# BELGIUM

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

## Abuse

### *BCA Rejects White Star Football Club's Request for Interim Measures to Play in First Division*

On July 14, 2016, the College rejected a request for interim measures from football club Royal White Star Bruxelles ("White Star"), after the club was denied a license that would have allowed it to be elevated to the first division of the Belgian football league. The College held that the request was admissible but unfounded.

As it won the second division 2015–2016 championship, White Star would have been able to move to the first division for the next season. Under the federal regulations of the Royal Belgian Football Association (*Union royale belge des sociétés de football-association/koninklijke belgische voetbalbond*) ("RBFA"), a football club also has to meet other requirements in order to obtain a license to participate in the first division championship. The RBFA licensing committee considered that White Star did not meet all the requirements, in particular the principle of continuity—*i.e.*, the requirement that the club will exist for the duration of the relevant season—and therefore denied it the license. White Star appealed this decision to the Belgian Sports Arbitration Court ("BSAC"), which sided with the RBFA.

White Star then complained to the BCA, claiming infringements of Articles IV.1 and 2 CEL and 101 and 102 TFEU, and requested interim measures suspending the RBFA's conduct, approved by the BSAC, so that it could be elevated into the first division. Two cumulative conditions must be met to obtain interim measures: (i) the existence of a *prima facie* infringement of Article IV.1 and/or IV.2 CEL (and Article 101 and/or 102 TFEU); and (ii) the urgent need to avoid a situation that is likely to cause a serious and imminent harm that is difficult to remedy, or a situation that is likely to harm the general economic interest.

The College reviewed the application of competition rules and found that the RBFA could be considered as an association of undertakings but that the BSAC could not be considered as an undertaking nor association of undertakings. The College therefore examined the federal regulations and the licensing committee's conduct. It held that the principle of continuity of the federal regulations pursued a legitimate interest, because it aimed to protect the orderly and fair conduct of competitions, and further that the criteria used for the application of the principle were relevant. The College also reviewed the application of the principle to White Star and found that, in light of the club's financial situation, it was reasonable to consider that it did not meet the principle of continuity. White Star's further claim that it had been discriminated against compared to other clubs also did not hold, in light of the information provided by the RBFA.

Therefore, the College held that a *prima facie* infringement of Articles IV.1 and 2 CEL and 101 and 102 TFEU could not be established at this stage of the procedure. Therefore, the College did not review the existence of a prejudice and rejected the interim measures.

***Brussels Court of Appeal Confirms BCA Interim Measures Preventing Exclusive Broadcasting Rights For Superprestige Cyclocross Competition***

On September 7, 2016, the Brussels Court of Appeal confirmed the interim measures imposed by the BCA on Telenet BVBA ("Telenet") and VZW Verenigde Veldritorganisatoren ("VV") on November 5, 2015,[1] regarding the exclusive licensing of the broadcasting rights of the Superprestige Cyclocross competition (*i.e.*, a cycling competition).

Telenet, a provider of retail television services in the Flemish region, and VV, the organizer of the Superprestige Cyclocross competition, had concluded an agreement granting Telenet exclusive television broadcasting rights of the competition for five years. Proximus, a competitor to Telenet, filed a complaint to the BCA claiming that this infringed Articles IV.1 and IV.2 CEL and/or Articles 101 and 102 TFEU, and requested interim measures.

The BCA granted the interim measures and ordered Telenet and VV, until the adoption of a final decision, to either: (i) suspend the exclusivity clause until a final decision is rendered by the BCA on the complaint, and offer the broadcasting rights to interested parties on reasonable and non-discriminatory terms and conditions; or (ii) suspend the exclusive agreement from the end of the 2015–2016 season and offer the broadcasting rights, exclusive or not, after transparent and non-discriminatory tenders. Telenet appealed the decision to the Brussels Court of Appeal in December 2015.

With respect to the existence of a *prima facie* infringement, the Court held that the BCA had applied the appropriate legal standard, by finding that it was "not manifestly unreasonable" and that the exclusivity agreement could constitute an infringement of competition law. The BCA was right in finding a separate relevant market for the licensing of broadcasting rights for cyclocross races, instead of a broader market for the licensing of sports broadcasting rights. The Court further confirmed the finding of *prima facie* abuse of Telenet's dominant position, in light of the exclusive nature and duration of the agreement, the absence of prior tender, and Telenet's existing similar rights for the UCI Worldcup cyclocross races for the 2016–2020 seasons.

As to the risk of a serious and imminent harm that is difficult to remedy, the Court confirmed that the BCA should consider both the complainant's situation and the general economic interest. Therefore, the BCA may consider the interests of other parties, such as competitors, in addition to complainant's interests. Telenet's exclusive broadcasting rights could cause serious harm that was difficult to repair because only Telenet could provide a full and largely live cyclocross offering, posing a significant barrier to competitors and new entrants.

The Court dismissed further claims, holding in particular that interim measures did not depend on the risk of complainant's exit from the market, nor on the conduct's impact on complainant's turnover. The Court therefore upheld the interim measures.

## FINLAND

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

**Policy and Procedure**

***Competition Authority Succeeds in Opening Taxi Sector to Competition***

On September 22, 2016, the Government of Finland submitted a legislative proposal for the Transport Code

[1] S*ee* National Competition Report, October – December 2015, pp. 1-2.

to the Parliament of Finland. The Transport Code will consolidate several transport market regulations concerning passenger and goods transport into a unified Act. One of the major changes introduced by the Transport Code is the deregulation of the taxi market.

Deregulation of the taxi industry has been on the agenda of the FCCA for a number of years. The FCCA has received numerous complaints concerning anticompetitive practices regarding various taxi operators and it has been unable to address these concerns effectively due to the current sector-specific regulation. Consequently, the FCCA has, on a number of occasions, advocated deregulation of the taxi market to promote competition.

Before the preparations for the new Transport Code began, the FCCA made a formal motion to the Ministry of Transport and Communication to reform the taxi legislation, especially the taxi license system that the FCCA considered the main obstacle to effective competition. The FCCA has succeeded, and the taxi licensing system will be considerably deregulated. Although taxi operators will still need to be licensed, licenses will be granted to everyone who fulfills set criteria. Likewise, taxi pricing will be deregulated and determined by the market, though authorities can intervene if prices become unreasonable.

This development, along with the FCCA's ongoing efforts to amend the Finnish Competition Act,[2] shows that the FCCA continues to have considerable influence to shape Finland's legislation concerning competition-related matters.

## FRANCE

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

### Horizontal and Vertical Agreements

#### *The FCA Imposes Fines for Anticompetitive Horizontal and Vertical Agreements in the Heating Units Sector*

On July 21, 2016, the FCA fined heating unit suppliers for price fixing and customer allocation, as well as for having implemented resale price maintenance agreements with distributors. The fines amount to a total of €9 million.[3]

In 2008, the French Ministry of Economy initiated an investigation on potential anticompetitive practices in the liquid fuel heating sector. Liquid fuel heating units are mobile devices used as backup heating and are imported from abroad by PVG France S.A.R.L. ("PVG") and Ligne Plus, the two main suppliers of such units in France. These units are then sold to supermarkets and DIY stores.

The French Ministry of Economy then transferred the matter to the FCA. The FCA found that PVG and Ligne Plus entered into horizontal agreements from 2005 to 2008 by exchanging information on the wholesale prices of their liquid fuel heating units and by allocating customers. PVG and Ligne Plus simultaneously entered into vertical agreements with their distributors during the same period to ensure that the agreed wholesale prices would be reflected at the retail level.

The two suppliers exchanged information on the wholesale and recommended public resale prices of their liquid fuel heating units. These information exchanges took place every year during informal meetings between the sales directors of the two suppliers, in preparation for the coming winter season. In addition, PVG and Ligne Plus allocated distributors between them, and each one refrained from supplying the distributors allocated to the other.

[2] *See* National Competition Report, July – September 2015, p. 2–3.

[3] French Competition Authority, Decision no. 16-D-17 of July 21, 2016 relating to anticompetitive practices in the liquid fuel backup heating units sector, available at: http://www.autoritedelaconcurrence.fr/pdf/avis/16d17.pdf.

In order to ensure that the horizontal agreements would be effective at the retail level, PVG and Ligne Plus also implemented a resale price maintenance scheme with their distributors. More specifically, both PVG and Ligne Plus communicated recommended prices to their distributors and monitored their implementation (by collecting advertisements showing retail prices and by contacting the distributors that they found did not comply with such recommended prices). The FCA ultimately found that distributors effectively followed PVG's and Ligne Plus's recommendations, notably for the low price heating units.

As a result, the FCA found that the combination of the horizontal and vertical agreements hindered both inter-brand and intra-brand competition. Both PVG and Ligne Plus did not challenge the FCA's objections and made compliance commitments in exchange for a 16% fine reduction. In addition to the suppliers, the FCA fined distributor Leroy Merlin because it was actively involved in the resale price maintenance scheme. In particular, this distributor acknowledged several times in writing that it would follow PVG's recommended retail prices and complained that competing distributors did not implement PVG's price recommendations.

**Mergers and Acquisitions**

***The French Supreme Court Orders the FCA to Reexamine UGI/Totalgaz Merger***

On July 6, 2016, the French Administrative Supreme Court partially reversed a FCA Phase II clearance decision and ordered the FCA to review its analysis of certain markets as well as the adequacy of the corresponding commitments.[4]

On May 15, 2015, following an in-depth investigation, the FCA cleared the acquisition by US-based company UGI Corporation ("UGI") of Total's subsidiary Totalgaz. Both companies were distributors of liquefied petroleum gas ("LPG"). In order to address the competition concerns identified, the FCA had imposed for the first time a "fix it first" remedy, *i.e.*, a solution whereby the notifying party divests the problematic assets prior to the adoption of the clearance decision. However, two rival companies challenged the FCA's decision before the French Administrative Supreme Court ("*Conseil d'Etat*").

The *Conseil d'Etat* upheld the decision regarding three of the four affected markets identified by the FCA and the corresponding commitments. However, regarding the sale of LPG in mini-bulk, the *Conseil d'Etat* found that the FCA underestimated the potential anticompetitive effects of the merger by unduly limiting the scope of its analysis.

On this market, distributors supply their clients by using small trucks that can travel up to 150 km from LPG filling plants and deposits. This radius defines local markets centered around each LPG filling plant or deposit. Filling plants and deposits are owned by distributors, either jointly or individually. The FCA's decision observed that the merger was likely to create or strengthen dominant positions in 11 of these local markets. The parties therefore committed to divesting their shares in some LPG deposits so as to entirely remove the overlaps, or to reduce their aggregate market shares below 50%, in the areas where the transaction created or strengthened a dominant position.

The plaintiffs argued, however, that those divestments did not address the broader concern that, as a result of the merger, the new entity would have an incentive to abuse its market power in local markets where one of the parties was already dominant pre-merger, but where the transaction did not result in any overlap.

Before the merger, no single network of LPG deposits covered the whole of France. Consequently, distributors had to enter into mutual agreements whereby they allowed competitors to use their LPG deposits. Even in the areas where they had a dominant position, UGI and Totalgaz had a strong incentive not to abuse such position since competitors could react by depriving them of the possibility to serve some of their

[4] French Administrative Supreme Court, Decision of July 6, 2016 available at: http://www.conseil-etat.fr/Decisions-Avis-Publications/Decisions/Selection-des-decisions-faisant-l-objet-d-une-communication-particuliere/CE-6-juillet-2016-compagnie-des-gaz-de-petrole-Primagaz-societe-Vitogaz-France.

customers. Because each distributor needed the LPG filling plants and deposits of its competitors at the national level, none of them could take the risk of abusing its dominant position on any local market.

Post-merger, however, UGI/Totalgaz was the only distributor whose network covered the whole of France and, as such, it no longer needed to enter into agreements with competitors to give them access to its LPG deposits in exchange for access to their deposits. Whereas before the merger UGI and Totalgaz had an incentive to provide access to their respective deposits subject to reciprocity, they no longer had this incentive since they no longer needed any access to their competitors' deposits to cover the whole country.

Based on these findings, the *Conseil d'Etat* did not annul the entire decision. The *Conseil d'Etat* merely quashed the part of the FCA decision which deals with the assessment of the effects of the transaction on the sale of mini-bulk LPG and the commitments necessary to authorize the merger. The *Conseil d'Etat* then referred the transaction back to the FCA to further review this specific issue and determine appropriate additional commitments.

***The FCA Gives Conditional Clearance To FNAC/Darty Merger***

On July 27, 2016, the FCA cleared the acquisition by French retailer Fnac of Darty, following an in-depth review of the brown, grey, and white products distribution sector, and subject to divestments in the Paris region.[5]

Fnac is a French retailer of cultural products (books, CDs, video games) as well as "brown" products (TVs, cameras, audiosets, DVD and Blu-Ray players, etc.) and "grey" products (tablets, laptops, smartphones, etc.). Fnac also offers a limited selection of "white" goods (kitchen and domestic appliances). Darty is a competing retailer of brown, grey, and white goods (and also offers video games). The transaction involved Fnac's acquisition of exclusive control over Darty, through a cash offer and an option for a partial share-based payment. In view of the overlaps, the FCA analyzed the impact of the transaction in the retail markets for grey, brown, and white products, as well as video games.

The FCA found that the parties' competitors included not only specialized chains but also large food supermarkets, multi-specialized supermarkets, specialized hard-discounters, independent store groupings, large convenience stores, and large supplier stores (*e.g.* Apple stores). The FCA also considered for the first time that online retailers (*e.g.* Amazon) directly competed with brick and mortar retailers and therefore there was no reason to identify a distinct market for the online channel (given, in particular, the development of an all-channel model and the ability of customers to easily switch from one channel to the other). This had the effect of significantly decreasing the market share of brick and mortar retailers.

In terms of geographic dimension of the market, Fnac argued for a national market (which was consistent with a market that included the online channel). However, the FCA found that competition takes place at both the national and local levels. While price and commercial policies for in-store and online sales are set at the national level, brick and mortar stores set local prices below national prices and adjust to local competition factors. In addition, having sales points remains important for non-pure players, as customers still favor in-store purchases.

