competition. (Specifically, ICA estimated that the diversion ratio from Manzotin to Simmenthal was nearly 60%, while the diversion ratio from Simmenthal to Manzotin was approximately 30%).

The ICA also used the results of the diversion ratios calculation together with the Gross Upward Pricing Pressure Index ("GUPPI"), to investigate whether the merged entity would have had an incentive to increase prices. The ICA estimated that the transaction would have caused an average market price increase in the range of 6.2-9.3%; both the ICA and the European Commission had previously determined that a price increase above 4-5% constitutes a significant impact on competition.

The ICA also found that the merger would impede competition for the following reasons: (1) the merged entity would face limited competitive pressure; (2) the markets in question have substantial barriers to entry as Simmenthal is perceived by consumers to have a blockbuster product, which means that a new entrant would have to invest significantly in marketing in order to build a brand capable of competing with that of Simmenthal; (3) the merged entity would be capable of engaging price discrimination, and; (4) the transaction would give rise to conglomerate effects by enhancing Bolton's premium products portfolio, thereby strengthening its negotiation power with distributors.

In light of the above, the ICA authorized the transaction subject to the following remedies: (1) the sale of the Manzotin business unit to a competitor; and (2) the creation within Bolton, for a certain period of time, of a separate sales unit concerning the commercialization of Simmenthal products.

Policy and Procedure

The TAR Lazio rules on the accessibility of complainant's business plan filed in antitrust proceedings

On November, 12, 2012, the TAR Lazio upheld two appeals lodged, respectively, by Trenitalia S.p.A. ("Trenitalia") and Rete Ferroviaria Italiana S.p.A., ("RFI") against the ICA's decisions to refuse them access to the business plan and other internal economic studies (the "Documents") of Arenaways S.p.A. ("Arenaways").[37]

[37] TAR Lazio's decisions of November 12, 2012, nn. 9275 and 9276.

The ICA initiated an investigation into Trenitalia and RFI for alleged abuses of their dominant positions in the markets for railway passenger transport and of railway network access. The alleged abusive conduct consisted in having delayed and obstructed market entry of the new entrant Arenaways.[38] During the proceedings, Trenitalia and RFI requested access to the Documents, as they deemed them necessary for defending their position before the ICA and, in particular, to prove that any alleged delay to Arenaways' market entry was only a result of Arenaways' own actions. The ICA refused access to the Documents on grounds that: (1) they contained business secrets, and; (2) the information reported therein was of no relevance for Trenitalia and RFI's defense.

The TAR Lazio overruled the ICA's decisions. The judges held that although compliance with the principle of equality of arms does not imply that access to the file should always prevail over the protection of confidentiality of business secrets, that principle does imply that when access is sought in relation to documents that are necessary for the parties' defense, confidentiality should be confined to those parts of the document containing sensitive information. Therefore, the TAR Lazio stated that in deciding whether to grant access to a given document of its case file, the ICA should strike a balance between the guarantee of the principle of equality of arms and the protection of commercially sensitive information.

According to the TAR Lazio, the ICA's decision revealed that they had not engaged in the appropriate balancing exercise, but had simply endorsed Arenaways' confidentiality claims *in toto*. The TAR Lazio highlighted that such an approach was revealed by the weak justification for the refusal; the ICA merely asserted that the Documents contained business secrets, without substantiating this conclusion, and without clarifying why such protection of confidential information should have prevailed over Trenitalia's and RFI's right of defense. Concerning this latter aspect, the TAR Lazio held that the ICA did not take into serious consideration the fact that access to the Documents appeared to be of considerable importance for Trenitalia and RFI's defense. In particular, access to the information contained in the Documents (and especially to any eventual information on the timetable anticipated by Arenaways in relation to the launch of its operations), could have been used by the parties to rebut the ICA's charges that the asserted delay of Arenaways' market entry would have been caused by Trenitalia and RFI's behavior.

In light of the above, the TAR Lazio annulled the ICA's decisions. As a consequence, the judges ruled that a fair balance between the involved parties conflicting interests could have been drawn by allowing Trenitalia and RFI to consult the content of the Documents, without making any copies of them. Therefore, the TAR Lazio ordered the ICA to render the Documents accessible to Trenitalia and RFI on a consultation only basis.

38 *See* The ICA fines Ferrovie dello Stato italiane for alleged abuse of dominant position, in National Competition Report, Italy, 3rd Quarter, 2012.

Netherlands

This section reviews developments under the Competition Act of January 1, 1998, which is enforced by the Dutch Competition Authority ("NMa").

Horizontal Agreements

NMa Imposes Fines on Demolition Companies for Cover Pricing in Private Procurement Procedures.

In a decision issued on December 10, 2012, the NMa fined two demolition companies for participating in a cartel, which consisted of cover pricing during four[39] private procurement procedures over a period from 2004 to 2009. [40] The anti-competitive behavior occurred when, upon being requested to submit a bid, one company submitted a bid not in order to win the procurement proceeding, but out of fear that it would be excluded from future procurement procedures if it did not. In those instances, the company would ask another bidding company for the exact value of its bid and, once known, would submit a slightly higher bid in order not to win the procurement.

In its fining decision, the NMa identified this as a type of bid rigging, namely cover pricing. In response, the parties put forward multiple factual and legal arguments including principally that: (1) the conduct was unilateral and that there was no information exchange; and (2) there was no anti-competitive effect as the price of one of the bids was independently determined with the goal of winning the procurement. The NMa nevertheless concluded that the behavior provided insight into the other company's bidding behavior and led to knowledge that one party would bid at a higher price than the other. In general, the NMa held that the companies had eliminated the uncertainty in the competition between them by engaging in cover pricing. Additionally, the NMa found that cover pricing has the object of negatively affecting the competitive process underlying procurement procedures.

In determining the relevant market, the NMa referred to a decision by the Trade and Industry Appeals Tribunal (College van Beroep voor het Bedrijfsleven, "CBB") which held that the relevant market for anti-competitive behavior prior to a procurement was limited to the companies bidding in that procurement. For the relevant turnover, the NMa used the realized project turnover of the projects during which the parties had colluded. Determining a gravity factor ranging from 1.5 to 1.75 per procurement procedure, the NMa set fines to an amount of €56,000 and €42,000 for the two companies involved.

CBB: Right to Silence Extends to Former Employees

On December 12, 2012, the CBB overturned a judgment by the Rotterdam District Court regarding the "right to silence" of former employees in cartel investigations. [41]

The NMa regularly requires former employees to cooperate in cartel investigations. On a number of occasions, these employees have refused to cooperate, relying on their "right to silence." The NMa has consistently fined these ex-employees for refusal to cooperate, issuing fines ranging from €10,000 up to €150,000. In a judgment following an appeal of one such decision in 2011, the District Court of Rotterdam confirmed that former employees have no right to silence and that the NMa can fine them if they refuse to cooperate.

In its recent decision, the CBB overturned the judgment and ruled that the right to silence extends to former employees. On appeal the NMa had argued that the right of silence only extends to a company's employees within the timeframe of the hearing. The CBB held that this restrictive approach would diminish the company's protection by means of the right to silence holding that this militated against the restrictive approach.

Mergers and Acquisitions

NMa Approves Sports Broadcasting Merger Despite Persisting Concerns

In a decision issued on November 29, 2012, the NMa cleared Fox International Channel's acquisition of a 51% controlling shareholding in Eredivisie Media en Marketing ("EMM") which manages the use of broadcasting rights of the Netherlands' premier football league.[42] On the same day, the NMa also published an "informal memorandum" in which it assessed the

[39] The investigation included a fifth private procurement proceeding, however the NMa was time-barred from considering this proceeding since the investigation started more than five years after the alleged events had taken place.

[40] Case Nr. 249/828 (Slopersbedrijven Rotterdam), NMa decision of December 10, 2012.

[41] CBB, Judgment of December 21, 2012, LJN:BY7031.

[42] Case Nr. 7500 (Fox Entertainment – Eredivisie), NMa decision of November 29, 2012.

antitrust implications of the management of these broadcasting rights.

The acquisitions relate to the exploitation rights of football match highlights, which are currently licensed to public broadcaster NOS until July 2014. After the expiry of the license, EMM is considering whether to exploit the broadcasting rights for the highlights itself via a new television station called "Fox NL." The informal memorandum states that if EMM will exploit the broadcasting rights itself, the license should be limited to a maximum of six years. The NMa considered such a period justified to establish a new television channel (the establishment of which will be positive for competition amongst television broadcasters). After these six years, the football teams should offer the broadcasting rights to the market and allow all television channels to bid for them. The parties have agreed to commit to these recommendations.

The acquisition does not affect the exploitation of live football matches, which EMM will continue to broadcast on its separate paid television channel (Eredivisie Live). The parties have guaranteed that Eredivisie Live will be offered to other suppliers of television services under non-discriminatory conditions. However, the parties reserved the right to combine Fox NL with other Fox content. The NMa held that that this conduct might violate competition law if it significantly impedes competition. However, unless new evidence or complaints emerge, the NMa considered it unlikely that it would start an investigation on its own initiative.

Critics of the decision have pointed to divergences from certain UEFA and German Bundesliga cases which held that the joint selling of broadcasting rights by football clubs is only allowed by means of a transparent bidding process, and for a period of a maximum of three years. The NMa decision made no provision for such a procedure and the exploitation rights have been sold for a period of six years instead of three. Proponents of the decision have explained that the different model is the result of the lower value of football broadcasting rights in the Netherlands.

