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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 enforced by the Competition Auditorate ("Auditorate") and the Competition Council ("Council").

Unilateral Conduct

Competition Council Finds National Chamber Of Judicial Officers Infringed Competition Law But Does Not Impose A Fine

On December 8, 2011, the Council found that the National Chamber of Judicial Officers (bailiffs) infringed Article 2 of the APEC by adopting Directive 2008/001.

On February 21, 2008, the National Chamber of Judicial Officers internally adopted Directive 2008/001. This Directive extended the scope of the Royal Decree of November 30, 1976, which legally determines the fees that bailiffs can charge for executing their judicial duties, to extra-judicial activities, such as the 'amicable' recovery of debts, public auctions, etc. Ordinarily, bailiffs can perform both judicial and extra-judicial activities. Fees for judicial activities are regulated by the Royal Decree of November 30, 1976 whereas bailiffs' fees for extra-judicial activities are not regulated and bailiffs face competition with *inter alia* lawyers and credit management services companies.

On February 8, 2011, the Auditorate issued its Report where it found that such an extension of the regulated fee system to extra-judicial activities would be equivalent to a price-fixing infringement by a professional services association contrary to Article 2 APEC and Article 101 TFEU.

In its December 8 decision, the Council established that the activities covered by the Directive 2008/001 fall outside the scope of the legal mission of bailiffs. Hence, the National Chamber of Judicial Officers was not legally entitled to regulate the fees for these extra-judicial activities. The fact that fees for bailiffs' judicial duties are regulated does not prevent competition law from applying to extra-judicial activities. The Council therefore followed the Auditorate's view and found that the Directive amounted to price-fixing. However, the Council held that it was "neither relevant nor useful" to impose a fine on the National Chamber of Judicial Officers. It decided that it was essential to raise awareness in the organization and among individual bailiffs that fees must be determined freely. As a result, the Council required that the decision will be published on the website of the National Chamber of Judicial Officers for a minimum period of six months and that the full text of the decision is circulated among its members.

Mergers and Acquisitions

Competition Council Clears Acquisition Of Cobelguard By Securitas

On October 11, 2011, the Council approved the transaction that will give Securitas NV ("Securitas") control over D&S Holding, which controls Cobelguard NV ("Cobelguard"). Securitas and Cobelguard are both active in the private security sector. The transaction concerns all security related activities of Cobelguard except for the transportation of valuables.

On September 19, 2011, the Auditorate issued its Report in which the Auditorate advised the Council to approve the notified transaction. According to the Auditorate, there were two affected markets: (i) the market for manned guarding in Belgium and (ii) the market for alert monitoring and response services in Belgium. However, in its Report, the Auditorate concluded that the transaction does not raise any competition concerns in these markets.

In its decision, the Council confirmed the market definition postulated by the Auditorate. With regard to the market for manned guarding in Belgium, the Council finds that Securitas' market share will increase pursuant to the notified transaction. However, a sufficient number of other competitors remain active on the market and will continue to exert competitive pressure on Securitas following the transaction. Furthermore, the Council concluded that the market shares in this market are potentially volatile given that most contracts are concluded after a bidding procedure. The market investigation also revealed that most contracts are concluded for a relatively short period of time and indicated that large clients often work with several different providers of security providers to decrease dependency on one specific security provider. With regard to the market for alert monitoring and response

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services in Belgium, the Council finds that the notified transaction will have hardly any impact.

As a result, the Council decided to approve the acquisition of Cobelguard by Securitas.

Competition Council Clears Acquisition Of The Phone House By Belgacom Following Second Phase Investigation

On December 23, 2011, the Council approved the acquisition by Belgacom of The Phone House, subject to conditions. On August 12, 2011, the Council had decided to open an in-depth investigation into Belgacom's planned acquisition of The Phone House, which was notified to the Council on May 24, 2011. The Council, which took into account the initial remedies offered by Belgacom, could not exclude that the transaction would significantly hinder competition on the Belgian market or on a substantial part thereof.

On September 27, 2011, following an in-depth investigation, the Auditorate raised serious objections as to the admissibility of the proposed transaction and consequently advised the Council to prohibit the proposed acquisition of The Phone House by Belgacom.

The Council ultimately decided to approve the proposed transaction, subject to certain conditions, on December 23, 2011. Pursuant to those conditions, Belgacom is required to divest nearly half the points of sale of The Phone House that it intended to acquire. According to the Council, the objective is to find a buyer who will operate these points of sale as a multi-operator distribution chain in the same way The Phone House operated prior to the acquisition. Moreover, Belgacom itself is obliged to continue to operate the points of sale of The Phone House that it acquires as a multi-operator distribution chain for a certain period of time. This implies that points of sale of The Phone House under control of Belgacom will have to carry products and services of other telecom operators in addition to products and services of Belgacom. Additional details on the clearance conditions will become available once the final decision of the Council is published.

Policy and Procedure

Competition Council Adopts Fining Guidelines

On December 19, 2011, the Council adopted guidelines which explain the method it will follow for the calculation of fines (the "Guidelines") that the Council can impose in cases of anticompetitive agreements or abuses of dominant position. According to the Council, the Guidelines aim to improve transparency and legal security and are built on its current practice, but they also take into account developments at the EU level and in other Member States. The Guidelines were published in the Official Gazette on January 18, 2012, and apply prospectively to all proceedings for which, on that date, there has been no oral hearing before the Council yet.

Pursuant to Article 63 APEC, the Council can impose fines up to a maximum of 10% of the turnover of the undertaking(s) concerned. Below that limit, the Council enjoys a certain margin of discretion but will use these Guidelines as a framework for reference.

The starting point for calculating the fine is the relevant turnover of the infringing undertaking in the last full year of that infringement, known as the calculation basis. The calculation basis is then multiplied by a percentage corresponding to the gravity and duration of the infringement to determine the basic amount of the fine. This basic amount can consequently be adjusted upward or downward to reflect aggravating or mitigating circumstances.

According to the Guidelines, the Council will generally apply a factor of up to 15% for the gravity of the infringement and a percentage of 15-20% for severe and very severe infringements, with a maximum of 30%. For the duration factor, the Council will, per year of the infringement, take an amount into consideration that equals a percentage of the amount for the gravity factor. The Guidelines clarify that this percentage can be 10- 30% per year.

The basis amount will therefore be determined as follows:

- Basic amount = the gravity factor (X% of the calculation basis) + the duration factor (Y% of the gravity factor multiplied by the number of years of the infringement)

The Council will then consider the specific circumstances of the case, *i.e.*, any mitigating or aggravation circumstances. The Guidelines contain a non-exhaustive list of factors that the Council can take into consideration. The Council can also consider initiatives taken by the infringing undertaking to avoid anticompetitive behavior or to limit the anticompetitive effects of its conduct. For example, the Council can lessen the fine if compensation has been made to other undertakings or consumers who were harmed by the infringement.

DENMARK

This section reviews the competition law developments under the Competition Act (Consolidation 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 ("Tribunal").

Horizontal Agreements

A Danish Court Has Imposed Fines On A Freight Transport Association For Exchanging Illegal Information With Its Members

On December 15, 2011, the District Court of Copenhagen found that a Danish freight transport association, Dansk Transport og Logistik ("DTL") had infringed Section 6 (corresponding to Article 101 TFEU) of the Danish Competition Act by publishing a calculation program for freight transport by road with a specific forecast of cost development.

DTL admitted the infringement before the court but argued that no intent or gross negligence had been demonstrated (which is a requirement under Danish law in order to be fined). The court found that the exchange of information by DTL did restrict competition by object and that DTL had acted gross negligently by not ensuring that the exchange of information complied with Section 6 of the Danish Competition Act.

When setting the fine, the court found it to be an aggravating factor that DTL is a professional association with a large number of members, who had demanded a forecast of cost development and received it. Furthermore, the court found it to be an aggravating factor that the infringement had taken place during a substantial number of years. However, the court found it to be a mitigating factor that no information indicated that the forecast had actually been used to limit competition between the members by coordinating prices. Lastly, the court noted that DTL ended the distribution of the forecast as soon as DTL realized that it might constitute an infringement.

Based on these considerations and considering the gravity of the infringement, the court set the fine at DKK 400,000 (approx. €54,000). The fine imposed is within the range that has been imposed on trade associations on previous occasions.

Unilateral Conduct

The Tribunal Has Remitted A Case To The DCC Concerning Post Danmark's Alleged Abuse In The Market For Distribution Of Magazine Mail

On December 22, 2010, the DCC found that Post Danmark A/S (the incumbent postal operator in Denmark) had abused its dominant position in the market for distribution of magazine mails in Denmark contrary to Section 11 of the Danish Competition Act and Article 102 TFEU. The DCC found that Post Danmark had abused its dominant position in two ways. First, Post Danmark granted loyalty-enhancing rebates to four major customers that accounted for approx. 40%-50% of the turnover in the market. Second, Post Danmark applied minimum requirements in its general price lists in order to obtain rebates. As a result, Post Danmark was ordered to cease its illegal activities. The case was appealed to the Tribunal, which rendered its decision on December 8, 2011.

The Tribunal concurred with the DCC in regard to the loyalty-enhancing rebates granted to the four major customers. However, the Tribunal noted that the DCC had failed to establish that the minimum requirements in the pricelist had loyalty-enhancing effects.

Post Danmark's general pricelist is constructed as a step-by-step, non-cumulative rebate scale, which entails that the achieved rebate only applies to the share of the customer's magazine mail, which is above each step on the scale. The number of magazines is calculated for each magazine separately. However, in order to be categorized as a magazine mail product and for the relevant general pricelist to be applicable, each magazine title will have to meet a minimum threshold number of magazines per title per posting.

Although the Tribunal noted that retroactive price setting usually is a clear indication of loyalty-enhancing behavior, the DCC had not demonstrated that it actually had such an effect in the present case. The Tribunal found that the distribution of magazine mail is connected with cost benefits in comparison with distribution of regular mail. Letting these advantages affect the price setting was found by the Tribunal to be economically reasoned. The Tribunal was therefore of the opinion that minimum requirements could be set and that the price setting could be affected by this. On this basis, the Tribunal remitted the entire case to the DCC.

The Terms Of Use Of A Low Cost Airport Terminal In Copenhagen Airport Were Found To Be Discriminatory

On December 21, 2011, the DCC found that certain terms of use for the airport terminal CPH Go adopted by Copenhagen Airport were discriminatory. CPH Go is a flight terminal within Copenhagen Airport, which provides low-cost airlines and their passengers with facilities that have been tailored to low-cost carrier needs. The CPH Go terminal is a cheaper and simpler alternative to the existing terminals at the airport. Airlines operating from CPH Go enjoy operational advantages such as a 30 minute maximum turn-around time and a discount of DKK 20 per passenger on charges. In order to operate from CPH Go, airline carriers had to meet the criteria set out in the terms of use for CPH Go.

The DCC found that Copenhagen Airport held a dominant position in the market for aeronautic terminal services to airline carriers and passengers regardless of whether the geographical scope was defined as Copenhagen Airport alone or if it included Odense and Malmoe Airports.

After having reviewed the terms of use, the Council found that the following three terms to be discriminatory:

Carriers with transfer passengers were not allowed to use CPH Go (luggage from passengers/airlines using CPH Go could only be handled on an older baggage facility (BF2), which could not handle transfer baggage, so air carriers operating from CPH Go were effectively blocked from accommodating transfer passengers).

- Carriers using baggage/luggage containers were not allowed in CPH Go.
- Only aircrafts with a wingspan of 24-36 meters were allowed to use CPH Go.

The Council found these conditions infringed Section 11 of the Danish Competition Act and TFEU Article 102. The provisions were found to de facto limit the use of the facility for airline carriers carrying transfer passengers, using baggage containers and/or operating specific aircrafts. The Council found that the limitations were not objectively justified.

Against this background, the Council ordered Copenhagen Airport to abolish the terms regarding transfer passengers and baggage containers. Furthermore, CPH Airport was ordered to allow aircrafts with a wingspan of less than 24 meters to operate from CPH Go.

Mergers And Acquisitions

Danish Mortgage Bank Nykredit Allowed To Alter Commitment Proposed In 2003

On November 30, 2011, the DCC decided that Danish mortgage bank Nykredit could amend a commitment that was proposed and adopted in 2003 as part of a merger.

In 2003, Nykredit merged with the mortgage bank Totalkredit. In order for the merger to be approved, Nykredit proposed a commitment, which obliged Nykredit to decrease the contribution rate on mortgage loans to 0.50%. However, in February 2010, Nykredit gave notice of an increase of the rate corresponding to 0.625%.

On June 23, 2010, the DCC ordered Nykredit to refrain from increasing the rate, as an increase would violate the commitment given in connection with the merger. The case was appealed by Nykredit to the Tribunal, which, on December 2, 2010, determined that the commitment in relation to the size of the contribution rate on loans to private customers, which Nykredit offered in connection with the merger, was of indefinite duration.

However, the DCC announced in connection with its decision of June 2010 that the Competition and Consumer Authority would assess whether the market and regulatory conditions had changed to such an extent since 2003 that the commitment should be amended or repealed.

Nykredit was of the opinion that the commitment should be repealed due to the change in conditions on the financial market caused by the financial crisis. The DCC, on the other hand, found that the commitment could not be repealed. However, the Council noted that regulatory and structural changes since 2003 had resulted in increased capital costs for Nykredit. The DCC therefore accepted that Nykredit could amend its commitment. The new commitment will allow Nykredit to raise administration margins for private customers in Nykredit to 0.55% for fixed-rate loans with repayments and to 0.60% for other loans for a period of 5 years.

From April 1, 2017, the original commitment entered into in 2003 will reapply.

FINLAND

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

Vertical Restraints

Market Court Fines Iittala For Resale Price Maintenance

In December 2011, the Market Court imposed a €3 million fine on the Finnish design firm Iittala, a supplier of kitchen and other home consumer products, for resale price maintenance in Finland during 2005–2007. The fine is the largest imposed for resale price maintenance in Finland.

According to the Market Court, Iittala pressured retailers to follow its instructions on minimum prices for its products, decided maximum discount percentages, and the duration of discounts. Common understanding on prices was formed either by signing product-specific agreements with specific minimum prices or maximum discounts or through oral agreements, e-mail correspondence and complying with the agreed price level. Iittala threatened to discontinue supplies to non-complying retailers.

The Market Court evaluated the infringement separately for two groups: (i) independent shops that are usually discount stores or specialty stores and (ii) stores which belong to large retail store chains.

For the first group, the Market Court found that Iittala and the retailers had entered into agreements that allowed Iittala to recommend prices for the products. However, the parties also entered into product-specific cooperation agreements which included minimum prices or maximum reductions. Iittala also set the maximum amount for campaign discounts and the duration of sale campaigns. Supply of the products was conditional on compliance with those terms. The Market Court noted that since there was an explicit agreement on sales prices, it was not relevant whether the retailers had actually complied.

For the second group, the Market Court found that the retailers who belonged to large retail store chains had refused to sign agreements with minimum price provisions. However, the Market Court found that Iittala and the retailers had reached an understanding on the minimum prices and sale campaign terms through e-mail correspondence, verbally or by the retailers simply complying with the terms set by Iittala. Iittala had also controlled the actual prices applied by the retailers and actively persuaded the retailers to comply with the common price level.

The Market Court found that the arrangement constituted resale price maintenance. Iittala's requirement to comply with set prices was backed with the threat of discontinuing the supply of products. In certain cases Iittala carried out its threat. Given the popularity of Iittala's products, it was difficult for the retailers not to comply.

The Market Court rejected Iittala's claim that the company had merely issued price recommendations. The Court stressed that Iittala had demanded compliance with the set price level by threatening to discontinue the supply of products. Neither did the Court find Iittala's efficiency arguments justified since the company had presented limited actual evidence. However, the Court considered that efficiency arguments could in theory justify resale price maintenance but it is for the respondent to present evidence of alleged efficiency gains.