On the retail markets for white, grey, and brown products, including online sales, the national market share of Fnac/Darty did not exceed 30%. The FCA therefore ruled out the risk of horizontal anticompetitive effects at the national level. At the local level, however, the FCA identified overlaps in 188 catchment areas and held that competition concerns arose in nine of these areas in the Paris region. In order to address the FCA's concerns, Fnac committed to selling 6 stores in Paris and its surroundings to a buyer which will have to be

[5] French Competition Authority, Decision no. 16-DCC-111 of July 27, 2016 regarding the acquisition of the Darty company by the Fnac group, available at: http://www.autoritedelaconcurrence.fr/pdf/avis/16DCC111 VNC.pdf.

approved by the FCA. Such a buyer will have to be a specialized-supermarket (preferably) or a retailer active in the same sector as Fnac/Darty.

On the other markets, the FCA found that the transaction was not problematic. On the retail markets of video game products, despite market shares of up to 70% in some catchment areas, the FCA excluded the risk of horizontal anticompetitive effects, in view of the market pressure of pure players and the limited overlap. Regarding potential vertical effects, the FCA considered that the merged entity's suppliers (*e.g.* Apple or Samsung) were at no risk of becoming economically dependent on Fnac/Darty, and that there was no risk of foreclosure through the securing of preferential supplying conditions with the suppliers.

## GERMANY

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

### Horizontal Agreements

#### *FCO Declares German Banking Industry Rules on Restriction of Online Payment Services Illegal*

On June 29, 2016, the FCO found that the German Banking Industry Committee's (*Deutschen Kreditwirtschaft*) general online banking terms and conditions contain several provisions that violate competition law.[6] The FCO published the complete decision on September 1, 2016.[7]

The German Banking Industry Committee and its banking associations use jointly agreed General Terms and Conditions, including "Special Conditions for Online Banking", which all banks operating in Germany use. The "Special Conditions for Online Banking" contain a provision that prohibits online banking customers from using their personal identification number ("PIN") and their transaction authentication number ("TAN") in non-bank payment systems to access third party systems, in particular so-called payment initiation services. As a result, access to innovative non-bank payment solutions in the context of online shopping is significantly restricted.

The German Banking Industry Committee justified the prohibition with its interest in safeguarding the security of online banking. The FCO, however, found that the provision was not a necessary feature of a consistent security concept, but rather impeded non-bank competitors and violated German and European antitrust law. In particular, the prohibition of non-bank payment services from using PINs and TANs hinders the offer of new and innovative services in the e-commerce sector.

The FCO did not impose any fines, but declared the concerned clauses illegal and, upon the parties' request, suspended the immediate enforceability of its decision. Thus, the German Banking Industry Committee, its banking associations, and, ultimately, all banks need to terminate their conduct and change the concerned provisions, but can do so without having to adhere to a strict deadline. The reason for this generous approach is the required implementation of

[6] FCO decision of June 29, 2016, case B 4 – 71/10, press release of July 5, 2016, available in English at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/05_07_2016_Sofort%C3%BCberweisung.html?nn=3591568.

[7] FCO decision of June 29, 2016, case B 4 – 71/10, only available in German at: http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Kartellverbot/2016/B4-71-10.pdf?__blob=publicationFile&v=2.

the EU Payment Services Directive by the end of 2017 with which the FCO did not want to interfere.

### *FCO Fines Film Studios for Illegal Exchange of Information*

On July 26, 2016, the FCO fined three German film studios a total of €3.1 million.[8] The FCO found that the film studios had been engaged in an illegal exchange of information between September 2011 and December 2014.

During this period, representatives of four German film studios (Studio Berlin Adlershof GmbH, Studio Berlin Broadcast GmbH, Bavaria Studios & Production Services GmbH and MMC Studios Köln GmbH) met on a regular basis to discuss specific issues and exchange pricing information. The FCO found that the studios' main objective in conducting these meetings was to decrease mutual price competition and increase their respective profits. The studios discussed, in particular, the ancillary costs that they charged customers (for instance costs for electricity, heating, and water supply). In addition, they discussed the prices that they charged for the staffing of specialized and freelance employees. The FCO pointed out that it was unable to determine whether these measures had an effect on the overall prices charged by the studios involved.

According to the FCO, the studios further used their mutual meetings to discuss their behavior with respect to each other's regular customers. Apparently, the studios frequently criticized each other for providing attractive offers to regular customers of other studios.

While the studios also exchanged information on their participation in ongoing or future tenders by TV channels or production companies on at least two occasions, the FCO was not able to determine whether any of the studios indeed coordinated their bids in these tenders.

The FCO's investigation was initiated by a leniency application submitted by MMC Studios Köln GmbH, which thereby avoided a fine. According to the FCO, it took into account not only the duration and severity of the infringement, but also the involved studios' cooperation throughout the investigation when determining the amount of the fines. The fined parties did not appeal the FCO's decision so it is now legally binding.

## Abuse

### *Berlin Regional Court Dismisses Publishers' Action Against Google*

In February 2016, the Berlin Regional Court dismissed an action 41 news publishers had filed against Google in the summer of 2015.[9] The plaintiffs—all members of the collecting society VG Media—had requested that the Berlin Regional Court order Google to display small text excerpts (so-called snippets) of their websites in the search results and on Google News even in cases where they had not allowed Google to use their content free of charge. They argued that Google abused its allegedly dominant position.

This litigation is another episode in the conflict between a few German news publishers and VG Media on one side and Google on the other side regarding the German ancillary copyright for news publishers. Introduced in August 2013, this right entitles news publishers to prohibit search engines and equivalent services from using their news content, except for single words or small extracts (snippets). However, the precise scope of an acceptable snippet has remained unclear and Google has refused to purchase licenses for any

[8] *See* FCO, case summary of June 26, 2016, case B 12 – 23/15, available in German on the FCO's website at : http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2016/B12-23-15.pdf?__blob=publicationFile&v=3.

[9] *See* Berlin Regional Court, judgment of February 19, 2016, case 92 O 5/14 Kart. The full text of the judgment has recently become available in German on the Court's website at: https://www.berlin.de/gerichte/presse/pressemitteilungen-der-ordentlichen-gerichtsbarkeit/2016/pressemitteilung.481361.php.

content that it displays in its search results. In September 2015, the FCO formally confirmed its position that Google's conduct did not infringe competition law.[10]

Similarly, the Berlin Regional Court decided that the plaintiffs' request lacked merit. It considered a multi-sided platform market for online search engines: Google is in the center of this platform market and maintains relations with search users, third-party websites, and advertisers. Interestingly, the Berlin Regional Court found that a product or services market for competition law purposes did not presuppose the exchange of goods or services against payment and therefore included Google's relationship with search users in its assessment.

The Berlin Regional Court left open whether Google was dominant in this market, because it found that, in any event, Google did not engage in discriminatory conduct; Google's announcement to no longer display snippets from only VG Media members unless they confirm that Google may use their content free of charge, was justified. Contrary to other publishers, VG Media and its members insisted that Google had to pay for displaying their content. In the Berlin Regional Court's view, Google rightfully defended its business model. After all, a search engine creates a "win-win situation" for all parties involved—it allows Google to generate turnover through advertising, users can find the information they are looking for, and (news) publishers can generate a higher advertising turnover with the traffic Google directs to their websites. The Berlin Regional Court held that the situation would no longer be balanced if Google had to display, and to pay to display, news publishers' snippets. Similarly, the Berlin Regional Court rejected the plaintiffs' claims that Google engaged in exploitative abuse.

The plaintiffs have appealed the judgment. While the German Government is currently evaluating the German ancillary copyright for news publishers, the European Commission recently proposed introducing such a right on an EU level.[11]

***Applying Nomination Criteria Defined By the German Athletics Association Does Not Constitute an Abuse of a Dominant Position***

On July 18, 2016, the Frankfurt Higher Regional Court rejected the immediate appeal of the incumbent World Champion in women's javelin ("applicant") against a decision of the Frankfurt Regional Court, rejecting the applicant's motion for an interim injunction by which it sought nomination for the Olympic Games in Summer 2016 by the National Olympic Committee (*Nationales Olympisches Komitee für Deutschland*, "NOK").[12]

[10] *See* FCO decision of September 8, 2015, case B6-126/14, available in German on the FCO's website at: http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Missbrauchsaufsicht/2015/B6-126-14.pdf;jsessionid=F8BEFD420C28BC625A1E03D7BC2F0B4E.1_cid371?__blob=publicationFile&v=2. A case summary in English is available at: http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2016/B6-126-14.pdf?__blob=publicationFile&v=2. *See also* National Competition Report, July – September 2015, p. 10.

[11] European Commission, Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market, COM(2016) 593 final of September 14, 2016.

[12] On May 20, 2006 the NOK merged with the German Sports Confederation (*Deutscher Sportbund*, "DSB") creating the new umbrella organization German Olympic Sports Federation (Deutscher Olympischer Sportbund, "DOSB"), *see* the DOSB's website available in English at: http://www.dosb.de/en/organisation/wir-ueber-uns/dosb-profile/. Since then, the NOK does no longer exist and the Frankfurt Higher Regional Court should have, in our view, named the DOSB rather than the NOK as respondent. Frankfurt Higher Regional Court, decision of July 18, 2016, case 11 W 22/16 (Kart), ), available in German at:

The NOK/DOSB is exclusively responsible for the nomination of athletes for the Olympic Games and had to nominate three female athletes for the discipline of javelin for the 2016 Olympic Games. The NOK/DOSB had to choose these three athletes out of the four, including the applicant, that met its nomination criteria.[13]

The applicant challenged the nomination of one of the other athletes by the NOK/DOSB, arguing, among other things, that when making its nomination decision, the NOK/DOSB had arbitrarily considered a shortened qualification period of only 14 weeks (April through mid-July 2016, as set by the German Athletics Association (*Deutscher Leichtathletik Verband*)) rather than applying a qualification period of more than one year (May 2015 through mid-July 2016, as defined by the International Association of Athletics Federations ("IAAF")), which would have benefitted the applicant. Thereby, the applicant claimed NOK/DOSB abused its allegedly dominant position according to Section 19(2) No. 1 GWB.

While leaving open the question of whether the NOK/DOSB can be qualified as a dominant undertaking pursuant to the Act against Restraint of Competition, the Frankfurt Higher Regional Court held that the NOK/DOSB did not engage in abusive conduct. In particular, national federations were not obliged to make full use of the qualification period as suggested by the IAAF and the reduction of the qualification period to 14 weeks does not result in an unfair disadvantage raising competitive concerns. The decision on the length of the nomination period is at the discretion of the NOK/DOSB who can prioritize short-term performance peaks in the Olympic year over a constant performance.

Further, according to the Frankfurt Higher Regional Court, the NOK/DOSB's exercise of discretion relating to the balance between other relevant nomination criteria remains within the nomination rules. The Frankfurt Higher Regional Court acknowledged that such predictive decisions enjoy a wide margin of appreciation and are therefore subject to only limited review by the courts.

***FCO Has No Objections to German Savings Banks' Joint Mobile App to Operate Current Accounts***

On September 14, 2016, the FCO announced that it does not have any competitive concerns about several savings banks' plans to jointly develop a mobile banking app and abstained from opening formal proceedings.[14] A number of savings banks are currently jointly developing a mobile app ("Yomo", short for "your money"), which allows customers to open and operate bank accounts via their smartphones. The app will enable customers to choose any of the participating savings banks and to open a current account containing the new features, in particular the use of a standard debit card to pay and to withdraw money. While basic services are standardized and free of charge, each savings bank will set up its own terms and conditions for additional services, such as issuing a credit card or allowing an overdraft facility.

Given that the cooperating savings banks are direct competitors for offering such a nationwide service (the offer is directed to customers regardless of their place of residence), they notified the FCO of their plans in advance. The FCO considered that the cooperation will enable smaller savings banks to also offer app-based current accounts and to target young customers, and found that the joint approach stimulates competition in the current accounts market. Further, the FCO assumed that in light of the existing market environment, the savings banks have no choice but to offer the app free of charge, which means that the

http://www.lareda.hessenrecht.hessen.de/lexsoft/default/hessenrecht_lareda.html#docid:7616169.

[13] The nomination criteria set by the NOK/DOSB are further specified by the German Athletics Association.

[14] FCO, press release of September 14, 2016, available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/14_09_2016_Sparkasse_App.html?nn=3591286.

restriction of competition—if there is any—would be insignificant.

### *DCA Rules Against Booking.com and Rejects Application for Interim Injunction Against FCO's Prohibition of Using "Best Price Clauses"*

On May 4, 2016, the DCA rejected Booking.com's application to suspend the FCO's decision of December 2015[15] to prohibit the use of "best price clauses".[16] As a consequence, Booking.com has to implement the FCO's decision immediately, notwithstanding the pending appeal.

Booking.com is the world's leading online hotel booking platform and the market leader in Germany. In its contracts with hotels in Germany, Booking.com initially used a clause that obliged the hotels to offer Booking.com their most favorable conditions available, in particular the lowest room prices, the maximum room capacity, and the best booking and cancellation conditions ("wide best price clause"). In the course of the proceedings, Booking.com voluntarily amended this clause and only obliged the hotels not to offer prices and conditions on their own websites better than the ones on Booking.com's hotel portal ("narrow best price clause").

The FCO did not consider these adjustments sufficient. It found that the clauses in question had the effect of restricting competition on the booking portal market as well as on the market for hotel rooms and ordered Booking.com to delete the respective clauses from its contracts and general terms and conditions within a month. Booking.com appealed the decision before the DCA and, at the same time, applied for an interim injunction in order to stop the decision's immediate enforceability.

Given that Booking.com could neither establish "serious doubts" as to the legality of the FCO's prohibition decision, nor that the decision's enforcement would constitute an "unfair hardness not justified by overriding public interests", the DCA rejected the application for interim injunction.

The FCO had already prohibited Booking.com's competitor HRS from using almost identical clauses in late 2013 and the DCA confirmed this decision in January 2015.[17] Proceedings against Booking.com's competitor Expedia, which is still using best price clauses in its contracts with hotels, are ongoing.