NMa Blocks a Bakery Merger since the Merged Entity Would Have a Market Share of 70 to 80% in the Market for Crisp Bakes

In a decision issued on December 14, 2012, the NMa prohibited an acquisition by Continental Bakeries of A.A. ter Beek which was notified on December 13, 2011.[43] The acquisition concerned the markets for the production and supply of crisp bakes (beschuit) and honey cake (ontbijtkoek).

In its in-depth investigation, the NMa paid close attention to the definition of the relevant market, and made use of a third party consumer survey on the degrees of substitutability between different products. Having concluded that there was little supply or demand substitution between crisp bakes and honey cake, the NMa defined separate product markets for these products. As both parties were active in both branded products (such as "Bolletje") and produced private label products for retailers, the NMa considered whether these constituted separate product markets. It concluded that the production and supply market for both products functioned at two levels: the upstream level (the production and sale to retailers); and the downstream level (sale by the retailers to consumers). Given (1) the substitution between private label products and branded products downstream, and (2) that both producers and retailers consider this downstream substitution in their price negotiations at the upstream level, the NMa concluded that branded products and private label products constituted a single product market. It defined the affected market as the production and supply of crisp bakes and the production and supply of honey cake via the retail channel. The geographic market was defined as national for both product markets.

On the market for honey cake, the NMa held that the merged entity would only have a modest market share of 20-30%. The merged entity would indeed continue to face significant competitive pressure from Peijnenburg (50-60%) and Modderman (10-20%). However, the transaction would negatively impact the already highly concentrated market for crisp bakes, with the merged entity having a market share of 70-80%. In response to the market investigation, retailers indicated that the price for crisp bakes was likely to increase as a result of the merger. The merging parties tried to counter the concerns by pointing to (1) sufficient competitive pressure from existing players; (2) the likelihood of entry and expansion of existing competitors as constraints on the merged entity's behavior; and (3) the countervailing buyer power of retailers.

[43] Case Nr. 7321/401 (Continental Bakeries – A.A. Ter Beek), NMa decision of December 14, 2012.

None of these arguments were accepted by the NMa, and the parties proposed remedies on December 11, 2012. They offered to decrease production capacity by means of the divesture of one of A.A. ter Beek's production lines. The parties presented two potential buyers and indicated that apart from buying the production line, an additional investment would be required to actually produce crisp bakes. The NMa indicated that for a divesture of production capacity to be effective, the buyer should have the possibility and incentive to be active on the market for crisp bakes on a lasting basis. The NMa concluded that the divestment did not provide sufficient safeguards that either proposed buyer would make the substantial investments required to be active on the market for crisp bakes on a long lasting basis. Concluding that the remedies were insufficient to address the anti-competitive concerns, the NMa prohibited the merger between the parties.

The NMa Exempts Merger from Mandatory Stand-Still Period for Reasons of Financial Distress

In its decision on October 31, 2012, the NMa granted iCentre Group an exemption from the mandatory stand-still period required before implementing a merger for its acquisition of i-Am Stores. The Competition Act allows the NMa to do so if adhering to the mandatory stand-still period would irreparably damage a proposed concentration. The NMa based its exemption on the financial distress and imminent bankruptcy of the target. Relevant factors were: (1) the cancellation of i-Am Stores' credit line by Apple Benelux; (2) the stores were not being supplied anymore; and (3) its personnel were seeking other employment.

Policy and Procedure

Focus New Authority: Promoting Chances and Choices for both Companies and Consumers

In his speech on October 4, 2012[44] Christ Fonteijn, president of the NMa and anticipated president of the new Consumer and Market Authority (the "ACM"),[45] set out the current situation as regards the opening of the ACM, which was supposed to start functioning on January 1, 2013. On December 20, 2012 it was announced that the ACM could not start operating as the necessary legislative changes were still under review in the Senate.

Fontein emphasized that the new authority will amount to more than simple merger of the current authorities; but would also generate important synergies. He identified that a prerequisite for such synergies was the development of an overarching view of the identity, role, and core values of the new authority. Fonteijn emphasized that the ACM would exist to promote choice for both companies and customers and that it would not just enforce and penalize illegal conduct, but would have broader focus on tackling harmful market developments. In that respect, the ACM will look at the bigger picture, and investigate whether such harmful developments may be the result of underlying problems in the market. He stressed that commitment decisions and market inquiries could play a role in addressing such underlying problems.

However, Fonteijn noted that "the ACM is and will remain an enforcer" and pointed in particular to the *Wegener* line of case-law (fines on individuals) and a renewed focus on liability of parent companies that have decisive influence over their subsidiaries, even if they only have a minority interest.

Finally, Fonteijn welcomed further collaboration with other national and international authorities, and pointed in particular to the proposed legislative changes that provide for further possibilities to share information with other authorities, including the tax authorities.

44 *See* http://www.nma.nl/images/Kurhausspeech%20Chris%20Fonteijn%204%2010%2012%20def22-202341.pdf.

45 The ACM involves a merger of NMa, OPTA (telecoms and post authority) and CA (consumers' authority).

Portugal

This section reviews developments under the Competition Act of May 8, 2012, Law No. 19/2012 (the “Competition Act”), which is enforced by the Autoridade da Concorrência (“PCA”).

Mergers and Acquisitions

PCA imposes fines for failure to notify transaction in 2008

On December 28, 2012, the PCA concluded an investigation opened in January 2012 into the alleged failure of the Portuguese National Association of Pharmacies (“ANF”), Farminveste 3 – Gestão de Participações, SGPS, Lda. (“Farminveste”), and Farminveste – Investimentos, Participações e Gestão, S.A. (“Farminveste, S.A.”) to notify a transaction under Portugal’s merger control rules.

The transaction took place in the first half of 2008 and involved the acquisition by Farminveste, the investment arm of the ANF, of control over ParaRede, SGPS, S.A (“ParaRede”), a publicly-traded company active in the IT sector, particularly in the provision of electronic payment terminals.

On November 5, 2009, following an *ex officio* investigation, the PCA notified Farminveste of the need to notify the transaction for merger control review. The parties subsequently notified the transaction, simultaneously arguing that the notification was not required. On May 28, 2010, the PCA gave unconditional clearance to transaction and confirmed its view that the notification was mandatory.

According to a note published on the PCA’s website, the proceedings opened in January 2012 led to a total fine of € 149 278,79, which is equivalent to 0.05% of the turnover of the ANF and of Farminveste, S.A. (Farminveste itself had no revenues on the reference year used in the calculation of the fine). In calculating the fine, the PCA took into account the fact that the transaction had not caused anticompetitive effects in the marketplace.

In its website note, the PCA stated that this decision reflects the importance given to detecting transactions that are not properly notified for merger clearance.

Policy and Procedure

Rules setting forth procedural rules for Portugal’s new leniency regime are enacted

On January 3, 2012, following a public consultation process, a regulation was officially published setting forth procedural rules for Portugal’s leniency regime. The rules complement the substantive provisions of the Competition Act that entered into force in July 2012, and are to be read in conjunction with a non-binding guidance notice prepared by the PCA.

Portugal’s new leniency regime only applies to horizontal agreements or concerted practices (*i.e.,* cartels). Immunity is available to the first undertaking or individual to provide information and evidence that allows the PCA to either conduct a search and seizure procedure or to detect the existence of an infringement. Unlike in other European jurisdictions, immunity is available for the “first in” even if the PCA has already started to investigate the case. Fine reductions of 30-50%, 20-30% and up to 20% are granted to other applicants providing significant added value to the PCA’s case.

The regulation clarifies a number of important practical aspects concerning the procedural framework of the leniency regime:

1. It sets out the possible methods of delivery of the leniency application to the PCA, including through oral statements that are transcribed by the attorneys at the premises of the PCA;
2. It permits the submission of short form leniency applications in English, when the applicant is also in the process of submitting leniency applications to the European Commission in cases where more than three Member States are affected;
3. It introduces a clear marker system, detailing the information that must be included in the marker request and confirming the discretion enjoyed by PCA in extending the deadlines for the submission of a complete leniency application, and;
4. It explains in which contexts the leniency applicant might convert its immunity request into a fine reduction request, and the situations where the fine reduction application can be withdrawn if the PCA finds that the information and evidence do not add significant value to the case.

The PCA declined to introduce further clarification on the concept of significant added value for leniency purposes. In a note accompanying the publication of the document, the PCA stated that its law is in line with European practice and that it could revisit the issue after gaining more experience.

The PCA also chose not to further regulate the subject of confidentiality and access to leniency material, saying that its regime is in accordance with the European rules and that the European Commission is currently studying the topic of access to documents and private enforcement.

Regulation 1/2003 is an important step in the PCA's efforts to establish a fully functioning leniency regime in Portugal within the legal framework of the new Act.

The PCA publishes its enforcement priorities for 2013

On December 20, 2012, the PCA published a four-page document containing its enforcement priorities for 2013. Unlike in the previous regime, in which the PCA was required to investigate every alleged violation of the competition rules, the new Competition Act gives the PCA discretion to choose its enforcement goals and required it to produce a policy document outlining its priorities every last quarter of the year.

The PCA framed its 2013 enforcement goals in the context of a changing institutional landscape: (a) the creation of a specialized Court for competition matters in April 2012; (b) the enactment of the new Competition Act in 2012; (c) a new statute aimed at regulatory agencies to be passed in the first quarter of 2013; (d) the PCA's new internal statutes; and (e) a new legal regime on unfair commercial practices and the PCA's jurisdiction on the issue.

