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Austria

This section reviews the latest amendments to the Austrian Cartel Act, 2005 (Kartellgesetz – KartG) and Competition Act (Wettbewerbsgesetz – WettbG), to be brought about by the Reform Act, 2012.

Policy and Procedure

The 2012 Reform Act

On June 12, 2012, the Austrian Council of Ministers adopted the Reform Act, 2012 (the "Act") amending the Cartel and Competition Act, 2005. The Austrian Parliament is expected to approve the Act before the end of 2012.[1]

In general, the Act will strengthen the enforcement powers of the Austrian Federal Cartel Authority ("FCA"), meaning that its enforcement practices will be more closely aligned with those of the European Commission.

De minimis rule

(1) Currently, Austrian legislation exempts agreements between companies with market shares below 5% in Austria, or below 25% in narrower geographic markets, from competition law enforcement under the *de minimis* exemption. Under the Reform Act, the *de minimis* thresholds will be set at 10% for the Austrian market and 15% for narrower geographic markets, in line with the thresholds set out in the Commission's *de minimis* Notice.[2]

(2) Additionally, certain hardcore restrictions no longer qualify for the *de minimis* exemption; the Reform Act provides that even companies with nominal market shares will not be able to enter into naked price-fixing agreements, or similarly anti-competitive practices.

Collective dominance

(1) Under the Reform Act, the FCA will be able to investigate and prosecute undertakings for abuses of collectively dominant positions. Collective dominance has not until now been recognized as a form of dominance under Austrian cartel legislation.

(2) The Reform Act provides for a rebuttable presumption of collective dominance in the presence of certain combined market shares held by a limited number of competitors. If the relevant thresholds are met, the competitors in question may rebut the presumption by, for example, establishing that the competitive conditions prevailing in the relevant markets do not allow firms to gain a collectively dominant position.

Calculation of fines

(1) The Cartel and Competition Act, 2005 provides a list of criteria to be taken into account when calculating cartel fines (namely gravity and duration of the infringement, profit achieved from the infringement, intentional/negligent conduct, and ability to pay); it does not define aggravating and/or mitigating factors.

(2) The Reform Act will define aggravating and mitigating circumstances to be taken into account by the FCA in the calculation of cartel fines. These amendments correspond to paragraphs 28 and 29 of the Commission's Fining Guidelines.[3]

Private enforcement

The Reform Act contains provisions which are designed to facilitate private competition law enforcement through civil claims. The Reform Act provides that, *inter alia*: (1) decisions of the Cartel Court, the Austrian Competition Commission, and national competition authorities are binding on Austrian civil courts; (2) interest is awarded from the moment the damages.

[1] http://www.parlament.gv.at/PAKT/VHG/XXIV/I/I_02035/index.shtml.

[2] OJ C 368/07 of 22.12.2001 - Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81 (1) of the Treaty establishing the European Community (*de-minims*).

[3] OJ C 210/2 of 01.09.2006 – Guidelines on the method of setting fines imposed pursuant to Article 23 (2) (a) of Regulation No 1/2003.

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occurred; and (3) limitation periods are suspended pending cartel proceedings.

Belgium

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

Restrictive Practices / Abuses of Dominant Position

The Competition Council fines Presstalis for an abuse of a dominant position

On July 30, 2012, the Council imposed a fine of €245,530 on Presstalis S.A.R.L. ("Presstalis") for an abuse of a dominant position.[4]

Presstalis is a French company that exports French newspapers and periodicals to other countries, such as Belgium. From 2000 to 2004, Presstalis operated a fidelity discount system (the so-called BSC system) that granted rebates to French publishers who entered into exclusive export and distribution arrangements with Presstalis with respect to the three most important export markets, namely Belgium, Switzerland, and Canada. In February 2003, a Belgian press distributor, Tondeur Diffusion S.A. ("Tondeur"), lodged a complaint with the Belgian Competition Authority alleging that the BSC system constituted an abuse of dominance. Similar complaints were lodged with the French Competition Authority and the European Commission; these complaints were dismissed by both authorities on procedural grounds.

The Council established that Presstalis held a dominant position in the worldwide export market for French newspapers and periodicals given its enduring share of around 90%. For its competitive analysis, the Council also took into account the neighboring downstream Belgian market for press distribution because of its close links with the export market of French newspapers and periodicals. The Council also analyzed the possible effects of the BSC system on this market.

The Council further established that Presstalis had abused its dominant position through utilization of the BSC system. According to the Council, the BSC system was loyalty inducing because it incentivized French publishers to deal exclusively with Presstalis and could therefore have the effect of excluding competitors from the market. In addition, the Council determined that the restrictive effects of the BSC system were reinforced by Presstalis' privileged relationships with the main distributors in Belgium (AMP), Switzerland (Naville), and Canada (LMPI); Presstalis could offer publishers an attractive package of distribution services in the three main export markets that discouraged publishers from working with competing distributors in those markets. For example, while publishers were not strictly obliged to use the services provided by AMP to benefit from Presstalis' BSC system, in order to use the services of an alternative distributor, publishers were required to make a request to this effect to Presstalis in writing. The Council therefore concluded that the BSC system strengthened Presstalis' dominant position in the Belgian press distribution market, and that the close relationship between Presstalis and AMP rendered the BSC system highly restrictive.

