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BELGIUM

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

Unilateral Conduct

Belgian Pro League Abandons Proposed New Relegation Rules Following Objection by the Auditorate

Following concerns expressed by the Auditorate on March 16, 2011, the Belgian Pro League abandoned its proposal to revise the relegation rules for the 2011-2012 football season onwards.[1] Under the proposed new rules, relegation from the Pro League would be decided by playoffs between two Pro League clubs and three second division clubs, and the two Pro League clubs to participate in these playoffs would be the teams with the worst average Pro League rankings over the past three seasons (while the current relegation rules designate the two relegating clubs based only on their performance in the past season).

Following complaints from second division clubs, the Auditorate carried out a preliminary investigation into the proposed new rules. On March 16, 2011, the Auditorate announced that, if the new relegation rules were to be adopted, the Auditorate would initiate formal proceedings under the APEC. According to the Auditorate, the new relegation rules would limit the risk of relegation for the majority of current Pro League football clubs. As a consequence, the risk of relegation for clubs that have recently been promoted or will be promoted in the future to the Pro League would significantly increase, which would adversely affect the economic interests of those clubs.

In light of the findings of the Auditorate, the Pro League abandoned its proposal to revise the relegation rules. The current relegation rules will therefore remain in force for at least the next three seasons.

DENMARK

This section reviews the competition law developments under the Danish Competition Act, as set out by executive order No. 1027 of August 21, 2007, and enforced by the Danish Competition Council ("DCC"), assisted by the Danish Competition and Consumer Authority ("DCCA"), and the Danish Competition Tribunal ("Tribunal").

Horizontal Agreements

A Danish District Court Has Imposed Fines On Two Environmental Laboratories And Their Directors For Bid Rigging

On March 25, 2011, two Danish environmental laboratories – Miljoelaboratoriet ("Miljoelaboratoriet") I/S and Milana A/S ("Milana") and their directors were found to have infringed Section 6 (1) (corresponding Article 101 TFEU) of the Danish Competition Act by coordinating prices and by bid rigging.

In February 2007, two regional environmental centers in Denmark owned by the state – Miljoecenter Roskilde and Miljoecenter Nykoebing Falster – issued offers for the supply of laboratory analysis to several individual environmental centers. The Danish Competition Authority found that Miljoelaboratoriet and Milana coordinated their prices and divided contracts between them. The case was brought before the District Court by the Public Prosecutor for Serious Economic Crime, and both laboratories and their directors were found to have infringed the Competition Act.

When setting the fines for the laboratories, the District Court held that the price coordination and the bid rigging constituted serious infringements of the Competition Act. However, because the two laboratories had low market shares and had achieved limited profit from the contracts with the environmental centers, the District Court set the fines at DKK 500,000 for each laboratory and DKK 25,000 for cach director. The fines to the individuals were in line with the case law of the Supreme Court. The judgment has been appealed.

1 The Belgian Pro League is the top league competition for association football clubs in Belgium.

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Unilateral Conduct

Danish Broadcaster TV 2 Has Abused Its Dominant Position By Granting Rebates

On March 18, 2011, the Supreme Court upheld a judgment by the Eastern High Court finding that a rebate system used by Danish broadcaster TV 2 constituted an abuse of TV 2's dominant position on the market for national television advertising, because the system was potentially loyalty enhancing and thereby contrary to Section 11 of the Danish Competition Act and Article 102 of the TFEU. The rebate system in question included a progressively increasing rebate depending on the annual turnover between the advertiser and the TV 2 group.

The DCCA had in December 2005 adopted a decision finding that the rebate system used by TV 2 – especially the rebate based on annual advertisement – was loyalty enhancing and therefore contrary to Section 11 of the Competition Act and Article 102 of the TFEU. The Danish Competition Appeal Tribunal annulled this decision in November 2006 with regard to the annual rebate, as the Tribunal found that a rebate should be assessed in accordance with the special characteristics of the specific market on which it was employed, and that this type of rebate was common on the specific market in question. The Tribunal found that the Council had failed to establish that the rebate system constituted an abuse.

The case was brought before the Eastern High Court of Denmark in 2006, which annulled the Tribunal's decision, thereby confirming the earlier decision by the Council. The Supreme Court found that the rebates offered by TV 2 were both progressive and retroactive. The marginal rebate was as high as 35%. The fact that the rebates were generally agreed in advance for the entire year did not imply that the rebates were unlikely to have a loyalty enhancing effect.

Unlike the Tribunal, the Supreme Court did not find that the characteristics of the specific market in question were decisive. On the contrary, the Supreme Court implicitly suggested that because a rebate system tends to have a loyalty enhancing effect based on its form, that is sufficient in itself for a finding that they were loyalty-enhancing.

FINLAND

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

Policy And Procedure

Parliament Passes New Competition Act

On March 11, the Parliament passed a new Competition Act. Changes to the current Act are mainly procedural, increasing the prioritization of cases in the FCA, extending inspection rights, and clarifying the rules for sanctions, leniency, and damages. The main substantive change relates to the merger control test. The new Act is expected to enter into force on September 1, 2011.

In merger control, the new Act replaces the current dominance test with the so-called SIEC test (significant impediment to effective competition), thereby harmonizing Finnish law with the EU Merger Regulation. According to the new Act, the Market Court may, on the FCA's proposal, prohibit a transaction, order it to be abandoned, or impose conditions if the concentration would significantly impede effective competition in Finland or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position.

The new Act will abolish the current time limit of one week from the signing of an acquisition agreement to submit a merger notification. However, a transaction must still be cleared before it can be implemented. The FCA can extend the procedural time limits in case of significantly incomplete or inaccurate information or delays in providing information.

If the notifying party agrees to remedies, such conditional approval decision can no longer be appealed: the conditions imposed by the FCA must either be implemented or the deal abandoned. Hence, if the notifying party does not agree with the remedies required by the FCA, the only alternative is to challenge the FCA's prohibition proposal in the Market Court.

As regards other changes, the new Act makes it clear that a group of undertakings is to be understood as "one economic entity," thus making the parent company liable for infringements of wholly-owned subsidiaries, in accordance with the case law of the Court of Justice of the European Union. Furthermore, the principle of successor liability in corporate transactions is explicitly included.

The maximum amount of fines is specified as 10% of the turnover of each undertaking (or economic entity) during the last year of the infringement. Currently, the relevant year has been the last year before the imposition of the fine. Provisions on leniency are also to be clarified.

The new Act also makes it clear that anyone who has suffered harm from an infringement is entitled to claim damages. Currently, public entities and consumers are excluded. Limitation periods for damages claims are also clarified. The right to claim damages expires ten years from the date on which the infringement was committed or, in the case of a continuous infringement, ten years from the date on which the infringement ceased. In case the damages claim is based on a prohibition decision of the FCA or the FCA's proposal on the imposition of an infringement fine, the limitation period expires one year after the decision has gained legal force.

Finally, the FCA will be given inspection powers corresponding to those of the European Commission. The FCA will be able to conduct an inspection also in other premises than the business premises of the suspected undertaking, for instance in a private residence, provided that it has received an advance authorization from the Market Court.

FRANCE

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

Horizontal Agreements

The Paris Court Of Appeals Renders A Decision Concerning Agreements Between Joint Ventures And Their Parent Companies

On January 20, 2011, the Paris Court of Appeals held that a joint venture that was not commercially and financially independent from its parent companies could not, under the circumstances, have entered into an anticompetitive agreement with one of them since both parties were parts of a single economic entity. In its decision, the Paris Court of Appeals amended and restated the decision rendered by the FCA on April 15, 2010, in the port of Le Havre's stevedoring case.[2] Unlike the FCA, the Court of Appeals found that the joint venture known as Terminal Porte Oceane (TPO) could not have entered into an agreement within the meaning of Article L. 420-1 of the French Commercial Code and Article 101 TFEU with its parent company, since it lacked the autonomy from its parent companies to do so.

On April 15, 2010, based on a complaint filed by APMM, the FCA imposed fines amounting to €625,000 on Perrigault, TPO (a joint-venture between AP Moller-Maersk and Perrigault), and two other companies for their participation in two anticompetitive agreements: (i) TPO, Terminal Normandie MSC and Générale Manutention Portuaire (sanctioned for an agreement concerning the allocation of berths); and (ii) TPO and Perrigault (sanctioned for a an agreement to allocate customers). The FCA decision was challenged by TPO and Perrigault only with respect to the customer allocation agreement.

The FCA had found that TPO was sufficiently autonomous from Perrigault for the two not to be regarded as forming a single economic unit, for the following reasons: (i) TPO and its parent companies presented the joint venture as an autonomous entity for merger control purposes; (ii) TPO had sufficient resources and an independent commercial policy; and (iii) TPO acted autonomously on the market. As a result, the FCA concluded that the customer allocation agreement between TPO and Perrigault fell within the scope of Article L. 420-1 of the French Commercial Code and Article 101 TFEU.

In its decision, the Paris Court of Appeals recalled the requirements for a subsidiary to be regarded as autonomous from its parent companies – *i.e.*, that the independence of a subsidiary was to be established through "a concrete analysis of the conditions under which this subsidiary has conducted its business as well as its behavior on the market."

In this particular case, the Court of Appeals noted that: (i) each parent company held 50% of the subsidiary; (ii) the joint venture was overseen by both parents on an equal basis; (iii) the subsidiary's commercial policy was decided by the management board on which both parents were equally represented; (iv) the subsidiary's management could not implement a commercial strategy autonomously; and (v) the subsidiary's business had been suspended following a dispute between its parents which had prevented the implementation of any commercial policy.

2 Paris Court of Appeals, Judgment n°2010/08165 of January 20, 2011 http://www.autoritedelaconcurrence.fr/doc/ca10d13_jan11.pdf.

The Court of Appeals concluded that even if the two parent companies did not agree on a commercial strategy for TPO, TPO had no commercial independence and could not have adhered to the alleged anticompetitive practices on its own. Accordingly, the practices in question were not the result of a common agreement between Perrigault and TPO, but rather the unilateral decision of Perrigault.

Policy And Procedure

French Supreme Court Rejects The Decision Of The Court Of Appeals On The Ground That Unfairly Obtained Recordings Are Inadmissible

On January 7, 2011, the French Supreme Court confirmed that the French Code of Civil Procedure applies to proceedings before the FCA and that therefore, telephone conversations recorded by one party without the knowledge of the other cannot be used as evidence by the FCA.[3]

On December 5, 2005, the FCA fined consumer electronics manufacturers for entering into a vertical agreement with their distributors for purposes of fixing the retail price of their branded brown goods (FCA Decision no. 05-D-66). The case was brought to the attention of the FCA by a small retailer who produced recordings of telephone conversations obtained without the knowledge of the speaker in support of its complaint. Despite the defendants' objections, the FCA admitted these recordings as evidence in accordance with the rules of evidence that apply in criminal matters rather than the provisions of the French Code of Civil Procedure.

On June 2007, the Paris Court of Appeals upheld the FCA's decision, but one year later the French Supreme Court remanded this decision to the Paris Court of Appeals (decision no. 664 of June 3, 2008) on the basis of Article 6(1) of the European Convention of Human Rights (the "ECHR"). The Supreme Court held that the recording of a telephone conversation made without the knowledge of the speaker is unfair and the recording itself is not admissible as evidence.