## Mergers and Acquisitions

### *DCA Suspended Ministerial Approval of EDEKA/Kaiser's Tengelmann Merger*

On July 12, 2016, the DCA suspended the ministerial approval of the acquisition of the supermarket chain Kaiser's Tengelmann ("Tengelmann") by EDEKA on application for an interim injunction by Tengelmann's competitors REWE and Markant.[18]

After the FCO had blocked the proposed acquisition of Tengelmann by EDEKA on March 31, 2015,[19] the Minister for Economic Affairs overruled the FCO decision on March 9, 2016 by granting a ministerial authorization requested by EDEKA and Tengelmann. The ministerial authorization was made subject to the condition that EDEKA will protect the jobs of Tengelmann's 16,000 employees and will guarantee works council structures for at least 5 years.

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15 FCO decision of December 23, 2016, case B9-121/13, press release of December 23, 2015, available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/23_12_2015_Booking.com.html?nn=3591568.

16 DCA judgment of May 4, 2016, case VI – Kart 1/16 (V), available in German at: http://www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2016/VI_Kart_1_16_V_Beschluss_20160504.html.

17 DCA judgment of January 9, 2015, case VI – Kart 1/14 (V), available in German at: http://www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2015/VI_Kart_1_14_V_Beschluss_20150109.html.

18 *See* DCA decision of July 12, 2016, case VI-Kart 3/16, available only in German at: http://www.olg-duesseldorf.nrw.de/behoerde/presse/archiv/Pressemitteilungen_aus_2016/20160712_PM_Eilentscheidung-Minister-Edeka_Tengelmann/Beschluss-anoymisiert-VI--Kart-3-16-_V_.pdf .

19 *See* National Competition Report January – March 2015, p. 15.

The DCA found in its interim measures proceedings that the ministerial authorization was illegal for three reasons.

First, the minister created an apprehension of bias because he held two secret talks with the CEO of EDEKA and an owner of Tengelmann without any records and without the knowledge or participation of EDEKA's competitors, in particular REWE, who had also made an offer to acquire Tengelmann. Thereby, the minister failed to conduct a transparent, objective, and fair proceeding.

Second, the minister wrongly considered the retention of workers' collective rights as a public interest in his assessment because, according to the DCA, the constitutional right to form and to belong to a trade union is protected to the same extent as the freedom to decide against a participation in a trade union.

Third, the minister's assessment was based on incorrect facts: the acquisition by EDEKA would also be linked with job cuts within 5 years.

In a public statement, the minister rejected the court's accusations and applied to correct the facts of the DCA's decision. However, the DCA rejected this application as inadmissible and unfounded.[20]

***Owens Corning and Ahlstrom Withdraw Merger Filing After Phase II Investigation***

Owens Corning intended to acquire the glass fiber non-woven and glass fiber fabric business of the Finnish company Ahlstrom Glassfibre Oy ("Ahlstrom"). After the FCO had raised serious competitive concerns in an in-depth Phase II investigation, the parties decided to no longer pursue this transaction and withdrew their merger filing in July 2016.[21]

The FCO scrutinized the area of glass fiber non-wovens closely. These products are thin sheets of non-woven glass fiber strands bound together by synthetic resin binders. Depending on the composition of these raw materials, the end products have different characteristics and can be used in various applications. Accordingly, the parties argued that these different applications constituted separate markets. Each of these markets would have been a so-called *de minimis* market[22] and the FCO would, under the Act against Restraint of Competition, not have been able to prohibit the merger in case of significant impediments to effective competition. The FCO, however, did not follow the parties' approach and instead defined a broader market for wet-processed glass fiber non-wovens. It considered supply-side substitutability to be sufficiently high: the products were made of the same raw material on the same production equipment and it deemed switching between applications to be easy. As a result, the *de minimis* market exception did not apply.

Based on its market investigation, the FCO preliminarily concluded that the transaction would have concentrated the EEA-wide market for wet-processed glass fiber non-wovens even further. Owens Corning's market share of about 50–60% would have grown significantly by 10–20% and only one important competitor, Johns Manville, would have remained in the market. The FCO also found that the merging parties and Johns Manville were close competitors and considered Ahlstrom a price-aggressive maverick. In the FCO's view, the remaining companies post-merger would have had incentives to reduce production volumes, increase

[20] *See* DCA decision of August 10, 2016, case VI-Kart 3/16, available only in German at: http://www.olg-duesseldorf.nrw.de/behoerde/presse/Presse_aktuell/20160811_PM_Terminierung-Edeka/EDEKA_Tengelmann_OLG-Duesseldorf_1_-Kartellsenat_Tatbestandsberichtigungsbeschluss-10_08_2016.pdf.

[21] *See* FCO, case summary of September 23, 2016, cases B3-37/16 and B2-58/16, available in German at: http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Fusionskontrolle/2016/B3-37-16_B2-58-16.html.

[22] Pursuant to Section 36(1)(no. 2) of the ARC, markets are *de minimis* if, in particular, their volume did not exceed €15 million in the previous calendar year.

prices, and/or offer less favorable supply conditions to customers. Finally, it considered barriers to entry to be high, given that large initial investments and special know-how is necessary to succeed in this industry.

After the FCO had issued a statement of objections on June 27, 2016, Owens Corning and Ahlstrom decided to withdraw their merger filing.

***FCO Clears Acquisition of MUK Beteiligungs GmbH by Nagel Group***

On August 25, 2016, the FCO approved Nagel Group's ("Nagel") planned acquisition of MUK Beteiligung GmbH ("MUK").[23]

Through its subsidiaries, Transthermos GmbH and Transthermos Kontraktlogistik GmbH, MUK operates cold storage houses throughout Germany and provides services for the transport of frozen foods. Nagel, commonly known under its operating name "Kraftverkehr Nagel", mainly provides logistics services for fresh and frozen products.

Although the merged entity is becoming the market leader in frozen goods logistics, and will also gain a strong position in fresh products logistics, the FCO found that there would still be sufficient competition in the market post-merger.

In particular, the FCO found that the largest remaining competitor, Nordfrost, along with other companies, would provide sufficient alternatives, both as logistics providers for frozen foods and in the groupage freight segment for frozen foods. In the latter segment, goods are collected from different consignors and then delivered to different recipients.

Further, the FCO found that the transaction would not enable the merged entity to squeeze competitors out of the market. The FCO also examined whether the merged entity would gain privileged access to sub-contractors (haulers and freight capacity) as compared to its competitors and found that that there was no sufficient indication of this.

***FCO Approves Joint Venture of Gruner + Jahr and the Landwirtschaftsverlag Münster***

On June 10, 2016, following a Phase I investigation, the FCO cleared the joint venture Deutsche MedienManufaktur GmbH & Co. KG between Gruner + Jahr and Landwirtschaftsverlag Münster.[24] The parties plan to combine six living, food, and rural life magazine titles in the joint venture. Gruner + Jahr, part of Bertelsmann SE & Co. KGaA, provides numerous public magazines. The Landwirtschaftsverlag Münster offers trade journals and two public magazines. The FCO found that the merger would not create a significant obstacle to effective competition in the affected reader and advertising markets because there are several major competitors and sufficient competitive pressure.

The FCO considered garden, living, lifestyle, and food magazines to have their own reading markets in the general area of public magazines. It also examined whether rural life magazines have their own reader market as a special mix of gardening, living, food, and lifestyle. Ultimately, the FCO left the precise market definition open, because it expected no competition concerns under any definition. There are currently 30 rural life magazine titles from various publishers and barriers to entry in gardening, living, food, and lifestyle magazines are low, as shown by frequent new releases from various publishers.

The FCO also found that the joint venture would not hinder effective competition in advertising markets. In previous cases, the FCO considered the advertising market to be the general public magazine area—wider than the reader market—but left the precise definition open. In only one Phase I decision, the FCO found a separate market for advertisements in program magazines. Here, the FCO considered a separate

[23] An English version of the press release is available on the FCO's website at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/26_08_2016_Tiefk%C3%BChlh%C3%A4user.html;jsessionid=9EE5E249EFA3B95ECE21F46CA14A88EE.1_cid362?nn=3591568.

[24] *See* FCO, case summary of June 10, 2016, case number B7-75/16, available in German at: http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Fusionskontrolle/2016/B7-75-16.pdf?__blob=publicationFile&v=2.

market for advertising in housing, gardening, food, lifestyle, and rural life magazines, but found no competition concerns under any circumstances.

***FCO Clears Merger Between Sparkasse Hildesheim, Sparkasse Goslar/Harz, and the Kreissparkasse Peine***

On August 10, 2016, the FCO cleared the merger between Sparkasse Hildesheim, Sparkasse Goslar/Harz, and the Kreissparkasse Peine in Phase I.[25] The concentration had to be notified to the FCO because revenue thresholds were met due to revenues flowing from other economic activities of the city and district of Hildesheim being attributed to Sparkasse Hildesheim.

The merger affected several banking services markets. For the market definition, the FCO distinguished between private and commercial customers. The demand for banking services of these two groups differs quantitatively and qualitatively, and requirements on the supplier side vary correspondingly. In particular, commercial customers use banking services for financing business and investment and individuals use banking services for building and maintaining private property.

Within the respective customer segments, the FCO further distinguished between giro, deposits, and loans. In retail markets, the FCO continued to assume that online banking fulfills a primarily complementary function, substitutable with the brick and mortar store business and therefore part of a uniform market.

The FCO continues to limit some geographic markets affected by the merger, though many credit institutions are active nationwide. This is especially true for the private giro account market and the business customer credit market, because proximity to credit institutions is of particular importance to the average consumer.

To examine the effects of the merger, the FCO initially departed from the individual business areas of the participating savings banks. It considered a larger market instead, comprising the entire territory of the merging savings banks. To determine the market conditions, the FCO requested information from all credit institutions that the parties identified as offering services in the regions concerned and in neighboring areas.

The investigations showed local savings banks have high market shares in many markets within their own home area. Some of these shares are above the threshold for a presumption of dominance. However, the three savings banks involved in the merger do not actively compete with one another, and due to legal requirements, cannot be considered potential competitors. The Niedersächsische Sparkassengesetz (Savings Banks Act of Lower Saxony) and statutory provisions for savings banks in Lower Saxony stipulate that the business area of a savings bank regularly corresponds to a confined territory. In addition, savings banks generally may not open branches and promote advertising outside their home areas.

The investigations showed the participating savings banks do not operate branches outside their home areas. Therefore, virtually no market share additions were found in the respective business segments of the parties involved. The market investigation also showed that in the Hildesheim-Goslar-Peine area, there are alternatives for private and business customers within all market segments. This is also true for credit institutions operating nationwide; credit institutions with no branches in the affected area were considered to be available as alternatives.

***FCO Approves Sonova's Acquisition of AudioNova***

On July 22, 2016, the FCO approved Swiss Sonova AG's ("Sonova") acquisition of Dutch AudioNova International B.V. ("AudioNova").[26] AudioNova

[25] *See* FCO, case summary of August 10, 2016, case number B4-53/16, available in German at: http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Fusionskontrolle/2016/B4-53-16.pdf;jsessionid=8C2CBDB1A68945AF30FEC6C0B437D1B1.1_cid378?__blob=publicationFile&v=3.

[26] *See* FCO, press release of September 6, 2016, available in German and English at:

operates more than 550 stores offering hearing aids and acoustician services across Germany though its retail chains Geers and hörGut, while Sonova is the leading manufacturer of hearing aids in Germany, which it sells to hearing aid acousticians. Sonova is also active in the sale and fitting of hearing aids through its retail chains Fiebing and Vitakustik.

Although, post-acquisition, Sonova will become one of the largest providers of hearing aid acoustician services, the FCO found that Sonova is not likely to foreclose other hearing aid manufacturers or other hearing aid acousticians from the relevant markets and that sufficient competitive pressure from other competitors will remain in both markets.

In particular, with respect to the regional markets for the sale and fitting of hearing aids, end customers will have supply alternatives which will be sufficient to constrain Sonova's behavior. In addition, the FCO noted that some of these regional markets qualified as *de minims* markets, which are not subject to German merger control.

### *FCO Clears Merger of Savings Banks in Bavaria*

On September 6, 2016, the FCO cleared the merger between Sparkasse Ingolstadt and Sparkasse Eichstätt in Phase I proceedings.[27] Under the savings bank law of Bavaria, the business districts of savings banks generally correspond to the geographic areas of their responsible carrier which is commonly a municipality. Therefore, savings banks in Bavaria are generally prohibited from opening branches and advertising outside of their business district.

Although the merger affects several markets in the banking services sector (some of which the FCO defines as regional in scope) and investigations revealed high market shares in many of the relevant markets for each of the parties, no competitive concerns arise because the savings banks' activities do not overlap geographically and therefore do not lead to an increment in market shares. Further, the merged entity will face significant competition from other banks in each of the relevant regions, *i.e.*, in the areas of Ingolstadt and Eichstätt.

For similar reasons, the FCO also cleared a merger of saving banks in Lower Saxony on August 10, 2016.[28]

## Policy and Procedure

### *DCA Rules on Interest to be Paid on Cartel Fines*

On June 22, 2016, the DCA ruled that interest on a fine imposed is to be paid even where the FCO has extended payment terms—be it in the initial decision or thereafter—and the addressee has paid the amount due within the extension period.[29]

The appeal was lodged by the addressee of a FCO fine decision that was adopted on June 29, 2009. The FCO had imposed a fine of €2.9 million and allowed the addressee to pay in three installments: (i) €1.0 million within two weeks after the fine decision became final and binding; (ii) €1.0 million by December 1, 2009; and (iii) €0.9 million by December 1, 2010. The addressee had not appealed the fine decision. It paid the first installment on March 12, 2009. Subsequently, the payment terms of the following two installments were extended by the FCO. Although the addressee had paid the entire fine on March 25, 2011, in 2014 the FCO claimed payment of interest for the period from February 19, 2009 through March 25, 2011.

http://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2016/22_07_2016_Sonova_Adionova.html.

[27] *See* FCO, press release of September 6, 2016, available in German and English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2016/06_09_2016_Sparkasse_Bayern.html.

[28] *See* FCO, press release of September 6, 2016, available in German and English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2016/10_08_2016_Sparkassen.html?nn=3591568.

[29] *See* Düsseldorf Court of Appeals, decision of June 22, 2016, case V-2 Kart 8/15 OWi, available in German at: https://www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2016/V_2_Kart_8_15_OWi_Beschluss_20160622.html..