The first priority listed by the PCA within this framework involves the optimization of the PCA's work on competition enforcement and advocacy. The PCA mentions the application of competition law in regulated sectors and its focus on fighting cartels and abusive unilateral practices by dominant firms. In exercising its supervisory role, the PCA will be concerned with merger control, the regulation of payment card systems at the European level, and three sectors to be monitored: energy, telecommunications, and ports.

The second announced priority is targeted at the judicial review of the PCA's decisions. As regards unilateral conduct cases in particular, which are often overturned by Courts, the PCA will seek cooperation from the European Commission as an *amicus curiae* in such cases and will make more frequent use of expert evidence in order to meet the standard of proof required by the Courts.

The third priority involves the management of personnel at the PCA, with a view to bolstering the PCA's capacity to act. The PCA will be prepared to change its internal organizational structure as needed and will make an effort to recruit staff. The PCA also plans to release more information on its website and to deepen multilateral and bilateral contacts with other competition authorities.

PCA releases guidance on pre-notification contacts in merger control cases

On December 27, 2012, the PCA published guidelines on pre-notification contacts in merger control cases. The guidelines clarify practical aspects concerning the conduction of confidential and informal pre-notification contacts between the potential notifying parties, legal counsel and the PCA, with the purpose of achieving a more streamlined merger review process once the notification is filed.

The guidelines contain a non-exhaustive list of possible topics to be addressed through the pre-notification contacts. For example, the contacts can help the parties to ascertain whether the PCA has jurisdiction over a certain transaction, whether a complete merger control form or a simplified form will be used if a notification is needed, and which information must be submitted to the PCA. The contacts can also be used to identify on a preliminary basis potential competition concerns and to make progress on issues such as relevant market definition.

The pre-notification contacts are voluntary and can take place as soon as the parties are able to demonstrate an intention to conclude an agreement relating to the transaction. The contacts should start with adequate time in light of the complexity of the analysis, and at least fifteen days before the expected notification date.

The contacts are informal and thus do not follow a pre-determined format. Meetings are held with a case team, which will normally be the same team that will be responsible for reviewing the notification. Parties are encouraged, particularly in more complex cases, to submit an advanced draft of the merger control form and to provide copies of the pre-contractual documents such as MOUs.

The guidance provided by the PCA during the pre-notification contacts is non-binding. However, the PCA states that its merger control process will strive to be consistent with the pre-notification guidance, subject to the information available and as long as consistency is warranted. Also, with the exception of more complex cases, the PCA will be able to issue an written opinion as to whether notification thresholds are met.

The guidelines were published following a public consultation process and are based on the PCA's experience under the previous Competition Act and on the best practices of the European Commission ("DG Competition Best Practices on the conduct of EC merger proceedings" of January 20, 2004).

Spain

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

Horizontal Agreements

The CNC Fined Six Shipping Groups €88.5 Million For Participating In A Cartel Affecting Maritime Transport Between The Iberian Peninsula and Morocco

In March 2011, the ID opened formal proceedings against Compañía Trasmediterránea SA, Europa Ferrys SA, Cenargo España SLU, Ferrimaroc, SA, Balearía Eurolíneas Marítimas SA, Euromaroc 2000 SL, Förde Reederei Seetouristik Iberia SL, Förde Reederei Seetouristik Maroc SARL, International Maritime Transport Corporation SA, Compagnie Maritime Marocco-Norvegiènne SARL., Líneas Marítimas Europeas SA, Comanav Ferry SA, CMA-CGM SA and COMANAV SA for a possible violation of Articles 1 of the LDC and 101 of the TFEU, consisting of the adoption of market sharing agreements and the fixing of prices and trading conditions. It was maintained that such potential anticompetitive conduct could have affected the market for the provision of maritime passenger and vehicle transport services over the period 2002 to 2010.

The investigation was initiated *ex officio* by the CNC, which conducted dawn raids at the premises of several shipping companies during May 2011. In its Resolution of November 7, 2012, the CNC Council confirmed the ID's conclusions, stating that the defendant shipping companies had indeed held several meetings, exchanged information, and reached agreements concerning pricing issues, commissions, trading conditions, and timetables. It was confirmed that the cartel had been operational between 2002 and 2010 and had effectively led to the elimination of competition in the provision of maritime cargo and passenger services on numerous routes between the Iberian Peninsula and Morocco during this period. In particular, the undertakings in question coordinated their conduct on the market by agreeing on, *inter alia*, who was to service specific routes and what services were to be offered. The result of such conduct was that prices for the mentioned services were significantly higher than those which would have resulted from competitive market conditions.

In calculating the fines, the CNC Council took account of the serious damage caused by the conduct in question. The Council of the CNC found that the relevant conduct constituted infringements of an extremely serious nature and that they had affected the near entirety of the relevant market for an eight-year period. The Council found that these circumstances justified the imposition of fines of up to 15% of the undertakings' total turnover.

Moreover, several undertakings were subject to a 5% fine increase due to recidivism, in light of Article 64(2)(a) of the LDC. In this regard, both Transmediterránea SA and Europa Ferrys had already been fined three times for committing similar infringements in 2003 and 2004. On the other hand, Balearía Eurolíneas Marítimas and its subsidiary Euromaroc 2000 benefited from a 40% fine reduction under the leniency program, as a result of having provided information with significant added value for the purposes of proving the existence of the cartel during the investigation.

The CNC Levied Fines Of More Than €9 Million On Four Companies For Organizing A Cartel In The Archive Material Manufacturing, Distribution And Marketing Sector

On September 14, 2010 the company Unipapel SA submitted a leniency application to the CNC, seeking to obtain an exemption from the payment of the fine that it was liable to incur due to its participation in an infringement of Article 1 of the LDC and 101 of the Treaty on the Functioning of the European Union ("TFEU"). In particular, the undertaking maintained that it had engaged in collusive behavior by fixing prices for archive material with competitors and by reaching market-sharing agreements concerning customers of own-brand archive material in the national market.

In October 2010, the CNC carried out dawn raids at the headquarters of the leading companies in the sector. On December 20, 2010, the ID opened formal proceedings against Unipapel SA (today Adveo Group International SA), Dohe SA, Esselte SA and Grafoplas del Noroeste SA for their participation in the mentioned conducts.

In its Resolution of November 21, 2012, the CNC Council confirmed that from May 2005 to February 2010 representatives of the accused undertakings had held at least twenty meetings in order to adopt price-fixing and market sharing agreements, which they subsequently implemented. Such agreements pursued the common goal of restraining price competition and took different forms, such as 'non-aggression pacts' with regard to each other's customers. The undertakings at issue exchanged a large volume of pricing information concerning, *inter alia*, price increases, minimum prices, discounts and promotions.

In view of these facts, the CNC Council concluded that an infringement of Article 1 LDC and Article 101 TFEU had indeed taken place during the period in question, and classified such an infringement as 'very serious' within the meaning of Article 62(4) LDC, which justified the imposition of fines of up to 10% of the undertakings' total turnover in the preceding business year. Although no aggravating or mitigating factors were identified, Unipapel SA (now Adveo) was exempted from the fine since it had been the first to provide evidence enabling the CNC to carry out inspections and fully cooperated with the CNC throughout the proceedings. Moreover, DOHE was granted a 50% fine reduction for having provided the CNC with evidence of the infringement that represented significant added value.

Unilateral conduct

The CNC Fined Telefónica, Vodafone And Orange For Abusing Their Position In The Wholesale Telephone Short Messaging Markets

On December 19, 2012, the CNC fined Telefónica Móviles de España, S.A.U. ("TME") €46,490,000, Vodafone España, S.A.U. ("VODAFONE") €43,525,000 and France Telecom España, S.A. ("ORANGE") €29,950,000 for committing abusive practices prohibited by Article 2 of the LDC and Article 102 of the TFEU in relation to short text and multimedia messages sent via mobile telephones (SMS and MMS).

In January 2011, the ID opened formal proceedings against TME, Vodafone, and Orange for possible anti-competitive practices consisting of excessive pricing in the wholesale markets for access and origination and for termination of short messages over the period 2000-2009.

These wholesale markets concern essential services, the main aims of which are to ensure network access and interoperability between the different networks. According to the CNC, whilst the parties maintained a collectively dominant position on the wholesale access and origination market, they held a monopoly position in the wholesale market for the provision of SMS and MMS termination services in their respective networks. Moreover, it was noted that, unlike the situation for wholesale termination services for voice calls, the short messages wholesale termination services market was not regulated during the abovementioned period.

In its Resolution, the CNC Council confirmed the ID's conclusions by stating that the three mobile network operators had priced termination services at an excessively high level and that this had led to higher retail prices for SMS and MMS services users due to pass-on. In reaching these conclusions, both the ID and the Council noted that: (1) prices of termination services were high and stable over the period, despite considerable traffic increase and cost reductions; (2) short message termination services margins increased, especially from 2004 onwards; (3) average revenue obtained from the provision of non-regulated wholesale termination services for short messages was considerably higher than that obtained from the provision of regulated voice call services; and (4) wholesale termination services prices for short messages in Spain were amongst the highest in Europe.

Moreover, the CNC Council confirmed that these anticompetitive effects on the termination services market were aggravated by the fact that the three operators, who were deemed to hold a collectively dominant position, applied a pricing policy in access and origination services which was consistent with the policy in the termination market. In this sense, the high access and origination wholesale prices contributed to maintaining retail prices for short messages at a higher level, and to strengthening barriers to entry and expansion for mobile operators.