The Market Court found that Iittala's actions with different retailers were part of a larger strategy to increase or maintain prices and constituted a continuous and serious infringement. The evidence showed that Iittala's intention was to raise the resale gross margin and the price level. The Court stressed that Iittala's actions were executed on an organization-wide level. The Court considered that Iittalas conduct was particularly harmful to consumers because the resale price maintenance likely increased the price level of the products.

In its reasoning, the Market Court made extensive reference to EU practice. It thereby clarified a number of questions where there was no national case law. The level of the fine also reflects the recent, more strict approach towards clear infringements of competition law.

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 ("Minister").

Horizontal Agreements

The FCA Fines Four Major Laundry Detergent Manufacturers

On December 8, 2011, the FCA imposed total fines of €367.9 million on the four major detergent manufacturers, Unilever, Henkel, Procter & Gamble ("P&G"), and Colgate-Palmolive, for coordinating pricing and promotions in the household laundry detergents sector in France in breach of Article L. 420-1 of the French Commercial Code and Article 101 of TFEU.[1]

Unilever, P&G, and Henkel coordinated prices, promotions, and detergent formats at the European level, on the fringe of an environmental initiative of the International Association for Soaps, Detergents and Maintenance products ("AISE"). In France, these

1 Dec. of the French Competition Authority No. 11-D-17 of 8 December 2011relating to the practices implemented in the laundry detergent sector, http://www.autoritedelaconcurrence.fr/pdf/avis/11d17.pdf.

three manufacturers and Colgate-Palmolive agreed on prices and promotions offered to hypermarkets and supermarkets.

On March 4, 2008, Unilever submitted a leniency application before the FCA disclosing the existence of agreements at the French level. However, Unilever's leniency application did not mention any practice taking place at the European level.

On April 28, 2008, Henkel submitted a leniency application before the Commission disclosing the agreements settled at the European level and submitted leniency applications before several national competition authorities, including the FCA.

Though the Commission could have declined the jurisdiction of the FCA regarding this case, it stated, in May 2010, that the EU and the French parallel proceedings concerned distinct infringements. Consequently, the Commission and the FCA both pursued their proceedings.

On April 13, 2011, the Commission found that Unilever, P&G, and Henkel had, on the occasion of the AISE environmental initiative, coordinated prices and promotions for powdered heavy-duty detergents in several national markets, including the French market, from January 2002 to March 2005. The Commission fixed the basic amount of the fines at 16% of the sales of the parties in the powdered heavy-duty detergents sector and increased the basic amount of the fine of P&G by 10% in consideration of its individual situation. Being the first leniency applicant to the Commission, Henkel was granted immunity. P&G, the second leniency applicant, was granted a 50% fine reduction and fined €211.2 million. Unilever, the third leniency applicant, was granted a 25% fine reduction and was fined €104 million.

On December 8, 2011, the FCA found that Unilever, P&G, Henkel, and Colgate coordinated prices and promotions for all kind of laundry detergents from 1997-2004. In assessing the amount of the fines, the FCA implemented for the first time its notice on the method of setting fines published on May 16, 2011. In contrast with the Commission's decision, the FCA fixed the basic amount of the fines at 20% of the value of the sales of the parties in the laundry detergent sector and increased the basic amounts of the fines by 25% for Unilever, 15% for Henkel, 25% for P&G, and 15% for Colgate-Palmolive in consideration of their individual circumstances.

For the first time in a French cartel procedure, all the parties involved had decided to apply for leniency before the FCA. Being the first leniency applicant in France, Unilever was granted total immunity from fines. The FCA then took into consideration the added values of the evidence brought by the three other companies and their order of arrival when submitting their leniency applications. Henkel, the second leniency applicant, only benefited from a 25% reduction of fine, as the FCA considered that it had unduly delayed the FCA proceedings by claiming that there was a link between the European and the French cartels. P&G and Colgate-Palmolive benefited from a 20% and a 15% reduction, respectively. In the end, the FCA fined Henkel €92.3 million, P&G €240.24 million, and Colgate-Palmolive €35.4 million. Henkel immediately announced that it would appeal the FCA decision.

Policy and Procedure

The FCA Launches A Public Consultation On Draft Guidelines For Corporate Compliance Programs And Settlement Procedure

On October 14, 2011, the FCA launched a consultation on two new draft guidelines, the first one regarding competition law compliance programmes and the second one on its settlement procedure.

Compliance Programs

The draft framework-document released for public consultation highlights the added value of corporate compliance programs, demonstrating the key role of these programs in helping corporate boards detect and deal with antitrust violations (including the submission of leniency applications).

The FCA is of the opinion that, in order to be robust and effective, a corporate compliance program must include five key components: (1) a firm, clear and public commitment by the entire board and management to comply with competition law and to support the undertaking's compliance program; (2) empowering someone within the organization to implement and oversee the compliance program, with the necessary autonomy and means to fulfil this role; (3) developing an effective information, training and awareness toolkit in order to spread and maintain a competition culture at all levels, from the top management to each member of the staff of the undertaking; (4) setting up effective control, audit, and warning mechanisms; and (5) implementing follow-up and sanction measures in the event of any detection of a violation of competition rules or of a breach of the undertaking's compliance programme.

The FCA does not consider the presence or absence of a compliance program as a mitigating or aggravating circumstance. However, if the top management of the undertaking is aware of an infringement through the compliance program, but ignores it, this would likely result in criminal sanction.

Settlement Procedure

The FCA submitted draft guidance on its settlement procedure to maximize corporate incentives to cooperate and swiftly resolve antitrust cases. The draft guidance enhances transparency and predictability.

The settlement procedure, created in 2001, allows undertakings to waive their right to challenge charges of the FCA in return for a reduction in the fine. All types of antitrust cases (cartels, other horizontal or vertical agreements, or abuse of dominance) can be settled, although there is no right to settlement. This procedure is intended to streamline and expedite antitrust cases, as well as to provide undertakings with a clearer view of the risks linked to participating in an infringement, and with an opportunity to manage them by cooperating with the FCA.

For the FCA to accept a settlement, the undertakings will have to refrain from contesting the facts. This includes the facts, their qualification, and the validity of the procedure. The undertakings can, however, raise arguments likely to have an impact on the amount of the fine. It is enough that one undertaking wishes to enter into the settlement procedure. In that case, the FCA will have to prove the participation of the other parties to the infringement. The request for settlement should be made as soon as possible, ideally immediately after the Statement of Objections. Should the FCA agree to a settlement, it will reduce the fine by 10%.

Undertakings that request a settlement can also commit to amend their behavior in the future in a variety of ways, in return for an additional reduction in the fine of 5-15%. The creation or improvement of a compliance program can allow the undertakings to receive up to another 10% reduction in the fine.

The public consultation for both draft guidelines ended on December 14, 2011, and the FCA held a public roundtable on the two draft documents on December 20, 2011. The release of the two sets of guidelines in their final form is expected in February 2012.

GERMANY

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

Horizontal Agreements

Federal Court Of Justice Limits Liability Of Legal Successors Of Companies Fined For Cartel Offenses

On August 10, 2011, the Federal Court of Justice ("FCJ") rendered two judgments confirming the formalistic approach under German law regarding liability of legal successors in cartel cases.

In the first case, an insurer (company A) had been fined for price-fixing by the FCO.[2] Company A then merged with a competitor (company B). Through the merger, company B became company A's legal successor. Most of company A's insurance contracts were not transferred to company B, but to other entities of the group to which company B belonged. The FCO held company B liable for the cartel fine originally imposed on company A. In the second case, a ready-mix concrete company involved in price-fixing had transferred its main assets (operating business) to another affiliate within the company group and subsequently merged into the parent company.[3] The Düsseldorf Court of Appeal imposed a fine on the parent company.

In both cases, the FCJ rejected the liability of the legal successors. It confirmed that under German law, liability is limited to the legal entity that has – through its legal representatives – committed the cartel infringement. The FCJ explicitly noted that, in contrast to EU law, German law does not follow the concept of a "single economic unit" and group liability for cartel conduct. Instead, a legal successor could only be held liable if – from an economic perspective – the legal successor's assets were (nearly) identical with those of the legal entity that committed the cartel infringement.[4] This is the case (i) if the "liable assets" from the original company remain separate from the legal successor's other assets, (ii) if they continue being used in the same or in a similar way after the merger or acquisition of assets and (iii) if they account for a substantial part of the legal successor's total assets.

2 FCJ, Decision of August 10, 2011, Case KRB 55/10 (*Versicherungsfusion*), available in German at: http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=1c0b7e445970b1b20deb746b63be31ed&nr=58187&anz=1&pos=0&Frame=4&.pdf.

3 FCJ, Decision of August 10, 2011, Case KRB 2/19 (*Transportbeton*), available in German at: http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=50c3a19b014716536898258a8bf69011&nr=58186&pos=0&anz=1.

4 The leading case in this respect is FCJ, Decision of March 11, 1986, Case KRB 8/85 (*Bußgeldhaftung*), available in German at: WuW/E p. 2265 et seq.

The FCJ held that in both cases, the requirements to establish the legal successors' liability were not met. In the first case, only a limited number of insurance contracts had been transferred to the legal successor (company B) and the majority to other entities of the group to which the legal successor belonged. More importantly, only 28% of the legal successor's insurance contract portfolio, 42% of its gross revenues, and 56% of its capital assets used to belong to the legal entity that committed the cartel infringement. The legal successor's assets were thus not (nearly) identical with those of the predecessor. The FCO clarified that in a merger of (almost) equals (as in the case at hand), the successor's liability is excluded. In the second case, the FCJ also rejected the liability as the cartelist had transferred its main assets to a sister entity within the group, but not to its parent company which was held liable by the Düsseldorf Court of Appeal. The legal successor's (*i.e.*, the parent company's) assets were not (nearly) identical with those of the predecessor. The FCJ clarified that separate entities could not be held liable only because they belonged to the same group.

The judgments expose a loophole in German law: legal entities involved in a cartel may under certain conditions escape liability either through (i) merging with competitors (first case) or (ii) transferring their main assets within the group (second case). The FCJ was aware that its decision may invite cartelists to re-structure their business in order to exclude liability. It clarified, however, that it is up to legislator to prevent possible circumventions and to ensure a proper punishment of cartel infringements.[5]

FCO Reduces The Fine Against Industrial Steam Boiler Manufacturer Alstom

On October 20, 2011, the FCO reduced the fine imposed on Alstom Power Systems ("Alstom") for bid rigging regarding industrial steam boilers from €91 million to €42 million, after Alstom had objected to the FCO's fine calculation.[6]

The FCO had imposed the €91 million fine on Alstom on August 6, 2010, for bid rigging committed by Alstom's legal predecessor, EVT Energie- und Verfahrenstechnik GmbH ("EVT"), from 1990-2003. The FCO had to apply the former law (applicable until 2005) and thus calculated the fine based on the estimated additional proceeds EVT derived from the cartel.[7]

Alstom objected to the fine totaling €91 million, claiming that the FCO had failed to take all of EVT's relevant primary costs into account and had relied on irrelevant documents. The FCO reviewed the objections in so-called intermediate proceedings. Alstom was partially successful, and the FCO recalculated the "additional proceeds." The FCO also took into account that the other cartel participants had gone insolvent or had otherwise ceased to exist, so that Alstom was the only addressee of a fine in the case. The FCO's decision is now final.

FCO Fines Dishwashing Detergents Manufacturer In Parallel Proceedings

On November 23, 2011, the FCO imposed fines on Reckitt Benckiser Deutschland GmbH ("Reckitt Benckiser") and several of its employees in two parallel proceedings, totaling around €24 million.[8] In both proceedings, Reckitt Benckiser received a reduction of fines under the FCO's leniency program. In addition, Reckitt Benckiser agreed to settle the cases with the FCO.

The first proceeding concerned coordinated price increases by Reckitt Benckiser and Henkel Wasch- und Reinigungsmittel GmbH ("Henkel") regarding certain dishwashing detergents from 2005-2007. Henkel had applied for leniency and thus escaped a fine.

The second proceeding concerned illegal information exchange between Reckitt Benckiser and several other branded goods manufacturers, and took place in a working group of the Branded Goods Association. The investigation had originally been triggered by a leniency application from Colgate Palmolive GmbH in 2006, and the FCO had already fined four manufacturers of drugstore products in separate proceedings in 2008/2009.[9] The investigation against other members of the Branded Goods Association's working group, including Reckitt Benckiser, now revealed new evidence for illicit information exchange, including on planned price increases. Accordingly, in these proceedings the FCO extended the scope of the infringements pursued. In addition, the FCO has initiated proceedings

5 While the existing reform proposal of the Ministry of Economics for the 8th amendment to the GWB does not yet address these issues, it is planned that the next draft proposal will aim at eliminating these loopholes as identified in the two FCJ decision.

6 A case summary is available in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell11/Fallberichte/B11-026-05-Fallbericht_Dampferzeuger_Aktualisierung_November_2011.pdf.

7 FCO, Decision of August 6, 2010, Case B11 – 26/05 – *Großdampferzeuger*. See National Competition Report, July – September 2010, p. 6 et seq.

8 A press release is available in English at: http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2011/2011_11_23.php and in German at: http://www.bundeskartellamt.de/wDeutsch/archiv/PressemeldArchiv/2011/2011_11_23.php.

9 See on this the press release in German, available at: http://www.bundeskartellamt.de/wDeutsch/archiv/PressemeldArchiv/2008/2008_02_20.php, see also National Competition Report January – March 2008, p. 7.

against the Branded Goods Association for supporting the illegal information exchange. This investigation is still ongoing.

FCO Imposes Fines In Several Cartel Cases

Instant cappuccino. On October 18, 2011, the FCO imposed fines totaling €9 million on instant cappuccino makers Kraft Foods Deutschland GmbH ("Kraft") and Krüger GmbH & Co. KG ("Krüger"), and on two senior employees for price-fixing in 2007 and 2008.[10] The proceedings were triggered by whistleblower Melitta Kaffee GmbH, which secured immunity. Kraft received a fine reduction due to its cooperation in the proceedings. In addition, it agreed to settle the case with the FCO. The decision is not yet final, as Krüger has appealed the fine. With this decision, the FCO concluded its cartel proceedings against coffee roasters for horizontal price-fixing agreements regarding cappuccino and roasted coffee.[11]

Flour. On October 25, 2011, the FCO fined VK Mühlen AG ("VK Mühlen") for price fixing, market and customer allocation, and limiting capacities in the flour distribution sector in the amount of €23.8 million.[12] This is the first fine in the ongoing investigation in the flour distribution area, with ongoing proceedings against another 40 milling companies. The fine was reduced due to VK Mühlen's extensive cooperation with the FCO during the proceedings under the leniency program. In addition, VK Mühlen agreed to settle with the FCO. Interestingly, the FCO allowed VK Mühlen to pay the fine in five annual installments.

Bunker fuel. On November 8, 2011, the FCO imposed fines totaling more than €11 million on two suppliers of bunker fuel, Bominflot Bunkergesellschaft für Mineralöle mbH & Co. KG and BMT Bremer Mineralöltransportgesellschaft mbH & Co. KG, for market allocation as well as price- and quota-fixing.[13] Both companies agreed to settle the case with the FCO.

Hydrants. On December 16, 2011, the FCO imposed fines in total of €15.5 million on six manufacturers and retailers of hydrants and other water pipe fittings and on four individuals for price-fixing.[14] The investigation was triggered by evidence the FCO had discovered in another cartel investigation into cast iron pipes. The FCO then opened a new case and carried out dawn raids in the hydrants sector. Three companies applied for leniency and obtained a reduction in fines. In addition, these three companies and a fourth addressee agreed to settle with the FCO.