On remand, the Paris Court of Appeals nevertheless reaffirmed its initial position that the FCA has procedural autonomy and therefore is not subject to the provisions of the French Code of Civil Procedure (Case 2008/11907, April 29, 2009). The Court of Appeals held that unfairly obtained evidence should not be excluded automatically. It noted that the FCA is allowed to impose punitive sanctions in order to fulfill its mission, and that the admissibility of such evidence should be assessed in light of the objectives being pursued and the situation and rights of the parties against whom it is being used. According to the Court, unfairly obtained evidence should only be excluded when it compromises a party's right to a fair trial, and/or the adversarial principle and/or the right of defense of those against whom the evidence is brought.

In response to the Court of Appeals' decision, the Plenary Assembly of the Supreme Court affirmed the applicability of the French Code of Civil Procedure in competition law proceedings unless expressly provided otherwise in the Commercial Code, thus rejecting the notion that the FCA has procedural autonomy. Based on Article 9 of the French Code of Civil Procedure which provides that each party must prove the required facts in support of its claim in accordance with the law, and Article 6(1) ECHR, the French Supreme Court concluded that recordings of telephone conversations made without the speaker's knowledge are unfair and thus may not be admitted as evidence by the FCA.

The FCA Issues Draft Notice On Method By Which Antitrust Fines Are To Be Calculated

On January 17, 2011, the FCA issued a draft notice setting out the method by which antitrust fines are to be calculated (the "draft Notice") in response to the publication last September of a report recommending the adoption by the FCA of such guidelines.[4] The Minister of the Economy requested the draft Notice to address the confusion and uncertainty concerning the French approach to antitrust sanctions following the decision of the Paris Court of Appeals to drastically reduce the fines imposed by the FCA in a steel cartel case from a total of €575 million to €75 million.

While the draft Notice includes a discussion of the issues relating to a party's exercise of its rights of defense before the FCA, it focuses exclusively on method by which antitrust fines are to be calculated. According to the draft Notice, its purpose is to educate companies caught in antitrust investigations on the way that antitrust fines are calculated by the FCA and to facilitate the Paris Court of Appeals' review of the FCA's decisions.

In France, the current system for antitrust sanctions is based on Article L. 464-2 of the French Commercial Code. This Article sets forth four criteria that affect the level of a fine: (i) the seriousness of

3 French Supreme Court, Judgment no. 587 of January 7, 2011, Sony-Philips, http://www.courdecassation.fr/jurisprudence_2/assemblee_pleniere_22/587_7_18654.html.

4 Draft Notice on the Method of Setting Fines, January 17, 2011, available at http://www.autoritedelaconcurrence.fr/doc/projet_communique_sp_17janvier2011.pdf.

the infringement; (ii) the significance of the damage to the economy; (iii) the company's specific circumstances; and (iv) whether the company has repeatedly breached competition rules. It further states that fines may not exceed 10% of the company's worldwide consolidated turnover. However, until now the FCA has never issued any specific guidelines regarding the calculation of fines and case law provides very few and sometimes contradictory indications of how these criteria are to be applied.

According to the draft Notice, the FCA will start calculating the basic amount of a fine by referring to the sales generated in France by the infringing company in the relevant market affected by the infringement. The basic amount of a fine will be between 0% and 30% of such sales, depending on the seriousness of the infringement and the resulting damage to the economy. This methodology is consistent with the European Commission's Fining Guidelines, except that (unlike the Fining Guidelines), there is no "entry fee" (*i.e.*, a lump sum of 15%-25% of the value of sales) in the draft Notice. If the infringement lasts for more than one year, the FCA will apply 100% of this amount for purposes of these calculations in the first year of the infringement and add 50% of this amount for each subsequent year (instead of 100% as in the Commission's Fining Guidelines).

This basic amount may be adjusted in order to take into account (i) the infringing company's individual behavior and position on the market; (ii) mitigating and aggravating circumstances; (iii) discounts that may be granted on the basis of the French leniency program or settlement procedure; (iv) the legal maximum amount (*i.e.*, 10% of the company's total worldwide sales and (v) the company's ability to pay the fine.

As for the repeated infringement of antitrust rules, which is treated as a distinct aggravating factor in French law, the draft Notice indicates it is unlikely to affect the final amount of the fine if the delay between the actual and the previous offenses exceeds twenty years. If the delay is less than twenty years, however, the FCA will increase the fine by 5%-50% depending on the nature of the infringements and the delay between the actual and the previous offences.

The draft Notice was released for public review until March 11, 2011, which enabled the FCA to receive comments from various participants (attorneys, economists, professional organizations, consumer associations, etc.). It was then publicly discussed on March 30 during a roundtable organized by the FCA. The final version of the Notice and the written comments should be published on the FCA's website by the summer of 2011.

French Supreme Court Extends The Effects Of The French Settlement Procedure To Companies That Choose Not To Settle

On March 29, 2011, the French Supreme Court affirmed the decision of the Paris Court of Appeals of January 26, 2010, in the temporary employment case, confirming that the FCA does not need to prove the existence of collusion where at least one company opted for the settlement procedure.[5]

On February 9, 2009, the FCA imposed a fine of €94.4 million on the three main global players in the temporary employment service industry – Adecco, Manpower, and Vediorbis – for anticompetitive coordination in violation of Article L. 420-1 of the French Commercial Code and Article 101 TFEU (Decision n°09-D-05). During the administrative proceedings, Adecco and Vediorbis opted for the settlement procedure set forth in Article L. 464-2 III of the French Commercial Code. Under this procedure, a company's fine may be reduced if it (i) does not dispute the objections raised against it and (ii) provides substantial, credible and verifiable commitments to modify its conduct in the future. Manpower did not opt for the settlement procedure. On appeal, the FCA decision was affirmed by the Paris Court of Appeals.

Manpower lodged an appeal before the French Supreme Court. First, Manpower challenged the evidentiary weight attributed by the FCA and the Paris Court of Appeals to the fact that Adecco and Vediorbis had chosen to settle rather than dispute the existence of a collusion. According to Manpower, this course of action did not amount to a confession of the existence of an anticompetitive practice, and the FCA could not impose a fine on Manpower until it could prove the existence of a collusion.

The French Supreme Court dismissed this argument. The Court held that since Adecco and Vediorbis had not disputed the collusion allegation, and therefore had not challenged the materiality of the facts, their legal qualification, the FCA and the Paris Court of Appeals had properly inferred that the only issue to be considered was that of Manpower's participation in the collusion (but not the actual existence of the collusion). The French settlement procedure

5 French Supreme Court, Judgment n°10-12913 and 10-13686 of March 29, 2011, http://www.autoritedelaconcurrence.fr/doc/cass_travail_temporaire.pdf.

therefore has an impact not only on companies that choose to settle but also on other participants of the practices under investigation. While the authority must establish that companies that choose not to settle have participated in any collusive conduct, it need not prove the existence of a collusion.

Second, Manpower claimed a violation of the principle of equality of arms on grounds that it had not been given access to the electronic mailboxes of Vediorbis' employees that were seized during the investigation. These mailboxes were classified under a single confidential exhibit in the file. However, the case handler had been given access to this exhibit and had obtained the declassification of certain elements in order to support the statement of objections. Manpower argued that it did not have access to the mailboxes and was therefore prevented from using any counter-evidence that they may have contained.

The French Supreme Court held that Manpower's lack of access to the electronic mailboxes was not a violation of the principle of equality of arms. The Court relied on the fact that Manpower had not used its right to request the declassification of certain elements of these mailboxes pursuant to Article R. 463-15 of the French Commercial Code. The Court rejected Manpower's appeal in its entirety, ignoring Manpower's argument that it could not have used such right in practice, given that it did not know the content of the mailboxes and therefore could not justify a declassification request.

GERMANY

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

Horizontal Agreements

FCO Fines Fire-Fighting Vehicles' Manufacturers And Independent Accountant

On February 10, 2011, the FCO imposed a fine on three German manufacturers of fire-fighting vehicles for bid rigging (more precisely price-fixing, quota agreements, and market sharing) since at least 2001, totaling approx. €20.5 million.[6] The FCO also fined several company representatives and, interestingly, an independent accountant based in Switzerland for complicity in the cartel. The participants were providing the independent accountant with their individual sales data and based their quota arrangements on the statistics prepared by him. They also used these statistics to monitor each other's adherence to the agreed quota.

All three companies participating in the cartel as well as the independent accountant benefitted from the FCO's leniency program. In addition, the companies agreed to settle the case with the FCO. It is unclear whether the accountant also settled with the FCO. Investigations against a fourth manufacturer are still ongoing.

By fining the independent accountant, the FCO followed the Commission's practice (most recently in AC Treuhand; there the Commission imposed fines on an independent consultancy firm in a similar context). Under German law on administrative offenses, any legal entity or individual that contributed to the infringement may be fined, regardless of their role in the infringement (either as a main offender or for complicity).

FCO Suspected Cartel Infringement In Planned Settlement In Tender Dispute ("Buying Competition")

From December 2010 to February 2011, the FCO investigated a contemplated settlement in a judicial tender review proceeding within the public transport sector. The FCO suspected that the parties' intended settlement would infringe Section 1 GWB/Article 101 TFEU, but it ultimately did not open formal proceedings.[7]

The parties of the planned settlement considered that Abellio Rail NRW GmbH ("Abellio"), which had requested a judicial tender review proceeding for the direct award of a contract for public transportation services (*i.e.*, local train services) to its competitor DB Regio NRW GmbH ("DB Regio"), would withdraw its request for a review. In return, DB Regio would subcontract parts of the local train services in question to Abellio.[8]

The FCO found that, through its request for a judicial tender review proceeding, Abellio kept the competition for contracts for local train services alive ("competition for the market") and thereby exerted

6 A press release in English is available at: http://www.bundeskartellamt.de/wEnglisch/download/pdf/Presse/2011/110211_PM_Feuerwehrfahrzeugenhersteller-E2.pdf; a press release in German can be obtained at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Presse/2011/2011-02-10_PM_Feuerwehr.pdf; a case summary in German can be obtained at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell11/Fallberichte/B12-011-09-endg.pdf?navid=36.

7 A case summary in German is available at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell11/Fallberichte/B09-001-10-01-68.pdf?navid=36.

8 In the judicial tender review proceeding, Abellio argued that there should have been a proper tender procedure because general procurement law (Section 97 *et seq*. GWB) applied to the award of public transport services via local trains. The public transport utility and DB Regio, in contrast, argued that the German Railway Act was applicable, which would have allowed a direct award of the contract. The court of first instance followed Abellio's argument. On appeal, the Düsseldorf Court of Appeals referred the question to the FCJ.

competitive pressure on DB Regio. By withdrawing its request, Abellio would have given up its ability to compete for contracts for local train services for several years, and thereby would have eliminated the competitive pressure on DB Regio. The FCO concluded that the planned settlement would not compensate for the elimination of competition for the award of the contract for local train services itself because, following the planned settlement, Abellio would have only been active as a subcontractor in the market for commission-based transport services. This market would only be downstream to the market for the award of the contract itself, and DB Regio would have determined the scope of Abellio's activities. The settlement raised thus the suspicion that DB Regio would simply "buy out" competition because of the economic link between the withdrawal of the request for a judicial review and DB Regio's offer of a subcontract to Abellio.