The DCA rejected the appellant's position according to which interest accrues only where the addressee has appealed the fine decision and has later withdrawn the appeal. After pointing to a Federal Constitutional Court decision of 2012, by which the provision in question was found to be constitutional, the DCA considered the provision's language, pursuant to which "*interest is payable on fines imposed on legal persons and associations of persons by way of an order imposing an administrative fine*" and "*fines bear interest as of two weeks after service of the order imposing the fine*" to be clear and unambiguous. In the DCA's view, the provision applies irrespective of any appeal or its withdrawal. Interest accrual starts two weeks after the addressee is served with the fine decision. The provision does not contain any indication that the accrual may start later and, in particular, neither the fine's due date (which depends on the date when the fine becomes final and binding) nor a delay with its payment should have any bearing on the accrual. This interpretation is confirmed by a historical and teleological interpretation of the provision. In particular, according to the legislative material available, the provision was meant to prevent addressees from appealing fine decisions with the sole purpose of avoiding interest.

However, the DCA found that parts of the interest claimed by the FCO were time-barred. In the DCA's view, the German standard limitation period of three years—which does not begin to run until the end of the year in which a claim arises—applies in this case. Consequently, claims for interest that already arose in the course of the years 2009 and 2010 were time-barred when the FCO claimed payment of interest in 2014.

***Monopolies Commission Publishes Biennial Report***

The Monopolies Commission (*Monopolkommission*)[30] published its twenty-first Biennial Report (*Hauptgutachten*) entitled "Competition 2016" (*Wettbewerb 2016*) on September 20, 2016.[31] The topics covered in the Biennial Report are: (i) analysis of concentration and FCO's decision practice under the Act against Restraint of Competition ("ARC"); (ii) the proposed 9th amendment to the ARC; (iii) airport regulation; (iv) central marketing of football broadcasting rights; (v) and digital markets (the sharing economy and digital financial services).

The proposed 9th amendment to the ARC is intended to adapt the law to the advancing digitalization of the economy, transpose the EU damages directive into national law, and close gaps in the rules on cartel fines. According to the Biennial Report, the proposed amendment will implement several recommendations made by the Monopolies Commission. It agrees with extending the scope of merger control to take transaction values into account to close gaps that exist in systems that rely entirely on turnover thresholds. The transposition of the EU damages directive into German law will make it easier for companies and consumers to claim damages. The Monopolies Commission welcomes this and makes recommendations as to how the position of market participants harmed by cartels could be improved further. Finally the amendment envisages that liability for infringements of cartel law will be further aligned with the liability principles of European law to close liability gaps resulting from restructuring. This is based on a recommendation from the Monopolies Commission.

In the Biennial Report, the Monopolies Commission also analyzes the regulation of passenger airports. While liberalization has increased competition between airlines, government regulation continues to be necessary in principle at airport level. According to the Biennial Report, there is potential for improvement

[30] The Monopolies Commission is an independent expert committee, which advises the German government and legislature in the areas of competition policy-making, competition law, and regulation. Its reports are being published.

[31] The Report is available on the Monopolies Commission website at: http://www.monopolkommission.de/. The complete Report is available in German only. The complete chapter on digital markets, a summary of the complete report, as well as press releases on different chapters are also available in English.

in airport charge regulation, slot allocation, and ground handling services.

Concerning the central marketing of football broadcasting rights, the Biennial Report supports the FCO's approach to add competitive elements to central marketing, *e.g.,* no-single-buyer rules. However, it recommends a more comprehensive case assessment by the FCO, which should focus on customer preferences and the effects on competition in media technologies.

Concerning cross-sector company concentration in Germany, in the EU as well as by way of minority shareholdings, the Monopolies Commission sees a potential for distortions of competition through institutional investor shareholdings creating indirect links between portfolio companies. It currently does not see a need to expand EU merger control in order to capture non-controlling interests between horizontally or vertically linked companies.

The Biennial Report further assesses the case practice of the German and European competition authorities and courts. In addition, it makes recommendations for statutory changes. In particular, the Monopolies Commission addresses the issues of legislative developments, implementation of quantitative analysis, efficiency defense, compliance defense, and questions of causality in the case of rescue mergers.

In a special chapter, the Biennial Report analyzes competition issues in the sharing economy and digital financial services. At the heart of the sharing economy are digital intermediation platforms used to market the temporary use or to facilitate the shared, often sequential use of goods or services. P2P services, enabling private individuals to offer goods or services commercially, are particularly relevant. The market entry of P2P services leads to increased competition in the sectors concerned and can contribute to reduced prices, enhanced quality, and a greater diversity of supply. From the point of view of competition, distortions of competition between traditional and new providers as a result of asymmetrical regulation should be avoided. To this end, an appropriate regulatory framework should be created for suppliers of P2P services, taking into account the type and extent of the activity. On the other hand, the regulation of traditional suppliers should be reviewed and, if necessary, regulations that are no longer necessary revised. A disproportionate restriction of only occasional activities on P2P services through excessive regulations should be avoided. With regard to digital financial services, the Monopolies Commission holds that interventions should aim at improving the competitive framework and not at protecting individual market participants failing to adapt to changing market conditions.

### *FCJ Rules on the Requirements for Proving Cartel-Related Damages*

On July 12, 2016, the FCJ annulled a decision by which the DCA had granted damages in the amount of €11.5 million (plus interest) to a gambling agent in a follow-on damages action against the Regional Lottery Company of the State of North Rhine-Westphalia and referred the case back to the DCA.[32]

The action was brought in the aftermath of a 2006 decision in which the FCO found the German Association of State Lottery Companies infringed EU and German competition laws by requesting that its members (the regional lottery companies, *inter alia*, the Regional Lottery Company of the State of North Rhine-Westphalia) reject stakes from commercial gambling agents. As of 2005, the plaintiff had tried to implement a stationery intermediary service for stakes in state lotteries. As a result of the Regional Lottery Company of the State of North Rhine-Westphalia's rejection of its stakes, the gambling agent sought compensation for lost profit between 2006 and 2008.

The FCJ held that while the plaintiff could rely on the binding effect of the FCO decision with respect to the occurrence of a cartel infringement, the FCO decision contains no finding as to the infringement's duration. However, in the FCJ's view, the DCA was right to

[32] *See* FCJ decision of July 12, 2016, case KZR 25/14, available in German at: http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&Sort=12288&nr=75559&pos=5&anz=596.

assume that *prima facie* the anti-competitive agreement had a bearing on the regional lottery companies' market behavior until at least 2008.

This circumstance did, however, not suffice to conclude that the plaintiff suffered any damages. Although a court has the power to estimate damages, the DCA failed to consider all significant circumstances necessary to determine whether the gambling agent had suffered any harm. According to the FCJ, it was possible that the regional lottery companies would have refrained from or would have limited their business with the plaintiff even if the cartel infringement had not taken place. In the FCJ's view, the DCA should have considered the regional lottery companies' interest to protect the status quo of the state lottery system and the uncertainties relating to the future regulation of the state lottery system (in 2006, the Federal Constitutional Court had rendered a decision according to which the entire state lottery system was to be revamped). Moreover, the DCA failed to factor in the potential effects of a decline in the regional lottery companies' sales in the period from 2005 through 2008 as well as the temporal bans on commissions for commercial lottery brokering that were in place in some federal states during the period in question.

### *Local Court of Bonn Rules on the Scope of Access to Files by Potential Cartel Victims*

In the first half of 2016, the local court of Bonn (*Amtsgericht Bonn*) rendered several new decisions with regard to requests for access to the FCO's case files by potential cartel victims.[33] According to German criminal procedural law, potential cartel victims can request to be given access to the FCO's case files in order to gain the information necessary to raise damage claims against the cartelists. As in previous decisions, the Local Court of Bonn had to decide about appeals by potential victims who had been denied full access to the file by the FCO as well as about appeals by cartel members who appealed against a the FCO's decision to grant access to the file to potential victims. The court adopted the following principles:

— Potential cartel victims can request access to information with respect to cartel members that did not have a direct business relationship with them. Since the cartel participants are jointly and severely liable for all damages caused by the cartel, potential victims can claim damages from each cartelist and therefore have a legitimate interest in obtaining information on all potential cartelists (while the ultimate decision, whether such claims are indeed justified, is of course subject to the actual damage claim procedure).

— The right of access to file is not limited to potential victims of price cartels, but also covers victims of other illegal, horizontal antitrust agreements, such as territorial agreements (52 OWi 132/15 and 52 OWi 133/55).

— While some results of the FCO's factual findings have a binding effect for the courts in follow-on damage actions, this does not limit the potential victim's access to file that is subject to this binding effect. The potential victim may have a legitimate interest in obtaining further information. Therefore, potential victims will typically have a legitimate interest to access the FCO's entire fining decision (52 OWi 9/16 and 52 OWi 64/15).

— Whether a potential cartel victim has a legitimate interest to access any parts of the FCO's case file besides the actual fining decision is subject to an individual decision by the FCO. The potential victim must point out specific aspects in the FCO's fining decision which indicate that the FCO's case file contains further information that may potentially be necessary to support a damage claim (52 OWi 77/15).

[33] *See* Local Court of Bonn, decisions of January 8, 2016, cases 52 OWi 138/15; 52 OWi 126/15; 52 OWi 132/15; and 52 OWi 133/15; decisions of April 19, 2016, cases 52 OWi 9/16; 52 OWi 10/16; and 52 OWi 64/15; decision of April 29, 2016, case 52 OWi 73/15; and decision of June 1, 2016, case 52 OWi 77/15, all available in German on the FCO's website at: http://www.bundeskartellamt.de/DE/Kartellverbot/Materialien/Amtsgericht_Bonn/Entscheidungen_AG_Bonn_node.html.

Because a potential victim's legitimate interest in obtaining access to the FCO's file has a strictly personal character, it cannot be transferred to an assignee. However, if the potential victim transfers its potential civil damage claims to an assignee, the assignee may have the right to receive certain information on the content of the FCO's fining decision itself, but not according to the rules applicable to genuine potential victims (52 OWi 50/14).

***Düsseldorf Administrative Court Rules on Access to File in Cartel Damages Proceedings Before Labor Court***

On July 7, 2016, the Düsseldorf Administrative Court (the "DAC") annulled the prior decision of the president of a German Regional Labor Court who had denied a potential cartel victim (a public transport company) access to the file of the cartel damages proceedings before that court.[34] In the damages proceedings, a steel trading company that had participated in the so-called "railway tracks cartel,"[35] sought compensation *inter alia* for a fine imposed on it by the FCO in the amount of €191 million from one of its former managing executives for his active in role in the cartel.[36]

The DAC held that a company who potentially suffered damages from a cartel infringement (the "claimant") generally has a justified interest in access to the file in labor court proceedings according to Section 299(2) of the German Code of Civil Procedure (the "ZPO"), thereby adding another claimant-friendly brick to follow-on damages proceedings in German courts. The DAC overturned the decision of the president of the Regional Labor Court, who had held that secrecy interests of both the steel trading company as well as its former employee outweighed the claimant's information interest.

The DAC held that the Regional Labor Court's president wrongly prioritized the steel trading company's and its former employee's secrecy interests secured by the rights to informational self-determination and protection of business and industrial secrets over the claimant's legal information interest triggering the right of access to the file. Not only was the claimant dependent on the Regional Labor Court's file in order to effectively enforce its potential damages claims as other available sources of information[37] were not equally well suited, but there were also strong indications that the file contained relevant and helpful information that would allow the claimant to substantiate and pursue its damages claim. While German claimants mostly rely on the FCO's or European Commission's findings of a cartel infringement when claiming damages, they still need to quantify damages and prove causation. They therefore generally have a legitimate information interest, which is secured by the right of access to the file. Although the labor court proceedings and the forthcoming damages proceedings were not identical, the labor court proceedings would reveal which of the parties contributed to the cartel infringement and to what extent. Further, the DAC emphasized that, according to the Federal Constitutional Court, damages claims on grounds of a cartel infringement are a legitimate objective that may justify an

[34] *See* DAC judgment of July 7, 2016, case 20 K 5425/15, available at:https://www.justiz.nrw.de/nrwe/ovgs/vg_duesseldorf/j2016/20_K_5425_15_Urteil_20160707.html. While it may seem surprising at first glance that an administrative court got involved in this civil proceeding, the denial of the Regional Labor Court's president constitutes an administrative act which can be challenged before an administrative court.

[35] *See* FCO's press releases of July 11, 2013 and March 10, 2016, both available in English on the FCO's website at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/11_07_2013_Moravia-Steel.html?nn=3591568 and http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/10_03_2016_Schienenfall.html?nn=3591568.

[36] *See also* National Competition Report, April – June 2014, p. 15.

[37] Such sources of information included for example the FCO's decision imposing the fine, files of investigations made by the public prosecution or the decisions issued in the labor court proceedings.

interference in otherwise protected secrecy interests. In any event, facts that imply a cartel infringement generally do not qualify as sensitive business secrets.

Finally, the DAC ruled that any confidential information that is unrelated to the cartel infringement, in particular business relations between the steel trading company and third parties (that may even be subject to confidentiality agreements) or private data concerning the former employee, are not covered by the claimant's right of access to the file and need to be protected. The Regional Labor Court's president must define the precise scope of the claimant's access to the file.

## GREECE

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

### Vertical Agreements

#### *The Athens Administrative Appeal Court Provides Important Guidance on the Determination of Fines*

Germanos, a leading telecommunications retailer, established a franchising system in 1990 involving a nationwide operation of shops selling land line, mobile telephone, and internet equipment and services. In 2006, the company was acquired by Cosmote, a subsidiary of the Hellenic Telecommunications Organization.

Between 2009 and 2012, five franchisees filed complaints against Germanos – the franchisor - with the HCC for alleged infringement of Article 1 of the Competition Act. The complainants alleged that the contracts signed with Germanos included provisions whereby (i) their resale prices were set by Germanos; (ii) they had to purchase their products exclusively from Germanos or other companies indicated by Germanos; and (iii) they could deal only in retail trade and not in wholesale trade, which was only allowed under special conditions. Moreover, the contracts included clauses allowing Germanos to terminate these contracts in case of breach of these provisions. Finally, the contracts included a post-termination non-compete clause applicable for 18 months throughout the Greek territory. Consequently, the franchisees claimed that their viability was in danger.