Vertical Agreements

FCO Takes Action Against Anticompetitive Distribution Agreements In Luxury Bathroom Fittings Market

The FCO terminated proceedings against Aloys F. Dornbracht GmbH & Co. KG ("Dornbracht"), a manufacturer of luxury bathroom fittings, for anticompetitive distribution agreements. After Dornbracht removed the restrictions contained in so-called specialized trade clause from the distribution agreements with wholesalers, the FCO did not impose a fine.[15] The FCO had opened proceedings, because internet retailers had complained that wholesalers ceased to supply them with Dornbracht products or only supplied them at higher prices than brick and mortar retailers.

The specialized trade clause granted wholesalers a considerable rebate if they sold Dornbracht fittings to retailers, which fulfilled service requirements and a certain level of quality (*i.e.*, professional installation, adequate after-sales service) vis-à-vis customers. The FCO found that the clause decreased the wholesalers' incentive to supply hardware stores, discount stores, and Internet retailers, which usually do not provide installation and adequate after-sales services. Dornbracht also explicitly advised consumers on its website to purchase Dornbracht fittings from specialized retailers (not the internet), and repeatedly took a position against Internet sales.

The FCO found that the specialized trade clause created a dual pricing scheme that restricted intra-brand competition in violation of Article 101 TFEU and Section 1 GWB. Regarding sales to Internet retailers, the FCO qualified the clause as a hard-core restriction, because it restricted passive (online) sales to consumers.

10 A press release in English is available at: http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2011/2011_10_18.php; a press release in German can be obtained at: http://www.bundeskartellamt.de/wDeutsch/archiv/PressemeldArchiv/2011/2011_10_18.php.

11 The FCO had already fined coffee roasters for price fixing in coffee for retail sale and coffee for commercial use (catering sector, bulk buyers, etc.). See National Competition Reports, October – December 2009, p. 6 et seq. and April - June 2010, p. 7 *et seq*.

12 A press release in English is available at: http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2011/2011_10_25.php; a press release in German is available at: http://www.bundeskartellamt.de/wDeutsch/archiv/PressemeldArchiv/2011/2011_10_25.php.

13 A press release in English is available at: http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2011/2011_11_08.php; a press release in German can be obtained at: http://www.bundeskartellamt.de/wDeutsch/archiv/PressemeldArchiv/2011/2011_11_08.php.

14 A press release in English is available at: http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2011/2011_12_16.php. A press release in German is available at: http://www.bundeskartellamt.de/wDeutsch/archiv/PressemeldArchiv/2011/2011_12_16.php.

15 A case summary is available in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Missbrauchsaufsicht/Kurzberichte/B05-100-10-endg.pdf.

Unilateral Conduct

Federal Court Of Justice Rejects Exclusive Supply Claim In The Press Wholesale Sector

On October 24, 2011, the FCJ affirmed a decision of the Schleswig Court of Appeal that the refusal to supply claim brought by Heinz-Ulrich Garde KG, a press wholesaler ("Garde"), against publisher Bauer Media Group ("Bauer"), was unfounded.[16]

Bauer had terminated its exclusive supply contract with Garde, which had been effective since 1965, for further distribution of Bauer magazines and newspapers to retailers in Garde's territory in Northern Germany. Bauer gave Garde six months notice in advance and then shifted the supply contract to its wholly-owned subsidiary Pressevertrieb Nord KG ("PVN") instead. Garde went to court and requested the exclusive and, alternatively, the non-exclusive right to supply Bauer's magazines and newspapers. Garde argued discrimination and unfair impediment by Bauer (Sections 20 and 30(1) GWB).

The FCJ confirmed that Bauer was an addressee of Section 20(1) GWB and thus subject to the same rules as if it were dominant, because it was a company that was allowed by law to fix the retail prices of magazines and newspapers.[17]

The FCJ held that given Bauer and its wholly-owned subsidiary PVN were part of the same economic group Bauer had an objective justification to treat PVN differently from Garde. The FCJ also rejected Garde's argument that using the subsidiary PVN in the Garde territory was discriminatory because Bauer still used press wholesalers for distribution in other territories in Germany. The FCJ stressed that a different treatment of similar facts only constituted unfair discrimination under Section 20 GWB if the different treatment concerned undertakings active on the same relevant product and geographic market. This was not the case here because, with the exception of PVN, other press wholesalers were not active in the same (geographic) market.

The FCJ also rejected the unfair impediment claim. It found Bauer's interests were legitimate and outweighed any possible interests of Garde. The FCJ clarified that Bauer was in principle free to change its distribution model and to supply its magazines and newspapers via a wholly-owned subsidiary. The FCJ elaborated that keeping the exclusive distribution relationship between Garde and Bauer would rather restrain competition in the relevant press wholesale market, as it would have prevented the market entry of PVN as a second press wholesaler. The FCJ also referred to the fact that Garde was still dominant in the press wholesale market in its territory because the distribution of Bauer's newspapers and magazines only accounted to 12.6% of Garde's overall press distribution revenues.

The FCJ also rejected Garde's non-exclusive supply request. The FCJ ruled that Garde was not dependent upon Bauer's magazines and newspapers as "must-have" products, as Garde still supplied the entire portfolios of the other publishers in the market.

The FCJ did not give any guidance on the length of an appropriate readjustment period. In the case at hand, Bauer terminated the supply contract with Garde with a six month notice period.

Mergers and Acquisitions

FCO Blocks Acquisition Of Slaughterhouse Operator By Competitor

On November 17, 2011, the FCO prohibited the acquisition of a majority shareholding in slaughterhouse operator Heinz Tummel GmbH & Co. KG ("Tummel") by competitor Tönnies Holding GmbH & Co. KG ("Tönnies"), because it would have strengthened Tönnies's dominant position in the German markets for the purchase of cull sows and for the distribution of sow meat to meat processors.[18]

According to the FCO, prior to the merger Tönnies already had a dominant position in each of the two markets which were characterized by a few big players and many medium-sized companies. Tönnies held market shares of around 40% and had a lead of at least 20% over the next direct competitors, had high purchasing volumes and was vertically integrated on different market levels. Tönnies had strong buyer power and could thus unilaterally influence purchasing conditions to the detriment of competitors. The transaction would have increased Tönnies' shares by 10- 15% in the market for the purchase of cull sows and its capacity in the market for the distribution of sow meat to meat processors. This would have further weakened the remaining competitors' position in both markets, and would have further decreased the already low probability of new market entrants.

16 FCJ, Decision of October 24, 2011, KZR 7/10, Grossistenkündigung, available in German at: http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&Sort=12288&nr=58092&pos=28&anz=504.

17 According to Section 30(1) GWB, resale price maintenance between newspaper/magazine producers and distributors is exempted from the cartel prohibition in Section 1 GWB. On the other hand, Section 20 (1) GWB also applies to non-dominant newspaper/magazine producers.

18 The decision is available in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion11/B2-36-11.pdf. A press release in English is available at: http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2011/2011_11_17.php. A press release in German in available at: http://www.bundeskartellamt.de/wDeutsch/archiv/PressemeldArchiv/2011/2011_11_17.php.

The parties proposed a number of market access remedies, but failed to convince the authority to clear the transaction. First, the remedies would have required continuous monitoring of the parties' conduct by the FCO, which is not permissible under German law, and second, the FCO found that the conditions did not remove the structural problems created by the transaction.

FCO Clears Cable Merger Subject To Conditions

On December 15, 2011, the FCO cleared the acquisition of regional cable network operator Kabel Baden-Württemberg ("Kabel BW") by its competitor, Liberty Europe Holding ("Liberty"), subject to conditions.[19] Liberty operates cable networks in North Rhine-Westphalia and Hesse via its subsidiary Unitymedia. Kabel BW is active in Baden-Württemberg and the largest cable network operator, Kabel Deutschland GmbH ("KDG"), operates throughout the rest of Germany. The transaction was originally notified to the European Commission. However, the FCO received the case on referral pursuant to Article 9 of the EUMR.[20]

The FCO cleared the transaction after a second-phase review, but only subject to far-reaching conditions and obligations. These concerned in particular the national so-called "end-customer market," where cable network operators offer cable TV service contracts to housing associations that administer large apartment complexes. The FCO found that KDG, Unitymedia, and Kabel BW were collectively dominant in the end customer market, with combined market shares of 65-75%, and that the transaction would eliminate competition between Unitymedia and Kabel BW.

This is a new development, as in previous cable network merger cases, the FCO had taken the position that there was sufficient bidding competition for contracts with housing associations, including bidding among the large regional cable network operators.[21] Since then, competition has decreased significantly, but it remains unclear what caused this change in market behavior (in this respect, the FCO does not refer to its prior merger decisions).

In order to alleviate the FCO's concerns, Liberty agreed to grant special termination rights to housing associations that had long-term contracts with Unitymedia, which should facilitate market access. Liberty also agreed to waive certain contractual exclusivity rights and ownership claims on local household cable connections.

Further, the FCO required commitments in the so-called feed-in market, where cable network operators offer broadcasters to feed programs into their networks (for which the network operators obtain feed-in fees). The network operators are presumed dominant in each of their network areas. By acquiring Kabel BW, the FCO found that Unitymedia would be able to strengthen its market position, because it could then introduce the encryption of free-TV programs in Kabel BW's network area (as it had done in its own network area in 2006). Since the (proprietary) set-top boxes necessary for viewing Unitymedia's encrypted programming can only be addressed by Unitymedia, it would make broadcasters wishing to access end-customers dependent on Unitymedia's feed-in services.

As a remedy, Liberty therefore agreed to refrain from encrypting free-TV programming. That not only reduces Unitymedia's bargaining power vis-à-vis broadcasters, but also decreases barriers to entry in the end-customer market, because non-encrypted programming can be offered by Unitymedia's competitors to housing associations. This remedy is particularly interesting, because it seems to be rather close to a behavioral commitment that would require continuous monitoring of the parties' behavior by the FCO, which is not permissible under German law.

Deutsche Telekom and Netcologne, both interveners in the FCO proceedings, have appealed the FCO's clearance decision with the Düsseldorf Court of Appeal.

Policy and Procedure

Federal Court Of Justice Allows Indirect Customers' Claims And Passing-On Defense In Damages Actions

On June 28, 2011, the FCJ issued a landmark decision (i) granting indirect customers standing to bring damages actions and (ii) accepting the passing-on defense.[22] The Court quashed a judgment of the Karlsruhe Court of Appeal of June 11, 2010,[23] and remanded the case to the latter. The case concerned damages claims brought

19 The decision is available in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion11/B7-66-11.pdf.

A press release is available in English at http://www.bundeskartellamt.de/wEnglisch/download/pdf/Presse/2011/2011-12-15_PR_Liberty_E.pdf and in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Presse/2011/2011-12-15_PM_Liberty.pdf.

20 The European Commission's referral decision is available in German at: http://ec.europa.eu/competition/mergers/cases/decisions/m5900_20110616_20330_2035084_DE.pdf.

21 See for example the FCO's decision of June 25, 2005, B 7 – 22/05 (IESY / ISH). p. 76 et seq., available in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion05/B7-22-05.pdf. See also National Competition Report, April – June 2005, p. 7.

22 FCJ, Decision of June 28, 2011, Case KZR 75/10, available in German at: http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=cc2b33706a991e678f6d7602c7f2f049&nr=56712&pos=0&anz=1.

23 Karlsruhe Court of Appeal, Decision of June 11, 2010, Case 6 U 118/05 (*Kart*). See National Competition Report, April - June 2010, p. 8.

against a member of the carbonless paper cartel that was fined by the European Commission in 2001.

The FCJ held that not only direct, but also indirect customers in principle have standing to bring damage claims against cartel members, provided that they have suffered damages. Accordingly, indirect customers have to prove that a cartel overcharge was passed on to them by their suppliers (*i.e.*, by the cartel members' direct customers). The indirect customers have to show that (i) there was a cartel that led to higher prices for direct customers, (ii) the indirect customers had to pay higher prices as well, and (iii) there is a link of causality between the cartel and the higher price paid by the indirect customers. The FCJ ruled that there is no presumption of causality between a cartel overcharge and a subsequent price increase in the downstream market. Instead, the indirect customers have to show that the market conditions in the downstream markets allowed passing-on of the overcharge. Factors that may be relevant in this regard are the price elasticity of supply and demand, the cartel duration, as well as the intensity of competition.

Further, the FCJ explicitly allowed cartel members to rely on the passing-on defense. Defendants in damage cases can argue that the plaintiffs passed-on to their customers (*i.e.*, to the cartel members' indirect customers) any damage that may have been caused by the cartel. However, it is for the defendants to prove such passing-on by showing that the market conditions in the secondary market made passing-on likely. Of particular importance in this respect are demand elasticity, price developments, and product features. In a second step, the defendant has to show that there was no reduction in demand due to the higher prices charged by the direct customers. To the extent that the direct customers added value to the product, the defendants have to show how this affected pricing.

The FCJ found that the burden of proof for the passing-on defense might exceptionally shift to the plaintiffs. Plaintiffs would then have to prove that they did not pass-on a cartel overcharge to their customers. However, a reversal of the burden of proof requires a careful balancing of interests. The FCJ did not provide general guidance in which cases the burden of proof could shift. In contrast, the FCJ indicated that a shift would be unlikely if it led to the plaintiff having to disclose sensitive business information. A shift would even be excluded if it is reasonable and possible for the defendant to implead the indirect customers. In the latter case, the defendant could eliminate the risk of multiple lawsuits, as impleaded indirect customers would be bound by a judgment in the proceedings with the direct customers.

While the FCJ clarified two of the most controversial issues concerning cartel damages claims, it remains to be seen how the general principles will be applied in practice by the lower courts.

Proposed 8th Amendment To The German Act Against Restraints Of Competition

On November 10, 2011, the German Federal Ministry of Economics and Technology ("Ministry") published a draft of the proposed 8th amendment ("Amendment") to the GWB.[24] The proposed changes are intended to harmonize German merger control rules with the provisions of the European Union Merger Regulation ("EUMR"[25]), simplifying the GWB's provisions on abuse of dominance, strengthening private antitrust enforcement, and clarifying third-party access to leniency submissions after the *Pfleiderer* judgment of the Court of Justice of the European Union ("CJEU").

Most importantly, the Amendment proposes to introduce the EUMR's "significant impediment to effective competition" (SIEC) test into German law. The creation or strengthening of a dominant position, which has so far been the substantive test under German merger control law, would still be included as an example of a significant impediment to effective competition (as is the case under the EUMR). The recitals of the Amendment explicitly state that the change is designed to ensure a "largely parallel appraisal of concentrations at the EU and German levels."

The market share for a presumption of single dominance will be increased from 33% to 40%, reflecting economic insights and the FCO's own practice, which, according to the Ministry, has shown that a dominant position of a single company with a market share of 33% is nowadays exceptional. The GWB will continue prohibiting abusive conduct not only by dominant companies, but also by companies enjoying "superior market power in comparison to their competitors" and by companies on which "small or medium-sized companies depend" as suppliers or purchasers of certain kinds of goods or commercial services (relative or quasi-dominance).

The Amendment also deals with private enforcement, strengthening the position of professional and consumer associations. Currently, only professional associations grouping companies active in the same

24 The draft proposal is available in German at: http://www.bmwi.de/BMWi/Redaktion/PDF/G/gwb-8-aenderung-referentenentwurf,property=pdf,bereich=bmwi,sprache=de,rwb=true.pdf. The Amendment, which is intended to come into force on January 1, 2013, follows a paper published by the Ministry in August that already set out the key points of the planned Amendment, available in German at: http://www.bmwi.de/BMWi/Redaktion/PDF/E/eckpunkte-8-gwb-novelle,property=pdf,bereich=bmwi,sprache=de,rwb=true.pdf.

25 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, [2004] OJ L 24/1.

markets as companies that violated antitrust rules have standing to seek injunction, *i.e.*, to request termination of the infringement, under the GWB (and this legal standing has played no role in practice). The Amendment extends the legal standing to trade associations of companies with activities in vertically related markets. In addition, consumer associations will receive standing to seek injunction and to skim off cartel profits in cases where a large number of consumers have suffered damages that are too small to warrant individual damages claims.