Due to the FCO's concerns, the parties refrained from the settlement. In the tender review proceedings, the Federal Court of Justice ("FCJ") finally decided in Abellio's favor, namely that general procurement law applies to the award of public transport services via local trains. This decision significantly improves the competitive conditions for public transportation services.

FCO Fines Manufacturers Of Consumer Goods For Illicit Information Exchange

On March 17, 2011, the FCO fined three German consumer goods manufacturers for illegal information exchange. The fines in total were €38 million.[9] Investigation into a fourth major consumer goods manufacturer is ongoing.

Proceedings were initiated in 2008 following a leniency application by Mars GmbH, to which the FCO granted full immunity. The other participants agreed to settle the case with the FCO. According to the FCO, the companies exchanged relevant information on retailers' requests during annual negotiations and informed each other about how they intend to react to these requests. The products involved included several consumer goods like confectionary, frozen pizza, pet food, and detergents. In addition, some manufacturers exchanged information on intended price increases.

The FCO seems to increasingly punish the participation in "pure" information exchange. Already in 2008, the authority imposed fines on manufacturers of luxury cosmetics for engaging in illegal exchange of information.[10] However, the fine in the present case was the highest imposed on cartel participants for this type of infringement.

Unilateral Conduct

FCJ Decides That MAN Does Not Hold A Dominant Position Vis-À-Vis A Car-Repair Shop Requesting Admittance To MAN's Network

On March 30, 2011, the FCJ rejected a claim brought by an authorized dealer and repair shop of Daimler commercial vehicles to be admitted to MAN's network of authorized repairers. The FCJ ruled that MAN had not abused a dominant position when rejecting the request.[11] The Court held that for the purposes of market definition, the relationship between MAN offering its goods, services and (IP) rights to repairers was relevant, not the relationship between MAN repair shops and final customers, as the lower court had erroneously held.

The FCJ found that the relevant market comprised all products, services, and rights that facilitate entry to the (downstream) market to offer repair and maintenance services for commercial vehicles – *i.e.*, the sale of spare parts, the provision of diagnose tools, repair tools, training in brand-specific know-how, as well as admittance to the network. Importantly, the FCJ clarified that this market was not brand-specific, *i.e.*, was not limited to goods, services, or rights supplied by MAN. The FCJ concluded that MAN did not hold a dominant position on this market. The "admittance to MAN's network" was not an input required for a repair shop to be active on the downstream market for repair and maintenance services. While a repair shop that was not admitted to the network of a particular brand might not be able to provide some services for vehicles of this brand, such as warranty services, goodwill services, or services in the context of recall campaigns, the repair shop could still offer services outside of the scope of the warranty. The FCJ referred to the existence of several independent repair shops to illustrate that these

9 A press release in English is available at: http://www.bundeskartellamt.de/wEnglisch/download/pdf/Presse/2011/110317_PR_HEMA_E_Final.pdf; a press release in German can be obtained at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Presse/2011/2011-03-17_PM_HEMA__FINAL.pdf.

10 *See* National Competition Report July-September 2008, p. 6.

11 FCJ, Decision of March 3, 2011, Case KZR 7/09, available in German at http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=76a12694f6f7285c8a47bf541875f660&nr=56009&pos=0&anz=1.

other services were economically attractive. The FCJ clarified that MAN's possibly high share on the downstream market for repair and maintenance services for MAN commercial vehicles had no bearing on its position on the market to facilitate entry to the downstream market.

While the FCJ did not deal with the Commission's market definition practice and instead followed its own analysis, its ruling may not necessarily conflict with the Commission's practice. Only with respect to the end-customer market has the Commission previously taken the position that service markets are brand-specific.

Düsseldorf Court Of Appeals Rules On Restitution Of Excessive Electricity Transmission Fees

On December 22, 2010, the Düsseldorf Court of Appeals rendered judgment in which it *inter alia* awarded a power supplier restitution of excessive electricity transmission fees that had been charged by a network operator.[12] The Court rejected, however, additional claims for restitution based on unjust enrichment. In the Court's view, individual claims for restitution based on unjust enrichment are barred by the German Energy Law. The Court also stated briefly that such a result does not contradict European law. First, Directive 2003/54/EC (applicable at the time) did not require national law to provide for the restitution of excessive fees. Further, European law does not prevent recognizing the passing-on defense. In this context, the Court came to the conclusion that there is an assumption that the plaintiff passed on the excessive fees to the consumers, as all of the plaintiffs' competitors were affected by the excessive transmission fees, and thus the consumers had no possibility to switch to an unaffected provider. The Court therefore assumed that it was in the plaintiff's economic interest to pass on any excessive transmission fees to its customers and argued that the plaintiff had not rebutted this assumption.

Frankfurt Court Of Appeals Grants €9 Million In Damages Due To Excessive Pricing

On December 21, 2010, the Frankfurt Court of Appeals decided in favor of a buyer of local antibiotics because of excessive prices charged for a period of nearly four years. The Court upheld the damages claim under Sections 33(1), 19(1), and 19(4)(2) GWB, but reduced the amount of the award by 30%.[13]

In 2005, the defendant, a manufacturer of a specific pharmaceutical product, raised the price per unit by around 400%. The claimant requested damages amounting to the difference between the prices paid for the products in 2005-2008 and the lower prices paid up to 2004.

The Court found that the defendant held a dominant position in the relevant market because it was the only (contract) manufacturer of the local antibiotic. Market entry by other manufacturers was unlikely, as it would have taken them longer than a year to obtain the necessary regulatory approval and start production due to considerable investment in production facilities. The Court also rejected the argument that the claimant's buyer power could counterbalance the dominant position. The claimant was the only customer and also the owner of the product license, but the Court found the claimant could not transfer production to a different manufacturer on short notice.[14]

The Court further held that the increase of 400% in 2005 indicated that the defendant could not have charged the higher price under competitive conditions, in particular because the overall price increase from 1996 to 2004 amounted to only approx. 20%. The Court also found that the defendant did not provide sufficient evidence for an objective justification. German law allows the courts to estimate damages based on tort law. In the case at hand, the Court in principle endorsed the claimant's approach to damages calculation. However, the Court also took into account that (i) the defendant would have been entitled to increase prices moderately by 10%, and that (ii) only prices that are significantly higher than the competitive level may be considered abusive, which justified the application of an additional "significance margin" of 20%. The Court accordingly reduced the amount of damages requested by 30%.

Further, without discussing it in detail, the Court explicitly disallowed the "passing-on defense." It simply referred to Section 33(3) GWB

12 Düsseldorf Court of Appeals, Decision of December 22, 2010, Case VI-2 U (Kart) 34/09 – *Netzdurchleitungsentgelte, see* WuW DE-R 3224, available in German at: http://www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2010/VI_2_U__Kart__34_09urteil20101222.html.

13 Frankfurt Court of Appeals, Decision of December 21, 2010, Case 11 U 37/09, available in German at: http://www.lareda.hessenrecht.hessen.de/jportal/portal/t/1606/page/bslaredaprod.psml?doc.hl=1&doc.id=KORE522102011%3Ajuris-r02&documentnumber=2&numberofresults=2&showdoccase=1&doc.part=L¶mfromHL=true#focuspoint.

14 Interestingly, the claimant had assigned an additional manufacturer already in 2006, but continued to purchase from the defendant to 2008, which the court considered a sign that the claimant depended on the defendant until 2008 as the other manufacturer could not supply the claimant's total demand.

and concluded that it was irrelevant that the claimant resell the purchased products at an even slightly higher price.[15] The Court did not allow further appeal to the FCJ.

Düsseldorf Court Of Appeals Disagrees With Compulsory License Conditions In The Microsoft Judgment

On January 20, 2011, the Düsseldorf Court of Appeals confirmed that if a dominant holder of a patent seeks an injunction (under Sections 64 EPC, 139 PatG) against a patent user without license, the latter can raise a compulsory license objection under Article 102 TFEU. The Court, however, set very strict conditions for the objection.[16] The Court concluded that these conditions were not met.

The owner of a patent for the production of ink jet printer cartridges had applied to the Regional Court Düsseldorf for a preliminary injunction against the defendants, other producers of ink jet printer cartridges. The defendants argued that under antitrust law the patent holder was obliged to license the patent to third parties. The Regional Court granted the patent owner the injunction in summary proceedings. The Düsseldorf Court of Appeals upheld this decision.

In line with the EU jurisprudence in *Magill*, *IMS Health*, and *Microsoft*, the Court required the existence of "exceptional circumstances" for a compulsory licensing obligation for the patent holder, *i.e.*, (i) the use of the patent must be indispensable to exercise a particular activity, (ii) refusing to allow the use prevents the appearance of a new product or services for which there is potential consumer demand, (iii) the refusal is not objectively justified, and (iv) the refusal is of such a kind as to exclude any effective competition on a neighboring market. The Court held that the indispensability and the "new product" criteria were not fulfilled here.

The Court explicitly disagreed with the EU General Court's statement in *Microsoft* that an input is already indispensable if it is necessary for the input-seeker to viably compete in the market. The Court held that it is not bound by the rulings of the EU General Court, but merely by the EU Court of Justice's judgments. According to the Court, an input is only indispensable if even a sufficient effort of the patent user would not make an actual or potentially realistic substitute of the particular input available. The Court held that the defendants did not demonstrate that they were unable to "invent around the patent."

In addition, the Court explicitly distanced itself from the *Microsoft* judgment, which held that it is sufficient for the new product criterion that the refusal to supply limits technical development to the detriment of consumers according to Article 102(b) TFEU. The Court argued that the new product requirement is only met if the new product is not substitutable with existing products that use the patent, *i.e.*, it has to fall within a different relevant market. The Court held that the defendants' ink cartridges did not meet this condition, since they did not feature any technical advantages, but merely replaced the existing products of the patent owner with a lower price.

Mergers And Acquisitions

FCO Prohibits RTL's And Pro7Sat1's Online Video Platform

On March 18, 2011, the FCO prohibited a joint venture ("JV") between broadcasters RTL and Pro7Sat1 ("P7S1") to set up an online video on demand ("VOD") platform.[17] The platform would have allowed broadcasters in Germany and Austria to make their television shows available free of charge in a "7-day catch-up offering" after the initial broadcast (not before). The offer would have been financed by advertising revenues. The JV would have offered content administration and advertising space (allowing the placement of commercials before, during and after display of the content). The parties originally notified the transaction with the European Commission. However, upon requests by Austria and Germany, the Commission referred the case to the two national competition authorities.[18]

The FCO found that the JV's activities would strengthen the parties' dominant position in the German television advertising market ("TAM"). Like in previous cases, the FCO found that RTL and P7S1 held a collective dominant position in this market,[19] with individual market shares of 42%-47% each. (Interestingly, the FCO followed the *Airtours*-criteria analysis, rather than the criteria used in its

15 The provision states that if a good or service was purchased at an excessive price, the damage is not excluded because the good or service was later resold.