On the basis of the foregoing, the CNC Council declared that TME, Vodafone and Orange had committed an exploitative abuse of a dominant position, consisting of excessive pricing in the identified markets. Although substantial fines were imposed on the three operators, the CNC Council did not consider it necessary to adopt regulatory measures as had been proposed by the ID, since: (1) it had only been proven that the anticompetitive conduct took place until 2009; and (2) the Council believed that the Telecommunications Market Commission was better positioned to adopt *ex ante* regulation.

Sweden

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

Horizontal Agreements

The Swedish Market Court upholds the SCA's decision regarding the Swedish Automobile Sports Federation's rules on the organization of car racing competitions by non-affiliated clubs.

On December 20, 2012, the Swedish Market Court (the "Court") issued a judgment upholding the SCA's decision from May 13, 2011, finding Svenska Bilsportsförbundet's (Swedish Automobile Sports Federation, "SASF") rules in violation of Article 101 TFEU and Chapter 2, paragraph 1, of the Swedish competition statute.

The SASF's rules prevented its licensed officials and drivers from participating in competitions organized by clubs not affiliated with the SASF. Violation of SASF rules could lead to a temporary exclusion from the SASF, and there was no internal procedure that allowed for a licensed official or driver to apply for the authorization to participate in non-affiliated competitions. The SASF justified its rules by the need to ensure fair and safe competitions, the need to grant access to everyone, *etc*.

In its appeal against the SCA's decision, the SASF raised several arguments: (1) the organization of car racing competition does not constitute an economic activity; (2) the SASF constitutes a single economic unit and not an association of undertakings and therefore does not fall within the scope of Article 101 TFEU; (3) the SCA has incorrectly defined the market and the rules at stake do not cause any anticompetitive effects; (4) sports have a special status and, therefore, rules aimed at ensuring, amongst other things, safe and fair competitions do not constitute a breach of Article 101(1) TFEU; (5) the rules fall under Chapter 2, paragraph 2 of the Swedish competition statute or under Article 106(2) TFEU, as the SASF offers a service of general economic interest.

In its judgment, the Court made the following findings:

1. The Court first held that the organization of car racing competitions does constitute an economic activity, notably the competitions generate turnover through the sale of tickets and participation fees. This is true despite the fact that the SASF is a non-profit organization.
2. The Court further held that SASF's different member clubs constitute separate independent entities and therefore rejected the application of the single economic unit principle, which would have precluded the application of Article 101 TFEU. Indeed, the members have their own statutes, boards and budgets, in addition to the freedom to organize or not organize events and to exit the SASF.
3. The SASF argued, based on the Court of Justice of the European Union's (the "ECJ's") MOTOE judgment, [46] that the actual organization of sporting events should be considered separately from the commercial exploitation of the events. The SASF had argued that the MOTOE judgment only held that the commercial exploitation of a sporting event would amount to an economic activity. The Court countered that the ECJ in fact considered both elements to form an economic activity, especially as it is difficult to separate them. The organization and exploitation of a sporting event complement each other and thus form part of the same market.
4. The Court concluded that the SAFS's total ban had a significant anticompetitive effect on the relevant market, despite SASF's argument that it had not applied the rules strictly.
5. The SASF argued that the rules in question did not fall under Article 101(1) TFEU because of the special nature of sports, as established in the Meca-Medina judgment.[47] The Court examined the overall context and found SASF's objectives to be legitimate, but that the measures in question were neither necessary nor proportionate. The Court noted that a total ban was not necessary to ensure safe and just competitions, as the SASF claimed. The Court also rejected SASF's argument that in the absence of the rule under scrutiny, there would be a shortage of licensed officials.
6. Finally, the SASF argued that the rules in question qualified under Article 106(2) TFEU. According to Article 106(2) TFEU, undertakings which have been entrusted with a

[46] Case C-519/04P David Meca Medina and Igor Majcen v. Commission (2006) ECR I-6991 and Case T-313/02 Meca-Medina an 0pol,0.,d Majcen v Commission (2004) ECR II-3291.

[47] Case T-313/02 *David Meca-Medina and Igor Majcen v.* Commission [2004] ECR II-3291.

service of general economic interest are only subject to competition law to the extent that it does not prevent them from accomplishing their missions. According to SASF, it had been entrusted with a mission of general economic interest in that it participates in the distribution of state subsidies and more generally it is in charge of organizing sporting events. The Court, however, found that the SASF has never been entrusted with a mission of general economic interest.

The judgment, which cannot be appealed and which enters into force immediately, is expected to facilitate access to sport by more practitioners.

The Swedish Market Court Allows An Appeal By The Swedish Hockey League, Thereby Annulling An Interim Decision By the SCA.

On December 3, 2012, the Swedish Market Court (the "Court"), a specialized court that handles cases related to the Swedish Competition Act, ruled in favor of the Swedish Hockey League ("SHL"), thereby annulling the SCA's interim decision of September 20, 2012. The interim decision had stated that the SHL may not prohibit its member clubs from entering into short-term contracts with players from the North American based National Hockey League ("NHL").[48]

The Court considered that the SHL's rule had a wide scope, which prohibited short-term contracts between member clubs and all other leagues, not just the NHL. Moreover, it held that rules adopted by the SHL fall within the scope of the Swedish Competition Act. Thus, it considered whether the rule to prohibit short-term contracts breached competition law. Citing ECJ precedent, the Court emphasized that sporting rules, which impose restrictions on the parties' freedom of action, may, under certain circumstances, be compatible with EU competition law.[49] The rule under scrutiny had originally been implemented to provide for fair games and to avoid the possible imbalance caused by the variation in a team's skills and strength during an ongoing season that occurred due to member clubs contracting short-term players. The Court held this objective to be legitimate. Furthermore, it found the rule to be necessary to ensure a fair, just and proper running of the league and, consequently, that it fulfilled the criterion of proportionality. Accordingly, the Court ruled that the SHL's rule was deemed compatible with the Swedish Competition Act and so annulled the interim decision of the SCA.

The annulment led to considerable legal uncertainty in Swedish professional ice hockey. Following the annulment decision, the SHL was able to enforce its rule until the SCA had concluded its market investigation and adopted its final decision. As a result, the SHL was in a position to impose financial punishment on two member clubs that had entered into short-term contracts with NHL players, although the lockout of the NHL had already come to an end and no NHL players remained contracted with SHL member clubs.

On January 21, 2013, the SCA terminated the investigation into the sporting rule adopted by the SHL. The SCA concluded that there was no further need to pursue the case following the end of the NHL lockout and therefore did not come to a final decision as to whether the sporting rule constituted a breach of competition law.

SCA Closes Investigation Into Cooperation Between Major Mobile Phone Operators To Offer Mobile Payment Services

On December 21, 2012, the SCA decided to close is investigation into 4T Sverige AB ("4T"), a joint venture created in October 2011 by four major Swedish mobile phone operators, Telia Sonera Sverige AB, Tele2 Sverige AB, Telenor Sverige AB, and Hi3G Access AB (the "Mobile Operators"). 4T was set up in order to offer payment services to customers in Sweden through a so-called "mobile wallet" marketed under the trade mark MyWallet. This mobile wallet makes it possible for consumers to both initiate and debit payments by using text messages on mobile phones.

In June 2012, the SCA had opened, on its own initiative, an investigation into the Mobile Operators' cooperation within 4T and its effect on competition. Shortly thereafter, Västtrafik AB ("Västtrafik", the company that manages public transport services in the Västra Götaland region) had filed a complaint to the SCA alleging that the Mobile Operators required it to enter into an agreement with 4T regarding debit services as a condition for Västtrafik to continue using the Mobile Operators' premium-SMS numbers 72-xxx, which allow consumers to initiate payments for the purchase of public transport tickets via SMS. The 72-xxx premium SMS numbers are owned and

48 For more detail on the interim decision of the SCA on September 20, 2012, *See* NCR Q3 2012.

49 Case C-519/04 P, *David Meca-Medina. Igot Majcen v Commission* [2006] ECR I-6991.

controlled by the Mobile Operators. Västtrafik took the view that this practice amounted to abusive tying.

The SCA examined whether the Mobile Operators' cooperation within 4T and, in particular, their practice of making access to their premium SMS numbers subject to using their MyWallet debit service, violated Article 101 TFEU and/or Article 102 TFEU and the corresponding provisions of the Swedish competition law. In the context of its investigation, the SCA sent several requests for information to the Mobile Operators and held meetings with the Swedish mobile service industry organization and with public transport operators such as Västtrafik.

The SCA eventually concluded that there were insufficient grounds to continue investigating 4T. The SCA found, first, that 4T is subject to competition from other mobile payment services in Sweden, e.g., services that rely on QR codes scanners or other types of solutions based on mobile apps. Moreover, the SCA noted that it is also possible to carry out SMS payments by using phone numbers that are not owned by the Mobile Operators. Finally, the SCA also placed great emphasis on the fact that the market for mobile payment services is highly dynamic, innovative and subject to fast technical change, and that, therefore, it is difficult to predict how this market will develop in the future.

Mergers And Acquisitions

SCA clears the concentration of Akademibokhandelsgruppen and Bokia following a Phase II investigation.

On December 10, 2012, following a Phase II investigation, the SCA unconditionally cleared the KF Media's, Stiftelsen Natur & Kultur's and Killbergs Bokhandel's (the "Parties") acquisition of joint control over Akademibokhandelsgruppen AB ("Akademibokhandelsgruppen"), up until now owned by KF Media, and Bokia AB ("Bokia").