Finally, the Ministry has reacted to the CJEU's *Pfleiderer* judgment.[26] In June 2011, the CJEU held in a preliminary ruling procedure that EU law did not preclude a victim of anticompetitive practices from being granted access to the FCO's full file, including leniency applications, with a view to preparing a damages claim. It was for national law to determine the conditions for the permission or refusal of such access to the file. The Amendment would include a provision that no access to leniency applications, including any evidence submitted in connection with such applications, would be granted to third parties. In the Ministry's view, the importance of leniency applications for the effective enforcement of competition law justifies this restriction, and precluding access to leniency statements and related documents does not unduly curtail cartel victims' possibilities to obtain damages.

GREECE

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

Policy and Procedure

The HCC Adopts A Revised Leniency Program Based On The Commission's 2006 Notice On Immunity From Fines And Reduction From Fines In Cartel Cases (Leniency Notice)

By its Decision No. 526/VI/2011 the HCC introduced a revised Leniency Program. In full compliance with the European standards and with a view to improve the effectiveness of the fight against cartels, the new Program includes several amendments, primarily intended to increase the number of leniency applications.

The Program has expanded immunity to natural persons, who are now entitled to apply for leniency themselves. It introduces the EU marker system to protect the applicant's place in the queue. It abolishes the recidivism exception provided under the previous Leniency Program, according to which recidivists were not allowed to apply for immunity or leniency. Finally, under the new Leniency Program the HCC may accept oral corporate statements made by the leniency applicants, provided that written evidence is submitted at a later stage of the procedure.

Full Immunity Or Reduction From Fines

The revised Leniency Program offers two main types of lenient treatment depending on the level of the cooperation provided by each undertaking concerned – there is full immunity or a reduction in the fines that would otherwise have been imposed on a cartel member.

In accordance with the European Commission's Leniency Notice, the Decision provides for two types of immunity: Immunity Type 1A is granted to the applicant who will be the first to submit evidence enabling the HCC to initiate a targeted inspection in connection with the alleged cartel, as long as the HCC did not already possess, at the time of the application, sufficient evidence which would allow the initiation of the investigation procedure concerning the cartel. Alternatively, Immunity Type 1B shall be granted to the applicant who will be the first to submit evidence which enables the HCC to establish the infringement of Article 1, Law 3959/2011 or also of Article 101 par. 1 TFEU, in case the evidence already in the possession of the HCC were not sufficient in this respect.

In case the conditions for the granting of immunity are not met, a reduction from the fine (Type 2) that would otherwise have been imposed may be granted to the applicant who shall provide the HCC with evidence of the suspected cartel, representing significant added value with respect to the evidence already in the HCC's possession.

The HCC will determine in any final decision adopted at the end of the administrative procedure whether the evidence provided at a given time provides sufficient added value as well as the level of any reduction in fine. An undertaking which has submitted a Type 2 application may benefit from a reduction not exceeding the 50% of the fines that would otherwise be imposed. A natural person which has submitted a Type 2 application may benefit from a reduction not exceeding 70% of the fines that would otherwise be imposed.

Conditions For Leniency

The Decision clarifies the information an applicant needs to provide to the HCC to qualify for leniency. The undertaking must submit to the HCC a corporate statement which includes all information related to the revealed cartel, *i.e.*, name and address of the legal entity submitting the immunity application as well as the names and

26 CJEU, Judgment of June 14, 2011, Case C-360/09, *Pfleiderer*.

addresses of all the other undertakings that participated in the alleged cartel. In addition, the undertaking must provide a detailed description of the cartel and the activities and functioning of the cartel, the product or services concerned, the geographic scope, the duration, and the estimated market volumes affected by the cartel. In addition, the applicant must submit any other evidence in its possession.

In addition, in order to qualify for leniency, the applicant must satisfy the following conditions:

a) The applicant must cooperate genuinely, fully, on a continuous basis and expeditiously from the time it submits its application throughout the Commission's administrative procedure. This requires in particular that the applicant provides accurate, not misleading and complete information.

b) The applicant must end its involvement in the alleged cartel immediately following its application, except for what would, in the HCC's view, be reasonably necessary to preserve the integrity of any inspections;

c) When contemplating making its application to the HCC, the applicant must not have destroyed, falsified, or concealed evidence of the alleged cartel nor disclosed the fact or any of the content of its contemplated application, except to other competition authorities.

Immunity For Natural Persons

Under the revised legal regime both legal and natural persons are entitled to apply for leniency. The decision clarifies that the immunity or the reduction granted to an undertaking applies automatically to the natural persons that acted on behalf of said undertaking, provided that they cooperate genuinely, fully, and on a continuous basis with the HCC. On the contrary, immunity or a reduction of fines granted to a natural person favors only that natural person and is not extended to the undertaking involved in the cartel.

Moreover, for natural persons, the granting of total immunity from the administrative fines also absolves them from criminal liability, while a fine reduction is regarded as a mitigating circumstance, resulting in a reduced criminal sanction.

The Marker System

The Leniency Program now provides for a marker system. A marker protects the applicant's place in the queue for a given period of time, allowing it to collect the information and evidence necessary in order to meet the minimum conditions and requirements for immunity. To be eligible to secure a marker, the applicant must provide the HCC with information concerning its name and address, the parties to the alleged cartel, the affected products and territory, the estimated duration of the cartel, and the nature of the cartel conduct. If the applicant perfects the marker within the period set by the Commission services, the information and evidence provided will be deemed to have been submitted on the date which the marker was granted.

IRELAND

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

Unilateral Conduct

Irish Competition Authority And Public Broadcaster RTÉ Reach A Settlement Regarding RTÉ's Advertising Discount Scheme

On October 12, 2011, the ICA wrote to Irish television channel TV3, the complainant against public broadcaster RTÉ, to confirm that it had completed its investigation of RTÉ's practices. The ICA and RTÉ have entered into a settlement, by which RTÉ has agreed to change its television advertising model.

TV3 had lodged a complaint with the ICA arguing that the public broadcaster's use of "share deals" amounted to an abuse of its dominant position. This "share deal" scheme involved an advertiser being charged more if a certain percentage of their total television advertising budget was not committed to RTÉ.

The ICA will publish its Enforcement Decision regarding the outcomes of its investigations and talks with RTÉ, "in due course." TV3 claims it has lost significant incomes as a result of the scheme, and that it may seek damages against RTÉ, a decision it will make once it has seen the ICA's Enforcement Decision.

In addition to receiving €200 million annually from TV license fees, RTÉ has the highest share of TV advertising in their market of any State broadcaster in the EU. The contested scheme will remain in place until July 2012.

ITALY

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

Unilateral Conduct

ICA Fines The Incumbent Postal Operator Poste Italiane

On December 15, 2011, the ICA fined Poste Italiane S.p.A. ("Poste Italiane"), the incumbent operator in the postal sector in Italy, Euro 39,377,489 for abusing its dominant position in the markets for liberalized value-added services.[27] The ICA's decision was issued at the end of an investigation launched in October 2009, prompted by complaints from TNT Post Italia S.p.A. ("TNT").

The ICA held that Poste Italiane, by taking advantage of its control over the postal network, adopted a series of practices which were part of a "single coherent strategy" aimed at excluding competitors.

First, according to the ICA, since 2007 Poste Italiane used its control of the network utilized for the postal universal service to hinder the activities of its rival TNT, which had made significant investments in setting up an alternative network to launch a service for mail delivery within a guaranteed time and date (the "Formula Certa" service). Specifically, according to the ICA, Poste Italiane applied an abusive procedure for handling mails sent through the Formula Certa service of TNT (and other rival mailing services) that were mistakenly addressed through the Poste Italiane mailing network and, ultimately, were not delivered to the proper addressee. Particularly, the ICA challenged the facts that (i) Poste Italiane returned the undelivered mails to the sender rather than to the rival postal operators from which the mailing service had originated; (ii) the sender was charged with unreasonably high fees for the provision of the returning service and (iii) the undelivered mails were destroyed in case of refusal by the sender to pay the returning service fee.[28]

Second, in the ICA's view, in order to hinder TNT's Formula Certa service, Poste Italiane launched its own guaranteed time and date service (PostaTime), which was selectively offered to TNT's customers at a price below long-run incremental cost.

Finally, the ICA stated that Poste Italiane offered predatory prices also in the tenders launched by the Municipality of Milan and the tax-collection agency Equitalia, concerning the delivery of administrative acts by means of messengers and the guaranteed time and date service.

Based on the above, the ICA concluded that Poste Italiane's conduct amounted to an abuse of dominant position in breach of Article 102 TFEU and it ordered the incumbent to immediately cease the contested conduct. Poste Italiane appealed the ICA's decision before the Regional Administrative Court of Lazio.

Mergers and Acquisitions

ICA Reassesses The Acquisitions Of Vallenergie S.p.A. And Deval S.p.A. By CVA S.p.A., And Approves The Transaction[29]

On August 5, 2011, the ICA adopted a decision (the "First Decision") prohibiting the acquisition by CVA-Compagnia Valdostana delle Acque S.p.A. ("CVA") of sole control of Vallenergie S.p.A. ("Vallenergie") and Deval S.p.A. ("Deval"). Following the amendment of the regional law regulating the market(s) for electricity, the parties re-notified the transaction. On November 16, 2011, in light of the amended legal framework, the ICA adopted a new decision clearing the transaction (the "Second Decision").

In its First Decision, the ICA found that potential competition in the local markets for the (1) retail supply of electricity to domestic final users, and the (2) retail supply of electricity to non-domestic final users, *i.e.*, small businesses, was hindered by significant legal barriers to entry. Pursuant to the local regulation, the distributors that had concluded a convention with the competent local authority could apply to the customers' invoices a 30% discount on the price of electricity, which was subsequently refunded (to the distributors) by the local authority. The ICA considered that new entrants would not benefit from this policy. The costs of access to the discount, *i.e.*, changes in the invoice system and detailed reports to be regularly sent to the local authority, made the rebate non-economic for distributors lacking an established local presence. On October 19, 2011, the local regulation was amended and the intermediation of distributors eliminated. According to the new provisions, the discount would directly be granted by the local authority to the customers requesting it.

27 Case A413 – *Poste Italiane (PostaTime)*.

28 According to the ICA, Poste Italiane, for the provision of the returning service, charged the sender with its full postage fee, notwithstanding the fact that the restitution of undelivered mails required only part of the activities carried out for the delivery of regular mails.

29 Case C11315 – *CVA- Compagnia Valdostana delle Acque/Deval-Vallenergie*.

In its Second Decision, the ICA replicated the market analysis developed in its First Decision but reached an opposite conclusion. The ICA found that the *post*-merger entity would enjoy a *quasi*-monopoly in the two markets affected by the transaction. In the market for the retail supply of electricity to domestic final users, the entity would hold a share of approximately 95-100% of both the demand of electricity and the number of delivery points supplied. In the market for the retail supply of electricity to non-domestic final users, the new entity would hold around 80-85% of the demand of electricity and 90-95% of the delivery points. In contrast to its First Decision, however, the ICA considered that the transaction would not raise competition concerns. First, the ICA found that the new regulatory framework had eliminated the competitive disadvantage of new entrants. By allowing the distributors that are active in different geographic markets to benefit of the discount, it made their entry into the local market of Valle d'Aosta economic. Second, the ICA considered that potential competition from other distributors was sufficient to significantly reduce any market power of the post-transaction entity, regardless of its monopolistic market share. Therefore, the ICA concluded that the transaction would not create or strengthen the existence of a dominant position.

ICA Investigates 2008 Merger Of Alitalia And Air One Following Expiry Of Three-Year Governmental Freeze On Merger Control Rules

On November 30, 2011, the ICA opened an investigation into the merger between Italy's flagship carrier Alitalia and its main competitor Air One after expiry of the three-year suspension of the operation of national merger control rules.[30]

The merger had taken place in December 2008 and involved a vehicle company owned by a group of Italian investors, Compagnia Aerea Italiana ("CAI"), which was established for that purpose. The transaction consisted in CAI's acquisition of: (i) certain assets of the Alitalia Group (which at that time was under special administration); and of (ii) sole control over the companies of the Air One Group. The ultimate aim of the merger was to prevent Alitalia's default by creating a new Italian airline combining Alitalia's main operating assets and Air One.

The transaction would have led to an overlap between the parties' activities on a number of domestic and international routes, with very significant aggregated market shares on several routes. In order to ensure clearance, the Italian government adopted ad hoc urgency measures exempting from merger control scrutiny those "*concentration operations* [that] *fulfil major public interests.*" The exemption was due to last for a period no longer than three years, after which, according to the law, "*any possibly ensuing monopoly positions must end.*"[31]

The merger was notified to the ICA in 2008, however only for the purpose of allowing it to order any behavioural remedies required to "*prevent the risk of prices or other contractual conditions being imposed that would be unduly burdensome for consumers.*"[32] The ICA was therefore barred both from prohibiting the transaction and from imposing structural remedies such as the divestiture of airport slots. Accordingly, on December 3, 2008, the ICA adopted a decision ordering a number of price control and consumer protection remedies for a period of three years.[33]

As the three-year suspension period has now elapsed, the ICA's newly opened investigation is designed to ascertain whether the 2008 transaction created or the strengthened a dominant position on certain routes and whether any such dominant position persists to date. In its November 30, 2011, decision, the ICA set the framework for its subsequent analysis, which is due to be completed by the end of February 2012.

The ICA first stated that the relevant markets should be defined according to the Commission's consolidated approach to market definition in air transport of passengers, the point-of-origin/point-of-destination pair approach ("O&D"),[34] adding that, despite their proximity, the three Milan airports (Linate, Malpensa, and Orio al Serio) could not (either in 2008 or today) be considered substitutable and should therefore identify distinct markets at least in relation to domestic flights. The ICA then identified seven international routes and twenty-two domestic routes where the transaction had determined an overlap between the parties' activities.

Turning to the competitive effects of the merger, the ICA held that, as regards international routes, in light of CAI's limited market share, the competitive pressure from other carriers and the absence of

30 Case C9812B – *Monitoraggio Post-Concentrazione Compagnia Aerea Italiana/Alitalia Linee Aeree Italiane – Airone*.

31 Law Decree No. 134/2008, concerning "*Urgent measures for the restructuring of large companies in a state of crisis*", subsequently converted into Law No. 166/2008.

32 *Ibid.*

33 Case C9812 – *Compagnia Aerea Italiana/Alitalia Linee Aeree Italiane – Airone*.

34 According to that approach, every combination of point-of-origin and point-of-destination should be considered to be a separate market from the customer's point of view. *See, e.g.*, Commission Decision in Case No IV/JV.0019 – *KLM/Alitalia*.

administrative barriers to access, the transaction did not distort competition. As regards the domestic routes, the ICA relied on EU and national precedents, which consider the control of at least 60% of the daily flights operated on a given route to be a threshold of concern that may trigger the application of structural remedies. The ICA identified eighteen domestic routes where CAI came to operate at least 60% of daily flights post-merger (on most routes, CAI controlled 100% of the daily flights).[35] The ICA added that, of these eighteen routes, those having Milan Linate as their origin or destination raised particular concerns due to the high entry and expansion barriers resulting from regulatory constraints on the allocation of slots at Linate airport, especially in light of CAI's 70% overall share of total available slots. Lastly, the ICA stressed that its analysis would also need to consider the entry of new airlines into the market and the development of alternative transportation systems (*e.g.*, the new high speed trains).

Should the ICA conclude that the merger created or strengthened a dominant position, remedies may be imposed (this would occur before October 28, 2012).

Policy and Procedure

Appointment Of New ICA Chairman And Secretary General

On November 18, 2011, the Chairmen of the Italian Parliament, *Camera dei Deputati and Senato della Repubblica* jointly appointed Giovanni Pitruzzella as the new chairman of the ICA (effective November 29, 2011). Mr. Pitruzzella replaces Antonio Catricalà (in office since March 2005), who in turn has been appointed as a member of the newly-formed Italian Government led by Mario Monti. Moreover, as of December 19, 2011, the ICA has a new Secretary General: Roberto Chieppa. Mr. Chieppa replaces Luigi Fiorentino who has also been appointed as a member of the new Italian Government.