16 Düsseldorf Court of Appeals, Decision of January 20, 2011, Case I-2 U 92/10 available in German at: http://www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2011/I_2_U_92_10urteil20110120.html

17 Press releases in German are available at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Presse/2011/2011-02-24_RTL-P7S1__Final.pdf (statement of objections) and http://www.bundeskartellamt.de/wDeutsch/download/pdf/Presse/2011/2011-03-18_PM_RTL-P7S1__Final.pdf (prohibition decision). The prohibition decision is in German available at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion11/B06-094-10_endg.pdf.

18 Article 9(3) of the EU Merger Regulation.

19 The FCO's analysis was more detailed, but not substantially different from previous FCO and court proceedings regarding the German TAM. *See* National Competition Reports October-December 2005, p. 8 *et seq.*; April-June 2006, p. 8; October-December 2006, p. 8; October-December 2007, p. 12 *et seq.*; October-December 2010, p. 9 *et seq*.

prohibition of Axel Springer/ProSieben in 2006, which also focused on a duopoly in the TAM. However, it came to the same result in substance. The FCO largely followed the Federal Court of Justice's decision in Axel Springer's appeal in this regard.[20])

The FCO found that the JV's creation would have strengthened the parties' dominant position, because it would be active and likely obtain a strong position in in-stream-video commercials, which the FCO considered to be the closest neighboring market to TAM.[21] The JV would have alleviated the competitive pressure from this neighboring market on TAM, because the JV would have bundled and aligned the parties' conduct in in-stream-video commercials and foreclosed potential competing VoD-platforms that could exert competitive pressure on the TAM. Under German law, only a minor restriction of actual or potential competition can strengthen a dominant position.

While the FCO acknowledged that the JV offered benefits, like a one-stop-shop advantage, it found that these did not outweigh the restrictive effects. Further, the FCO held that the JV would unnecessarily harmonize competitive parameters in the in-stream-video advertising segment, such as technical parameters and the determination of who would be able to make which content available for how long. In particular, the FCO found no justification for restricting access to broadcasters only, thereby foreclosing non-broadcasting content providers such as publishers and aggregators. The FCO also considered it unnecessary that content would only be available after broadcasting, and only for up to seven days.

Finally, the FCO also had concerns under Sections 1 and 2 GWB and Article 101 TFEU. In its view, as the JV would create corporate links between RTL and P7S1, it would create a platform for information exchange and give rise to spillover effects by reducing the incentives to compete aggressively. The FCO also rejected the parties' commitments.

FCO Clears American Express's Acquisition Of Loyalty Partner Holdings, Operator Of German Loyalty Program "Payback"

On February 17, 2011, the FCO cleared American Express Company's ("Amex") acquisition of sole control of Loyalty Partner Holdings S.A. ("Loyalty Partner"), the operator of the German "Payback" loyalty program.[22] The FCO assessed the transaction's effects in the area of loyalty programs, *i.e.*, programs that offer consumers rewards for purchases made at merchants that participate in the loyalty program.

The FCO found that there were good reasons to assume that loyalty programs constituted a distinct product market, separate from other customer relationship management ("CRM") services. It further considered that single-company loyalty programs did not form part of the same relevant market, because such programs are used only captively by the merchant. Ultimately, however, the FCO left the product market definition open.

The FCO reasoned that under a narrow market definition, Loyalty Partner's share would be significant, but the transaction would not strengthen Loyalty Partner's preexisting position. First, the Parties' activities did not overlap. Although Amex operated its own loyalty program, this program was used to incentivize the use of Amex's credit cards and thus operated for captive use. Second, the FCO also did not identify any foreclosure concerns. The FCO reasoned that, while loyalty programs and credit cards are, in the FCO's view, complementary products, the relevant customer groups overlapped only marginally, and the VISA and Mastercard networks were much bigger than Amex's credit card network. Therefore, foreclosure concerns could be excluded and the FCO decided to clear the transaction.

FCO Fines Hauptgenossenschaft ZG Raiffeisen For Failure To Notify

On January 28, 2011, the FCO imposed a fine of €414,000 on Hauptgenossenschaft ZG Raiffeisen ("ZG Raiffeisen") for pre-clearance closing of the acquisition of certain company assets (premises) of Wurth Agrar GmbH & Co. KG, Appenweier ("Wurth").[23]

The case concerned a two-stage acquisition of assets: In May 2009, ZG Raiffeisen acquired Wurth's company premises, including a storage depot, without prior notification.[24] Only two months later, in July 2009, ZG Raiffeisen notified the acquisition of further assets of Wurth. The FCO considered this latter transaction to be the second step of an overall acquisition of Wurth's assets, of which ZG

20 *See* National Competition Report October-December 2010, p. 9 *et seq*.

21 Section 36(1) GWB.

22 Case Summary in German available at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion11/Fallberichte/B04-012-11_endg.pdf?navid=76.

23 A press release in English is available at: http://www.bundeskartellamt.de/wEnglisch/download/pdf/Presse/2011/110128_PM_Landhandel-E.pdf. A press release in German is available at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Presse/2011/2011-01-28_PM_Landhandel_Final.pdf

24 Regarding agricultural trade, the FCO considers the acquisition of a storage depot as the acquisition of a substantial part of the assets of another company, and thereby as a concentration within the meaning of Section 37(1) No.1 GWB, because agricultural traders conduct their essential business relations over their storage depots.

Raiffeisen had already implemented the first step when it notified the FCO of the second. Further, the FCO's preliminary view was that the transaction would have created a dominant market position with respect to the distribution of plant protection products for farmers in Baden. Ultimately, the notification was withdrawn, and unwinding proceedings were initiated.[25]

It is noteworthy that this is the first decision in which the FCO settled an early implementation case. The press release does not provide any details regarding the FCO's considerations with respect to setting the fine in this case, in particular whether the case involved intentional infringement.

Policy And Procedure

FCJ Refers Question On Jurisdiction For "Torpedo" Actions To ECJ

On February 1, 2011, the FCJ referred a question on the interpretation of Article 5 no. 3 of Regulation 44/2001[26] to the ECJ for a preliminary ruling.[27] Article 5 no. 3 of Regulation 44/2001 provides special jurisdiction of the courts of the place where a tort occurred. The FCJ asked the ECJ whether this provision also applied to negative declaratory actions asking a court to find that there are no grounds for tort claims.

The issue referred to the ECJ is highly debated and concerns the so-called "torpedo" actions: where a potential defendant in a damages law suit files a negative declaratory action in one jurisdiction in order to preempt the defendant from bringing damage claims in other jurisdictions that are perceived to be less favorable to the defendant, *e.g.*, because they provide for the possibility of pre-trial discovery. The FCJ stated that it tends to interpret Article 5 no. 3 of Regulation 44/2001 as granting jurisdiction even for "torpedo" actions.

The question arose in proceedings between competitors in laminate films. The defendant, an Italian company, complained about the allegedly anti-competitive features of the distribution practice of the plaintiffs, companies registered in Switzerland. The Swiss companies brought an action for a negative declaratory judgment in Germany, where all of the competitors were active, seeking confirmation that their distribution system did not infringe competition law and that the defendant was not entitled to tort claims.

Sectoral Investigations

FCO Publishes Results of Sector Inquiry Into Electricity Production And Wholesale Sector

On January 13, 2011, the FCO published the results of a sector inquiry launched in March 2009 in order to examine the competitive situation on the German electricity production and wholesale markets during 2007 and 2008.[28] The inquiry report concludes that the structure of the market for the first-time sale of electricity (*Erstabsatzmarkt*) in Germany (although the FCO for the first time included Austria in the relevant geographic market) is unsatisfactory: the four largest suppliers – RWE, E.ON, Vattenfall and EnBW – have a combined market share of approximately 80%.

The report suggests that the four companies hold a collectively dominant position. The report goes on to state that, even if there were no collective dominance, each company would hold an individual dominant position, because each company was indispensible for covering general electricity demand. In the FCO's view, FCJ case law does not rule out the possibility of more than one market participant being individually dominant in a relevant market.[29]

While the FCO did not find any evidence showing that the electricity producers had abused their dominant position(s), it found that they nevertheless had the incentive and the ability to significantly influence the price of electricity by reducing output. Unsurprisingly, the FCO expressed its approval of a so-called market transparency scheme proposed by the German federal government that is intended to improve access to market data and thereby facilitate proving price and capacity-related anti-competitive abuses on electricity markets. The FCO announced in its press release that it will, in any case, continue to monitor the supply behavior of electricity producers closely.

25 FCO, Case B 2 – 80/09. A case report in English is available at: http://www.bundeskartellamt.de/wEnglisch/download/pdf/Fallberichte/B02-075-09--B02-080-90-engl.pdf?navid=41, p. 4. A case report in German is available at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion09/Kurzberichte/B02-075-09--B02-080-90Fallbeschreibung.pdf, p. 4 *et seq*.

26 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001, L 12, p. 1.

27 FCJ, Decision of February 1, 2011, http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&Sort=12288&nr=55459&pos=6&anz=620.

28 The sector inquiry results and a summary are available in German at: http://www.bundeskartellamt.de/wDeutsch/publikationen/SektoruntersuchungW3DnavidW26117.php. A press release is available in German at: http://www.bundeskartellamt.de/wDeutsch/aktuelles/presse/2011_01_13.php and in English at http://www.bundeskartellamt.de/wEnglisch/News/press/2011_01_13.php. A press statement by the president of the FCO, Andreas Mundt, is available in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Presse/2011/2011-01-13_SprechzettelSU_endg2.pdf.

29 The FCO in this respect refers to FCJ, Decision of March 3, 2009 – *Reisestellenkarte*, Case KZR 82/07, p. 13, available in German at: http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=9f258a3f739ffebb6f5f808bf4d760bd&nr=49138&pos=18&anz=26, and to ECJ, Decision of April 6, 1995 – *Magill*, Cases C-241/91 and C-242/91.

FCO Launches Sector Inquiry Into The Procurement Markets In Food Retailing

In previous merger cases[30] and investigations into anti-competitive practices,[31] the FCO has concluded that the food retailing sector has become more and more concentrated in recent years. Based on this experience, the FCO announced on January 14, 2011 that it has decided to launch a sector inquiry to learn more about the competitive conditions on the procurement markets in food retailing.[32] The objective of the inquiry is to shed light on the distribution of market power in the relationships between food retailers and suppliers.

The sector inquiry is intended to confirm and support the FCO's findings in its case-law. The inquiry's focus are a number of selected product groups for which the FCO will examine the extent of buying power held by food retailers vis-à-vis their suppliers, investigate whether the leading food retailers enjoy advantageous purchasing conditions as compared to smaller competitors, and explore how such advantages affect competition on the downstream retail market.

IRELAND

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

Horizontal Agreements

Irish Competition Authority Wins Beef Industry Case

On January 25, 2011, the Competition Authority announced its victory against the Beef Industry Development Society ("BIDS") in a long-running case concerning an agreement by members of the society to leave the beef processing industry in return for payment.

As previously reported in Quarter 4 of 2009, BIDS sought approval for its scheme to reduce excess capacity in the beef processing industry from the Authority which opposed the arrangements and applied to the High Court ("HC") for a declaration that the agreement infringed Article 101(1) TFEU. The case was appealed to the Supreme Court of Ireland ("SC") which made a preliminary reference to the Court of Justice. In light of the Court of Justice's judgement that an agreement of this kind had as its object the restriction of competition, the SC allowed the Authority's appeal on the basis of Article 101(1) TFEU. It did, however, remit the case to the HC to allow BIDS the opportunity to argue that the agreement should be allowed on efficiency grounds.