By virtue of its decision 580/VII/2013, the HCC concluded that the above contractual terms constituted infringements by object of Article 1 of the Competition Act and Article 101 TFEU that had lasted from 1990 until 2012. The decision found that Germanos had committed three infringements: (i) fixing franchisees' resale prices; (ii) restricting mutual supplies of products among franchisees; and (iii) imposing on franchisees an 18-month post-termination non-compete obligation. For these three infringements the HCC had imposed on Germanos a single fine amounting to €10.25 million.

Germanos appealed the HCC decision before the Athens Administrative Appeal Court. By virtue of its decision 527/2016, the Court upheld the HCC decision as to the infringements, but annulled the determination of the fine on the grounds that in applying one single fine for all three infringements the HCC erred in law as it should have applied a separate fine for each infringement.

More specifically, the Court stated that the maximum fine imposed for a breach of Article 1 of the Competition Act is, as provided in Article 25 thereof, 10% of the total turnover of the undertaking in the year in which the infringement ceased or, if the infringement continued up to the issuance of the decision, of the total turnover in the preceding business year. It further stated that the purpose of the fine is not only to sanction the infringing undertaking but also to deter that undertaking and others from engaging in such an infringement.

The Court then held that in accordance with the principles of proportionality and effectiveness and taking into account the deterrent effect of the fine, Article 25 should be interpreted to mean that in cases of multiple infringements, the maximum fine provided in Article 25 must apply separately for each

infringement provided if such infringements are independent from each other in terms of nature and content. Furthermore, in cases where an infringement lasts for several consecutive years, it should be regarded not as an independent infringement occurring every year but as a single and continuous infringement, so that the maximum fine ceiling applies with respect to the total term of the infringement. In this specific case, where the HCC had found that three independent infringements had been committed, the maximum fine should apply to each one of them separately and for its total duration, not for each year of the infringement. Finally, the Court stated that for the determination of the maximum fine, the HCC must take into account total turnover of the undertaking in the business year where the infringement had ceased, and not total turnover during the years of the infringement.

The Court decided that it could not itself set the fine for each infringement since this authority was attributed to the HCC under the Competition Act. It therefore referred the case back to the HCC for this purpose.

By virtue of its decision 625/2016, the HCC determined three separate fines for Germanos, one for each independent infringement, namely (i) the fixing of resale prices (considered the most harmful restriction of competition, thus the fine was set at €6.1 million); (ii) the restriction of mutual supplies of products among franchisees (fine of €3.1 million); and (iii) the imposition of an 18-month non-compete obligation (fine of €1.1 million), resulting in a total fine of €10.3 million.

# ITALY

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

## Horizontal Agreements

### *The Council of State Rejects the ICA's Appeal on an ICA Proceeding for Breach of Commitments, and Confirms that in Such Cases a Stronger Standard of Proof is Required*

On August 31, 2016, the Council of State[38] confirmed the ruling of the TAR Lazio,[39] which quashed the ICA's cartel decision[40] against five shipping companies active in the ferry services sector in the Gulf of Naples.

In 2008, the ICA started a cartel investigation concerning the market for passenger sea transport services in the Gulf of Naples and Salerno. In particular, the ICA's investigation focused both on the creation of a consortium ("CLMP") aimed at carrying out a program called "Biglietto Unico"[41] (the "Program") and on an association of undertakings ("ACAP"). According to the ICA, these entities operated with the purpose of facilitating information exchanges and reducing competition among the undertakings concerned.

The ICA concluded the investigation with a commitment decision obliging the companies to terminate CLMP and ACAP and to limit the applicability of the Program to the routes to and from Capri.

On January 28, 2015, the ICA found that the undertakings had breached the commitments by creating a new company, Gescab, and continuing the exchange of sensitive information as carried out by CLMP. The ICA claimed that this was a cartel infringing Article 101 TFEU, designed to share costs

[38] Council of State decision of August 31, 2016; Judgments Nos. 3769, 3770, 3771, 3772, 3773.

[39] TAR Lazio decision of November 4, 2015, Judgments Nos. 12416, 12421, 12422, 12423, 12428.

[40] ICA decision of January 28, 2015, *Organizzazione Servizi Marittimi nel Golfo di Napoli* (Case No. I689C).

[41] This initiative dealt with the adoption of a regulation by the Companies to provide customers with a unique ticket valid for all the routes in the Gulf of Naples. According to the ICA, this ticket led to a restriction of the competition insofar it did not grant other competitors the possibility to access to the market.

and revenues on the basis of predefined historical quotas and not of the activity effectively carried out.

The TAR Lazio upheld the undertakings' appeal against the ICA decision, finding that no breach of commitments occurred and that sufficient evidence of the concerted anticompetitive practice was lacking.

After the ICA's appeal against the TAR Lazio judgment, the Council of State rejected the ICA's arguments on the alleged breach of commitments. According to the Council of State, the incorporation of Gescab - an entity with the same structure, participants, location, and IT tools - is not a breach of the commitment to dissolve CLMP. The Council declared that, notwithstanding these similarities, there is no functional identity in terms of activity carried out, because Gescab replaced CLMP only to guarantee the smooth functioning of the Program for the routes to and from Capri. More specifically, the Council of State held that the similarities between the two entities were justified by the fact that CMLP ceased its activities during the summer peak season.

The Council of State also rejected the ICA's allegation of an anticompetitive agreement pursuant to Article 101 TFEU. The Council of State ascertained the lack of logical consistency between the outcome of the ICA's investigation concluded in 2009 (with the acceptance of the commitments) and that of the proceedings concluded in 2015.

In particular, until 2009, the ICA had criticized the regulations adopted by the Region of Campania and had adopted a commitment decision which did not find a violation. Subsequently, in 2015, the ICA did not mention the effect that the regional regulation had on the undertakings' behavior and concluded that the anticompetitive agreement lasted from 1998 onwards.

The Council of State concluded that the ICA should have deepened its investigation, analyzed the impact of the regional regulation over the undertakings' conduct, and explained the reasons which led it to modify its previous evaluations. It thus declared that the ICA's decision had been seriously affected by the incomplete investigation and the contradictory and inconsistent reasoning.

### *The Council of State Reverses a TAR Lazio Judgment on the Scope of the ICA's Power to Deny Access to Documents on File*

On July 28, 2016,[42] the Council of State reversed the TAR Lazio's judgment against Superbeton S.p.A. ("Superbeton")[43] concerning an ICA decision to deny access to documents on file in cartel proceedings. In particular, Superbeton, already sanctioned by the ICA for participating part in a cartel in the concrete industry (Case I772), asked the ICA for access to confidential documents in novel cartel proceedings against concrete producers (Case I780) in which the company was also involved. The ICA denied Superbeton access to some of these documents because they concerned different geographic areas to those in which Superbeton's alleged anticompetitive conduct had occurred.

Superbeton appealed the ICA's decision refusing access before the TAR Lazio, which rejected the appeal. The TAR Lazio judgment was appealed before the Council of State.

The latter found that Superbeton's request to access the file was legitimate. According to the Council of State, the request aimed at obtaining documents that might prove helpful for the exercise of defense rights in proceedings that could lead to administrative sanctions. It recalled the ECHR *Menarini* judgment,[44] according to which antitrust sanctions have a quasi-criminal nature and the parties must therefore be granted full rights of defense during antitrust proceedings. On this basis, the Council of State concluded that the parties in antitrust proceedings must be granted access to all administrative documents that appear necessary for the exercise of their rights of defense, both in antitrust administrative proceedings and in appeal proceedings before the courts.

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[42] Council of State decision of July 28, 2016, *Superbeton SpA v ICA* (Judgment No. 3409).

[43] TAR Lazio decision of February 25, 2016, *Superbeton SpA v ICA* (Judgment No. 2606).

[44] ECHR decision of September 27, 2011, *Menarini* (Judgment No. 43509).

Hence, the ICA cannot generally refuse access to confidential documents contained in the case file, even if they concern geographic areas not directly related to an undertaking's conduct. Nevertheless, the Council of State clarified that when providing the required documents, the ICA must ensure that no confidential information about third parties is revealed.

**Abuse**

***The TAR Lazio Clarifies the Subjective and Objective Scope of Article 8(2)-Quater of the Italian Competition Law***

On September 28, 2016, the TAR Lazio[45] confirmed the decision of the ICA[46] that Poste Italiane S.p.A. had infringed Article 8(2)-*quater* of Law No. 287/90, applying this provision for the first time. Pursuant to Article 8(2)-*quater* of Law No. 287/90, any undertaking with a legal monopoly or required by law to provide a service of general economic interest ("SGEI"), and which offers goods and services exclusively available to it in connection with its public service mission to its subsidiaries operating in different markets, must also provide the same goods and services to other undertakings that compete with its subsidiaries under equivalent conditions.

Poste Italiane S.p.A. ("PI") runs the universal postal service in Italy and grants its subsidiary Poste Mobile S.p.A. ("PM") access to its network of post offices in order to promote PM's telecommunications services and provide pre-sale and post-sale information about these services. The ICA held that PI infringed Article 8(2)-*quater* of Law No. 287/90 by refusing access to its whole network of postal offices to H3G S.p.A., a competitor of PM.

The TAR Lazio clarified that unlike the provision prohibiting abuse of a dominant position, the provision in Article 8(2)-*quater* of Law No. 287/90 applies regardless of the position of the subsidiary and its competitors on the market (therefore, it applies even if the subsidiary's competitor requesting the access has a higher turnover and market share). The profitability of the SGEI is also irrelevant, since Article 8(2)-*quater* of Law No. 287/90 makes no reference to economic factors.

The TAR Lazio also clarified the scope of application of Article 8(2)-*quater* of Law No. 287/90, when referring, in general terms, to goods or services "exclusively available" in connection with the public service obligations of undertakings holding a legal monopoly or required by the law to provide an SGEI. In particular, it made clear that Article 8(2)-*quarter*: (i) not only refers to goods legally owned by the undertaking, but even to goods awarded under a concession regime; (ii) not only refers to goods used exclusively for SGEI purposes, but generally to goods "exclusively available" to the undertaking providing the SGEI, their exclusive or mixed destination being irrelevant; and (iii) does not concern "essential facilities", since it does not contain any reference to the duplicability and substitutability of the goods or services in question, but only requires that they are exclusively available to the undertaking in connection with the provision of the SGEI.

The TAR Lazio also confirmed that the undertaking holding a legal monopoly or required by the law to provide an SGEI must offer the goods and services to requesting undertakings competing with its subsidiary on equal terms to those applied to its subsidiary.

**Vertical Agreements**

***The TAR Lazio Endorses The ICA's Decision on Corrective Maintenance Services, Preferring Substance Over Form***

On September 6, 2016,[47] the TAR Lazio rejected appeals brought by Telecom Italia S.p.A. ("Telecom Italia") and six other companies[48] ("Maintenance

[45] TAR Lazio decision of September 28, 2016, *Poste Italiane v ICA* (Judgment No. 9965).

[46] ICA decision of December 12, 2015, *H3G/Condotte Poste Italiane and Postemobile* (Case No. SP157).

[47] TAR Lazio judgments of September 6, 2016, nos. 9553, 9554, 9555, 9556, 9559, 9560 and 9561.

[48] Sielte S.p.A., Sirti S.p.A., Ceit Impianti S.r.l., Alpitel S.p.A., Site S.p.A., and Valtellina S.p.A.

Providers") against the decision of the ICA in Case I761.[49]

Telecom Italia is the owner of the public switched telecommunications network in Italy. Following the sector liberalization,[50] Telecom Italia provides, *inter alia*, interconnection services to its competitors, the so-called other licensed operators ("OLOs"), such as Wind Telecomunicazioni S.p.A. ("Wind") and Fastweb S.p.A. ("Fastweb"), the two OLOs involved in this case. To run their businesses, the OLOs are given unbundled access to the local loop ("ULL"), *i.e.*, physical access to Telecom Italia's copper network. The OLOs rely on the Maintenance Providers for the activation and corrective maintenance of their telephone lines. By contrast, Telecom Italia is vertically integrated as it runs its own maintenance services.

In April and July 2012, Wind and Fastweb asked the Maintenance Providers to submit offers for their services. The proposals they received were almost identical and unduly high, thus prompting the OLOs to complain to the ICA.

The ICA found that, between July 2012 and February 2013, the Maintenance Providers engaged in a single and continuous infringement of Article 101 TFEU by agreeing on the economic conditions of their offers in relation to the tenders made by Wind and Fastweb, fixing prices and hampering the implementation of the sector liberalization. In particular, the infringing undertakings aimed at preventing the development of a market for the unbundled provision of maintenance services to the OLOs. This was possible due to Telecom Italia acting as a facilitator. Accordingly, the ICA imposed a €28 million fine on Telecom Italia and the Maintenance Providers (together, the "Appellants").

This case is of interest insofar as it shows how the administrative court prefers a substantive approach over a formalistic one.

The Appellants before the TAR Lazio put forward two main groups of pleas in law.

In the first group of pleas, the Appellants alleged the absence of a liberalized (*i.e.* contestable) market, or even the lack of a market *tout court*. The Appellants argued that the ICA could not identify a relevant market for the maintenance services. According to them, the Italian Communications and Media Authority (AGCOM) empowered to adopt the liberalization measures making unbundled access to the local loop possible was not under a *duty* to act. The liberalization law merely entrusted the authority with a *discretionary power* to do so. In the Appellants' view, the envisaged liberalization measures were not actually adopted, so a contestable market for maintenance services did not exist.

The TAR Lazio rejected these pleas. It took a substantive approach and ruled that the definition of a relevant market bears no relation to the relevant liberalization measures. Indeed, for the purposes of competition law, a "relevant market" is a broad economic concept, whereby the demand and the offer for a specific product or service meet.

In the present case, the maintenance services are well-defined services with no substitutes on the market. The existence of maintenance providers proves the existence of an offer for these services; and Telecom Italia and the OLOs require the regular provision of these services, *i.e.*, there is a demand for these services.