New Measures To Increase Competition By Strengthening The ICA's Powers

Law Decree no. 201/2011, setting forth "*urgent measures for the growth, fairness and consolidation of State public accounts,*" was converted with amendments into law by Law 22 December 2011, no. 214 (the "New Law"). With the aim of encouraging competition and boosting economic growth, the New Law provides, *inter alia*, for liberalization measures in certain sectors (including retail outlets, pharmacies, and transport), and introduces significant innovation in the ICA's powers.

Liberalization Measures

The New Law provides for a number of measures intended to remove administrative burdens and constraints on competition and business activity. In particular, Article 34 of the New Law sets forth a generally-applicable principle according to which access to economic activity can be conditioned upon authorization only in cases where such an authorization (i) can be justified in light of an economic interest which is constitutionally relevant and compatible with EU law; and (ii) is proportionate. Bills and regulations imposing restrictions to access to (and pursuit of) business activities are reviewed within thirty days by the ICA, which renders a binding opinion on the compliance with these measures with the principle of proportionality.

Increase Of ICA's Powers

Article 35 of the New Law grants the ICA significant monitoring powers over administrative provisions potentially distorting competition. In particular, the ICA has standing to take legal actions whenever the general administrative provisions, regulations, or measures of any public administration breach competition law. If the ICA determines that an act adopted by a public administration infringes competition law, it can issue a reasoned opinion indicating why the act infringes competition. Should the public administration fail to comply with the opinion within sixty days upon notification of the reasoned opinion, the ICA may lodge an appeal with the TAR Lazio.

Ban Of Interlocking Directors In The Insurance, Financial, And Banking Sectors

The ICA has always taken a very strict and critical attitude towards the numerous personal links traditionally characterizing the Italian insurance, banking, and financial sectors, as the ICA considers that they contribute to a large extent to the lack of an adequate level of competition in the Italian market. Article 36 of the New Law addresses these concerns by preventing directors, auditors, and top executives of companies active on the banking, insurance and financial sectors to hold similar positions in competing companies. Article 36 makes it clear that, for the purpose of the above prohibition, the notion of "competitor" encompasses independent companies active in the same product and geographic markets. Should an individual be appointed to conflicting positions, he has the right to choose between them, or otherwise he will be withdrawn from both positions. In case of failure to act by the

35 The routes concerned are: Rome Fiumicino-Bari, Rome Fiumicino-Brindisi, Rome Fiumicino-Catania, Rome Fiumicino-Genoa, Rome Fiumicino-Lamezia Terme, Rome Fiumicino-Palermo, Rome Fiumicino-Pisa, Rome Fiumicino-Turin, Rome Fiumicino-Trieste, Rome Fiumicino-Venice, Milan Linate-Bari, Milan Linate-Brindisi, Milan Linate-Lamezia Terme, Milan Linate-Naples, Milan Linate-Palermo, Milan Linate-Rome Fiumicino, Naples-Turin, and Naples-Venice.

relevant individuals/companies, the withdrawal shall be declared by the competent supervisory authority (*i.e.*, by the Bank of Italy or by the ISVAP).

Possible Further Powers For The ICA In The Transport Sector

Further powers and prerogatives might be granted to the ICA in the future under Article 37 of the New Law, which provides that the Government can take measures for the liberalization of the transport sector and grant regulation and monitoring powers to an independent authority still to be identified among today's existing agencies. In particular, such authority shall have the power to (i) ensure fair and non-discriminatory conditions for the access to transport infrastructures and networks; (ii) define cost-oriented and fair criteria for setting tariffs, tolls, and fees; (iii) fix the minimum quality standards for state-subsidized transport services; and (iv) define the tender offers concerning the allocation of exclusive transport services. To date, the ICA is likely the best-placed authority to take over this new role, which implies a significant extension of its functions, with powers of purely regulatory nature.

Reduction In Size Of The ICA Board

The number of members on the ICA Board has been reduced from five to three (including the chairman). This provision does not apply retroactively to the board members currently in office, namely: Piero Barucci and Carla Rabitti Bedogni (appointed on March 3, 2007) and Salvatore Rebecchini (appointed on February 12, 2009). The ICA's board, therefore, is currently composed of four members (the three above-mentioned members and the President) who will be in office until the expiration of their respective mandates (seven years from the date of the appointment).[36]

NETHERLANDS

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

Horizontal Agreements

NMa Investigates Potential Cartel Between Two Universities To Coordinate The Level Of Tuition Fees For Second Degrees

On September 1, 2011, the NMa conducted dawn raids at both the VU Amsterdam (*Vrije Universiteit Amsterdam*) and the University of Amsterdam (*Universiteit van Amsterdam*). The NMa stated that it is investigating potential coordination by these universities on determining the level of tuition fees for students wishing to follow a second Bachelor or Master degree.

Under Dutch law, the tuition for the first Bachelor and Master degree is fixed, and supplemented by the State in the form of a subsidy. However, in April 2010, a new Act came into force (*Wet Versterking Besturing*), according to which universities no longer receive subsidies for students doing a second Bachelor or Master degree. The Act allows universities to freely set the level of tuition, and the NMa believes that the VU Amsterdam and the University of Amsterdam have colluded in setting the level of tuition.

The recent dawn raids are interesting in light of the applicability of competition law to universities. It appears that the NMa considers the universities to be undertakings within the meaning of the Dutch Competition Act – at least with respect to the offering of additional degrees.

Tribunal Increases Fine Imposed On Participants In Bicycle Cartel

On October 4, 2011, the Tribunal increased the fines for the participants in the bicycle cartel that had been imposed by the District Court in July 2007 – however, the fines were still lower than those originally imposed by the NMa in April 2004.[37]

In April 2004, the NMa imposed fines of €12.9 million on Royal Gazelle B.V., €12.8 million on Accell Group N.V. (which owns the Batavus and Koga brand), and €4 million on Giant Europe B.V. According to the NMa, the companies had agreed to pass on the increased costs for bicycle parts to customers by increasing the

36 The mandate of the fifth member on board, Antonio Pilati, in office before the legislative reform, expired on December 2011.

37 Case 1615/691, *Fietsfabrikanten*, NMa, April 21, 2004: http://www.nma.nl/images/1615BLD22-150983.pdf.

recommended sales prices for bicycles to consumers, discounts offered to bicycle retailers, and a maximum margin to the *Nationale Fiets Projecten* (the "NFP"), a provider of corporate bicycle plans.

The bicycle companies first appealed the fine to the NMa, and later to the District Court, which on July 18, 2007 lowered the fines to about €6.7 million, €4.6 million, and €3.4 million, respectively. The District Court accepted the bicycle manufacturers' grounds of appeal that there was no concerted practice in relation to the maximum margin to be applied by the bicycle manufacturers to the NFP.[38] The District Court rejected all other grounds of appeal put forward by the manufacturers.

The companies finally appealed the District Court's judgment to the Tribunal. The Tribunal accepted Gazelle's and Giant's grounds for appeal relating to the District Court's failure to judge on violation of the presumption of innocence, violation of the principles of care, independence, impartiality, substantiation, equality relating to the level of the fine, mitigating circumstances, and interest; and the definition of the relevant market. The NMa's ground of appeal that the infringement was very grave was accepted by the Tribunal. It set the fines at €10.1 million, €6.9 million, and €2 million, respectively.[39]

NMa Imposes Fine On Mobile Operators For Participation In A Cartel And Conducts Dawn Raids At The Companies Two Months Thereafter

In October 2011, the NMa imposed a fine on Vodafone, Deutsche Telekom's T-Mobile, and KPN (together the "Operators")[40] for their participation in a cartel after lengthy legal proceedings that started in 2002 and involved preliminary questions to the Court of Justice of the European Union (the "Court").

By decision of December 30, 2002, the NMa had fined the Operators €88 million (at the time the highest fine ever imposed by the NMa) for their participation in a cartel.[41] Allegedly, the Operators had disclosed commercially sensitive information at a meeting on June 13, 2001. The Operators appealed the decision before the NMa, which upheld its decision in part on September 27, 2004,[42] but lowered the fines.

The Operators initiated an action against the 2004 NMa decision before the district court of Rotterdam (the "District Court"). By judgment of July 13, 2006, the District Court annulled the NMa's decision and ordered it to adopt a new decision.[43]

Both the Operators and the NMa appealed the judgment of the District Court to the Trade and Industry Appeals Tribunal (*College van Beroep voor het bedrijfsleven*, the "Tribunal") on the basis that the District Court applied a wrong interpretation of the concept of concerted practice under European law. To that effect, the Tribunal referred three questions to the Court: (1) which criteria it should apply when assessing whether a concerted practice has as its object the prevention, restriction or distortion of competition within the common market, (2) whether it is required to apply the presumption of a causal connection between the concerted practice and the market conduct as established in the Court's case law, according to which the undertakings are presumed to take account of the information exchanged with their competitors if they remain active on the market (the "Presumption"), and (3) whether the Presumption applies even if the concerted action is the result of a single meeting.

The Court held that "*[A] concerted practice pursues an anticompetitive object […] where, according to its content and objectives and having regard to its legal and economic context, it is capable in an individual case of resulting in the prevention, restriction or distortion of competition within the common market. It is not necessary for there to be actual prevention, restriction or distortion of competition or a direct link between the concerted practice and consumer prices. An exchange of information between competitors is tainted with an anticompetitive object if the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings.*"[44] Further, the Court held that a national court is required to apply the Presumption when examining causality, which is rebuttable by the undertakings concerned.[45] Moreover, the Court confirmed that the Presumption applies "*even if the concerted action is the result of a meeting held*

38 *Rechtbank Rotterdam*, NMa case number: 1615, LJ number: BB0440, July, 18, 2007.

39 *College van Beroep voor het bedrijfsleven*, Cases AWB 07/647, 07/648, 07/649 and 07/650, LJ number BT6521, October 4, 2011.

40 Case 2658/883, *Mobiele operators*, NMa, October 26, 2011: http://www.nma.nl/documenten_en_publicaties/archiefpagina_besluiten__en_fusiemeldingen/mededinging/2011/2658bbs.aspx.

41 Case 2658/344, *Mobiele operators*, NMa, December 30, 2002: http://www.nma.nl/documenten_en_publicaties/archiefpagina_besluiten__en_fusiemeldingen/mededinging/archief/2002/2658BLD.aspx.

42 Case 2658/553, *Mobiele operators*, NMa, September 27, 2004: http://www.nma.nl/documenten_en_publicaties/archiefpagina_besluiten__en_fusiemeldingen/mededinging/archief/2004/2658BBMA.aspx.

43 District Court of Rotterdam, LJ-number: AY4035, July 13, 2006.

44 Court of Justice in Case C-8/09 - *T-Mobile* of June 4, 2009, at para. 43.

45 Idem, at para. 53.

by the participating undertakings on a single occasion."[46]

Following the judgment of the Court, the Tribunal confirmed the judgment of the District Court and rejected the appeals. This meant that the NMa had to take a new decision on appeal. Taking into account the judgments of the District Court, the Court, and the Tribunal, the NMa reassessed the evidence put forward by the Operators to rebut the Presumption. The NMa also offered the parties the opportunity to adduce further evidence. On October 26, 2011, the NMa issued its new decision on appeal. Not convinced by the Operators' arguments concerning the lack of a causal link between the meeting and the parallel behavior, the NMa confirmed its initial finding that the Operators had violated the competition rules. However, the NMa took into account the Tribunal's view that the infringement was not as grave as the NMa had initially claimed, and lowered the Operators' fines to €7.9 million for KPN, €4.6 million for T-Mobile, and €3.7 million for Vodafone.[47]

Interestingly, on December 6, 2011 (*i.e.*, within two months after issuing its decision), the NMa conducted dawn raids at the premises of the Operators, and questioned five KPN employees. The investigation was sparked by two whistleblowers, and would relate to the Operators' coordination on prices for mobile internet services, particularly in the pre-paid segment, and on the re-introduction of connection fees for new customers.

Policy and Procedure

NMa Accepts Publishers' Commitments To Allow E-Book Retailers To Compete On Consumer Prices

In November 2011, the Dutch government decided not to set fixed price levels for e-books, accepting commitments from publishers to allow e-book retailers to compete on consumer prices. On December 1, 2011, the Chairman of the NMa, Chris Fonteijn, expressed the authority's expectation that this decision would boost the competition on the market for e-books.[48]

On the basis of a 2011 NMa study of the developments on the market for Dutch-language e-books, the NMa concluded that competition only develops slowly in this market, due to the restricted availability of Dutch-language e-books, but also because e-book retailers typically follow publishers' recommended sales prices. On the other hand, the NMa noted opportunities for further development of the market given the growing number of people owning a tablet as well as the fact that the e-books allows different sales models to be developed which are typical for e-books.

To address the restricted availability of Dutch-language e-books on the market, a so-called "Digital Platform" was established by the Royal Booksellers Association (*Koninklijke Boekverkopersbond*) and the General Publishers Group (*Groep Algemene Uitgevers*). This platform facilitates the storing and distribution of Dutch-language e-books.

The associations committed to the NMa not to hinder competition in the market by allowing both existing and new players access to the platform on the basis of objective, transparent, and non-discriminatory terms. The associations also agreed for publishers and retailers not to enter into exclusivity arrangements for the sale of e-books on the platform and price and delivery arrangements need to be made outside of the platform. In addition, retailers will get the chance to distinguish themselves from other retailers by the way they use information from the platform – which they are allowed to use, also in adapted form, on their own websites.

The market for e-books is not only under increased attention in the Netherlands; competition authorities in the EU, US, and the UK also opened investigations into pricing arrangements between publishers and retailers.

SPAIN

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

Horizontal Agreements

The CNC Fines 47 Construction Companies For Rigging Bids In Public Works Tenders

On October 19, 2011, the CNC imposed fines of more than €47 million to 47 companies in the construction sector for concluding agreements on the allocation and fixation of prices on government tenders for roadway maintenance works.

Due to results obtained in a confidential investigation, the CNC

46 Idem, at para. 62.

47 The fines include a reduction of €30,000, as the NMa found that the reasonable time limits for decision-making and judicial review had been exceeded between two-and-a-half and three years.

48 NMa press release of December 1, 2011: http://www.nma.nl/documenten_en_publicaties/archiefpagina_nieuwsberichten/nieuwsberichten/2011/58_11_groei_e_book_mogelijk_door_prijsconcurrentie_en_ruimer_aanbod.aspx.

decided to open infringement proceedings against 53 construction companies for possible anticompetitive practices prohibited under Article 1 of the Spanish Competition Act 15/2007 of 3 July 2007 (LCD).

For the activities concerned (roadway maintenance and paving works), the Public Administration calls tenders using bidding procedures. The procedures most often employed are the open and the restricted procedures. In this case, the procedure used was the restricted one, in which, in order to submit offers, the companies have, first, to apply, and then the Administration makes a selection based on objective criteria. The Administration sets a benchmark budget and each of the selected companies submits a bid that includes their proposed reduction to the budget.

In this context, it was proven that the companies were in contact and met in order to share information on the bids that each of them would be submitting. The ultimate aim was to propose lower reductions than the usual discounts they would be willing to offer in normal competitive conditions. The company appointed as the winning bidder would offer the highest reduction and the other participants would offer lower discounts. Therefore, the budget obtained from the Public Administration would be higher than it would have been in a competitive scenario. Moreover, it was agreed that the winning bidder would compensate the other competitors.

The evidence showed that the bid rigging arrangements affected 14 government tenders for roadway maintenance in Spain. Although the Investigations Division of the CNC considered there was not a unique cartel agreement but 14 different agreements, the CNC concluded there was a sole infraction where each of the agreements was part of a wider collusive strategy, operated repeatedly, with the same object and under the same criteria. The fact that all the enterprises were not participant in every tender did not preclude the finding of a single infringement consisting of several bid rigging arrangements during 2008 and 2009.