In 2010, during this second round of HC proceedings, the European Commission intervened as *amicus curiae* and submitted written observations pursuant to Council Regulation 1/2003 on the assessment of industrial restructuring agreements under Article 101(3) TFEU. However, in January 2011, before the HC had the opportunity to reach a decision, BIDS withdrew its claim for exemption under Article 101(3) TFEU and agreed to pay a substantial contribution to the Authority's costs, putting an end to over seven years of litigation.

Mergers And Acquisitions

Competition Authority Clears The Acquisition Of Joint Control Of R&H Hall Ltd. By W&R Barnett Ltd. And Origin Enterprises Plc.

On January 21, 2011, the Competition Authority unconditionally approved the proposed transaction whereby W&R Barnett Limited would acquire joint control of R&H Hall Limited by acquiring 50% of the outstanding share capital of R&H Hall from Origin Enterprises plc. After a Phase II investigation, the Competition Authority found that the proposed transaction would not substantially lessen competition in the markets for goods or services in Ireland. The acquisition is part of an agreement to establish an all-Ireland grain and animal feed handling, logistics, and trading business through the integration of Origin's R&H Hall business in the Republic of Ireland and the business of Origin and W&R Barnett in Northern Ireland.

The Authority was of the view that there was a horizontal overlap between the parties in the sale of grain and the sale of non-grain feed ingredients ("NGFI") animal feed manufacturers. Although it left the question of relevant product and geographic markets open, the Authority's analysis focused on the markets for (i) the sale of NGFI to animal feed manufacturers in the north of Ireland and (ii) the sale of grain to animal feed manufacturers in the north of Ireland.

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30 Case B2 – 52/10, October 28, 2010, EDEKA/trinkgut, *see* National Competition Report October-December 210, p 11; Case B2 – 333/07, June 30, 2008, Tengelmann/EDEKA, *see* National Competition Report April-June 2008, p. 9; and Case B9 – 27/05, August 25, 2005, Edeka/Spar, National Competition Report July-September 2005, p. 8 *et seq*.

31 *See* National Competition Report January-March 2010, p. 9 (*FCO Confirms Dawn Raids Of Retailers And Branded Goods Manufacturers On The Suspicion Of Fixing End Consumer Prices*).

32 A press release is available in English at http://www.bundeskartellamt.de/wEnglisch/News/press/2011_02_16.php and in German at http://www.bundeskartellamt.de/wDeutsch/aktuelles/presse/2011_02_14.php.

In each potentially affected market, the Authority determined that the transaction would not give rise to competition concerns, due to a combination of the following factors: (i) post transaction, a number of close competitors would remain, (ii) customers could easily switch between competing suppliers, (iii) the majority of customers contacted by the Authority expressed no competition concerns, (iv) the acquisition would not lead to a permanent increase in price of grain or NGFI, and (v) post transaction the likelihood of any coordinated effects would not increase. The Authority also examined the possible foreclosure of competitors via W&R Barnett's and R&H Hall's control of storage facilities in ports in the Republic and Northern Ireland, but concluded that the proposed acquisition would have no impact on the ability or incentive of R&H Hall/W&R Barnett to foreclose competitors by restricting access to their storage facilities.

The completed transaction brings together two of Ireland's indigenous grain and non-grain feed ingredient importing businesses servicing the animal feed and cereal milling industries and is an important strategic step in the long-term sustainability and competitiveness of Ireland's agri-food industry.

ITALY

This section reviews developments under the Competition Law of October 10, 1990, No 287, which is enforced by the Italian Competition Authority (the "ICA"), the decisions of which are appealable to the Regional Administrative Tribunal of Lazio ("Tribunal").

Sectoral Investigations

The ICA Has Launched Two General Fact-Finding Inquiries Into The Italian Banking And Fuel Sectors

Under Article 12(2) of the Italian Competition Law, the ICA is entitled to launch general fact-finding inquiries in areas of business in which the development of trade, the evolution of prices, or other circumstances suggest that competition may be impeded, restricted, or distorted. The aim of fact-finding inquiries is to identify the reasons underlying a weak competitive environment, promote possible measures to increase the competitiveness of the affected sector, and pave the way to further action to solve any concerns raised.

Several general inquiries are currently ongoing. Notably, the ICA is investigating the following sectors: electricity and natural gas (IC22B), local public transports (IC29), hospital healthcare services (IC30), securities negotiation and post-trading services (IC31), the audiovisual field (IC41), direct redress procedures and civil public liability in the car insurance sector (IC42), and supermarkets and large-scale distributors (IC43). The ICA has recently decided to explore the Italian banking and motor fuel sectors.

The Italian Banking Sector Inquiry. On March 23, 2011, following numerous complaints filed by consumers' associations, the ICA initiated a fact-finding inquiry in the Italian banking sector. This is the second fact-finding inquiry involving the Italian banking sector since 2007. The ICA believes that competitive concerns still exist relating to the provision of banking services and intends to investigate the market dynamics relating to bank accounts, collection, and payments services.

The ICA has explained that in the past few years the banking sector has undergone a profound restructuring phase due to a number of mergers involving financial institutions and new legislation regarding transparency and disclosure obligations in relation to the provision of banking services. Nonetheless, in certain instances, the ICA noted a number of concerns addressed in the context of the 2007 fact-finding inquiry are still present in the industry.

Indeed, the new sector inquiry will focus on many of the concerns raised in the sector inquiry concluded in 2007, namely: (i) a price level well above the European average for the provision of bank services (such as bank transfers, online transfers, withdrawals, and payments made at the bank counter and at automated teller machines); (ii) the existence of loyalty-inducing schemes for retail customers; (iii) a general lack of transparency with respect to banking services' conditions; (iv) high economic and administrative costs, and the associated time issues, underlying the closing or transfer of banking services (*e.g.*, accounts and mortgage loans), all of which heavily impair customers' switching.

The Italian Motor Fuel Sector Inquiry. On March 2 and 23, 2010,[33] the ICA launched a fact-finding inquiry on the Italian fuel sector. The ICA will focus on two main areas of possible concern: the fuel distribution system and the reference to Platt's quotations to set prices.[34] Ultimately, the fact-finding inquiry will endeavor to identify the

33 On March 2, 2010, the ICA decided to launch a first inquiry to inquire on White Label retail distributors in Italy. This decision was followed, on March 23, 2010, by a inquiry aimed at broadening the scope of the first survey.

34 Platt's quotations indicate the international market prices for fuels worldwide.

reasons leading to a price level of motor fuel in Italy well above the European average.

According to the ICA, the Italian fuel industry, despite of its oligopolistic nature, features a number of novelties capable of driving the price level down, including the increasing introduction of self-service gas stations, the elimination of national recommended retail prices by oil companies, and, most importantly, the entry into the market of white label retail distributors ("*pompe bianche*"), *i.e.*, independent non-vertically integrated fuel retailers ("White Labels"). These retailers source their fuel needs on the so-called extra-network market ("*mercato extra-rete*") from the same vertically integrated oil companies they compete with downstream, and are able to charge lower retail prices.[35] Indeed, White Labels distributors are mainly operated on a small scale, at regional level, bearing lower secondary logistical costs (*e.g.*, costs relating to the shipment of fuel from the wholesale source to the respective selling points) and without the need of large investments on nationwide infrastructures and commercial campaigns. According to the ICA, it cannot be excluded that vertically integrated oil companies may attempt to worsen supply terms *vis-à-vis* White Labels in order to foreclose their access to fuel and/or to recover at the wholesale level the margin of profit lost downstream as a result of White Labels' increased presence.

White Labels may indeed play an important role in the future development of the sector, as they are reported as already accounting for 7% of the Italian market and are expected to grow in influence. The ICA expects to review the number and geographic location of these independent retailers. This will, in turn, serve as a benchmark study for identifying existing obstacles to their future expansion over the Italian territory. The inquiry will also review: (i) the structural pre-conditions necessary for the establishment of White Labels retail points of sale (*e.g.*, proximity to refineries or coastal warehouses) and (ii) the mechanism by which White Labels exercise competitive pressure on branded gas stations.

NETHERLANDS

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

Horizontal Agreements

Tribunal Confirms NMa Decision In Shrimp Cartel, But Lowers Fines

On March 17, 2011, the Dutch Trade and Industry Appeals Tribunal (*College van Beroep voor het bedrijfsleven*; the "Tribunal") upheld a decision of the NMa of January 14, 2003, in which it fined Dutch, German, and Danish shrimp fishery associations and eight wholesalers for concluding anticompetitive agreements.[36] The parties involved had fixed the quantity and price of shrimp sold by the shrimp fishery associations to the wholesalers between 1998 and 2000. The Tribunal lowered the total amount of fines to €4.4 million.

The Tribunal confirmed the NMa's finding that the agreements on minimum prices and quantity constituted a violation of Article 6 of the Dutch Competition Act and Article 101 TFEU. The Tribunal rejected the shrimp fishery associations' argument that the agreements were exempt from competition rules on the basis of Regulation 3759/92 on the common organization of the market in fishery. According to the Tribunal, the agreements fixing the quantity and price of shrimp did not fall within the competences of the shrimp fishery associations as provided for by the Regulation, and the shrimp fishery associations therefore could not rely on the Regulation to justify their anticompetitive behavior.

The Tribunal acknowledged, however, the role that the shrimp fishery associations play within the framework of the common market organization in fishery, especially with respect to market stabilization and sale conditions. Without accepting that this role justified the anticompetitive behavior, the Tribunal took account of the uncertainty caused by the fine boundaries of the competences of the shrimp fishery associations and therefore reduced the fines imposed on the shrimp fishery associations by 20%. Furthermore, the Tribunal took account of the undue delay in the proceedings and reduced the fine for each cartel participant *pro rata* for the delay (*i.e.*, by 55 per cent, although it capped such reduction at €55,000).

35 According to data collected by Federconsumatori in 2008, consumers would be able to save 5-6 cents per liter.

36 Judgments of the Dutch Trade and Industry Appeals Tribunal of March 17, 2011, at http://www.rechtspraak.nl/ljn.asp?ljn=BP8060 and http://www.rechtspraak.nl/ljn.asp?ljn=BP8077.

NMa Fines Participants In Glass Cartel

On December 2010, the NMa imposed fines totaling €17.7 million on the four largest manufacturers of double-glazed glass in the Netherlands that were found to have participated in cartel conduct in violation of Article 6 of the Dutch Competition Act.[37] The individual fines ranged from €2.3 to €8.0 million, while AGC Flat Glass Nederland B.V. escaped a fine because it was the first to apply successfully for leniency.

The NMa found that the cartel participants had agreed on a 10-12% price increase for double-glazed glass. The participants also established a minimum price for double-glazed glass, mainly aimed at larger customers that would not accept the fixed price increase. The cartel lasted from May 2004 through September 2005.

The parent companies of three of the cartel participants had already been fined by the European Commission in 2007 and 2008 for participating in the flat glass and the car glass cartels. In those cases, the Japanese car glass company Asahi received a reduction of its fines for its leniency application, while its subsidiary AGC Flat Glass Nederland B.V. now received immunity from fines. Saint-Gobain Glass Nederland N.V. secured a 30% reduction of the fine as second leniency applicant, while its French parent company saw its fine in the car glass cartel increased by 60% for previous cartel involvement in 1984 and 1988.