The Council therefore concluded that Presstalis had abused its dominant position and imposed on it a fine of €245,530. For the calculation of the fine, the Council took into consideration certain mitigating circumstances, such as the excessive duration of the investigation, and the fact that Presstalis had put an end to the practice long before the report of the Auditorate was filed. Moreover, the Council noted that the new Fining Guidelines of 2011 were not applicable in the present case, as the hearing took place before their entry into force.

Competition Council stays proceedings in the Cargo Handlers Case

On August 30, 2012, the Council decided to stay proceedings regarding alleged restrictive practices by cargo handlers active at Belgian ports.[5]

Following a leniency application, the Auditorate opened an investigation in 2006 into alleged price fixing agreements between cargo handlers. On April 26, 2012, the Auditorate issued its reasoned report, where it found that cargo handlers had entered into an agreement to raise prices.

On June 5, 2012, the undertakings/members concerned were granted access to the case file. A number of the undertakings

[4] Raad voor de Mededinging, beslissing nr. 2012-P/K-20 van 30 juli 2012, zaak CONC-P/K-03/0006: Tondeur Diffusion S.A. / Presstalis S.A.R.L.

[5] Raad voor de Mededinging, beslissing nr.2012-I/O-22 van 30 augustus 2012, zaak MEDE-I/O-06/0001 – Mededingingsbeperkende praktijken in de sector van de goederenbehandeling in de Belgische zeehavens.

raised concerns regarding the absence of non-confidential versions of certain documents marked as confidential, the poor readability of the Auditorate's report due to redactions, and various other procedural issues.

Subsequently, on June 25, 2012, the Council directed the Auditorate to complete its case file and adapt the inventory accordingly by July 13, 2012. Specifically, the Auditorate was instructed to include a non-confidential version of each document marked as confidential in the case file. On July 13, 2012, the Auditorate asked for an extension to complete the file, which was granted on the same day to last until August 20, 2012. When the Auditorate failed to complete the investigation file by the extension date and asked for a second extension, the Council decided to stay the current proceedings and return the file to the Auditorate. According to the Council, an important consideration was the fact that the Auditorate itself suggested that it would need a considerable amount of time to complete the file.

Merger decisions

Competition Council approves the take-over of Flightcare by Swissport Handling with conditions

On August 31, 2012, the Council approved the take-over of Flightcare SL and Flightcare Belgium NV (together "Flightcare") by Swissport Handling SA ("Swissport") subject to two conditions.[6]

Flightcare is a supplier of groundhandling services at Brussels National Airport. Groundhandling services can typically be divided into activities performed on the tarmac (services on the airside) and activities performed beyond the tarmac (services on the landside). Airside services are regulated by the Belgian government: on a periodic basis, the Brussels Airport Company designates two companies as suppliers of airside services. The landside activities, on the other hand, can be carried out by any supplier willing to enter that market.

Flightcare provided both landside and airside services (*i.e.*, it was one of the two providers licensed to operate on the airside). Swissport was only active in the provision of landside services.

The Council defined the geographic market as the area of each Belgian airport (*i.e.*, Antwerp, Brussels National, Charleroi, Liege and Oostende). For the relevant product market the Council made a distinction between (1) self-handling activities (*i.e.*, activities that airlines carry out themselves); and (2) third party handling services. The Council considered that the present case only concerned third party handling services and segmented this market between (1) airside (regulated) services and landside (unregulated) services; and (2) cargo handling and passenger handling.

The Council identified concerns in the markets for airside and landside services for cargo on behalf of third parties. The Council considered that Swissport could abuse Flightcare's market power on the airside (as it is one of the two companies licensed to operate airside services) by bundling its services with those of Flightcare, or by offering rebates in order to hinder its competitors and restrict entry into the landside market. In addition, the Council noted that post-transaction it would be possible for the merged entity to obtain a monopoly on airside services, in that Flightcare and Swissport could obtain both available licenses for operating airside services.

Ultimately, the Council approved the take-over of Flightcare by Swissport following remedies offered by Swissport. Pursuant to the first remedy, Swissport will be prohibited from bundling its airside and landside services to the same airline. Swissport is also prohibited from offering discounts aimed at incentivizing airlines to purchase both airside and landside services. However, this remedy will only remain legally binding if the other supplier of groundhandling services on the airside is vertically integrated. The remedy will also cease to apply if the government decides that more than two suppliers of groundhandling services can be active on the airside. Pursuant to the second remedy, neither Swissport nor any other undertaking belonging to the same group is allowed to hold more than one of the licenses provided by the government for supplying groundhandling services for cargo on the airside.

Denmark

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

[6] Raad voor de Mededinging, beslissing nr. 2012-C/C-21 van 31 augustus 2012, zaak MEDE-C/C-12/0011: Swissport Handling SA / Flightcare SL en Flightcare Belgium NV.