The SCA found the transaction to give rise to vertical and horizontal overlaps between the Parties, Akademibokhandeln and Bokia. On the upstream level, the market was defined as the sale of general literature, excluding academic literature, by publishing houses. The geographic market was defined to be nation-wide.

On the downstream market, the SCA considered whether online, grocery and department stores, and bricks and mortar sales of general literature form part of the same product market. It was argued that consumers may find, in particular, online and brick and mortar supply to be substitutable. The SCA however noted that bricks and mortar stores offer an additional personal service that customers seem to value, as studies show they do not switch to the often cheaper online option. The market studies conducted by both the Parties and the SCA showed that some consumers consider that there is substitutability (*i.e.*, they would buy their books online should their regular book store be closed, as opposed to going to another book store), though the numbers are far from conclusive. The SCA applied the SSNIP test, deducting the answers from the infra-marginal customers (*i.e.,* those who would not switch to buying online or in grocery stores, even with a 5-10% price increase) and concluded that, in that situation, the diversion to online stores was more important than at first sight. The SCA, however, decided not to conclude on the product market definition. The geographic market was held to be either local or national with important local aspects, in scope. Ultimately, the SCA left the geographic market definition open.

The SCA first looked at the vertical effects of the transaction and found that the vertical integration of the Parties may give rise to input foreclosure. The SCA analyzed whether the Parties would have the possibility and the incentive to limit the range of upstream competitors' publications sold at the new entity's retail outlets. The SCA concluded that the Parties would have neither the possibility nor the incentive to foreclose upstream rivals from the retail market, as the loss caused by the reduced sales of competing publishers' literature would only be partially offset by the increased sales of the Parties' publications.

As for the horizontal effects, the SCA found the transaction to lead to high, or very high, market shares of up to 70% in the downstream product market in certain regions. The Parties mainly compete on a local level. Thus, the SCA conducted a diversion test on a local level, to determine to what extent a customer would divert from Akademibokhandeln to Bokia, and vice versa, should the first outlet no longer be available. The SCA concluded that the higher a chain's market shares, the higher the diversion rate. The SCA argued that if prices are set on a regional level, this may lead to price increases to the detriment of consumers. The Parties argued that, following the transaction, the two retail stores will operate under a common name. Under a joint trademark, a decrease in sales due to price increases in one of the retail chains cannot be compensated for by an increase in sales in the other retail chain. In the event of a price increase, customers are likely to turn to other retail outlets, including online stores. The SCA concluded that, post-transaction, the Parties will lack the incentive to abandon their policy to set prices on a national level. Thus, the horizontal overlap does not give rise to any competition concerns.

Therefore, despite horizontal overlaps and vertical relationships between the Parties, Akademibokhandeln and Bokia, the SCA found that the proposed transaction will not give rise to any competition concerns. Consequently, the SCA cleared the transaction unconditionally.

Switzerland

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

Horizontal Agreements

The Federal Competition Commission fines a cartel in the air freight sector

The FCC imposed fines amounting to CHF 6.2 million on four international freight forwarders for agreeing on user fees and surcharges in the field of air freight services. An amicable settlement reached between the FCC and the parties has closed the procedure.

For their participation in the air freight cartel, on December 11, 2012, the FCC imposed fines of CHF 907,349 on Agility Logistics International BV; CHF 1,021,751 on Deutsche Bahn AG/Schenker; CHF 1,173,767 on Kühne + Nagel International AG; and CHF 3,117,286 on Panalpina Welttransport (Holding) AG. The opening of the procedure was triggered by the immunity application of another company involved, Deutsche Post AG/DHL, which benefited from a full immunity from fines. Other applications for leniency by Deutsche Bahn and Agility led to substantial reductions of sanctions for these two companies. In its decision, which has not yet been published, the FCC also approved the amicable settlement reached by the undertakings concerned and the professional association Spedlogswiss.

The investigation opened by the FCC in October 2007 established that the freight companies had agreed to fix fees and surcharges in the field of international freight services between 2003 and 2007. According to the FCC Secretariat's press release, the FCC succeeded in demonstrating a horizontal price agreement between the freight companies based on behavior related to the introduction and implementation of specific fees and surcharges in Switzerland,[50] charges on imports, and of international levies.[51]

Such horizontal agreements constitute an illegal price-fixing cartel within the meaning of Article 5 para. 3 of the Swiss Federal Act on Cartels and other Restraints of Competition ("ACart").

Under Swiss law, the FCC may impose a fine of up to 10% of the respective companies' turnover in Switzerland in the previous three business years. The amount of the sanction is dependent, *inter alia*, on the duration and severity of the unlawful behavior. A fine reduction may be granted on the basis of an amicable settlement, which will be decided by the FCC based on a proposal issued by its Secretariat. According to the FCC's practice, reaching an amicable settlement closes the proceedings but does not rule out fines in respect of infringements that took place before the amicable settlement's conclusion.

Pursuant to the Swiss leniency program, for which Deutsche Bahn and Agility had applied, companies that contribute to the uncovering and elimination of an anticompetitive restriction may be partially or entirely exempted from fine. To benefit from complete immunity, the undertakings concerned must provide information that enables the competition authority to establish an infringement of competition or to open an antitrust investigation. Moreover, the companies should not have been the main actors within the cartel and must cooperate with the authority during all the duration of the proceedings.

Prior to the FCC investigation, the U.S. Department of Justice (DoJ) and the European Commission (EC) had investigated and imposed sanctions for the behavior of some of these air freight forwarding companies. In a press release of September 30, 2010, the DoJ announced that six international freight forwarding companies, including Kühne + Nagel International AG, Panalpina World Transport (Holding) Ltd., and Schenker AG, had agreed to plead guilty to criminal price-fixing charges, and to pay a total of $50.27 million in criminal fines for their roles in several agreements to fix a variety of fees and surcharges in the period 2002-2007. Similarly, the EC declared on March, 28, 2012, that fourteen international groups of undertakings (including Kühne + Nagel International AG, Panalpina World Transport (Holding) Ltd., Schenker AG, Deutsch Post AG/DHL, Agility Logistics Limited) would be fined a total of €169 million for participating in four cartels aimed at fixing prices and other trading conditions for international air freight forwarding services in the period 2002-2007. According to the EC press release, Deutsche Post (including its

[50] Such as the Surcharge Collection Fee (SCF); Security Fee Agent (SFA); E-dec fees

[51] Such as the Air Automated Manifest System (AAMS); Peak Season Surcharge (PSS); Currency Adjustment Factor (CAF); and New Export System (NES) fees.

subsidiaries DHL and Exel) received full immunity from fines as it was the first to reveal the existence of the cartels to the EC. Other applications for leniency by Deutsche Bahn (including Schenker and BAX), CEVA, Agility and Yusen, led to reductions of fines ranging from 5 to 50%.

Vertical Restraints

The Federal Competition Commission launches an investigation against Steinway & Sons, Hamburg and its distributors in Switzerland

On November 27, 2012, the FCC launched an investigation against Steinway & Sons and its distributors in Switzerland. As part of this investigation, several searches were conducted by the investigating bodies in the distributors' premises in Switzerland. The FCC has indicated that the arrangements in place between Steinway & Sons and its distributors may be in violation of competition law.

According to the FCC Secretariat's press release,[52] the investigation was initiated at the request of the Civil Engineering Department of the canton of Zurich. The purpose of the application was to investigate whether the tendering procedure for pianos and grand pianos held by the Zurich University of the Arts restricted competition. The information provided by the canton of Zurich, and the investigations conducted subsequently by the competition authorities, both indicated that Steinway & Sons and its distributors were engaging in practices that restricted competition. The competition authorities' concerns relate specifically to market partitioning and the fixing of prices of instruments produced by Steinway & Sons. Furthermore, parallel and direct imports from neighboring countries to Switzerland may have been hindered or prevented. The FCC's decisional practice indicates that it views market partitioning and restrictions of parallel imports as particularly grievous breaches of competition law.

Sector Investigations

The Federal Competition Commission launches an investigation into the accommodation-booking platforms sector

On December 11, 2012, the FCC launched an investigation into several online accommodation-booking platforms (Booking.com, Expedia and HRS).

According to the FCC Secretariat's press release[53], there are indications that certain clauses of the contracts entered into between Booking.com, Expedia and HRS and their respective partner hotels may restrict competition between these online booking platforms. In particular, the competition authorities' raised concerns over the best-price-guarantee provisions (which limit the possibility for hotels to fix the prices paid by customers by reference to the distribution channels they use) and to some provisions on room availability.

There are also indications that Booking.com, Expedia, and HRS may have committed an abuse by introducing and imposing certain contractual clauses on hotels; these clauses may hinder other undertakings from entering the relevant market. The investigation shall determine whether unlawful restraints of competition exist.

The Federal Competition Commission launches an investigation into the business of medical information

On December 6, 2012, the FCC launched an investigation against three companies of the Galenica group: e-mediat AG, Documed AG and HCI Solutions AG, which are all active in providing electronic medical information systems for use by drug distributors. There are indications that these companies may be abusing their position in the market to the detriment of their trading partners and competitors.

E-mediat AG, Documed AG and HCI Solutions are significant players in the field of electronic medical information. According to the FCC Secretariat's press release[54], there are indications that these companies may force their trading partners to continue their mutual business relationships. This behavior may constitute unlawful practice vis-à-vis pharmaceutical companies, final distributors and other undertakings active in the business of medical information. For this reason, the FCC has opened an investigation in order to determine whether the undertakings have a dominant position in the market and, if so, whether they abuse their dominant position.