Mergers And Acquisitions

No Obligation For Seller To Notify Concentration

On January 13, 2011, the Rotterdam District Court (*Rechtbank*) annulled a decision of the NMa in which it had fined an undertaking for failing to notify a concentration.[38] The Court ruled that for concentrations in which a party acquires sole control over another undertaking, the selling party has no obligation to notify the concentration.

In November 2008, the NMa imposed a €92,000 fine on an undertaking that had failed to notify the sale of all of the shares in one of its subsidiaries to a third party. The undertaking appealed the decision, claiming that it should not be considered an "undertaking concerned" within the meaning of both Dutch and European merger rules. The NMa rejected the appeal, arguing that under Dutch law the concept of a notifying party is different to the concept under the European merger rules. The NMa stated that in transactions concerning the change of control over a subsidiary, the seller is also responsible for filing the concentration.

The Court found that it follows from both the legislative history and the systematic interpretation of the Dutch merger rules that for changes of sole control in an undertaking, the seller cannot be considered an undertaking concerned and therefore has no obligation to notify a concentration. In this respect, the Court noted that it would not be reasonable to require the seller to notify a concentration, since the seller would not have access to the relevant information necessary for the NMa to assess the concentration. The Court found support for its judgment in the European merger rules.

Policy And Procedure

NMa Retains Legal Professional Privilege For In-House Lawyers

In a speech given on January 20, 2011, the director of the legal service of the NMa stated that the NMa would continue its policy to treat communication between an in-house lawyer and the company by which he or she is employed as being protected by legal professional privilege ("LPP").[39] The NMa has thus chosen explicitly not to follow the practice of the European Commission, which denies LPP to communications of an in-house lawyer (even when the lawyer is a member of a bar). The practice of the European Commission was confirmed by the European Court of Justice in its judgment in Akzo of September 14, 2010.

The NMa is generally concerned with the monopoly that lawyers in the Netherlands enjoy in legal proceedings, and considers in-house lawyers to be valuable competitors to external lawyers. Moreover, and contrary to the ruling of the European Court of Justice in *Akzo*, the NMa is not concerned that an in-house lawyer would not be sufficiently independent. First, an in-house lawyer in the Netherlands is a member of the bar and thus subject to its disciplinary regime. Second, Dutch in-house lawyers are specifically regulated by a "professional statute" that further ensures their independence.

The NMa has acknowledged that its position on LPP might cause uncertainty when companies are subject to an antitrust investigation and has set out the status of the in-house lawyer in the different potential scenarios. When the NMa conducts the investigation on its

37 The decision has not yet been published.

38 Judgment of the Rotterdam District Court of January 13, 2011, at http://www.rechtspraak.nl/ljn.asp?ljn=BP0781.

39 Speech of the director of the legal service of the NMa of January 20, 2011, at http://www.nmanet.nl/.

own behalf, in-house lawyers are always protected by LPP, even if the investigation is based on Articles 101 or 102 TFEU. The same is true when the NMa conducts an investigation at the request of the European Commission or the competition authority of another member state on the basis of Article 22 of Regulation 1/2003. Only when the NMa assists the European Commission in an investigation under EU competition rules on the basis of Article 20(5) of Regulation 1/2003 will the NMa deny LPP to an in-house lawyer.

Merger Of Regulatory Authorities

By letter of March 28, 2011, the Dutch Minister of Economic Affairs informed the Dutch government about his plans to merge the Consumer Authority (*Consumentenautoriteit*), the Independent Post and Telecommunications Authority of the Netherlands (*Onafhankelijke Post en Telecom Autoriteit*), and the NMa into one entity.[40] The process is to be completed in the course of 2013.

By combining the knowledge and experience of the different regulatory authorities, the Minister expects the merger to increase efficiency and effectiveness of market supervision. The Minister also believes that the new authority will be able to respond better to international and technological developments. The Minister is still investigating whether any tasks of the Dutch Healthcare Authority (*Nederlandse Zorgautoriteit*) will also be transferred to the new authority.

SPAIN

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

Horizontal Agreements

Cartel Fine Of Over €51 Million Imposed On Seven Companies In The Professional Hair Care Products Sector And On The National Perfumery And Cosmetics Association (STANPA)

On March 2, 2011, the CNC fined seven companies and the National Perfumery and Cosmetics Association ("STANPA") a total of over €51 million for their participation in a cartel in the market for professional hair care products.[41] Another undertaking, Henkel Ibérica, participated in the infringement but was granted full immunity from fines under the Spanish leniency program.

Following the leniency application of Henkel in February 28, 2008, the CNC conducted dawn raids at the premises of all companies involved (L'Oréal, Wella, The Colomer Group, Eugene Perma, Cosmética Cosbar (Montibello), Cosmética Técnica (Lendan) and DSP Haircare Products) in June 2008, opening formal proceedings on June 16, 2008. As Henkel Ibérica was the first leniency applicant, it was granted full immunity from fines. Wella was granted a 5% fine reduction as it actively cooperated with the CNC, and this was considered as a mitigating circumstance when calculating the fine.

The CNC found that L'Oréal, Wella, The Colomer Group, Eugene Perma, Cosmética Cosbar (Montibello), Cosmética Técnica (Lendan), Henkel, DSP Haircare Products, and the National Perfumery and Cosmetics Association participated in the infringement from February 1989 until February 2008, a total of 19 years. The companies involved met in the so-called G8 every six months on a stable and continuous basis and exchanged sensitive information that enabled them to learn the future strategies of their competitors. The CNC considered this systematic exchange of current and future prices eliminated strategic uncertainty, independence of commercial policies and the incentive to compete with one another on prices, quality or service, seriously affecting competition. Accordingly, the CNC found that the parties infringed Article 1 of Law 16/1989.

In determining the fines, the CNC considered the companies involved were individually liable for the fines imposed. However, from the date the companies involved were acquired by their parent companies the latter were considered jointly and severally liable from the date of acquisition until the end of the cartel. This is because according to the CNC, the parent companies owned, in the majority of cases, 100% of the share capital of their subsidiaries and thus had a decisive influence on them.

Mergers And Acquisitions

The Redsys/Redy Merger Cleared In Phase II Subject To Commitments

On March 14, 2011, the CNC conditionally approved the merger between Redsys and Redy, subject to commitments designed to guarantee that the entity resulting from the merger will be an open provider of card payment processing services and ensuring the free canvassing and exit of customers. The operation was notified on August 16, 2010. The CNC conducted an in-depth analysis in its second phase of its review because it considered that the operation

40 Letter of the Dutch Minister of Economic Affairs of March 28, 2011, at http://www.rijksoverheid.nl/.

41 Decision S/0086/08, *Peluquería profesional*.

could hinder the maintenance of effective competition on the Spanish markets for the provision of card payment processing services and card payment services.

The CNC was concerned that on the market for card payment processing services, the merger would entail a reduction in the number of operators from three to two, which, coupled with the major entry barriers that existed, would give rise to a serious risk of excessive or discriminatory rates for non-shareholder customers or shareholders not sponsoring the operation, a risk increased by the lack of knowledge of the entity's fee structure.

According to the CNC, there was also a risk that the merged entity would not adequately define or update the technical standards and procedures relating to the interoperability of the payment transactions, which could result in the exclusion or hindering of the activity of rival processors or payment systems to which the merged entity would provide its services. After submitting a first set of commitments which were considered insufficient, the merging parties offered new commitments on March 4, 2011, that resolved the CNC's main competition concerns.

The CNC considered the commitments submitted by the parties guarantee that the post-merger entity will be an open provider that provides processing services to any provider of payment services that requests them, without any exclusion or discrimination, while also guaranteeing the free canvassing and exit of customers.

The commitment not to discriminate also extends to prices, whereby the parties undertake that the entity resulting from the merger will have a single fee structure that will be applied without discrimination. Concerning the technical barriers to interoperability of the payment transactions, the merging parties undertook not to unilaterally intervene in processes to define, update, or modify the standards and technical procedures that enable interoperability between all the participants in the payment chain.

An initial period of three years has been established for the commitments, and they are extendable for a further two years if the market circumstances have not changed.

Policy And Procedure

Spain Changes Its Merger Notification Thresholds

On March 6, 2011, the Sustainable Economy Act came into force.[42] This has resulted in the modification of some of the provisions of the Spanish Competition Act 15/2007 of July 3, 2007, the most important of which relates to the merger notification thresholds.

The Sustainable Economy Act has introduced a new paragraph in the Spanish Competition Act 15/2007, which eliminates the need for notification if, although the 30% market share threshold has been exceeded, the Spanish turnover of the target firm does not exceed €10 million. The exemption will apply provided that the undertakings involved do not have an individual or joint market share of more than 50% on any of the affected markets in Spain.

The CNC has highlighted that these changes will lessen the administrative burden faced by companies without jeopardizing the integrity of the merger review process.

Sectoral Investigations

The CNC Opens An Investigation Into Possible Anticompetitive Practices In The Polyurethane Foam Manufacture And Distribution Sector In Spain

On February 16, 2011, the CNC carried out inspections at the head offices of the leading undertakings in the polyurethane foam manufacture and distribution sector in Spain. Possible anticompetitive practices were suspected in this sector, consisting of agreements directly or indirectly to fix prices and of coordinating their commercial policy in that market.

Inspectors from the regional competition authorities where certain of the inspected companies are located collaborated in carrying out the inspections, at the request of the CNC Investigations Division. Simultaneously, in coordination with the CNC, a competition authority in a different Member State of the European Union also carried out inspections at the head offices of the leading undertakings in the sector in its territory.

As a result of the confidential probe the Investigations Division has found *prima facie* evidence of the existence of practices prohibited by the Spanish Competition Act 15/2007. It therefore decided on April 12, 2011, to open formal proceedings,[43] against Esinca S.L., Eurospuma-Sociedade Industrial De Espumas Sintéticas, S.A., Flexipol Espumas Sintéticas, S.A., Flex2000-Produtos Flexíveis, S.A.,

42 Ley 2/2011, de 4 de marzo, de Economía Sostenible, Spanish Official Journal (BOE) of March 5, 2011, no. 55, p. 25033.

43 Case S/0342/11, *Espuma de poliuretano*.

Interplasp, S.L., Pagola Poliuretanos, S.A., Recticel Ibérica, S.A., Tepol, S.A., Torres Espic, S.L., Yecflex, S.A. and the Spanish Association of Polyurethane Businesses (ASEPUR) for restrictive practices prohibited by Article 1 of Spanish Competition Acts 16/1989 and 15/2007 and by Article 101 TFEU, consisting, in general, of the adoption of agreements to share out the market and fix prices in Spain.

There is now a maximum period of 18 months for the investigation of the case and its resolution by the Council of the CNC. The opening of these proceedings does not prejudge the final outcome of the investigation.

SWITZERLAND

This section reviews competition law developments under the Federal Act of 1995 on Cartels and Other Restraints of Competition (the "Competition Act"), as amended 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").