Under the agreements, the companies concluded to offer discounts around 3%, when they would normally offer reductions amounting to nearly 30%. Furthermore, these negative effects go beyond the detriment of public funds and the ultimate consequences on taxpayers. First, there is a risk of extension of the effect to other tenders and, second, there is a distortion of the real market conditions.

In its decision, the Authority pointed out that at least in eight of the fourteen tenders examined there was a clear harm to the public treasury (and, ultimately, to the taxpayers) that amounted to over €14 million. The dangers posed by this type of practice have been the object of analysis by the CNC in its "Guide on Government Procurement and Competition," where it estimated that bid rigging in government tenders causes an increase of approximately 20% in tender contracts.

One of the most recurrent claims made by the companies concerned in relation to the calculation of the fines was the necessity of taking into account the general economic crisis and, in particular, the crisis affecting the construction sector. The Authority estimated that the alleged situation should not have weight in the calculation of the fines.

Prisa And Zeta Fined For Joint Advertising Selling

Following the notification of a joint venture by the Prisa and Zeta groups, the CNC imposed a fine on these undertakings for an infringement of Article 1 of the Spanish Competition Act 15/2007 consisting on the joint sale of advertisement. On February 10, 2010, the Spanish Competition Authority considered that the project of joint venture between the Prisa and Zeta groups for the commercialization of advertisements on written media and the Internet did not constitute a transaction subject to notification.

Nevertheless, on May 25, 2010, the CNC started an investigation for the compatibility of the companies' agreement with the competition laws. On November 4, 2011, the CNC resolved to imposed fines on Prisa and Zeta for an infringement of Article 1 of the Spanish Competition Act 15/2007, consisting on the joint sale of advertisements.

The joint sale included certain restrictions of competition and, in particular, the coordination of the price of the goods subject to joint selling but also the price of individual sales. Moreover, the agreements also obliged customers to buy advertising space on two publications owned by the incumbents, thus restricting customers' choices.

As a consequence, the CNC held several undertakings of the Prisa group (included the newspaper "El País") and the Zeta group jointly liable and imposed a fine of €478,611 and €75,931, respectively.

Unilateral Conduct

The CNC Fines A Subsidiary Of E.ON Spain Active In The Distribution Of Electricity For An Abuse Of Dominant Position

On November 8, 2011, the CNC imposed a fine of €607,728 on the subsidiary of E.ON active in the distribution of electricity (E.ON) for an abuse of its dominant position on the market of distribution of electricity with the effect of foreclosing its competitors on the neighboring market for electric installations. Following a complaint lodged by the National Federation of Undertakings of Telecommunications and Electric Installations of Spain ("FENIE"), the CNC opened proceedings against E.ON on December 3, 2009.

In particular, FENIE denounced two conducts consisting in: (i) the execution of electric installations on the basis of E.ON's privileged position as a distribution company and (ii) the provision by E.ON of customer services from the premises of the companies offering installation services to E.ON. The CNC opened infringement proceedings following the first conduct. As regards the second conduct, the CNC opened a settlement proceeding. The following summarizes the infringement proceedings.

Distributors of energy are the companies exclusively entrusted by law to transport electricity through the network, from high voltage points to end consumers. These companies also hold the responsibility of running, managing and developing the network. The market for the distribution of electricity is local or regional and coincides with the extension of the specific distribution network operated by a distribution company, since the final consumer cannot switch to another network.

Distribution companies are obliged to grant equal access to applicants requesting electricity and to conclude contracts in order to access and connect to their networks. The price of the transport and distribution of electricity is regulated.

To access the network, a point of connection that complies with the technical requirements established by law is needed. The connecting works, *i.e.*, the installation of extensions of the network, can be classified as follows: (i) works reserved by law to the distribution company and (ii) works that can be undertaken by any authorized company active in the installation of network extensions, including distributors of electricity.

The market for the installation of the extensions of the network is considered as a market different from the market for the distribution of electricity. E.ON operates the market for the distribution of electricity, where it holds a dominant position in some regions of the north of Spain, but also competes with authorized operators in the market for installations of extensions of the network (although E.ON externalizes these services by concluding contracts with authorized installation companies).

In order to obtain a new supply of electricity or to expand an existing one in the network operated by E.ON, applicants must submit a request to E.ON. In response to these applications, E.ON is obliged by law to provide all the data necessary in order to build an installation, this is, the point of supply and the economic and technical requirements.

The CNC found that E.ON excluded competitors by not complying with this requirement, withholding information, and not informing clients that other installation companies could compete for the work. According to the CNC, because E.ON did not provide this information on its first reply (although it did sent it in subsequent replies) and, on the contrary, did include an offer for the works open to competition, constituted an abuse of its dominant position.

Following the theory of the neighboring markets, the Authority concluded that it was not necessary to find E.ON dominant on both markets. In this sense, the fact that E.ON was dominant on the market for the distribution of energy and that it profited from a benefit on the neighbor market was enough to find an abuse.

SWEDEN

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

Unilateral Conduct

Stockholm City Court Fines TeliaSonera SEK 144 Million For Margin Squeeze Following European Court Of Justice Preliminary Ruling

On December 2, 2011, the Stockholm City Court (the "Court") issued a judgment finding that Sweden's major telecommunications operator, TeliaSonera AB, had abused its dominant position through margin squeeze in the Swedish wholesale market for broadband services, in breach of both Article 102 TFEU and the corresponding Swedish competition rules.[49] TeliaSonera was fined SEK 144 million (approximately €16 million), the highest fine ever imposed in Sweden for abuse of dominance.

TeliaSonera owns the fixed-line telecommunications network encompassing all households in Sweden, and uses this network to sell telecommunications services directly to consumers. In addition, it also acts as a wholesaler, offering competing operators access to its network. The case began in 2004, when the SCA sued TeliaSonera before the Court claiming that it had charged unfairly high prices for

49 Case T 31862-04 *Konkurrensverket v. TeliaSonera AB*.

wholesale access to its network, thereby squeezing its competitors' profit margins. In 2009, the Court requested a preliminary ruling from the European Court of Justice (the "ECJ") regarding the specific criteria for establishing a margin squeeze abuse. The ECJ rendered its ruling in February 2011, stating, in essence, that margin squeeze was a stand-alone category of abuse rather than a form of refusal to supply, *i.e.*, it could occur even if the dominant undertaking was not under a duty to supply the wholesale product.[50]

In its December 2011 judgment on the merits of the case, the Court applied the ECJ's reasoning. After holding that TeliaSonera was dominant on the Swedish wholesale market for broadband access, the Court assessed whether TeliaSonera's conduct amounted to margin squeeze, based on the principles set out by the ECJ. It found that, on several occasions between April 2000 and January 2003, the prices offered by TeliaSonera were such that the margin between the wholesale prices for ADSL input services and the retail prices for broadband connection services to end users was insufficient to cover TeliaSonera's own costs for supplying retail services to end users.

The Court also examined whether TeliaSonera's margin squeeze had had the potential to prevent an "as efficient" competitor from operating on the retail market for broadband services. A potential anticompetitive effect was probable, first, where access to the supply of the wholesale product was indispensable. The Court pointed out that, consistent with the ECJ ruling, it was not required to conclude whether the supply was indispensable, although a number of factors suggested that this might be the case (*e.g.*, the fact that cable television networks and LAN offered no adequate alternative to TeliaSonera's network for entering the market). The Court then turned to the second factor mentioned by the ECJ as relevant for determining potential foreclosure effects, namely whether the level of the margin squeeze was negative. The Court noted that, indeed, TeliaSonera had on several occasions charged its competitors a wholesale price even higher than the retail price it charged end users.

While the foregoing was sufficient to suggest that potential anticompetitive effects were probable, the Court also found that the SCA had adduced evidence of concrete anticompetitive effects. Specifically, the margin squeeze had restricted the opportunity for TeliaSonera's competitors to expand from the dial-up market to the broadband market. Competitors had been forced to sell at loss or with such low profitability that they had been unable to engage in active marketing to acquire new end customers. The abuse could be expected to have had long-term effects given that market shares for this type of services are inflexible.

Lastly, the Court held that TeliaSonera's conduct could not be objectively justified absent evidence of any advantages in terms of efficiency which also benefited consumers. The Court therefore upheld the SCA's overall findings, even though it concluded that margin squeeze had occurred to a slightly lesser extent than argued by the SCA, as certain contracts had not been affected. The Court awarded the full amount of fines sought by the SCA.

TeliaSonera has appealed the judgment to the Market Court (the highest instance in competition cases in Sweden). TeliaSonera is also facing a lawsuit from its competitor Tele2, which is seeking SEK 873 million (approx. €96.1 million) in damages.

Mergers and Acquisitions

The SCA Conditionally Clears Merger Of Arla Foods And Milko

On October 24, 2011, the SCA cleared the merger between Arla Foods and Milko, subject to conditions.

Arla Foods, a Swedish-Danish cooperative, is the seventh largest dairy company in the world and Sweden's largest dairy company. Milko is a cooperative owned by Swedish farmers and is Sweden's third largest dairy company. The rationale behind the transaction was Milko's difficult financial situation and its need for access to more farmer members.

The SCA analyzed a whole range of products, including milk, cream, sour cream, sour milk, flavored and natural yoghurt, and butter/margarine. The SCA defined several product markets based on Swedish consumers' habits and preferences. As for the geographic market, the SCA defined regional markets for most products, because of transportation costs and limited shelf life. For butter and margarine, however, because of their longer shelf life, the SCA defined a national market and possibly a regional market including several Member States.

In large parts of Sweden, unconditional clearance of the merger would have led to a considerable limitation of competition in respect of milk, sour milk, yoghurt and several other products. The SCA concluded there was insufficient countervailing buyer power to neutralize the anticompetitive effects of the merger. The SCA noted the existence of mutual interdependence between dairy producers and supermarkets. Supermarkets need frequent and certain deliveries and dairy producers need predictable volumes. Because of the overproduction of dairy products in Sweden, the SCA did not expect new entry. As for European producers exporting to Sweden, the SCA

50 Case C-52/09 *Konkurrensverket v. TeliaSonera Sverige AB*, n.y.r.

concluded that most Swedes have a strong preference for national products. Finally, the SCA was unconvinced by the parties' arguments with regards to the existence of efficiencies.

The SCA took into account Milko's serious financial difficulties and examined the possibility to apply the failing firm defense, but ultimately concluded that the failing firm defense was not applicable and considered whether the merger would be worse for competition than the bankruptcy of Milko.

The SCA concluded that if Milko were to disappear, Arla Foods would not gain the same market power, as other existing or new competitors would acquire its infrastructure and compete against Arla Foods. Some plants would simply disappear, but this would not have a negative impact on competition.

The SCA cleared the merger under the condition that Arla Foods would divest a number of Milko's assets, including the Grådö dairy plant in Hedemora and a number of Milko's brands.

The SCA Prohibits Com Hem's Acquisition Of Canal Digital's Cable Television Operation In Sweden

On November 24, 2011, the SCA issued a summons application against Com Hem, asking the Stockholm City Court to prohibit the acquisition by Com Hem of Canal Digital's cable television operation in Sweden.

The SCA defined the relevant market as the market for distribution of television through collective agreements with landlords for apartment blocks in Sweden. The SCA considered television distribution for individual homes to constitute a separate market. In Sweden, most apartment blocks are owned by large housing companies. These companies enter into collective agreements with television providers for base offers for the whole apartment block or more. Collective TV distribution to apartment blocks is possible through cable, fiber-LAN and SMATV. The SCA considered there is certain interchangeability between cable TV and TV provided through fiber-LAN. On the other hand, for technical reasons, agreements for TV through xDSL, via satellite and digital terrestrial television are only entered into by individual households.

Com Hem, number one on the market with just over 60% share, sought to purchase the cable television operation from Canal Digital, the third largest company on the market. As a result of the transaction, Com Hem would have had a market share of over 68% of the market for television in apartment blocks.

The SCA concluded the transaction would significantly impede the development of TV service distribution in apartment blocks, notably because of the high barriers to entry. A new entrant needs access to certain infrastructure, agreements with content providers and finances to offer an attractive package and prices. Investigations show that most landlords adopt a passive approach and simply renew the current agreements. Furthermore, as landlords sign up for a base package, a certain percentage of the individual households will sign up for additional services, such as additional channels, phone services, Internet etc, with the same provider. In that case, if the provider increases its prices, landlords are unlikely to change TV provider knowing that the households have signed up for additional services with that same provider. This lock-in effect increases entry barriers further. The proposed deal would eliminate the possibility for new entrants establishing themselves or Com Hem's significantly smaller competitors from expanding.

The merger would have left landlords with fewer options in terms of television distributors and with higher prices. The SCA wanted to safeguard the possibility for TV viewers in apartment blocks to access the channels they wish to watch via their property owner, and for them to be able to do this at the lowest possible cost. Increasing the strength of Com Hem's dominance would reduce these opportunities, which is why the SCA prohibited the merger.

Com Hem and Canal Digital have since decided to drop the deal and the Stockholm City Court will not have the opportunity to review the SCA's decision.

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 per April 1, 2004, which is enforced by the Federal Competition Commission ("FCC"). The FCC's decisions are appealable to the Federal Administrative Tribunal (the "Tribunal").

Horizontal Agreements

FCC Prohibits Exchanges Of Information Between Importers And Suppliers Of Luxury Cosmetics

On October 31, 2011, the FCC prohibited several undertakings active in the luxury cosmetics sector from exchanging information on

51 The text of the decision (in German) is available at: http://www.weko.admin.ch/index.html?lang=fr.

prices, turnover, advertising expenses, and sales terms.[51] The FCC held that the information exchange between the undertakings involved (all of which were members of the Geneva based Association of Manufacturers, Importers and Suppliers of Cosmetic and Perfumery Products ("ASCOPA")) infringed the Competition Act, because the exchanged information allowed the participants to adjust their market behaviour to one another. However, the FCC considered that the information exchange could not be regarded as a hard-core cartel within the meaning of the Competition Act and, therefore, did not impose a sanction on the undertakings involved. The decision also provides guidance on FCC's practice in relation to information exchange.

The investigation, which was launched after the exchange information was reported by a member of the ASCOPA to the Secretariat of the FCC, was directed against Swiss subsidiaries and distributors of leading manufacturers of luxury cosmetic products, including Chanel, Clarins, Coty, Estée Lauder, L'Oréal Produits de Luxe, Parfums Christian Dior, P&G Prestige Products, Richemont and YSL Beauté. For years, these undertakings had been exchanging, within the ASCOPA, information on gross sell-in prices charged to their respective retailers, sales figures and turnovers, marketing channels and advertisement expenses and general sales conditions. The exchanges on gross sell-in prices and marketing expenses occurred on a semi-annual basis, whilst those on sales figures and turnovers occurred, with a different level of detail, on a monthly, quarterly and annual basis.

The FCC found that the information on gross sell-in prices allowed the members of the ASCOPA to adapt the level of their own gross price to the one of their competitors and, by doing so, to restrict the competition on the net sell-in prices (that is, the prices after discounts). The FCC further found that, with respect to turnovers, the exchanged data were so detailed that each participant was in a position to calculate the volume of products supplied by the other participants and, as a result, to control the evolution of its own market share compared to the one of its competitors. As far as marketing expenses were concerned, the FCC considered that they were sufficiently detailed to provide information on the budget allocated by each participant to promote its specific lines of products, allowing the other participants to compare such budget with the turnover achieved by the relevant undertaking. According to the Commission, by exchanging such information, the members of the ASCOPA were able to adjust their market behaviour relative to one another. This adjustment led to significant restrictions of competition on the markets for luxury flagrance, make-up and body-care products, which could not be deemed as justified on grounds of economic efficiency. Therefore, the Commission held that such information exchange amounted to an unlawful agreement within the meaning of Articles 5(1) and 5(2) of the Competition Act.