In the second group of pleas, the Appellants contested the finding of an infringement on different grounds. They claimed that it had not been demonstrated that their conduct could be categorized as a single and continuous infringement, nor could it be maintained that the object of their conduct was anticompetitive. In addition, the ICA had not qualified each single act as

[49] ICA decision of December 16, 2015, *Mercato dei servizi tecnici accessori* (Case No. I761).

[50] Decree Law of February 9, 2012, no. 5, converted into Law of April 4, 2012, no. 35.

constituting an agreement or a concerted practice, and had failed to assess the actual effects of conduct on the market.

The TAR Lazio rejected all the grounds of appeal.

Most interestingly, the TAR Lazio reasoned that a single and continuous infringement usually consists of a combination of different conduct, perpetrated at different moments. First, through agreements and concerted practices, the participants define the scope and the object of the cartel. Second, *i.e.*, once the cartel has been established, its operation is facilitated by means of an exchange of information.

This concept enhances the antitrust authority's efficiency, sparing it the effort of qualifying all of the components of a long-term infringement under the categories of Article 101 TFEU. Thus, it is unnecessary for every part of the overall coordination to be categorized as an agreement or concerted practice.

Accordingly, the TAR Lazio concluded that the ICA not qualifying every single act is compatible with the prohibition of Article 101 TFEU, and does lead to the creation of a new category of infringement, contrary to the Appellants' pleas.

The concept of a single and continuous infringement simply confirms that, in the case of an antitrust violation made up of different conduct, the conduct is defined differently but still falls within the sphere of application of the same norm and, therefore, is all prohibited. The effectiveness of Article 101 TFEU is consequently preserved.

Finally, the TAR Lazio also rejected the appeals challenging the amount of the fine.

## NETHERLANDS

*This section reviews developments under the Competition Act of January 1, 1998 (the "Competition Act"),*[51] *which is enforced by the Netherlands Authority for Consumers and Market (Autoriteit Consument & Markt, "ACM").*[52]

### Horizontal Agreements

#### *ACM Lowers Fine in Bell Pepper Cartel*

In 2012, the ACM fined bell pepper grower cooperatives and sales organizations €14 million for price fixing. Following judgments on appeal and recently submitted data on the financial position of the fined undertakings, the ACM lowered the fines from €14 million to €1.6 million.[53]

On appeal of the 2012 decision, the Rotterdam District Court noted that when the ACM fined associations of undertakings such as the bell pepper grower cooperatives, it should have applied a cap of 10% of the combined annual turnover of its members, meaning such a fine should have been based on the total turnover of the cooperatives' pepper growing members.[54] However, when it comes to fining the sales organizations involved, the Rotterdam District Court held that the ACM should have taken into account the turnover of the sales organizations themselves rather than that of the pepper growers. Moreover, from recently submitted financial data of the fined undertakings, it became apparent that the fined cooperatives were partially unable to pay the fines.

Accordingly, the ACM lowered the fines so as to ensure that the bell pepper growers were not fined twice. It also determined that the fine calculation should take into account an organization's ability to pay over the long term. Therefore, the financial position of each member forming part of an

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

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

[53] Case 7036, ACM decision of June 10, 2016.

[54] Rotterdam District Court, Judgment of July 9, 2015, ECLI:NL:RBROT:2015:4885.

association of undertakings has to be considered. This consideration led the ACM to further reduce the fines.

***District Court Dismisses Follow-On Damages Action in Elevator-Escalator Cartel***

On July 20, 2016, the Central Netherlands District Court ("CNDC") dismissed a private damages action by claim vehicle East West Debt ("EWD") following the elevator and escalator cartel decision of the European Commission.[55]

In 2007, the European Commission found that lift manufacturers KONE, Otis, Schindler, ThyssenKrupp, and Mitsubishi had participated in an illegal market-sharing and price-fixing cartel by coordinating the allocation of contracts for the installation and maintenance of elevators and escalators.[56] The European Commission held that their conduct had given rise to four parallel cartels covering different geographic areas, including the Netherlands, and imposed fines amounting to €992 million. Following this decision, EWD brought a private damages action against the cartel participants and their parent companies before the CNDC, on behalf of 144 hospitals and health care institutions that allegedly suffered damages of over €31 million due to the operation of the cartel in the Netherlands.

The CNDC rejected EWD's claim. It established that Dutch civil law (and not EU competition law) is applicable, under which parent companies are in principle not liable for their subsidiaries' actions. In addition, the case at hand did not concern an exceptional situation that would have warranted a departure from this principle. The CNDC also declared that EWD had failed to prove that the claimants it represents had indeed suffered harm from the lift manufacturers' conduct. In particular, the CNDC found that EWD had not produced sufficient information regarding the amounts for which it requested damages, *e.g.*, EWD did not specify to which individual transactions, when, and under what circumstances those amounts relate. According to the CNDC, failure to provide such information cannot be justified by the large number of claimants and transactions for which EWD acted.

***Supreme Court Rules on the Application of Passing-On Defense in Damages Actions***

On July 8, 2016, the Supreme Court of the Netherlands confirmed the application, under Dutch law, of the passing-on defense in private damages actions.[57]

The case arose out of a private damages action by electricity company TenneT, following the European Commission's gas insulated switchgear ("GIS") cartel decision of 2007.[58] TenneT claimed it had paid overcharge prices for GIS installation to cartel participant ABB. However, ABB contended that TenneT had passed these costs on to its customers, and thus did not suffer any damages as a result of the cartel.

The Supreme Court of the Netherlands was confronted with the question of whether the passing-on defense under Dutch law should be assessed in the context of the determination of the extent/amount of the damage or in the context of the doctrine of *voordeelstoerekening*.[59] This doctrine stipulates that if one event causes damage *and* confers benefit on the injured party (demonstrated by a direct causal link), such benefit must, so far as is reasonable, be offset against the damages claimed.

First, the Supreme Court of the Netherlands noted that the EU Antitrust Damages Directive had not yet been transposed into Dutch law, but that the applicable law should nonetheless be interpreted in a way compatible with the directive. The Supreme Court of the Netherlands ruled that, as a matter of Dutch law, the passing-on defense is available in private damages actions and could be assessed *both* in the context of the determination of the extent/amount of the damages as

55 Central Netherlands District Court, Judgment of July 20, 2016, ECLI:NL:RBMNE:2016:4284.

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

57 Dutch Supreme Court, Judgment of July 8, 2016, ECLI:NL:HR:2016:1483.

58 *Gas Insulated Switchgear* (Case COMP/F/38.899), Commission decision of January 24, 2007.

59 Eastern Netherlands District Court, Judgment of January 16, 2016, ECLI:NL:RBONE:2013:BZ0403.

well as in the context of the doctrine of *voordeelstoerekening*, and that courts are free to choose their approach. According to the Supreme Court of the Netherlands, both approaches assess whether the injured party would be in the same situation absent the harmful event. Coming back to its traditional case law on the matter, the Supreme Court of the Netherlands aligned (*i.e.*, relaxed) the standard of proof of the *voordeelstoerkening* doctrine with that of the determination of damages, considering it unnecessary for the benefit to result from the exact same event as that of the damages.

### Mergers and Acquisitions

#### *District Court Upholds ACM Decision to Block Hospital Merger*

On September 29, 2016, the Rotterdam District Court upheld the ACM's decision to block the merger between hospitals Stichting Albert Schweitzer Ziekenhuis and Rivas Zorggroep.[60]

In its decision on July 15, 2015, the ACM blocked the merger between the hospitals, considering it would significantly reduce competition between the parties for clinical and non-clinical general care services in Dordrecht and Gorinchem.[61] The behavioral remedies offered by the parties at the time, *i.e.*, a price cap on the annual health insurance charges of one party and a limit on the changes that may be brought to the services offered by the other party, were deemed insufficient to eliminate the competition concerns identified by the authority. The parties appealed the prohibition decision.

In its judgment, the Rotterdam District Court confirmed the ACM's definition of the relevant product and geographic markets and upheld its finding that the merger would significantly reduce competition. Furthermore, the Rotterdam District Court found that the ACM was right in dismissing the behavioral remedies offered by the parties. In particular, it found that the remedies required the ACM to exercise regulatory control on price and quality of the services provided by the merged entity, while without the merger, market forces operate without any intervention.

Interestingly, the Rotterdam District Court's judgment was delivered three weeks after the ACM published a study showing that hospital mergers do not improve the quality of care and are not necessary to achieve improved treatment of patients.[62]

## SPAIN

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

### Horizontal Agreements

#### *Spanish Supreme Court Upheld a Decision Finding a Regional Government Responsible for Anticompetitive Behavior*

On July 18, 2016, the Spanish Supreme Court overturned a Spanish High Court judgment concerning participation by the Government of Andalusia in a price-fixing agreement between sherry grape and wine producers.[63] The Supreme Court thereby upheld a rare decision of the Spanish Competition Authority (at the time, the "CNC"), which declared a government body responsible for an infringement of the prohibition of anticompetitive agreements.

On October 6, 2011, the CNC found that the Agriculture and Fishing Department of the Government of Andalusia (the "CAP") had played an active role in organizing and monitoring the effective

[60] Rotterdam District Court, Judgment of September 29, 2016, ECLI:NL:RBROT:2016:7373.

[61] Case 14.0982.24, *Albert Schweitzer Ziekenhuis en Rivas Zorggroep*, ACM decision of July 15, 2016.

[62] ACM, *Ziekenhuis en kwalitieit van zorg*, available at: https://www.acm.nl/nl/publicaties/publicatie/16256/Ziekenhuisfusies-en-kwaliteit-van-zorg/.

[63] Case 2946/2013, Judgment of the Spanish Supreme Court of July 18, 2016.

implementation of a price-fixing agreement between sherry producers from September 2002 until at least July 2007, and declared the CAP, and the other participants in the collusive cartel, responsible for an infringement of the prohibition of anticompetitive agreements enshrined in Article 1 of the LDC and Article 101 TFEU.[64] The CNC did not, however, impose a fine on the CAP or the Government of Andalusia, given the novel nature of its decision to attribute responsibility for an infringement of the prohibitions contained in the LDC to a government body.

According to the CNC, the CAP contributed to the conclusion and implementation of the agreement, and hence to a serious and long-lasting restriction of competition in the market. Specifically, the CAP: (i) participated in the adoption of the Strategic Plan for the Jerez Region in September 2002, where grape producers and winemakers fixed grape and must prices for the following four years; (ii) chaired and/or took part in the different meetings of the Monitoring Committee to that Strategic Plan until at least May 2006; and (iii) ensured that the agreement was complied with by all participants, and even proposed a review of the agreement after it was found that some signatories were deviating from it. Further, in the view of the CNC, the involvement of the CAP exceeded functions attributed to the CAP by law.

The CNC decision was set aside by the Spanish High Court on the grounds that the CAP had not acted as an economic operator but had simply exercised its planning and management competences in the wine sector, and therefore its actions were outside the scope of the prohibition of anticompetitive agreements enshrined in Article 1 of the LDC and Article 101 TFEU.[65] Article 4(1) of the LDC, on which the High Court relied, explicitly excludes conduct that is carried out in application of other laws from the scope of application of Article 1 of the LDC. Crucially, the High Court noted that the CAP might have misused its public powers through its involvement in the sherry producers' agreement. However, that did not make the conduct of the CAP subject to the prohibition of anticompetitive agreements. To the extent that the CAP was using public prerogatives, its conduct could only have been challenged through the ordinary judicial review mechanisms to which the regional government is subject ("*jurisdicción contencioso-administrativa*"), not through CNC infringement proceedings.

The Supreme Court overturned the High Court's judgment, confirming the original CNC decision as regards the CAP. The Supreme Court dismissed the argument that the use of public prerogatives should only be subject to judicial review ("*jurisdicción contencioso-administrativa*") or that it should trigger a blanket exclusion from the prohibition of anticompetitive agreements. In the words of the Supreme Court, the mere fact that a public power is invoked by government does not automatically trigger the exclusion contained in Article 4(1) of the LDC (and equivalent EU law precedents). A careful assessment of each specific activity and whether it may be considered an activity capable of preventing, restricting, or distorting competition is required. This is particularly important when no formal administrative procedures are used by the government, as was the case in the CAP's involvement in the sherry producers' agreement. Ultimately, the Supreme Court concluded that the CAP had played an important role in the distortion of competition and upheld the declaration of an infringement.

**Abuse**

***The CNMC Fined a Manufacturer of Car Wash Machines for Abusing a Dominant Position and for Participating in an Anticompetitive Agreement***

On June 30, 2016, the CNMC issued a decision by which it imposed a €638,770 fine on Istobal, a Spanish manufacturer and supplier of car wash machines, for infringing Articles 1 and 2 of the LDC.

Infringement proceedings against Istobal were initiated in November 2014, as a result of a complaint by a provider of technical assistance services for car wash machines (the so called "SATs") about Istobal's refusal

[64] *Productores uva y mosto jerez* (Expte. S/0167/09) CNC decision of October 6, 2011.

[65] Case 626/2011, Judgment of the Spanish High Court of July 16, 2013.

to supply car wash machine spare parts to SATs outside Istobal's own network of technical services and authorized SATs.

Car wash-related markets as described by the CNMC comprise several vertically related activities. Manufacturers of car wash machines sell their products to manual wash stations and petrol stations. While in operation, washing machines are serviced either by the manufacturer's own technical services, authorized SATs (who typically enter into selective distribution agreements with machine manufacturers for the necessary parts), or independent SATs. To provide repair services, SATs require spare parts, which they normally purchase directly from manufacturers. A majority of spare parts are "captive" parts, which means they can only be used with a particular machine or brand of machines. Car wash machine manufacturers may procure spare parts from third party manufacturers, but third party producers do not usually sell spare parts to SATs.

The CNMC identified three different relevant product markets: (i) the manufacturing and marketing of car wash machines; (ii) the manufacturing and marketing of spare parts; and (iii) the provision of after-sales services. The CNMC considered the markets for the manufacturing and marketing of car wash machinery and of spare parts to be national in scope, since manufacturers aim to supply the entire national territory through their sales and distribution networks. On the other hand, the CNMC considered that the market for the provision of after-sales services could be province-wide (due, amongst other factors, to the need of car wash machine owner's to have the machines repaired quickly after a failure). However, the CNMC did not consider it necessary to reach a conclusion on market definition, since its findings of anticompetitive conduct did not change under either definition.