The medical information provided by the above undertakings is required for wholesalers and distributors (*e.g.*, hospitals, pharmacists, drugstores and doctors dispensing drugs) to be in

52 A French and German version is available at: http://www.weko.admin.ch/aktuell/00163/index.html?lang (18.01.2013).

53 A French and German version is available at: http://www.weko.admin.ch/aktuell/00163/index.html?lang (18.01.2013).

54 A French and German version of the Competition Commission's press release is available at: http://www.weko.admin.ch/aktuell/00163/index.html?lang (18.01.2013).

a position to supply, dispense and bill authorized drugs in Switzerland. Information related to drug interaction or contraindication, active components and dosage of drugs, as well as pharmaceutical packaging and pharmacodes are of particular relevance. Therefore, it is essential for the functioning of the market to have access to this electronic information. Without access to the electronic system currently in use, distributors' access to drugs is at risk of being hindered, which in turn may result in harm to patients.

United Kingdom

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

Horizontal Agreements/Restraints

Supreme Court ruling on the Limitation Period for S47A Damages Actions

On October 24, 2012 the Supreme Court dismissed an appeal brought by BCL Old Co Ltd, DFL Old Co Ltd, PFF Old Co Ltd, and Deans Foods Ltd (together the "Appellants") against the Court of Appeal's judgment that the operation of the limitation period for damages actions under section 47A of the Competition Act 1998, and the CAT's ability to exercise its discretion to extend this period, breached EU law principles of legal certainty and effectiveness.[55]

In November 2001, the European Commission found that a number of undertakings (including BASF, Aventis and Roche) had been participants in a cartel for the sale of vitamins. BASF appealed the penalty imposed by the Commission (and, following a General Court judgment of March 15, 2006 succeeded in having its fines reduced) but did not appeal the infringement finding.

In March 2008, the Appellants brought a claim for damages against BASF under section 47A of the Competition Act 1998 for losses incurred as a consequence of the infringement. On September 25, 2008, the CAT ruled that the action had been brought in time, since the two year window set out in Rule 31 of the CAT Rules for bring a damages action (the "Two-year Period") had not begun until BASF's appeal against the level of penalties imposed by the Commission had been determined. This ruling was overturned by the Court of Appeal on May 22, 2009, which ruled that the Two-year Period in fact commenced on the day after the last day on which an appeal against the Commission's infringement finding (not the level of a penalty) could have been brought.

The Appellants therefore applied to the CAT under Rule 19 of the CAT Rules for an extension of the time in which to bring the claim. This application was rejected by the CAT on November 19, 2009 on the grounds that, although the Appellants might have been able to show that they had a "good reason" for bringing the claim, having "reasonably" misinterpreted the law relating to the relevant limitation period, the fact that they had delayed the commencement of the action once they were aware that the period for bring a claim had started, persuaded the CAT that it should not exercise its discretion to allow an extension. The CAT's view that Rule 19 gave it discretion to hear damages actions brought out of time was overturned on November 12, 2010 by the Court of Appeal, which confirmed that the relevant date for the commencement of the Two-year Period was the last day on which an appeal against an infringement finding could have been brought and, therefore, that the Appellants' action had been brought out of time.

The Appellants appealed the Court of Appeal's judgment to the Supreme Court on the grounds that the position in relation to the commencement of the Two-year Period and the CAT's ability to exercise its discretion to grant an extension to this period were, contrary to the principles enshrined in EU law, insufficiently foreseeable or clear and made it "excessively difficult" for the Appellants to bring a claim in time.

The Supreme Court held that EU law principles of legal certainty and effectiveness require only that the position in domestic law either be ascertainable with a "reasonable degree of certainty" or be "reasonably foreseeable". In relation to the question of the date determining the commencement of the Two-year Period, the court considered that there was a clear distinction in both the Competition Act 1998 and the CAT Rules between an infringement decision and a decision to impose a penalty and that, following the Court of Appeal's judgment in November 2010, the position in case-law (*i.e.*, that an appeal against the amount of a penalty was not a relevant appeal which would serve to extend the limitation period for damages actions under section 47A) was now clear. On the question of the CAT's discretion to extend the statutory time limit, the court held that the CAT rules are sufficiently clear in this regard and the CAT's inability to exercise its discretion to grant an extension to the Two-year Period was therefore sufficiently foreseeable. The Supreme Court noted that the fact that it took time and a process of appeals to reach positions of clarity in relation to both questions was a function of the appellate system and not in itself an indication that English law lacked the requisite certainty.

[55] BCL Old Co Ltd and others v BASF plc and others [2012] UKSC 45, http://www.bailii.org/uk/cases/UKSC/2012/45.html.

Court of Appeal upholds CAT in striking out damages claim against subsidiary of addressee of cartel decision

In a judgment of November 28, 2012[56] (the "Judgment") the Court of Appeal upheld the CAT's decision to strike out damages claims brought under section 47A of the Competition Act 1998 against a defendant (Le Carbone (Great Britain)) Limited, now renamed Mersen UK Portslade Limited, ("Carbone GB")) whose parent company had been found, in a European Commission decision dated December 2003 (the "Decision"),[57] to have been among a number of undertakings (the "Defendants") which had engaged in price-fixing and market sharing in the market for carbon and graphite products. The Judgment adds to recent case-law (including the BCL judgment summarized above) concerning the limits of the scope of the CAT's jurisdiction under section 47A Competition Act 1998 as compared with the High Court's wider jurisdiction.

During the course of 2007, Emerson Electric Co, Valeo SA, Robert Bosch GmbH, Visteon Corporation and Rockwell Automation Inc. (together, the "Claimants"), each of which had been purchasers of electrical and mechanical carbon and graphite products during the period of the cartel, commenced damages actions in the CAT against the Defendants. These actions were allowed by the CAT but stayed pending the resolution of appeals in the European courts against the Decision. In March 2010, the CAT refused a further stay of proceedings but by an order of May 2010, allowed the claim form to be amended to add additional defendants, including Carbone GB. In September 2010, Carbone GB brought an application for the claim against it to be struck out and this was allowed by the CAT in a ruling of March 2011 on the basis that there was nothing in either the recitals or the operative part of the Decision that could amount to an infringement finding against Carbone GB.

On appeal, the Court of Appeal upheld the CAT's finding that the Decision contained no finding that Carbone GB itself had infringed competition law. Mummery LJ noted that it is a general principle of EU law that, for the purposes of determining the persons to whom an infringement decision is addressed, only the operative part of a decision should be considered and reference should only be made to the statement of reasons where the operative part of the decision is unclear.[58] This was not the case here, since Carbone GB was not an addressee of the Decision, which was clearly addressed to Carbone Lorraine S.A. and not the group of companies as a whole. The court found that the CAT had no jurisdiction to contradict or amend the Decision by making its own findings of fact on liability or adding to the list of addressees and, by extension therefore, no jurisdiction to determine a section 47A claim against Carbone GB.

The Court of Appeal's decision follows two cases which also concern the interpretation and application of section 47A. In BCL, the Supreme Court confirmed that an appeal against the amount of a penalty was not a relevant appeal which would serve to extend the limitation period for damages actions under section 47A (see above). In Deutsche Bahn,[59] the Court of Appeal (whose judgment is now on appeal to the Supreme Court) held that a "decision" for section 47A purposes is a decision that there has been an infringement of competition law and that, therefore, the limitation period for damages actions is extended while an appeal (brought by any party) against the infringement decision is pending before the European courts (or where the decision could still be appealed).

The judgment also follows the Court of Appeal's September 2012 judgment in KME,[60] in which it upheld the High Court's refusal to strike out or summarily dismiss a cartel damages claim brought against a UK-domiciled defendant whose non-UK parent company had been the subject of the European Commission's December 2003 industrial tubes cartel infringement decision. This case concerned a standalone damages action in which the court held that the claimants had pleaded the knowing participation in, and implementation of, cartel arrangement by the UK-domiciled defendant company.

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56 *Emerson Electric Co & Others v Mersen UK Portslade Ltd* [2012] EWCA Civ 1559, http://www.bailii.org/ew/cases/EWCA/Civ/2012/1559.html.

57 Case C.38.359 –*Electrical and mechanical carbon and graphite products*, http://ec.europa.eu/competition/antitrust/cases/dec_docs/38359/38359_36_1.pdf.

58 Joined Cases 40-73 *Suiker and Others v Commission,* http://curia.europa.eu/juris/showPdf.jsf?text=&docid=88485&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=360361; Case T-61/99 *Adriatico di Navigazione SpA v Commission,* (http://curia.europa.eu/juris/showPdf.jsf?text=&docid=48794&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=360591.

59 *Deutsche Bahn AG & Others v Morgan Crucible Company plc and Others* [2012] EWCA Civ 1055, http://www.bailii.org/ew/cases/EWCA/Civ/2012/1055.html.

60 *KME Yorkshire Ltd and others v Toshiba Carrier UK Ltd and others* [2012] EWCA Civ 1190, http://www.bailii.org/ew/cases/EWCA/Civ/2012/1190.html.