The FCC did not fine the undertakings involved, considering that their conduct did not fall within the category of behaviours for which fines may be imposed under Swiss competition law. In particular, the Commission found that the information exchange on gross sell-in prices could not be deemed as a price-fixing agreement within the meaning of Article 5(3) of the Competition Act, since the exchanged information only allowed to compare certain reference products against each other and the investigation did not show that the undertakings had agreed on the gross prices of certain products. Nevertheless, the undertakings will be liable to a fine in the future should it appear that they do not comply with the prohibition imposed on them by the FCC

Unilateral Conduct

FCC Fines Nikon CHF 12.5 Million For Restricting Parallel Imports

On December 15, 2011, the FCC imposed a fine of CHF 12.5 million on the Swiss subsidiary of Japanese camera company Nikon for restricting parallel imports of the products "Nikon Imaging." Following a complaint, the FCC investigated Nikon's practices regarding parallel imports into Switzerland. The Commission launched a regular investigation on March 24, 2010 by inspecting the offices of Nikon. It concluded that Nikon illegally foreclosed the Swiss market by inserting clauses into foreign distribution contracts restricting exports to Switzerland and, conversely, by inserting similar clauses into Swiss distribution contracts to restrict supply abroad. In addition, evidence was found that Nikon exerted pressures over "parallel distributors." The investigation revealed that, between spring 2008 and autumn 2009, Nikon's conduct resulted in higher prices for the consumers.

The export and import prohibitions imposed on the distributors of the products "Nikon Imaging" and the actions taken in order to hinder "parallel distributors" from importing such products into Switzerland did not eliminate competition but, nevertheless, appreciably restricted competition on the relevant product markets. The FCC thus fined Nikon CHF 12.5 million for the ban on parallel import based on the turnover that Nikon achieved in Switzerland, and taking into account the duration and the gravity of the infringement.

Mergers and Acquisitions

FCC Clears Bridgepoint/Infront Merger

On December 14, 2011, the FCC approved the proposed acquisition of Infront Sports and Media AG by Bridgepoint Capital Group Limited. The preliminary investigation did not reveal any indication that the proposed concentration could create or strengthen a dominant position in Switzerland. The merger was cleared after a first-stage assessment without conditions or commitments.

Bridgepoint is an international private equity group, based in the U.K., which focuses on the take-over of middle-size companies. Infront is a global sports media and marketing group, based in Zug, Switzerland, which holds a portfolio of media and marketing rights for different types of sports.

The FCC found that the proposed transaction would give rise to an overlap only in the sector of the organization and promotion of motorcycle racing championships. Both Bridgepoint and Infront are active in the motorsport sector: Bridgepoint controls Dorna, a Spanish company which, among other racing championships, organises and promotes the Moto GP championship, whilst Infront holds the right to organise and manage the Superbike championship. As to the definition of the product markets (in particular with respect to advertisers and TV broadcasters), the FCC referred to the *CVC/SLEC* decision of the European Commission of March 20, 2006.[52] However, the definition of the product markets was ultimately left open, since the transaction did not raise any competition concerns.

FCC Imposes Fines For Collusive Tendering In Construction Sector

On December 16, 2011, the FCC fined 17 undertakings active in the field of road building and civil engineering in the Canton of Aargau a total amount of approximately CHF 4 million for entering into price-fixing and customer allocation agreements. This sanction comes as the result of an investigation launched in June 2009 by means of a dawn raid on the basis of suspicions of collusive tendering. The investigation confirmed that, from 2006-2009, the undertakings concerned participated in hundreds of illicit agreements to fix prices and allocate customers and projects. The FCC fixed the fines on the basis of the turnover of the undertakings involved in the restriction, considering also the type, duration, and gravity of the infringement. Seven undertakings qualified for the leniency program; one undertaking qualified for full immunity.

Under Swiss law, the FCC has the power to fine undertakings up to 10% of their turnover in Switzerland for the past three years. However, the FCC operates a leniency program, which applies to restrictive agreements that are prohibited and subject to fines because they contain hard-core clauses that eliminate competition. Full immunity from fines is available for the first undertaking that reports its involvement in a qualified hardcore cartel and delivers information enabling the authority to start a regular investigation. The applicant for full immunity must maintain complete, continuous and prompt co-operation with the investigating authority and cease participation in the prohibited activity. Full immunity is not available to undertakings which have coerced other undertakings to participate in the cartel activity or have instigated the cartel activity. Alternatively, a reduction in fines by up to 50% is available, at any time in the procedure, to an undertaking that does not qualify for full immunity, if the applicant co-operates with an investigation and ends its involvement in the prohibited agreement at the time evidence is provided.

The FCC considers as a priority combating cartels. The FCC has cooperated with local authorities in charge of tender procedures to increase awareness about compliance with competition law.

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

OFT Launches Investigation Into Patent Litigation Settlement Agreements Relating To Depression Drug

On November 14, 2011, the OFT announced that it had opened an investigation in August 2011 into patent litigation settlement agreements in relation to the GSK depression and anxiety disorder drug paroxetine.[53] The investigation is being carried out under Chapters I and II of the Competition Act 1998 and Article 101 and Article 102 TFEU.

The European Commission has been monitoring pharmaceutical patent settlement agreements since its Sector Inquiry into the pharmaceutical sector in 2009. There is a concern that these arrangements, also known as "pay for delay" or "reverse payment"

52 COMP/M.4066.

53 http://www.oft.gov.uk/OFTwork/competition-act-and-cartels/ca98-current/pharmaceutical/.

agreements, are used by originator drug companies to delay the entry of a drug onto the generic market. In April 2011, an investigation was launched by the Commission into a patent settlement agreement between Cephalon and Teva.

Vertical Agreements

OFT Closes E-Book Investigation

On December 6, 2011, the OFT announced that it was closing its investigation into the arrangements between publishers and retailers for the sale of e-books.[54] The investigation was opened in January 2011. The OFT stated that the closure is due to "administrative priorities" and because it considered the European Commission was better placed to consider the matter. The OFT confirmed that no view had been reached on whether or not the involved parties had infringed competition law.

On the same day, the European Commission announced that it had opened formal proceedings into the e-book distribution arrangements between Apple and several international publishers (Hachette Livre, Penguin, HarperCollins, Simon & Schuster, and Verlagsgruppe Georg von Holtzbrinck).[55]

CAT Judgment Allows Appeals Against The OFT's Decision In Relation To Tobacco Pricing

On December 12, 2011, the CAT allowed the appeals brought by Imperial Tobacco and five retailers against a finding by the OFT that these and other parties had infringed the Chapter I prohibition of the Competition Act 1998, which prohibits agreements and concerted practices that have the object or effect of preventing, restricting or distorting competition in the UK.[56]

The CAT considered the OFT's decision, on April 16, 2010, that two tobacco manufacturers (Imperial Tobacco and Gallaher) had entered into a series of anticompetitive bilateral arrangements relating to retail prices for tobacco products in the UK with ten retailers (Asda, The Co-operative Group, First Quench, Morrisons, One Stop Stores (formerly T&S Stores), Safeway, Sainsbury's, Shell, Somerfield and TM Retail), fixing the price of one manufacturer's brands to those of the other. The OFT imposed fines totaling £225 million, the largest total fine imposed by the OFT to date in a case under the Competition Act 1998.[57]

During the CAT hearing, and following the cross-examination of factual witnesses whose evidence did not support the OFT's findings, the OFT attempted to refine its case by amending its description of how the agreements operated in practice. The OFT argued that its refined description remained within the scope of its original decision. However, the CAT decided that the refined case was not within the scope of the OFT's original decision. The CAT further concluded that it did not have relevant jurisdiction to continue hearing the appeals and that, even if it had jurisdiction, it would have used its discretion against allowing the OFT to continue its response. Accordingly, the appeals were allowed.

The OFT has stated that it is "disappointed" by the CAT's judgment, but affirmed that it will "continue to pursue high impact enforcement cases" and pointed out that it has "a good track record on appeals."[58] However, the OFT went on to state that it would take full account of the CAT's judgment, considering in particular "any broader implications for the way in which it conducts investigations and possible appeals."[59]

The CAT noted in its judgment that it had not addressed any of the substantive issues raised in the appeals, and that it had not decided whether the agreements or the restraints that the OFT alleged were entered into would, if proven, amount to infringements of the Chapter I prohibition.[60] If the OFT wishes to pursue the case further, it will have to issue a new Statement of Objections against the parties.

54 http://www.oft.gov.uk/OFTwork/competition-act-and-cartels/ca98-current/e-books/.

55 http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1509&format=HTML&aged=0&language=EN&guiLanguage=en&utm_source=CPI+Subscribers&utm_campaign=3e7347ea9c-Tuesday_October_25_2011_new_template10_25_2011&utm_medium=email.

56 *Imperial Tobacco Group plc and Imperial Tobacco Limited v. OFT, Shell U.K. Limited, Shell U.K. Oil Products Limited and Shell Holdings (U.K.) Limited v. OFT, Asda Stores Limited, Asda Group Limited, Wal-Mart Stores (UK) Limited, and Broadstreet Great Wilson Europe Limited v. OFT, Safeway Stores Limited and Safeway Limited v. OFT, Wm Morrison Supermarkets PLC v. OFT and Co-operative Group Limited v. OFT*, [2011] CAT 41, (judgment of 12 December 2011).

57 OFT press release 39/10, *OFT imposes £225m fine against certain tobacco manufacturers and retailers over retail pricing practices*, (16 April 2010), http://www.oft.gov.uk/news-and-updates/press/2010/39-10. Notably, Asda, One Stop Stores, Sainsbury's and Somerfield benefitted from discounts in their fines under the OFT's leniency program, which provides co-operating parties with a discount in fines where they volunteer information assisting the OFT's investigation. Furthermore, Asda, Gallaher, First Quench, One Stop Stores, Somerfield and TM Retail entered into early resolution agreements with the OFT, whereby they admitted liability in respect of the alleged infringements and agreed to co-operate with the OFT in return for a reduction in the fine imposed.

58 OFT press release 134/11, *OFT statement on CAT judgment in tobacco case*, (12 December 2011), http://www.oft.gov.uk/news-and-updates/press/2011/134-11.

59 OFT press release 134/11, *OFT statement on CAT judgment in tobacco case*, (12 December 2011), http://www.oft.gov.uk/news-and-updates/press/2011/134-11.

60 CAT judgment of 12 December 2011, para. 3.

Mergers and Acquisitions

OFT Refers In-Flight Catering Joint Venture Between Alpha Flight Group And LSG Lufthansa Service Holding To The CC

On October 10, 2011, the OFT announced its decision to refer the joint venture between Alpha Flight Group Limited ("Alpha") and LSG Lufthansa Service Holding AG ("LSG") to the CC.[61]

Alpha and LSG supply in-flight catering to the airline industry, providing both traditional hot meals and light snacks for passenger flights in and out of the U.K.. Alpha is a wholly-owned subsidiary of Dnata, which is a sister company of Emirates, the international airline. LSG is a wholly-owned subsidiary of Deutsche Lufthansa AG. In Europe, LSG owns and operates airline catering facilities under the brand LSG Sky Chefs.

The OFT found that there was a significant overlap in their activities in the U.K. and that the joint venture between the companies would lead to high combined market shares in the supply of in-flight catering at ten U.K. airports, creating a risk of increased prices for customers. The merger would also lead to a reduction in the number of major national U.K. suppliers from three to two, and to the creation of a monopoly in the provision of in-flight catering for long-haul operators flying from Manchester airport.

According to the OFT, the competitive constraint from smaller players and of new entry in the supply of short-haul customers (where there has been a move away from traditional full meals towards the provision of more limited catering) would not be sufficient to replace the loss in competition which would be likely to arise from the merger, in particular in relation to the supply of in-flight meals to long-haul customers (where a traditional full service meal is provided).

The OFT therefore concluded that there was a realistic prospect of the joint venture having unilateral effects at several U.K. airports and more widely on bidding for national contracts to supply airlines that operate from many U.K. airports. In addition, the joint venture could be expected to result in a substantial lessening of competition in the supply of full-service catering for long-haul airline customers.

OFT Clears The Acquisition By Exponent Private Equity Of The Consumer Magazines Business Of BBC Worldwide

On October 17, 2011, the OFT announced its decision not to refer the anticipated acquisition by Exponent Private Equity LLP ("Exponent") of the consumer magazine business of BBC Worldwide Limited ("Target") to the CC.[62]

The merged entity will consolidate 20-30% of all gardening magazines and 15-25% of print-based craft magazines in the U.K., and the OFT found that the merger could not be expected to result in a substantial lessening of competition in the U.K.

Exponent and Target overlap in the publication and sale of consumer magazines. The OFT looked at three product markets: the publication of print-based magazines, consumer magazine distribution, and consumer magazines subscription management. The OFT did not reach a conclusion on the relevant product or geographic scope for these three markets because it considered that the proposed merger did not give rise to any competition concerns, even on a narrow basis.

For the publication of all print-based special interest consumer magazines, the merged entity would account for less than 10% of sales in the U.K. The OFT therefore did not consider there to be a realistic prospect of a substantial lessening of competition. The combined market share for gardening magazines and craft magazines would be 20-30% and 15-25%, respectively, but the increment resulting from the merger would be minimal because the magazine titles indirectly owned by Exponent only have insignificant market share. Further, the OFT considered that there was limited overlapping editorial content and advertising spend, and that Exponent's and the Target's titles were not considered close competitors by readers or advertisers. Finally, the OFT found indications that barriers to entry and expansion in the market were relatively low, and no specific post-merger concerns existed with regards to vertical foreclosure. The full text of the decision was published on November 17, 2011.[63]

OFT Clears Amazon's Acquisition Of The Book Depository

On October 26, 2011, the OFT cleared the proposed acquisition by Amazon.com Inc. ("Amazon") of The Book Depository International Limited ("The Book Depository").[64]

61 OFT Decision, Anticipated joint venture between Alpha Flight Group Limited and LSG Lufthansa Service Holding AG, ME/5113/11, (OFT's decision on reference given on 10 October 2011; full text of decision published 3 November 2011), http://www.oft.gov.uk/shared_oft/mergers_ea02/2011/Alpha.pdf. OFT Press Release 110/11, *OFT refers in-flight catering joint venture to Competition Commission*, (October 10, 2011), http://oft.gov.uk/news-and-updates/press/2011/110-11.

62 http://www.oft.gov.uk/OFTwork/mergers/decisions/2011/exponent.

63 http://www.oft.gov.uk/shared_oft/mergers_ea02/2011/Exponent.pdf.

64 Press Release: http://www.oft.gov.uk/news-and-updates/press/2011/117-11; full decision: http://www.oft.gov.uk/shared_oft/mergers_ea02/2011/Amazon.pdf.

The OFT acknowledged that the combined parties' market share of online retailing of physical books might now amount to over 70% in the U.K. Nevertheless, the investigation determined that the merger could not be expected to result in a substantial lessening of competition.

The OFT took a "cautious approach" and examined the merger only by reference to the online retailing of books. This is because consumer survey evidence had suggested that brick and mortar retailers imposed only a limited constraint on Internet retailers.

The OFT did not find it necessary to determine whether e-books formed part of the same relevant market, but instead considered the impact of the merger with regards to physical books only, since the Book Depository had limited activity in the sale of e-books.

In previous cases the CC established that it was not appropriate to distinguish separate markets for bestselling titles (those in the top 5,000 ranked titles) and deep-range titles.[65] The OFT distinguished these cases on the basis that they concerned retailing from physical stores. Although in this case the OFT did not reach a definite conclusion on this matter, it analyzed the competitive effects of the merger separately for bestsellers and deep-range titles.

The OFT found that the merger would be unlikely to result in a price increase. This is because the Book Depository was on average more expensive than Amazon, and the two were not close competitors in pricing terms. For both bestselling titles and deep-range titles, the analysis suggested that the cheapest retailers are neither Amazon nor the Book Depository, and that the parties will continue facing strong competition after the merger, especially from third party sellers on Amazon Marketplace.