The CNMC established that:

— Istobal tacitly agreed, both with Istobal authorized SATs and with third party manufacturers of Istobal spare parts, not to supply spare parts to independent SATs. This was found to constitute an infringement of the prohibition of anticompetitive agreements enshrined in Article 1(1) of the LDC.

— Istobal refused to provide independent SATs with the technical information necessary to repair Istobal's car wash machines. While the CNMC decision is not entirely clear as to what infringement this conduct would constitute, the CNMC appears to conclude that, to the extent that the refusal to provide such technical information was also tacitly agreed with authorized SAT suppliers, it would also constitute an infringement of Article 1(1) of the LDC.

— Istobal agreed with Istobal authorized SATs that each authorized SAT would only sell Istobal spare parts within an exclusively assigned geographic area. This was found to significantly restrict competition between authorized SATs and to contribute to excluding independent SATs from the after-sales market. In light of Istobal's "monopoly position" for the upstream sale of Istobal spare parts, this was considered to constitute an infringement of Article 1(1) of the LDC.

— Istobal refused to supply spare parts to independent SATs, both directly and through implicit agreements with authorized SATs and third party parts manufacturers (as described above). Istobal also delayed such supply by imposing unnecessarily onerous payment processing requirements on independent SATs. In light of Istobal's dominant position in the supply of Istobal spare parts, these types of conduct were found to infringe Article 2 of the LDC.

In the proceedings, Istobal tried to justify its behavior based on the need to preserve brand image, which might be damaged in the event that the maintenance and repair of its machines were not performed to a certain level of quality. The CNMC rejected such justification.

The CNMC imposed a total fine on Istobal of 2% of the company's turnover in 2015. In its decision, the CNMC said that this was a modest fine, given the alleged gravity of the infringing conduct and the

implied damaging effect of Istobal's conduct on competition in after-sales markets. However, in establishing a relatively low fine, the CNMC also took into account the limited ability of car wash machine users to pass higher after-sales costs on to their own customers.

The CNMC decision was appealed by Istobal before the Spanish High Court. A number of points in the motivation of the CNMC decision could raise attention on appeal, including the classification of certain types of conduct as collusive and/or abusive behavior, and the required standard of proof regarding the effects of the infringements established by the CNMC.

**Policy and Procedure**

***The Supreme Court Clarified the Rules Governing Statutory Deadlines in Antitrust Infringement Proceedings***

On May 23, 2013, the CNC issued an infringement decision against distributors of plumbing and hygiene products, in connection with their participation in a price-fixing cartel between 2008 and 2011, prohibited under Article 1 of the LDC.[66] In its decision, the CNC imposed a fine of €608,119 on Suministros Marval SL ("Suministros Marval"), who appealed the decision alleging it was made after the applicable statutory deadline had passed.

Under Spanish law, the time limit for issuing and notifying an infringement decision is 18 months from the date of the decision to start an investigation. This period can be suspended, in which case the deadline for the CNC to issue an infringement decision is extended by the number of days during which the procedure is suspended.[67]

In the present case, the initial deadline for the CNC to adopt and notify a decision was December 10, 2012. The deadline was suspended by the CNC on three occasions: twice before the end of the initial deadline (on November 17, 2011 and on July 5, 2012), for 79 days each; and once more after the end of the initial deadline, on April 29, 2013, for 19 days.

In its judgment of November 2, 2015,[68] the High Court found that the third suspension could not be lawfully taken into account, since it had been agreed to after the initial deadline. Therefore, the High Court concluded that the effective deadline to adopt and notify an infringement decision was May 15, 2013 (*i.e.*, the initial deadline plus the extensions adopted on November 17, 2011 and on July 5, 2012), and annulled the decision of the CNC, since it was notified on May 27, 2013, twelve days after the deadline.

In its judgment of July 26, 2016, the Supreme Court reversed the judgment of the Spanish High Court.[69] The Supreme Court concluded that all three suspensions should be taken into account for the purposes of calculating the deadline, regardless of whether the suspensions were granted before or after the initial 18-month period had lapsed. According to the Supreme Court, if the reasoning of the Spanish High Court was followed, the 18-month period that the CNC has to adopt and notify a decision would *de facto* be reduced. In these circumstances, the Supreme Court found that the deadline to adopt and notify the decision was June 4, 2013, thus the CNC decision of May 23, 2013 was lawfully adopted in time.

[66] Case S/0303/10, *Distribuidores Saneamiento*, Decision of the CNC of May 23, 2013.

[67] This is technically done by adding these days to the end of the initial deadline.

[68] Case 351/13, Judgment of the Spanish High Court of November 2, 2015.

[69] Case 3811/2015, Judgment of the Supreme Court of July 26, 2016.

# SWEDEN

*This section reviews developments concerning the Swedish Competition Act 2008, which is enforced by the Swedish Competition Authority ("SCA"), the Swedish Market Court (the Swedish Market and Patent Courts as of September 1, 2016) and the Stockholm City Court.*

## Horizontal Agreements

### *The Stockholm City Court Dismisses the SCA's Claim that Five Year Non-Compete Clauses are Anticompetitive*

On May 16, 2016, the Stockholm City Court issued its judgment in a case brought by the SCA concerning non-compete clauses entered into by Alfa Quality Moving AB ("Alfa") and NFB Transport Systems AB ("NFB"), and between Alfa and ICM Kungsholms AB ("ICM"), as part of Alfa's acquisition of the international businesses of ICM's and NFB's moving businesses.

Alfa acquired NFB's international moving business in 2006, followed by ICM's international moving business in 2010. The non-compete clauses stipulated that neither NFB nor ICM could establish an international moving business for effectively 5 years. None of the transactions were reportable to the SCA. The SCA considered that the non-compete clauses went beyond acceptable ancillary restraints due to their duration exceeding 2 years and, therefore, contravened Chapter 2 Article 1 of the Swedish Competition Act 2008 (equivalent to Article 101 TFEU).

The Stockholm City Court first examined the SCA's claim that the non-compete clauses should not have extended beyond 2 years as the transaction, in addition to the business itself, only included goodwill but not know-how. The Stockholm City Court agreed with the SCA that the knowledge included in the transaction was too general to qualify as know-how. However, the Court noted that the mere absence of know-how did not entail that a non-compete of more than 2 years was anticompetitive as all the relevant facts and circumstances of the case had to be taken into account. In particular, due to the particular conditions and characteristics of the international moving market, with NFB and ICM remaining active on neighboring markets, NFB's and ICM's strong reputation and customer network, high degrees of customer loyalty, and long-term customer contracts; the Court found that non-compete clauses of 3 years were objectively necessary and proportionate for the transaction.

Having established that a 3 year non-compete clause was acceptable, the Stockholm City Court dismissed the SCA's claim regarding the non-compete clause between Alfa and ICM, as it had only been effective for 9 months. The Court then examined the 5 year non-compete clause between Alfa and NFB.

The SCA argued that the non-compete clause between Alfa and NFB was a restriction of competition by object and, as such, there was no need to examine any actual or potential effects on competition. The Stockholm City Court acknowledged that a non-compete clause was counter to the idea of competition, however, it made clear that the legal and economic context of an agreement must be taken into account when making an assessment as to its anticompetitive nature.

The Stockholm City Court conducted an analysis of the legal and economic context in which the non-compete clause was entered into and found that the non-compete clause was restricted only to NFB's ability to operate on the international moving market, NFB had no incentive to re-enter the international moving market, and, in any event, the damages which NFB would incur from the clause if it decided to re-enter the market would be too small to act as a deterrent. Alfa and NFB were only potential competitors at a purely theoretical level, therefore the non-compete clause did not give rise to a sufficient degree of harm to warrant a finding of an infringement by object.

Having established that the non-compete clause was not anticompetitive by object, the Stockholm City Court examined whether it had any anticompetitive effects. However, the Court found that the SCA had not conducted a sufficient investigation in order to ascertain the relevant geographic market and,

therefore, was not capable of showing that the non-compete clauses had had any appreciable anticompetitive effects on the market. Consequently, the Stockholm City Court dismissed the claim made by the SCA concerning the non-compete clause between Alfa and NFB.

**Abuse**

***Stockholm City Court Dismisses the SCA's Claim Against an Airport Operator but Permits Claim Following Prior Market Court Decision on the Same Matter***

On June 9, 2016, the Stockholm City Court issued its judgment in a case brought by the SCA against Swedavia AB ("Swedavia"), the Swedish airport operator in control of, *inter alia*, Stockholm Arlanda Airport. The SCA claimed that charging taxi drivers for the use of name-signs inside the airport when picking up customers was an abuse of its dominant position in contravention of the Swedish Competition Act.

Prior to this claim, the SCA had received a complaint about the same matter but decided not to pursue an investigation. Instead, it gave leave for the complainant to bring its claim directly to the Swedish Market Court in accordance with rules of the Swedish Competition Act 2008. On November 23, 2011, the Swedish Market Court held that Swedavia's behavior did constitute an abuse of its dominant position and ordered it to remedy its taxi handling system under a penalty of two million krona should it fail to do so.

In response to this judgment, the SCA brought an action and requested that the Stockholm City Court should fine Swedavia on the grounds of this abuse of dominant position. Swedavia initially argued that the SCA was barred from bringing such a claim, as the Market Court had already adjudicated on the matter and Swedavia would thereby risk being penalized twice for the same offence. This procedural issue was addressed separately, first by the Stockholm City Court, and on appeal by the Market Court. Ultimately, both courts held that the SCA was entitled to bring a claim for fines after a court sanction. Specifically, the Market Court held that the initial judgment of November 23, 2011 provided for a possible penalty should Swedavia not address the competition concerns with its taxi handling system. The penalty was considered an *ex post* deterrent for Swedavia while the SCA's claim for fines addressed behavior which had occurred prior to the Market Court's judgment. Consequently, there was no risk of double jeopardy as each enforcement action addressed two distinct periods.

The Stockholm City Court held that Swedavia's policy to reduce the number of taxis at Arlanda airport through the imposition of a charge for taxi drivers to bring a name-sign into the airport was at least possible of anticompetitive effects as it ultimately led to increased consumer prices. However, upon examining the objective justifications put forward by Swedavia, namely that the charge's purpose was to address parking capacity problems, increase customer pick-up efficiency for both pre-booked and non-pre-booked fares, and help traffic safety at the airport, the Stockholm City Court found that Swedavia's policy did not breach antitrust rules.

The SCA has chosen not to appeal this judgment, stating that it has achieved its procedural objective of testing whether it was permitted to bring a case relating to subject matter previously adjudicated by the Courts.

**Mergers and Acquisitions**

***Stockholm City Court Approves District Heating Pipes Merger***

On August 4, 2016, the Stockholm City Court issued its judgment in the case brought by the SCA against the proposed merger between Logstor A/S's subsidiary Logstor Sverige Holding AB ("Logstor") and Powerpipe Systems AB ("Powerpipe"). The SCA sought to have the proposed merger prohibited on the basis that it would contravene Chapter 4 of the Swedish Competition Act 2008.

Logstor and Powerpipe are both manufacturers of district heating pipes in Sweden, which provide the network systems of pipes that conduct warm water to radiators and taps in households. Logstor sought to

purchase Powerpipe, however, the SCA argued that such a merger would reduce the number of competitors on the Swedish market, create a dominant undertaking, and potentially cause price increases or worse offers for customers.

The Stockholm City Court undertook a comprehensive review of the relevant market definition put forward by the SCA in its assessment of the transaction, focusing on geographic market definition. The Court found that the relevant product market was that for district heating pipes, potentially also including district cooling pipes, but noting that such a distinction would not impact any competitive assessment. The Court did not include prototype plastic pipes as these had not yet progressed to the stage of viable commercial production.

With respect to geographic market definition, the Stockholm City Court found that the SCA's claims of static market shares in Sweden over time were incorrect and that differing market shares across Member States should not be too heavily relied upon as individual transactions in Sweden can have the effect of reallocating sales from market participants to a greater extent than is the case in a larger market. The Court also noted that manufacturers and customers of district heating pipes conducted their sales and purchases across borders of Member States through a number of parties other than Logstor and Powerpipe.

Additionally, customers did not show a preference for locally manufactured district heating pipes with all manufacturers being capable of meeting the different specifications requested by customers for the pipes, which often differed by country.

Regarding costs, the Stockholm City Court held that price differences across Member States were not systematic nor were transport costs a decisive factor as these were relatively small and manufacturers often offset these with various other costs such as that of raw materials. Moreover, there were no regulatory barriers or costs to limit the geographic market on a national basis. As a result, the Stockholm City Court concluded that the relevant geographic market was northern Europe.

Under the Stockholm City Court's market definition, the parties had a combined market share of 35%, which the Stockholm City Court held has not been indicative of dominance by either the SCA or European Commission in their decisional practice. Moreover, the market for district heating pipes was characterized by overcapacity and low switching costs. The Stockholm City Court further held that Powerpipe could not be considered a disruptive new entrant and did not play a competitive role beyond its market shares, and there was substantial countervailing buyer power as pricing practices were transparent and customers were well-informed.

In conclusion, the Stockholm City Court held that the merger could go ahead as the anticompetitive concerns raised the SCA were not substantiated. The SCA has appealed against this decision.

**Policy and Procedure**

***New Patent and Market Courts***

On September 1, 2016, the Court of Patent Appeals and the Market Court ceased to exist under the Swedish courts system. Both were replaced by a single Patent and Market Court, along with a single Patent and Market Court of Appeal.

Following the Parliamentary decision of March 2, 2016 which introduced the new court, it was recognized that the cases which emerged from intellectual property law, competition law, and marketing law were among the most extensive, complex, and intensive cases before Swedish courts. By centralizing hearings before expert judges on these matters, both Parliament and the courts sought to improve the efficiency and standard of proceedings.

All adjudication of cases and matters relating to intellectual property law, competition law, and marketing law will be handled by this new court and its appellate division. Cases relating to these subject matters originating from the general courts and administrative courts have been centralized at the new court. As a court of first instance, the Patent and Market Court is a division of Stockholm City Court. Judgments and decisions reached by the Patent and

Market Court can be appealed to the Patent and Market Court of Appeal, which is a division of the Swedish Court of Appeal.