Policy And Procedure

Switzerland Adopts Legislation On Fixed Book Prices

On March 18, 2011, the Swiss Parliament adopted a fixed book price act. This act, which also applies to online book sales, requires in particular the publisher or importer to set the final retail price of books it publishes in, or imports into, Switzerland. Retailers must then sell books at this price. The act is currently subject to optional referendum, the Competition Commission decided, on March 24 2011, to temporarily suspend the investigation that it had opened in parallel to the legislative process. The purpose of this investigation is to determine whether the distributors and marketers of French-language books in Switzerland hold a dominant position and, if so, whether they set their prices at an excessively high level.

In France the retail price of books is set by publishers – booksellers cannot deviate from the price by more than 5%, by virtue of the "*loi Lang*." When a publisher decides to sell a French-language book in Switzerland, it generally resorts to the services of a distributor or marketer who distributes or markets the books of the relevant publisher on an exclusive basis. The distributor applies a conversion rate (which he sets freely) to the French price, and the resulting price is the gross price applied to the distributors and marketers (also called "Swiss recommended public price"), which is intended to cover the expenses of book distribution and marketing in Switzerland. The distributor then grants a discount on the Swiss recommended public price to the booksellers. Unlike for French booksellers, Swiss booksellers are presently free to depart from retail prices determined by publishers or distributors.

In July 2007, the Secretariat of the Competition Commission opened a preliminary investigation into the French-language book market in Switzerland. This preliminary investigation was intended to determine whether or not the retail price differences observed between books sold in Switzerland and those sold in France (which amounted to 25-35% at the time) was the consequence of a possible restriction on competition as defined in the Federal Act on Cartels and other Restraints of Competition ("ACart").

On March 13, 2008, the Competition Commission decided to open an investigation of the distributors of French-language books operating in Switzerland. Considering that the distributors have exclusive rights to the books of the publishers by which they are contracted, books of a particular publisher cannot be purchased from another distributor or marketer operating in Switzerland. In view of this exclusivity, the Competition Commission considered that distributors of French-language books might hold, on an individual basis, a dominant position on the Swiss market and that the level of prices charged for distribution services might be regarded as abusive pursuant to Article 7(2)(c) ACart. The Commission widened its investigation to include the Swiss recommended public prices set by distributors, in order to examine whether such practices (as well as the juxtaposition of vertical agreements between distributors and booksellers) could be regarded as an illegal cartel within the meaning of Article 5 ACart.

The investigation of the Commission was opened after a parliamentary initiative had been lodged in 2004, asking the Federal Council (*i.e.* the Swiss government) to prepare a draft federal act regulating book prices. This parliamentary initiative resulted in the adoption, on March 18, 2011, of the Federal Act regulating book prices.[44] The purpose of the act is notably to promote the variety and quality of books, considered as cultural assets. The act provides that the publisher or the importer has the right to determine the final retail price of the books that it publishes or imports. Booksellers are then compelled to sell the books at the final retail price. However, the

42 Ley 2/2011, de 4 de marzo, de Economía Sostenible, Spanish Official Journal (BOE) of March 5, 2011, no. 55, p. 25033.

43 Case S/0342/11, *Espuma de poliuretano*.

44 The text of the new Federal Act is available in French at http://www.admin.ch/ch/f/ff/2011/2525.pdf.

act allows booksellers to grant a general discount of up to 5% on the final retail price and additional discounts in a number of specific cases (sales to public libraries, sales of several copies of the same book, sales by a book sales clubs, etc.). The act entrusts the Price Supervisor with observing the evolution of book prices, conferring upon him the power to propose to the Federal Council to set by way of ordinance the maximum authorized price differences compared to prices charged abroad, taking into account the specificities of the Swiss linguistic regions (the German, French, or Italian parts of Switzerland). The act provides that publishers, importers and wholesalers shall not be allowed to supply retailers, whose product range does not mainly consist of books, at lower prices or under more favorable terms than those offered to the booksellers. The act also applies to the sale of books on the Internet (but not to digital books).

The act regulating book prices has not yet entered into force. The creation of a referendum committee with a view to putting the project to a public vote has already been reported in the media. The Secretariat of the Competition Commission took note of this, and decided on March 24, 2011, to suspend the investigation procedure until the end of the referendum deadline. Thus, it cannot be ruled out that the Competition Commission will take account of the regime introduced by the new act on book prices in the conclusions of its investigation.

Sectoral Investigations

Commission Investigates Into Cooperation Agreements In The Fiber Optic Sector

On January 4, 2011, the FCC announced that it has launched a preliminary investigation into a cooperation agreement between Swisscom and the city of St. Gallen to extend the city's fiber-optic network. The cooperation agreement was submitted to the FCC, which now plans to examine the agreement in more detail amid concerns that it could reduce competition for broadband internet access. In recent months, the FCC has received several notifications regarding similar cooperation in the fiber-optic sector.

The contemplated cooperation between the city of St. Gallen and Swisscom provides for the construction of the fiber-optic network in that city. The intention is to lay many fibers in each area of use (*i.e.*, flats, houses, and commercial premises), with the hope of guaranteeing effective competition by providing other operators with non-discriminatory access to the fiber-optic network (the so-called "multi-fiber optic model"). The agreement will guarantee Swisscom long-term access to up to two fibers per business and household. In return, Swisscom will assume around 60% of the required investment costs as well as the maintenance and operating costs. Swisscom has claimed that the agreement will guarantee the construction of an open-access infrastructure and enable real competition while avoiding the need to lay parallel networks.

The FCC's investigation will assess whether the cooperation might lead to the creation of a monopoly for Swisscom in relation to the fiber-optic network in St. Gallen and, if so, whether remedies could be provided for the alternative operators – many of which are alarmed at Swisscom's rapid dominance of the fiber-optic sector in St. Gallen. Analysts estimate that Swisscom still holds a 55% share of the total broadband market in Switzerland, chiefly through its asymmetrical digital subscriber line offerings, while cable operators represent the largest portion of the competition, with a market share of just under 30%. However, while the fiber-optic sector is nascent and commands only a minor market share, Swisscom has dominated all investment and roll-out in this area.

Swiss competition law provides for a system of non-mandatory preliminary notification of potentially unlawful agreements and practices. Undertakings have the option formally to notify the commission of agreements or practices which may restrain competition before they become effective. Once such a filing is made, the undertaking may carry out the notified agreement or practice without risk of being penalized, provided that the commission does not inform the undertaking that it has opened an investigation. It is particularly advisable to file such a notification where the agreement or practice in question entails significant investment.

In recent months, the FCC has received several notifications regarding cooperation arrangements between electricity distributors and Swisscom in the fiber-optic sector. The city of St. Gallen is the first to have notified certain terms of its cooperation agreement with Swisscom. The FCC intends to establish, in the context of this investigation, standards for all cooperation agreements regarding the establishment and development of fiber-optic networks.

On January 27, 2011, the FCC launched a preliminary investigation into a cooperation agreement between Swisscom and the public utility of Geneva to extend the fiber-optic network in that city, and on March 3, 2011, the FCC launched an investigation into a similar agreement between Swisscom and the public utility of Zurich. On April 15, 2011, preliminary investigations were also launched into cooperation agreements between Swisscom and the cities of Basel, Bern, and Luzern.

UNITED KINGDOM

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

Horizontal Agreements

Competition Appeal Tribunal Strikes Out Follow-On Damages Claim Against Non-Addressee Of Commission Decision

On March 21, 2011, the CAT struck out a follow-on claim for damages brought by Emerson Electric and others ("Emerson") against Le Carbone (Great Britain) Ltd ("Carbone GB") under Section 47A of the Competition Act 1998. The CAT held that the claim could not proceed because Carbone GB was not an addressee of the European Commission's 2003 infringement decision (the "Decision"), and that the claim would thus not be a true "follow-on" claim for the purposes of the Competition Act (*i.e.*, liability against Carbone GB would need to be proved).

Emerson's damages action followed the Decision, which found that certain companies had breached Article 101(1) TFEU by participating in an illegal carbon and graphite products cartel. The addressees of the Decision included Le Carbone-Lorraine S.A. ("Carbone S.A."), the parent of Carbone GB. In its claim, Emerson argued that Carbone S.A. and Carbone GB formed a single infringing undertaking and that the parent company had been named in the Decision in a representative capacity. In September 2010, Carbone GB applied for strike out of the elements of the claim that concerned it on the basis that it had not been named in the infringement decision on which Emerson's claim was based.

The CAT did not accept Emerson's argument that Carbone S.A. had acted in a representative capacity and on behalf of Carbone GB, in part because there was nothing in the infringement decision suggesting that Carbone GB had been involved in the infringing behavior. Although the Decision referred to a U.K. subsidiary, Carbone S.A. had more than one subsidiary in the U.K. at the time of the infringement. There was nothing to suggest that the Commission was identifying Carbone GB in its reference or, indeed, that anything in the Decision amounted to a finding that it was part of the same undertaking as Carbone S.A. at the material time. Furthermore, even if Carbone S.A.'s U.K. subsidiary were to be shown to be a reference to Carbone GB, that of itself would not amount to a finding by the Commission that Carbone GB had infringed Article 101(1). It might constitute evidence on the basis of which the Commission *could* find an infringement, but that would be an altogether different matter. Accordingly, the CAT held that it was compelled to strike out the claim against Carbone GB because of the limitations of Section 47A of the Competition Act.

The CAT's exclusion of a party not named in the infringement decision from follow-on damages proceedings is perhaps not surprising. However, the judgment serves to underline the limited scope of the CAT's jurisdiction under Section 47A of the Competition Act and emphasizes that the CAT will only remain an attractive forum to an increasingly narrow class of claimants, namely those that have a claim against a U.K. defendant that is named in the infringement decision. The restrictions on follow-on damages actions before the CAT stand in contrast to the more expansive approach to jurisdiction and cartel claims taken by the High Court in recent cases (notably *Cooper Tire* and *National Grid*), which reinforces what is fast-becoming the prevailing view that the High Court is the forum of choice for cartel claims.

CAT Rules On Construction Industry Bid Rigging Appeals

In September 2009, the OFT fined 103 construction companies a total of £129 million for engaging in cover pricing and other bid rigging activities. Twenty-five companies appealed to the CAT, predominantly challenging the OFT's calculation of the fine (and, in a small number of cases, particular findings of infringement). As of March 31, 2011, the CAT had handed down three judgments concerning thirteen of the appellants. In all three judgments the appellants were successful and had their fines reduced, in some cases by as much as 90 per cent. In particular, fines were significantly reduced as a result of the CAT rejecting the OFT's application of the so called "Minimum Deterrence Threshold" ("MDT"), by which the OFT had systematically increased parties' fines to a specific level it considered necessary to deter future infringements, and the OFT's decision to set the starting level of the fine by reference to the parties' turnover in the year prior to the adoption of the decision, rather than the last year of the infringement.

While it agreed with the OFT that cover pricing was a serious infringement, the CAT considered that cover pricing is materially distinct from, and less serious than, bid-rigging, stating that its purpose is not to prevent competition by agreeing the price which it is intended the client should pay, but rather to identify the price that the client would not be willing to pay. It therefore held that for a cover pricing infringement, the starting figure of 5% of turnover in the relevant market adopted by the OFT as its starting point as to

the appropriate amount of the fine was too high. The CAT considered that 3.5% was the appropriate level to reflect the seriousness of simple cover pricing and agreed with the submissions of several of the parties that the harmful effects to consumers of such an activity were minimal. In relation to infringements where compensation payments were made to the undertaking providing the cover price, the CAT found that due to its more serious nature the OFT was justified in attributing the higher starting point of 7%.