Mergers and Acquisitions

CC prohibits AkzoNobel/Metlac merger

On December 21, 2012 the CC published its final report[61] on the proposed acquisition by Akzo Nobel N.V. ("AkzoNobel") of Metlac Holding S.r.l. ("Metlac"), which it concluded would result in a substantial lessening of competition (a "SLC") in the market for the supply of metal packaging coatings for beer and beverage cans in the UK (the "B&B Market"). The CC's decision confirmed its provisional finding that the transaction might be expected to result in a SLC in the B&B Market, but reversed its provisional findings in relation to the market for food, caps and closures and general line metal packaging coatings (the "FCG Market"), which the CC concluded would not be subject to a SLC. The decision demonstrates that the CC will look at a transaction's potential effects on the UK market and is prepared to prohibit a transaction which has been cleared by other national competition authorities and which concerns parties located outside the UK.

Both AkzoNobel and Metlac manufacture and supply metal packaging coatings and metal decorating inks in the UK, used, in particular, in the production of food and beverage cans. Through its subsidiary Akzo Nobel Coatings International B.V. ("ANCI"), AkzoNobel has a 49% stake in Metlac and had a call option to buy the remaining shares, which would have seen AkzoNobel assume legal control of Metlac (the "Proposed Transaction"). On May 23, 2012, the OFT referred the Proposed Transaction to the CC, having determined that, in spite of the fact that AkzoNobel has the right to representation on Metlac's board and an economic interest in the business, the two parties compete independently in the markets for the manufacture and supply of metal packaging coating products and that there was a realistic prospect of the Proposed Transaction resulting in a SLC as a consequence of potential horizontal unilateral effects.

In its final report, the CC confirmed the OFT's finding that, notwithstanding AkzoNobel's existing stake in Metlac, the parties have operated as independent competitors and that, therefore, the acquisition by AkzoNobel of sole control over Metlac would represent a significant change as compared with the existing situation (which the CC found to be the appropriate counterfactual). As in its provisional findings, the CC identified the following two product markets: (1) the B&B Market in the EEA; and (2) the FCG market in the EEA. The CC determined that the degree to which firms compete with each other in these markets depends on the ease with which they can supply fully-certified, functionally equivalent and competitively priced products to each other's customer bases.

The CC's analysis focused on the impact of the Proposed Transaction on customers with operations in the UK. In relation to the B&B Market, the CC concluded that the removal from the market of Metlac, which had a record of competing vigorously and effectively (in particular in the B&B external coatings segment), would result in a loss of actual competition that was unlikely to be mitigated in the foreseeable future by new entry on a sufficient scale, nor by countervailing buyer power (which is constrained by the challenges associated in switching and developing suppliers), nor indeed by the activities of existing competitors (the CC noted that the only other suppliers, Valspar and PPG, had not competed aggressively on price). In addition, the CC determined that the Proposed Transaction was likely to result in a loss of potential competition, given that there was evidence that Metlac was a potential entrant into other segments (internal B&B coatings and B&B ends).

The CC reversed its provisional findings in relation to the FCG market, concluding that the Proposed Transaction would not be expected to result in unilateral anti-competitive effects from a loss of actual or potential competition in the UK on the basis that, in this market, most customers were able to source product from smaller competitors.

Having considered a range of potential remedies, including a range of behavioral remedies proposed by AkzoNobel, the CC concluded that the only effective remedy to the anti-competitive effects of the Proposed Transaction in the B&B Market would be to prohibit AkzoNobel from acquiring further shares in Metlac.

AkzoNobel has filed an application for the CC's decision to be reviewed by the CAT.

61 http://www.competition-commission.org.uk/assets/competitioncommission/docs/2012/akzo-nobel-metlac/main_report.pdf.

CC publishes issues statement in its investigation into Eurotunnel/SeaFrance acquisition

On December 17, 2012, the CC published its issues statement[62] in its investigation into the acquisition by Groupe Eurotunnel S.A. ("Eurotunnel", which provides rail transport services to passengers and freight customers through the Channel Tunnel) of certain assets of Sea France S.A. ("SeaFrance", a ferry operator which, prior to its liquidation in November 2011, provided ferry services to passengers and freight customers across short sections of the Channel), in which it sets out the main issues it is likely to consider in its investigation.

The OFT referred the completed acquisition to the CC on October 29, 2012 on the grounds that the transaction, which leaves only P&O in a position to exert a strong competitive constraint on Eurotunnel for some customers, may be expected to result in a substantial lessening of competition on key markets for transport links between the UK and Continental Europe, in spite of the fact that the services launched by Eurotunnel using the three ex-SeaFrance vessels acquired (operated on the Dover to Calais route primarily by former SeaFrance employees under a new brand "MyFerryLink") provide a benefit to passengers by replacing capacity on the Dover to Calais route that was lost when SeaFrance went into liquidation. The OFT was concerned in particular by the potential unilateral effects that could arise as a result of the transaction given that, although Eurotunnel and P&O are each other's closest competitors for both passenger and freight customers, SeaFrance was the second closest competitor to each and exerted competitive constraints on both.

The key items contained in the CC's issues statement are as follows:

1. Market Definition. The CC's initial view is that there are two relevant product markets: (1) freight ferry and freight tunnel transport services; and (2) passenger vehicle ferry and tunnel transport services. Competitive constraints on ferry and tunnel services by low-cost airlines and Eurostar services will also be considered. The CC has taken the initial view that the relevant geographic market consists of the following routes across the Short Sea: the Channel Tunnel and routes between Dover, Folkestone, Ramsgate, Newhaven and Calais, Dieppe, Boulogne and Dunkirk.
2. Counterfactual. The CC will consider whether the purchase of SeaFrance's ships by a joint venture between DFDS Seaways and Louis Dreyfus Armateurs (which also submitted a bid for SeaFrance's liquidated assets) is the appropriate counterfactual, as opposed to the cessation of SeaFrance's short-sea routes (as Eurotunnel has submitted).
3. Theories of Harm. The CC is considering whether the acquisition could give rise to a substantial lessening of competition in the following ways: (1) horizontal unilateral effects by providing Eurotunnel with an incentive to raise prices for its tunnel services (since a percentage of lost custom would be picked up by its MyFerryLink services); (2) the potential displacement of another ferry operator (most likely DFDS Seaways), given that, alongside Eurotunnel, only two strong ferry operators are viable; and (3) Eurotunnel's post-acquisition ability to sell a bundle of the Eurotunnel shuttle service and the MyFerryLink ferry service (if, for example, Eurotunnel were to increase prices for its Eurotunnel shuttle services, whilst at the same time offering a bundle in which MyFerryLink ferry service is sold at a considerable discount to other ferry operators' services, the CC suggests that this might disadvantage both customers and other ferry operators).
4. Countervailing Factors. The CC will consider whether the following countervailing factors would counteract any loss of competition arising from the acquisition: (1) entry/expansion; (2) countervailing buyer power; and (3) the impact of efficiencies that might reasonably be expected to result from the transaction.

Responses to the issues statement were due by January 4, 2013 and the CC is expected to publish its provisional findings in February 2013 and its final report by April 14, 2013.

CC publishes issues statement in Global Radio/GMG Radio merger

On November 21, 2012, the CC published its issues statement[63] in its investigation into the completed acquisition

62 http://www.competition-commission.org.uk/assets/competitioncommission/docs/2012/eurotunnel-seafrance/eurotunnel_issues_statement.pdf.

63 http://www.competition-commission.org.uk/assets/competitioncommission/docs/2012/eurotunnel-seafrance/eurotunnel_issues_statement.pdf.

by Global Radio Holdings Ltd ("Global Radio", whose brands include Capital, Classic FM, Gold, Heart, and Xfm,) of GMG Radio Holdings Limited ("GMG Radio", the operator of radio stations under the Real and Smooth brands) in which it sets out the main issues it is likely to consider in its investigation.

In spite of a public interest intervention notice issued on August 3, 2012 by the former Secretary of State for Culture, Media and Sport under section 42 of the Enterprise Act 2002, the new Secretary of State announced on October 11, 2012 that she would not be referring the acquisition to the CC on media plurality public interest grounds. The decision on whether to refer the transaction to the CC therefore reverted to the OFT, to be decided on purely competition grounds. The OFT having identified, in particular, potential unilateral horizontal effects concerns, determined that the test for reference to the CC had been satisfied.

The key items contained in the CC's issues statement are as follows:

1. Market Definition. The CC intends to focus on the potential effect of the acquisition on competition for radio advertising but notes that this is linked to competition for listeners. The CC's initial view is that competition for advertising occurs on national, regional, and local bases and can be divided into three segments: (1) contracted airtime (advertising sold through annual or longer contracts between media buying agencies and radio stations); (2) non-contracted airtime (advertising sold on a campaign-by-campaign basis by the radio station to advertisers or small agencies); and (3) sponsorship and promotion of radio programmes by advertisers (purchased through agencies or directly by advertisers). Global Radio and Real and Smooth Limited ("RSL", the name given to GMG Radio following the acquisition) operate in each of these segments.

2. Counterfactual. The main questions presently being considered by the CC in relation to the appropriate counterfactual are: (1) whether GMG Radio would have been purchased by another party or continued to operate independently; and (2) the implications of the pre-existing national sales agency agreement between the parties, including whether it would have continued in the same form.

3. Theories of Harm. The CC is considering whether the acquisition could give rise to a substantial lessening of competition in the following two ways: (1) horizontal unilateral effects (the CC will, in particular, assess the potential effect on customers in each of the three segments identified in all areas where the total survey areas of Global Radio and RSL overlap); and (2) possible foreclosure issues (the CC will consider whether the acquisition is likely to result in adverse effects as a result of changes in ownership/control of digital multiplexes and industry bodies).