## SWITZERLAND

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

### Horizontal Agreements

#### *The FCC Fines Eight Companies for Their Involvement in a Construction Bidding Cartel*

On October 4, 2016, the FCC fined Between 2002 and 2009, eight companies five million Swiss Frances for their involvement in a road construction and civil engineering bid rigging cartel in German speaking Switzerland (districts of See-Gaster, March, and Höfe). The companies had been found to have colluded from 2002 to 2009. One company was not sanctioned because of its cooperation.

The investigation was opened in April 2013 following dawn raids, following which the FCC produced a statistical analysis of the minutes of submissions. According to the FCC's press release,[70] the investigation showed that between 2002 and mid-2009 De Zanet AG, Hagedorn AG, Oberholzer Bauleistungen AG, Implenia AG Schweiz (Batigroup), Walo Bertschinger AG St. Gallen, Gebr. P. und J. Reichmuth AG, Toller Unternehmungen AG, and Bernet Bau AG agreed and coordinated their tender offers in order to manipulate the public and private bids for road and civil engineering construction projects in the districts of See-Gaster, March, and Höfe.

Under these agreements, the aforementioned companies met for so-called "market research meetings". At these meetings, they discussed regularly updated lists containing current public and private projects of road construction and civil engineering. The companies involved informed each other about their respective interest in participating in such projects. They then agreed on which company was to win the contract, with the other companies submitting higher offers. Between 2002 and mid-2009, hundreds of roads and civil engineering construction projects were affected. The agreements have been characterized by the FCC as horizontal price agreements between competitors within the meaning of the Competition Act.

When setting the fines, the FCC took into account the seriousness of the offense and the duration of the overall agreement. One company benefited from full immunity because it reported its involvement in the bid rigging arrangement after the FCC's first inspection and cooperated with authorities. Another company received a partial fine reduction.

## UNITED KINGDOM

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

### Horizontal Agreements

#### *High Court Rules on the Territorial Scope of Article 101 TFEU and Jurisdictional Issues in Follow-On Damages Action Based on the LCD Cartel*

On July 29, 2016, the High Court issued its decision determining preliminary issues in a follow-on damages action launched after the European Commission's Liquid Crystal Display ("LCD") cartel decision.[71] On

[70] A French version of the press release is available at: https://www.weko.admin.ch/weko/fr/home/actualites/communiques-de-presse/nsb-news.msg-id-64011.html.

[71] *Iiyama (UK) Ltd) v. Samsung Electronics Co Ltd* [2016] EWHC 1980 (Ch).

December 8, 2010, the European Commission fined six manufacturers of LCD panels for price fixing.[72]

The trial before the High Court related to three principal issues: (i) an application to strike out the claims on the basis that cartel conduct outside the EU fell outside the territorial scope of Article 101 TFEU and was thus not actionable within the EU; (ii) whether claims could be brought against undertakings which were not addressees of the European Commission decision; and (iii) whether the High Court had jurisdiction in respect of two defendants incorporated in South Korea.

The High Court decided all preliminary issues in favor of the claimants. It held that, since according to the European Commission decision the cartel had been implemented within the EU, the claimants had to prove that the loss they suffered resulted from this implementation. The fact that they had been affected as indirect purchasers from the implementation of the cartel in Asia did not suffice. The claimants argued that they would have bought monitors in the EU at lower prices but for the implementation of the cartel in the EU (*i.e.*, they had been harmed by paying a higher price to buy monitors outside the EU when they could have bought the monitors at lower prices in the EU had the cartel not been implemented there). Therefore, the European Commission refused to strike out the claims finding that the claimants had an arguable case that they had suffered recoverable loss and damage as a result of the cartel.

The High Court also found that a claim could be brought against two subsidiaries of a South Korean company, despite the fact that they had not been addressees of the European Commission decision and were not involved in any of the cartel activities. In reaching this conclusion, the High Court considered that the undertakings in question were wholly owned subsidiaries of a company that had charged cartel prices, that the case law was not yet entirely clear on this issue, and that under the common law rules of attribution it was possible to attribute knowledge of the operation of the cartel to these subsidiaries. Therefore, the claimants had an arguable case as to the liability of these undertakings.

Finally, the High Court held that the claimants had rightfully launched proceedings against two South Korean companies. One of these companies had subsidiaries in England and Wales, and both of them were addressees of the European Commission decision. It would not be appropriate to commence litigation in a third jurisdiction with respect to only one undertaking because of the danger of conflicting findings in different court decisions.

Even though this is only a first instance judgment ruling on preliminary issues, the decision is important as it indicates that indirect purchasers might not be precluded from bringing damages claims under Article 101 TFEU if they can prove that they were not able to buy at competitive prices within the EU as a result of the cartel.

### *CMA Publishes Full Infringement Decision on Agreements Aimed at Delaying the Potential Entry of Generic Competitors into the UK Paroxetine Market*

On August 10, 2016, the CMA published the non-confidential version of its decision in the pay-for-delay Paroxetine case.[73] The CMA found that GlaxoSmithKline plc ("GSK") agreed to pay suppliers of generic versions of paroxetine (an anti-depression medication) with the aim of delaying them from entering the UK market for paroxetine. It fined the undertakings involved in these agreements £44.9 million for infringement between 2001 and 2004.

The case started in August 2011, when the Office of Fair Trading ("OFT", the former U.K. competition authority) launched an investigation in relation to pay-for-delay agreements in the supply of paroxetine. In 2001, certain undertakings active in the pharmaceutical sector were attempting to enter the UK market for paroxetine by supplying a generic version of the drug. GSK's own version of paroxetine was very profitable and at the time, GSK held certain patents in relation to paroxetine. Initially, GSK argued

[72] *Liquid Crystal Displays* (Case AT.39309), Commission decision of December 12, 2010.

[73] *Paroxetine* (Case CE-9531/11), decision of the Competition and Markets Authority of February 12, 2016 (publication of the non-confidential version of the decision on August 10, 2016).

that the generic version of paroxetine would infringe its patents and initiated proceedings against generic producers, including Generics (UK) Limited ("GUK") and Alpharma Limited ("Alpharma"). However, before the patent dispute was resolved by the court, GSK agreed with these generic producers that in exchange for payments and other value transfers totaling over £50 million they would distribute only limited quantities of GSK's branded product and would not enter the UK paroxetine market with their own generic versions of paroxetine.

The CMA found that these agreements infringed the Chapter I prohibition and Article 101 TFEU, as well as the Chapter II prohibition. It found that agreements to restrict the quantities of GSK's product that could be distributed by generic companies violated Article 101 TFEU and the Chapter I prohibition because those agreements had the object and effect of restricting competition in the supply of paroxetine in the UK. The CMA further considered that there was uncertainty as to the outcome of the patents litigation that GSK had initiated. If GSK had not won, generic producers would have entered the market with their own rival products, resulting in both GSK's prices and market share declining. Therefore, the terms of these settlement agreements infringed competition rules. The CMA stressed the value of patent litigation for the protection of competition because challenging a patent before a court is a mechanism of testing the validity of a "legal monopoly," which constitutes a barrier to entry.

The CMA also found that GSK infringed the Chapter II prohibition by making cash payments and other value transfers to induce potential competitors to delay their independent entry into the UK paroxetine market. GSK was dominant in the supply of paroxetine in the UK and used its power to restrict competition, thus deviating from its responsibility to not allow its conduct to harm competition.

In setting the appropriate amount of fines, the CMA took into account the serious nature of the infringements and the need for deterrence. However, it also had regard for the fact that, at the time of the infringements, there had been no finding that such conduct infringed competition law. The CMA fined GSK £37.6 million, GUK £5.8 million, and Alpharma £1.5 million.

## Mergers and Acquisitions

### *CMA Publishes its Final Report Appointing a Monitoring Trustee and Accepting the Ladbrokes/Gala Coral Merger*

On July 26, 2016, the CMA published the final report in its Phase II investigation into the anticipated merger between Ladbrokes plc ("Ladbrokes") and Gala Coral Group Limited ("Gala Coral").[74] The merging parties represent, respectively, the second and third largest bookmakers in the UK by a number of licensed betting offices ("LBO"). The CMA's final report identified 642 local areas where the transaction may be expected to result in a substantial loss of competition, thereby leading to a worsening of the offer made to customers at both a local and national level.

The CMA found that the divestiture of a Ladbrokes or a Coral LBO in each of these areas would be an effective and proportionate remedy to address these concerns, provided it would be sold to a suitable purchaser and not reacquired by the merging parties within 10 years. In that respect, the CMA estimated that the parties would have to sell 350 to 400 betting shops. However, if the parties should fail to find suitable purchasers for the shops to be divested, or otherwise carry out the effective remedies, prohibition of the transaction would be the only remaining effective remedy.

Following the publication of its final report, the CMA also requested that Ladbrokes and Gala Coral appoint a monitoring trustee in order to secure their compliance with the interim undertakings they had made during the investigation. According to these undertakings, which the CMA made public on July 18, 2016, Ladbrokes and Gala Coral agreed not to

[74] CMA Report, *A report on the anticipated merger between Ladbrokes plc and certain businesses of Gala Coral Group Limited*, July 26, 2016, available at: https://assets.publishing.service.gov.uk/media/5797818ce5274a27b2000004/ladbrokes-coral-final-report.pdf (last visited November 8, 2016).

complete the transaction or impair the ability of the businesses to compete independently, and not to exchange confidential information. The monitoring trustee was to provide the CMA with regular and detailed information regarding Ladbrokes's and Gala Coral's compliance with the undertakings, including the viability of the shops to be divested and an overview of the status of the divestiture process.

The CMA initiated the Phase II investigation of the transaction under the fast-track procedure on January 11, 2016. On May 20, 2016, it published provisional findings where it identified 659 local areas where the merger may result in a substantial loss of competition.

### *CMA Accepts Undertakings in Lieu of Reference in Tullett Prebon / ICAP Merger*

On September 8, 2016, the CMA announced that it has decided to accept undertakings from Tullett Prebon plc ("Tullett") and ICAP plc ("ICAP") in lieu of referring Tullett's proposed acquisition of ICAP's voice and hybrid broking and information businesses to a Phase II investigation under the Enterprise Act 2002.

In its Phase I investigation, the CMA found that the merger may result in a substantial lessening of competition in the supply of voice and hybrid broking in relation to oil trading desks. This would result in the merged entity being able to raise prices for both wholesale and retail customers, in particular because ICAP and Tullett are such close competitors.

The CMA consulted on proposed undertakings in lieu of a Phase II reference in August 2016. These undertakings proposed the sale of ICAP's London-based oil desks, together with key staff, which are responsible for providing broking services to customers based in Europe, the Middle East, and Africa. The divestment proposal was subject to the purchaser being approved up-front by the CMA. To that end, the parties have already entered into an agreement with INTL FCStone Ltd.

The CMA has therefore announced that it is satisfied that the proposed remedy will address the competition concerns and has decided that the proposed transaction will not be referred to a Phase II investigation.

### *CMA Full Text of Decision on Anticipated Acquisition by Whittan Intermediate of Masondixie*

On September 7, 2016, the CMA announced its decision to approve Whittan Intermediate Limited's ("Whittan") acquisition of Masondixie Limited ("Masondixie").

Whittan is a UK manufacturer of storage equipment, including pallet racking, shelving, and lockers, active across Europe in the form of a number of brands. Masondixie is the holding company of Lion Steel Equipment Ltd ("Lion"), a UK manufacturer of lockers and cabinets. The parties overlap in the supply of all-steel lockers, shelving, benching, and locker stands, as well as locker installation services and spares.

With regard to the supply of all-steel lockers, the CMA found that the parties would have a combined UK market share of between 30–40% and 40–50%, with an increment of 10–20%. However, the CMA also found evidence that the parties target different customer segments, with Lion focusing more on specialized and customized products. The CMA's investigation also indicated that the parties were not close competitors and that the majority of customer respondents were unconcerned by the merger. In the market for the manufacture of shelving in the UK, the CMA found that while the parties would also have a 30–40% market share, the increment was very low.

On this basis, the CMA concluded that there would still be sufficient competition post-transaction, and that the merger does not give rise to a realistic prospect of a substantial lessening of competition in either market. The CMA therefore decided not to refer the transaction for Phase II investigation, approving the transaction.

## Policy and Procedure

### *CAT Publishes Application to Bring Collective Action Against Mastercard*

On September 21, 2016, the Competition Appeal Tribunal ("CAT") published a notice of an application to commence collective proceedings under section 47B

of the Competition Act 1998 against MasterCard. [75] The proposed collective proceedings would combine follow-on actions for damages arising from the European Commission's 2007 decision[76] finding that MasterCard's EEA multilateral interchange fees breached Article 101(1) of the TFEU, which the European Court of Justice upheld in September 2014.[77]

In its decision, the European Commission held that, from May 22, 1992 until December 19, 2007, the MasterCard payment organization and the legal entities representing it had infringed Article 101 TFEU by effectively setting a minimum price that merchants had to pay to their acquiring bank for accepting payment cards branded by MasterCard in the EEA.

Following the introduction of the Consumer Rights Act 2015, individuals have the right to bring private damages actions and authorized representatives also have the right to bring collective actions of their behalf. In this case, the proposed class representative (Mr. Walter Hugh Merricks CBE) made an application for a collective proceedings order permitting him to act as the class representative to bring proceedings against MasterCard. The class would comprise those individuals who, between May 22, 1992 and June 21, 2008, purchased goods and/or services from businesses selling in the UK that accepted MasterCard, where those individuals were both resident in the UK for a continuous period of at least three months and at least 16 years old.

For the collective action to proceed, the CAT must approve the proposed class representative and the action as a whole. If the CAT considers that the requirements have been met, it will make a collective proceedings order.

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75 *Notice Of An Application To Commence Collective Proceedings Under Section 47b Of The Competition Act 1998* (Case No. 1266/7/7/16), Competition Appeal Tribunal notice of September 21, 2016.

76 *MasterCard* (Case COMP/34.579), *EuroCommerce* (Case COMP/36.518), and *Commercial Cards* (Case COMP/38.580), Commission decision of December 19, 2007.

77 *MasterCard Inc. and Others v. European Commission* (Case C-382/12 P) EU:C:2014:2201.

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