The CAT also rejected the OFT's decision to calculate the starting point for the fine on the basis of the parties' relevant turnover in the last business year preceding the decision, which was a change from its earlier approach that used turnover in the last year of the infringement. The OFT argued that it had expressly altered its approach and that this was justified because at the end of the calculation of the fine a 10% cap applies that is calculated on the basis of relevant turnover in the last year before the decision and the approach when setting the starting point of the fine should be consistent. The CAT rejected the OFT's argument, agreeing with the parties that the use of turnover in the last year of the infringement is the correct relevant turnover to use when setting the starting point of the fine, which is intended to reflect the harmful effects of the unlawful conduct on the market affected by the infringement.

The most significant factor in the reductions of the fines for most companies was the CAT's rejection of the OFT's approach to increasing basic fines for deterrence. The OFT had decided that where a fine based on a party's relevant turnover was less than a certain proportion of its total turnover, the fine would not be sufficient to deter the company from infringing in future and, in those circumstances, the OFT increased the fine to the level which it had decided was necessary to ensure deterrence. The OFT set the MDT at 0.75% of total worldwide turnover, which it arrived at by assuming that the undertaking's turnover in the relevant market needed to represent at least 15% of its total worldwide turnover in order to serve as a sufficient deterrent, multiplied by the 5% starting point reflecting its assessment of the seriousness of the infringement. This approach was heavily criticised by the CAT, which considered that the MDT was applied mechanistically and as a substitute for an individual assessment of circumstances of each undertaking, and that by relying on worldwide turnover as the sole indication of the size and financial position of the companies, the OFT had failed to take account of other ways in which penalties are liable to have a deterrent effect.

The judgments in the remaining appeals are expected to produce some similarly striking reductions in fines, as is the judgment in the Construction Recruitment Forum appeal, in which the appellants challenged many of the same aspects of the OFT's approach to calculating fines. The judgments are also likely to have implications for the OFT's administrative practice, since many of the difficulties faced by the OFT in this case seem to have been, at least in part, a consequence of its attempts to manage an infringement decision addressed to over 100 undertakings. The OFT has already indicated that it will consider whether these judgments have any implications for its practices and policies in the future.

Unilateral Conduct

Court Of Appeal Upholds Dismissal Of Follow-On Damages Claim

On January 19, 2011, the Court of Appeal handed down its unanimous judgment upholding the decision of the CAT, dismissing Enron Coal Services Limited's ("ECSL") claim for damages from English Welsh & Scottish Railway ("EWS"). The Court held that while regulators' findings of fact are binding on the CAT, not every statement in a regulator's decision amounts to a finding of fact. The Court also agreed with the CAT's judgement that competitive disadvantage and loss are distinct concepts and a finding of competitive disadvantage does not relieve the claimant from the burden of proving that the competitive disadvantage led to demonstrable loss.

In 2006, the Office of Rail Regulation ("ORR") found that EWS abused its dominant position in the UK market for rail coal haulage by charging higher prices to ECSL for coal haulage than it did to other customers during the relevant period. This placed ECSL at a competitive disadvantage in relation, in particular, to coal haulage supply negotiations with electricity generator Edison Mission Energy ("EME").

ECSL subsequently claimed damages against EWS before the CAT under section 47A of the Competition Act 1998. Essentially, ECSL claimed that the conduct of EWS deprived ECSL of a real or substantial chance of winning a contract for the supply of coal to one of EME's power stations for the period from 2001 to 2004. The CAT concluded that a number of material considerations would have led EME to reject ECSL's tender for coal haulage and denied the claim on the basis that causation had not been proven. ECSL subsequently appealed against the dismissal of its follow-on claim to the Court of Appeal.

Before the Court of Appeal, ECS argued that the CAT's judgement should be overturned on the basis that it had ignored the effect of the ORR's decision that there had been an infringement and of findings of fact made by it in the course of reaching that decision.

The focus of the appeal was firstly, therefore, on whether the CAT was bound by findings of fact in the ORR's decision. In its decision, the CAT had concluded that section 58 of the Competition Act 1998, whereby a competition regulator's findings are binding on the parties unless "the court" directs otherwise, did not apply to section 47A proceedings before the CAT. Contrary to the finding of the CAT, the Court of Appeal agreed with ECSL and found that on the interpretation of section 58, it would be "most unlikely" to have been the intention that findings of fact would be binding in court proceedings but not in proceedings before the CAT. The Court of Appeal therefore concluded that the CAT was also subject to section 58 and as such could not depart from findings of fact in the ORR decision. However, the Court of Appeal was of the opinion that not every statement in a regulator's decision is to be regarded as a finding of fact that is binding as a result of section 58. In assessing whether a finding of fact has been made, the Court stressed that a party seeking to rely on a finding had to be able to demonstrate that the regulator had made a clearly identifiable finding of fact to a given effect, and it was not enough to be able to point to passages in the decision from which a finding of fact might arguably be inferred.

The Court also agreed with the CAT's decision that a finding of competitive disadvantage did not necessarily mean that ECSL had suffered any loss of chance, since a finding of competitive disadvantage was not dependent on proof of actual harm. Competitive disadvantage and causation of loss remain distinct concepts and must be proven separately.

ECSL's follow-on claim under section 47A of the Competition Act 1998 was the first of its kind to reach a full hearing before the CAT and the decision of the Court of Appeal is encouraging for potential claimants under section 47 as it establishes that section 58 of the Act does apply to follow on claims in the CAT. The Court itself noted the contrast between the limited jurisdiction of the CAT in respect of claims for damages and the non-specialist High Court's unlimited jurisdiction, describing the situation as "somewhat anomalous" and went so far as to say that the interrelationship between the two jurisdictions might merit reassessment in light of experience to date. The judgement may therefore fuel further discussion over the CAT's limited jurisdiction compared with that of the High Court.

Mergers And Acquisitions

OFT Clears Ordnance Survey/LGID Joint Venture

On February 15, 2011, the OFT decided not to refer to the CC the proposed joint venture between Ordnance Survey ("OS") and the Local Government Improvement and Development Agency ("LGID") creating a national addressing database, relying on the *de minimis* exception to the duty to refer.

OS is an independent non-ministerial government department with Executive Agency status operating as a Trading Fund. It produces a wide range of mapping products. LGID is the business name of the Improvement and Development Agency for Local Government, whose role is to support improvement and innovation in local government. The joint venture would combine the spatial address databases of OS and LGID to create the National Address Gazetteer, a database of accurate geo-referenced addresses in England and Wales.

The OFT identified distinct relevant markets for the supply of accurate geo-referenced addressing datasets in Great Britain for (i) public sector customers, and (ii) private sector customers. As OS and LGID are the only two providers of accurate geo-referenced addressing databases, the joint venture amounted to a merger to monopoly in both markets. In respect of public sector customers, the OFT found that there was limited competition between the parties since local authorities usually used LGID's products while central government bodies generally used OS's products. In addition, the parties' merged product, the National Address Gazetteer, would be provided free of charge at the point of use to all public sector organizations for at least ten years and so they would be protected from any loss of competition for a considerable period.

In respect of private sector customers, the OFT concluded that the merger may be expected to result in a substantial lessening of competition. The OFT considered, however, that it was not appropriate to refer the market to the CC. Although the OFT did not consider that relevant customer benefits resulting from the merger were sufficiently compelling to outweigh the substantial lessening of competition, it did consider that the *de minimis* exception to the duty to refer was satisfied.[45] In particular, the annual value of this market was £3 million, which was only marginally above the threshold below which the OFT generally does not refer.

45 *See* Exceptions to the duty to refer and undertakings in lieu of reference guidance, OFT1122, December 2010, para 2.15.

In addition, the magnitude of competition lost as a result of the merger was not significant since there had been limited opportunity in practice for customers of the parties to trade one off against the other. Finally, virtually all customers supported the creation of the new database. The OFT therefore exercised its *de minimis* discretion not to refer the transaction to the CC; the second such occasion since the publication of the revised 'exceptions to the duty to refer' guidance in December 2010.

Policy And Procedure

OFT Publishes New Competition Act Procedures Guidance And Trials New "Procedural Adjudicator" Role

On March 2, 2011, following an extensive public consultation, the OFT published the final version of its new Competition Act 1998 Procedures Guidance. At the same time, prompted by requests made by a number of respondents to the consultation, the OFT announced a one-year trial of a new Procedural Adjudicator role, to resolve disputes on procedural issues encountered during Competition Act investigations.

The Procedures Guidance sets out the procedures followed by the OFT in Competition Act investigations, from the initial complaint, through the formal investigation, to the provisional findings and, ultimately, the final decision. The Guidance discusses a number of new measures, including: the possibility of informal, pre-complaint discussions, to help potential complainants to decide whether the OFT would be likely to investigate if they were to receive a formal, reasoned complaint; a commitment by the OFT to reach a decision on whether formally to open a case within four months of receiving a reasoned complaint; and a new "case initiation letter," to be sent upon the opening of a formal investigation, setting out the details and key contacts of the investigators, including the Senior Responsible Officer ("SRO") and the case's decision maker.

The Procedural Adjudicator role, which will initially be filled by Jackie Holland, OFT Director of Competition Policy, commenced its one-year trial on March 21, 2011, and is intended to provide a "swift, efficient, and cost-effective mechanism for resolving disputes between parties and the case teams in Competition Act 1998 investigations." The initiative was prompted by feedback from businesses and lawyers that there was previously no efficient way to deal with disputes on procedural issues where they could not be resolved with the SRO, and a number called for the OFT to create a role similar to that of the Hearing Officer in European Commission investigations. While the OFT has responded to that feedback by trialling the role of Procedural Adjudicator, the OFT has emphasized that the scope of the role will be more limited than that of the Commission's Hearing Officer.

In particular, the OFT has stated that the Procedural Adjudicator will deal with the following matters:

- Deadlines for parties to respond to information requests, submit non-confidential versions of documents, or to submit written representations on the statement of objections or supplementary statement of objections;
- Requests for confidentiality redactions of information in documents on the OFT's case file, in a statement of objections, or in a final decision;
- Requests for disclosure or non-disclosure of certain documents on the OFT's case file;
- Issues relating to oral representations meetings, such as the date of the meeting; and
- Other significant procedural issues that may arise during the course of an investigation.

A party must request the involvement of the Procedural Adjudicator, and only after it has been unable to resolve the dispute with the SRO. The Procedural Adjudicator will review the disputed decision on grounds similar to those applied in judicial review proceedings, meaning she will consider whether the case team's decision was unreasonable or irrational, and whether the party's procedural rights have been respected. The Procedural Adjudicator will produce a short reasoned decision, which will be binding on the case team (although it will not prejudice a party's right to seek judicial review of the decision or to make any appeal to the CAT). The OFT's target is for the Procedural Adjudicator to make 90% of her decisions within 10 working days.

The OFT has indicated that while it will evaluate the trial after one year, it reserves the right to suspend the trial before that period has elapsed if parties are misusing the system so as to delay investigations.

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