4. Countervailing Factors. The CC's initial view is that the limited availability of the FM spectrum for stations of a similar size and scope to RSL and Global Radio acts as an impediment to parties attempting to enter the market by acquisition. Notwithstanding that prices in each of the three segments of the market are negotiated between radio stations and advertisers and/or their media buying agencies, the CC will also consider countervailing buyer power as well as the impact of efficiencies that might reasonably be expected to result from the transaction.

Responses to the issues statement were due by December 10, 2012 and the CC is expected to publish its provisional findings by the end of January 2013.

Policy and Procedure

CC publishes Merger Procedural Guidelines

On October 31, 2012, and following a consultation on a draft version published in April 2011, the CC published the final version of its new Merger Procedural Guidelines (the "Guidelines"),[64] which describe and explain the procedural steps of each of the main stages of a merger inquiry including, in particular, the information-gathering process, and how the CC develops its assessment in order to issue Provisional Findings, announces its final report and, where it finds that the merger may be expected to result in a substantial lessening of competition, examines and implements appropriate remedies.

The Guidelines are to a large extent substantively the same as the April 2011 draft version, although the structure of the document is modified slightly to incorporate additional headings and the CC provides additional clarification on a number of areas including, *inter alia*, the addition of indicative time scales for key phases of the inquiry, further guidance on information requests and the requirement that the Inquiry

64 http://www.competition-commission.org.uk/assets/competitioncommission/docs/2012/publications/cc18.pdf.

Group be appointed as soon as members' availability and any potential conflicts of interests are ascertained. The Guidelines contain the following key sections:

1. Overview of the merger inquiry process. As well as containing a table setting out the key stages of a merger inquiry, the Guidelines set out the process by which, following a reference, the Chairman appoints the Inquiry Group (the decision-making body which, supported by a staff team led by an Inquiry Director, is charged with setting the overall direction of the inquiry and reviewing and analyzing appropriate evidence).

2. Information gathering. The Guidelines provide clarification on the information gathering process (which will generally be most intensive during the first six weeks of the inquiry but will continue to some extent throughout and involves questionnaires, data requests, surveys, site visits, submissions and hearings), as well explaining the information that the OFT provides to the CC at the time of reference and setting out the stages leading up to the issues statement (drafting an administrative timetable, sending a "first day letter" to formally launch the inquiry and, in particular, considering and developing theories of harm).

3. Development of assessment. The Guidelines explain that this phase, which takes place between weeks seven and fifteen of the inquiry, comprises a number of steps leading up to the publication of Provisional Findings, including in particular the preparation of working papers (which may be put-back to the parties for comment on factual and technical matters) and main party hearings.

4. After Provisional Findings. In this period, initiated by the publication of Provisional Findings and running until the end of the 24-week statutory inquiry period (at which point the CC will, absent any exceptional circumstances justifying an extension, issue its Final Report), the CC issues a public consultation on the Provisional Findings and, where the Provisional Findings are adverse, a Notice of Possible Remedies (to be followed by Response Hearing(s) and the issuance to the parties of a Remedies Working Paper).

5. Implementation of remedies. The CC notes that the focus is on the implementation of a remedies package, either by way of undertakings agreed between the CC and the main parties (which will lead to the publication of a "notice to accept final undertakings"), or the making of an order (in which case the CC will issue a "notice of intention to make an order").

The final sections of the Guidelines address circumstances in which the CC can cancel a reference of an anticipated merger and procedural issues in completed mergers (including in particular the adoption at the time of reference of initial undertakings that have been accepted by the OFT, as well as additional interim measures that may be requested by the CC such as the appointment of a monitoring trustee or "hold-separate" manager).

OFT launches revised Competition Act 1998 Procedures Guidance

On October 16, 2012, the OFT issued the final version of its revised guidance on its investigation procedures under the Competition Act 1998 (the "Guidelines").[65] The Guidelines update the OFT's guidance originally published in March 2011 and their publication follows the conclusion of a consultation process launched in March 2012.

The Guidelines provide for the introduction of a new collective decision-making model, in which a three person Case Decision Group has responsibility for deciding whether or not to issue an infringement decision and the appropriate amount of any penalty, having first consulted with the OFT's Policy Committee (comprising the Chief Executive, other executive board members, the Chief Economist, General Counsel and Senior Director of Policy), whose role is to advise the Case Decision Group on any legal, economic and policy issues arising out of the proposed decision. If a statement of objections is issued, further investigation is undertaken by the Case Team, overseen by the Case Decision Group.

In cases where the OFT issues a statement of objections (and once written and oral representations by the parties on the statement of objections have been made), it will also issue a draft penalty statement to each party on which the OFT is considering imposing a financial penalty, setting out the calculation of this proposed penalty. Parties will be given the opportunity to comment and to request an oral hearing on the draft penalty statement, which would then be held around 10 to 20 working days after the deadline for the submission of written representations on the draft penalty statement.

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65 http://www.oft.gov.uk/shared_oft/policy/OFT1263rev.

The Guidelines include provisions to introduce oral hearings, which are to be held 20 to 30 working days after the deadline for the submission of written representations on the statement of objections. These oral hearings are intended to be interactive, with the case team, the Case Decision Group and other members of OFT staff able to ask questions on the parties' written representations, with the parties able to reiterate or clarify concerns raised in their written representations (although there are no provisions expressly allowing for questioning by the parties of the case team or Case Decision Group). Previously parties had the right to make oral representations, but there was little interaction between parties and the OFT at oral representations meetings.

The Guidelines also provide for the publication by the OFT of case opening notices containing basic information such as a summary of the suspected infringement (including whether the case concerns the Chapter I or II infringement) and the industry sector involved. Following concerns expressed during the consultation period in relation to the potential harm to reputations and the potential for damages actions, parties' names will not be included in case opening notices other than in exceptional circumstances (such as when this information is in the public domain or is expressly requested by the parties concerned).

The OFT is also extending the trial of its Procedural Adjudicator role until the OFT's Competition Act 1998 enforcement powers transfer to the Competition and Markets Authority (the "CMA") in April 2014, when a statutory role will be created. The OFT noted that although only three cases had been considered by the Procedural Adjudicator at that time, the initiative, which started in March 2011, had helped to resolve procedural disputes in a swift, efficient and cost-effective manner (even where no formal decision had been sought).

The OFT stresses the importance of handing over to the CMA a strong pipeline of cases supported by up-to-date policies and procedures and notes that the Guidelines, which came into force on October 16, 2012 (and will apply to all cases where a statement of objections was issued on or after July 18, 2012), will be kept under critical review as part of the transfer of enforcement powers to the CMA.

BIS publishes proposed amendments to the Enterprise and Regulatory Reform Bill

On October 9, 2012 and, subsequently, on December 6, 2012, the Department for Business, Innovation & Skills ("BIS") tabled a series of amendments to the Enterprise and Regulatory Reform Bill (the "Bill"), which is currently being scrutinized by the Grand Committee of the House of Lords having passed its first and second reading in the House of Lords.

The original Bill introduced a new section 188A into the Enterprise Act 2002 (the "Act"), which provides that the criminal cartel offence is not committed where customers are informed about the arrangements before they are entered into, where relevant information about bid-rigging arrangements are made known in advance to the person organizing the tender, or where relevant information about the arrangements is published. The package of amendments announced on October 9, 2012 provides for a further series of defenses to the cartel offence, which are being introduced in response to concerns that, by withdrawing the "dishonesty" element, the Bill in its original form risked lowering the barriers to prosecution to an unacceptably low level, to the extent that legitimate business activities between competitors (*e.g.*, joint ventures) would be caught. Reflecting the government's intention that the cartel offence should apply only to those who participate in secret cartels, the amendments insert a new section 188B into the Act which contains a series of new defenses which apply to any person who can show that, at the time of making the cartel arrangements, they did not intend that the nature of the arrangements would be concealed from customers or from the CMA, or that before making the agreement they took reasonable steps to ensure the nature of the arrangements would, before they were made or implemented, be disclosed to professional legal advisers for the purposes of obtaining advice. In addition, by inserting a new section 190A into the Enterprise Act 2002, the amendments require the CMA to prepare (by consulting the Director of the Serious Fraud Office, the Lord Advocate and such other persons it considers appropriate) and publish guidance on the principles to be applied in determining whether criminal proceedings under section 188(1) should be commenced.

The amendments proposed on December 6, 2012 relate to the functioning of the CMA and, in particular, to the concurrency regime included in the original Bill, which contained provisions to strengthen the CMA's power to coordinate competition work and to ensure that sectoral regulators were subject to a duty to consider using their general competition rather than sector-specific powers. The proposed amendments operate to give the Secretary of State power to order that all the functions of specified sectoral regulators (including, *inter alia*, the Office of Communications, the Gas and Electricity Markets Authority, the Office of Rail Regulation) that are exercisable concurrently by the regulator and the CMA (either under Part 1 of the Competition Act 1998 or Part 4 of the Act) be removed from that regulator and transferred to the CMA. In addition, the government proposes a series of amendments which, *inter alia*, re-define the remit and functions of the CMA (clause 20); introduce new provisions relating to the establishment of the CMA and the make-up and remuneration of the board (Schedule 4); insert a clause setting out a "small merger" exemption (specifying that a relevant merger situation is not created where the target's turnover does not exceed £5 million); and delete the new section 40A of the Competition Act 1998 introduced by the original Bill to create a system of civil penalties for non-compliance with CMA investigations.

The Grand Committee of the House of Lords, sat on December 10, 12 and 18, 2012, and on January 9, 2013 to scrutinize the Bill in its amended form.

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