Several third parties complained that the merger would reduce the range of titles available, including out-of-print books and those not commonly stocked by other retailers. The OFT found that other retailers already offered a large range of titles, and that out-of-print books could be found from other sources such as second-hand book retailers.

Finally, the OFT concluded that the merger would not eliminate a potential competitor. Despite uncertainty about the size of the market, the Book Depository was considered to account for less than 5%, and data showed that some of its inconsistent growth came from non-U.K. sales. Furthermore, evidence showed that barriers to expansion in the online book sale market were low, and the OFT considered that third party sellers could replace the Book Depository on Amazon Marketplace in the event of post-merger price increase.

OFT Publishes Full Text Of The Decision Referring The Anglo American/Lafarge Construction Materials Joint Venture To The CC

On November 2, 2011, the OFT published its full decision to refer a proposed construction materials joint venture between Anglo American plc ("Anglo American") and Lafarge SA ("Lafarge") to the CC under the Enterprise Act 2002. The OFT had initially announced its decision on September 2, 2011.[66]

The transaction would combine the parties' U.K. aggregates, asphalt, grey cement, and ready-mix concrete businesses to form a 50:50 joint venture. Although the transaction qualified for review by the European Commission, the parties made a pre-notification request under Article 4(4) of the EU Merger Regulation petitioning the European Commission to refer the joint venture to the U.K. on grounds that its impact was limited to the U.K.[67]

The OFT referred the transaction to the CC citing: overlaps between the parties in the supply of aggregates, asphalt and ready-mixed concrete in a number of local areas; an overlap in the supply of bulk grey cement at a regional and/or national level; and questions over the supply of bulk cement to independent ready-mix concrete suppliers.[68] The CC will carry out a detailed investigation and report its findings by May 1, 2012.

Policy and Procedure

The OFT Consults On New Guidance On Penalties And Leniency

On October 26, 2011, OFT published for consultation draft revised Guidance as to the appropriate amount of a penalty under the Competition Act 1998 (the "Proposed Penalty Guidance")[69] and a revised version of its Guidance on applications for leniency and no-action in cartel cases (the "Proposed Leniency Guidance").[70] If adopted, these proposals would significantly alter the way in which the OFT calculates the penalties it imposes on undertakings which are found to be in breach of the Competition Act 1998 and/or Article 101 and 102 TFEU. They would also clarify the circumstances under

65 See, *e.g.*, the proposed acquisition of Ottakar's plc by HMV Group plc: http://www.competition-commission.org.uk/rep_pub/reports/2006/fulltext/513.pdf.

66 http://www.oft.gov.uk/shared_oft/mergers_ea02/2011/anglo-american-lafarge.pdf.

67 Council Regulation (EC) No 139/2004 of January 20, 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1).

68 http://www.oft.gov.uk/news-and-updates/press/2011/95-11.

69 http://www.oft.gov.uk/shared_oft/consultations/oft423con.pdf.

70 http://www.oft.gov.uk/shared_oft/consultations/oft803con.pdf.

which the OFT will require leniency applicants to waive legal professional privilege.

The most significant changes relate to the Proposed Penalty Guidance. Although the OFT is proposing to retain a "step-based" approach for calculating penalties, it is proposing changes to the order and content of some of the steps. The key proposal is to increase the maximum starting point for calculating penalties from 10-30% of relevant turnover. Following the decision of *Kier Group plc and others v. Office of Fair Trading* [2011] CAT 3,[71] the OFT also considers that the current starting point may not provide sufficient scope to distinguish properly between the relative seriousness of different types of infringement. Although the change is being introduced as an attempt to increase the OFT's flexibility in calculating penalties, the OFT's consultation document suggests it could also lead to an increase in the overall level of fines.

Other changes in the Proposed Penalty Guidance include a clarification of the "relevant turnover" to be used when calculating penalties, confirmation of the OFT's current methodology for reflecting duration, additions and clarifications to the aggravating and mitigating factors that may be taken into account when calculating penalties, and a reversal of the order of current Steps 3 and 4 (which involves considering mitigating and aggravating factors before any adjustments for specific deterrence and proportionality).

The Proposed Leniency Guidance largely reflects the OFT's current practice. However, the OFT has changed the way in which the information is presented. The proposals aim to provide greater clarity and additional information on the OFT's existing leniency policy and practices in handling applications, to simplify the basic principles on what types of immunity or leniency are available and in what circumstances, and to provide clear information on the process for making applications and on how those applications will be handled.

However, one significant change is being introduced in relation to the OFT's expectations on the level of co-operation required from immunity and leniency parties: under the new guidance, in criminal investigations, the OFT may require applicants to waive privilege in certain documents for review by the OFT and potentially for disclosure to criminal defendants. The OFT was required by the court to seek waivers of privilege in the case of *R v. George, Crawley and Others*[72] as a result of its dual role as a criminal prosecutor and civil enforcer (combined with the obligations on leniency applicants to provide full co-operation to the OFT).

The OFT believes that it is most likely to require leniency applicants to waive privilege in "first witness account material", *i.e.*, original notes of witness accounts that could potentially undermine the reliability of witness statements submitted in support of an immunity, leniency or criminal no-action application.

OFT Publishes Report On The Impact Of Competition Interventions On Compliance And Deterrence

On December 7, 2011, the OFT published a report (the "Report") setting out the results of a study on the impact of competition interventions on compliance and deterrence.[73]

The Report builds on the 2007 report by Deloitte which suggested that the deterrent effect of the enforcement work of the OFT and the CC in the area of merger control is significantly greater than the direct effect of enforcement itself. The Report is based on a survey of a larger sample of businesses than the Deloitte report and includes 501 responses from large firms and 308 from small firms.

The Report noted that the following were the main drivers of non-compliance:

- lack of knowledge of the law;
- lack of management commitment to compliance;
- weak enforcement of competition law; and
- financial issues and competing priorities.

These findings were in line with the OFT's findings in its 2010 report on drivers of compliance and non-compliance with competition law.[74] In terms of the use of compliance measures by companies, the Report found that some large companies had compliance programs in place, but 58% of small companies and 37% of large companies lacked any compliance measures. The Report found that external advice is the most common measure taken to encourage compliance.

The Report found that knowledge of competition law is limited in general; only 57% of large businesses and 35% of small businesses felt very or fairly knowledgeable about competition law as a whole. Knowledge was highest in relation to what might constitute an abuse of dominance and in relation to cartel activity, but it was

71 http://www.catribunal.org.uk/237-4693/1114-1-1-09-1-Kier-Group-plc-2-Kier-Regional-Limited.html.

72 7 December 2009, unreported.

73 http://www.oft.gov.uk/shared_oft/reports/Evaluating-OFTs-work/oft1391.pdf.

74 *See*: OFT publishes report on drivers of compliance and non-compliance with competition law (*www.practicallaw.com/8-502-3139*).

notably lower in terms of awareness of specific aspects of the competition regime such as leniency, early resolution, commitments, the respective roles of the OFT and CC, short form opinions and "no grounds for action" decisions.

Looking at the effectiveness of the U.K. competition regime as a whole, the Report revealed that for each competition case involving commercial agreements, 40 potential infringements are deterred. The deterrence ratio for abuse of dominance is 12:1, and for cartel cases it is 40:1. Overall, the Report concludes that there are important wider benefits associated with OFT enforcement activities and that the U.K. competition regime is generally perceived to be effective in achieving deterrence and compliance.

In response to the survey, the Report noted that the OFT's guidance documents could be shorter and include more illustrative examples. There was significant disagreement, however, about how to improve the effectiveness of the OFT. Most legal professionals (67%) thought the OFT should undertake more cases, while businesses, in contrast, recommended fewer but higher profile cases. The Report concluded with the policy observation that awareness of competition issues could be improved by undertaking "higher profile" cases.

Sectoral Investigations

OFT Refers Audit Market To CC For Investigation And CC Issues Its First Statement

On October 21, 2011, the OFT announced that it was referring the market for the supply of statutory audit services to large companies in the U.K. (the "audit market") to the CC for a Market Investigation.

The OFT is concerned that the U.K. audit market is highly concentrated, with PwC, KPMG, Deloitte and Ernst & Young (the "Big Four") earning 99% of audit fees paid by FTSE 100 companies in 2010.[75] Low levels of switching (an average annual rate of 2.3% between 2002 and 2010[76]) and substantial barriers to entry are also sources of concern. Moreover, the OFT has determined that voluntary and industry-led efforts to increase competition and choice in the audit market have failed.

The decision to make a Market Investigation Reference follows a public consultation, which closed in September. The OFT had also held a number of meetings with audit service providers, customers and regulatory bodies before making the reference. One of the issues considered by the OFT during these meetings was the potential overlap with parallel work ongoing at a European level. However, the nature, content and timing of EU legislation are not settled, and the OFT believes that a Market Investigation has the potential to address U.K.-specific competition concerns that may not be within the scope of the EU's work.

On December 7, 2011, The CC published an issues statement (the "Statement") as part of its investigation of the U.K. audit market. The Statement sets out the CC's preliminary thinking, identifying concerns about the potential for poor audit quality and innovation, high prices, and reduced competition in the U.K. audit market. Stakeholders have until January 12, 2012 to submit evidence in response to the Statement and the CC is required to complete its report by October 20, 2013.

OFT's Provisional Decision To Refer The Private Healthcare Market To The CC

On December 8, 2011, the OFT published its Market Study into the U.K.'s £5 billion private healthcare ("PH") market, consulting on its proposed decision to make a further in-depth market investigation reference to the CC under the Enterprise Act 2002.[77] The OFT is expected to reach its final decision on whether to refer the matter to the CC by March 2012.

The OFT's decision to conduct a market study was prompted by changes in the PH market over the past ten years,[78] which have given rise to concerns that patient demand and choice are not driving competition and innovation in the PH sector.[79] The focus of the market study was on the provision of PH, which included the provision of healthcare by privately funded public providers (*e.g.*, by Private Patient Units (PPUs) of NHS Trusts), as well as private providers, but not publicly funded healthcare provided by the NHS.

The OFT has provisionally found a number of features that, both individually or in combination, prevent, distort, and restrict competition in the U.K. PH market. These identified features are

75 http://www.oft.gov.uk/news-and-updates/press/2011/115-11.

76 Ibid.

77 OFT press release 132/11, *OFT provisionally decides to refer private healthcare market to Competition Commission*, (8 December 2011), http://www.oft.gov.uk/news-and-updates/press/2011/132-11.

78 In particular, the OFT noted the following developments: the consolidation amongst private hospital providers since its last review in 1999; a shift by PMI providers away from vertical integration towards a reliance on network agreements with private healthcare providers; and the evolving interaction between the private healthcare market and the NHS.

79 The OFT announced on 14 December 2010, that it was seeking views prior to launching a market study into the provision of UK PH. On 10 March 2011, it launched and confirmed the scope of its investigation.

believed to impair the ability of private medical insurance ("PMI") providers, general practitioners ("GPs"), and patients from choosing between competing service providers, including new entrants, on the basis of superior quality of services to patients and better value for money. The features identified by the OFT include information asymmetries, market concentration, and barriers to entry. On the basis of these features, the OFT has provisionally decided to exercise its discretion to make a reference to the CC and has consulted on its provisional decision.

CC Publishes Final Report In Investigation Into The Local Bus Market In The U.K.

On December 20, 2011, the CC published its final report ("the Report") in its Market Investigation into the local bus services market.[80] The investigation was prompted by an OFT reference in January 2010 under Section 131 of the Enterprise Act 2002, and was restricted to local bus service markets in the UK, excluding Northern Ireland and London. The report finds that there are adverse effects on competition ("AECs") in relation to local bus markets within the meaning of section 131 of the Act. Detrimental effects arise where passengers have little or no choice of bus operator, meaning that the incumbent faces limited competitive pressure and is able to reduce service quality and increase fares. The detriment to consumers and tax payers as a result of these AECs is estimated to fall within the range of £115 million to £305 million a year.

The CC concluded that there are features of the market for the supply of local bus services which in combination prevent, restrict or distort competition, including high concentration, barriers to entry, and customer and operator market behaviors (for example, operators generally avoid competing with each other in their core territories).

The remedy package proposed by the CC in its final report mirrors the suggestions made in its provisional decision on remedies published in October 2011. It consists of three main elements: market-opening measures in relation to commercial bus services; measures to promote competition in relation to supported services; and recommendations about the wider policy and regulatory environment.

Market-opening measures focus on reducing barriers to entry and expansion, and on providing an environment in which competition is likely to be sustained. Key areas targeted include ticketing, operator behavior, and access to bus stations.

Measures to promote competition in relation to supported services involve making recommendations to the Department for Transport that it update its best practice guidance on tendering for supported services for LTAs, and that the Scottish and Welsh Governments develop similar but suitably tailored guidance. The CC is also making recommendations that LTAs be given powers to obtain, and where appropriate disclose, information about revenue and patronage of services being deregistered.

Suggested changes to the wider regulatory and policy environment that appeared in the provisional decision on remedies have also been repeated, notably the recommendation that the OFT apply a high priority to identifying bus mergers between competing operators, routinely following up bus mergers and take a cautious approach when deciding not to refer small bus mergers to the CC. A suggestion that the OFT establish a regular forum with operators to discuss issues related to the competition assessment of partnership arrangements with LTAs and other stakeholders is also made, as it is recognized that partnerships can facilitate increased competition within local areas if properly scrutinized.

80 http://www.competition-commission.org.uk/inquiries/ref2010/localbus/pdf/00_sections_1_15.pdf.

CLEARY GOTTLIEB

Contacts

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www.clearygottlieb.com

NEW YORK
One Liberty Plaza
New York, NY 10006-1470
T: 1 212 225 2000
F: 1 212 225 3999

WASHINGTON
2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
T: 1 202 974 1500
F: 1 202 974 1999

PARIS
12, Rue de Tilsitt
75008 Paris, France
T: 33 1 40 74 68 00
F: 33 1 40 74 68 88

BRUSSELS
Rue de la Loi 57
1040 Brussels, Belgium
T: 32 2 287 2000
F: 32 2 231 1661

LONDON
City Place House
55 Basinghall Street
London EC2V 5EH, England
T: 44 20 7614 2200
F: 44 20 7600 1698

MOSCOW
Cleary Gottlieb Steen & Hamilton LLP
CGS&H Limited Liability Company
Paveletskaya Square 2/3
Moscow 115054, Russia
T: 7 495 660 8500
F: 7 495 660 8505

FRANKFURT
Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
T: 49 69 97103 0
F: 49 69 97103 199

COLOGNE
Theodor-Heuss-Ring 9
50668 Cologne, Germany
T: 49 221 80040 0
F: 49 221 80040 199

ROME
Piazza di Spagna 15
00187 Rome, Italy
T: 39 06 69 52 21
F: 39 06 69 20 06 65

MILAN
Via San Paolo 7
20121 Milan, Italy
T: 39 02 72 60 81
F: 39 02 86 98 44 40

HONG KONG
Bank of China Tower
One Garden Road
Hong Kong
T: 852 2521 4122
F: 852 2845 9026

BEIJING
Cleary Gottlieb Steen & Hamilton LLP
Twin Towers – West
12 B Jianguomen Wai Da Jie
Chaoyang District
Beijing 100022
T: 86 10 5920 1000
F: 86 10 5879 3902

BUENOS AIRES
CGSH International Legal
Services, LLP-Sucursal Argentina
Avda. Quintana 529, 4to piso
1129 Ciudad Autonoma de Buenos Aires
T: 54 11 5556 8900
F: 54 11 5556 8999

SÃO PAULO
Cleary Gottlieb Steen & Hamilton
Consultores em Direito Estrangeiro
Rua Funchal, 418, 13 Andar
São Paulo, SP 04511-060
T: 55 11 2196 7200
F: 55 11 2196 7299