Policy and Procedure

Proposed amendment to the Danish Competition Act

On October 26, 2012, the Danish Minister for Business and Growth (the "Minister") presented a proposal for an amendment to the Danish Competition Act (the "Proposal"). If the Proposal is passed in its current form, the amendment will entail the following notable changes, which are scheduled to enter into force on March 1, 2013:

Possibility of imprisonment for cartel activity

Individuals (generally management staff) involved in cartel activities may be imprisoned for up to 18 months. If there are particularly aggravating circumstances, the sentence may be increased by up to 6 years imprisonment.

Only the first applicant for leniency will be able to obtain immunity. Subsequent applicants will only be able to obtain sentence reductions based on the normal rules of the Danish Criminal Code (*i.e.*, if there are mitigating circumstances or if the individual in question has cooperated with the public prosecutor).

Significantly increased fines for violations of the Danish Competition Act

The current range of fines for minor infringements, DKK 10,000-400,000 (approx. €1,350-53,700), will be broadened with the introduction of new a maximum fine of DKK 4 million (approx. €537,000). The range of fines for serious infringements is currently DKK 400,000-15 million (€53,700-2,010,000) whereas the new range will be DKK 4 million-20 million (approx. €537,000-2,684,000). Finally, the minimum fine for very serious infringements will be increased from DKK 15 million (€2,010,000) to 20 million (approx. €2,684,000).

There are currently no provisions in the Danish Competition Act which concern the level of fines for individuals, but the Supreme Court has set the maximum fine for individuals at DKK 25,000 (€3,350). The Proposal introduces minimum fines for infringements by individuals: DKK 50,000 (€6,700) for minor infringements; DKK 100,000 (€13,400) for serious infringements; and DKK 200,000 (€26,800) for very serious infringements.

Suspensive effect for complaints concerning merger proceedings

Where parties to a merger lodge a complaint with the Tribunal regarding the review process of the merger in question, the relevant review time limits will be suspended until the complaint has been processed.

The Proposal will also entail: changes to the sanctioning of illegal state aid; increased transparency; greater protection of parties' right to be heard in competition law infringement cases; additional rights for the DCC to publicize documents related to competition and merger cases; and the introduction of clarifying injunctions (aimed at securing compliance with previously issued injunctions) and interim injunctions.

Finland

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

Policy and Procedure

The Competition Authority and the Consumer Agency to be combined

On September 17, 2012, the Finnish government introduced to the parliament a bill to combine the FCA and the Finnish Consumer Agency into a new Competition and Consumer Authority. The new entity will become operational on January 1, 2013. The purpose of the bill is to make the enforcement of competition law and the protection of consumers more efficient. The consolidated authority will not have any duties or powers that are not currently held by either the FCA or the Finnish Consumer Agency.

The proposed Competition and Consumer Authority will have a competition department and a consumer department. The head of the consumer department will also function as the Consumer Ombudsman. The duties and powers of the Consumer Ombudsman are to remain unchanged. The head of the Competition and Consumer Authority is not authorized to act in matters within the remit of the Consumer Ombudsman.

The enforcement activities of the competition department and the consumer department will remain separate. Information used by one department will only be available to the other if it is made public.

The proposed budget of the new authority is €11 million for 2013, and it will have approximately 150 employees.

France

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

Unilateral Conduct

The French Competition Authority approved (again) the acquisition of the pay-TV group TPS by Canal + and the acquisition of two free-TV channels by Canal +.

Following an unprecedented withdrawal of the concentration's clearance decision due to violation of the conditions imposed by the French finance minister in 2006, the French Competition Authority had to reexamine the acquisition of TPS by Canal +. On the same day, the French Competition Authority approved, subject to commitments, the acquisition of Direct 8 and Direct Star by Canal +.[7]

The French audiovisual group Canal + has had a quasi-monopoly in the market for pay-TV since its acquisition of TPS, its former main competitor. That transaction was approved in 2006 subject to commitments submitted by Canal +, but the FCA later found in 2011 that Canal + had breached some of these commitments, and decided to withdraw its clearance decision. Consequently, Canal + was required to re-notify its acquisition of TPS to the FCA.

The FCA concluded that Canal + has a quasi-monopoly (or, at the very least, enjoys a dominant position) on the following pay-TV markets: (1) the acquisition of broadcast rights for American and French films; (2) the broadcast and commercialization of premium channels and cinema channels; and (3) the distribution of premium channels and thematic channels through CanalSat.

The FCA was chiefly concerned with preserving competition in the market for the distribution of premium and thematic channels.

Accordingly, the FCA conditioned clearance on Canal +: (1) permitting distributers to include all of Canal +'s cinema channels in their offers subject to non-discriminatory fees; and (2) lowering premiums given to independent thematic channels who broadcast exclusively through CanalSat.

The FCA also directed that the publishing and distribution branches of Canal + be made legally distinct, with each branch having separate accounting departments. This way, the precise production costs for cinema channels and distribution costs for channels according to broadcast medium (satellite, cable, ADSL, and fiber-optic cable) can be accurately determined. Under this arrangement, the FCA will be able to ensure, through an examination of costs, that prices offered by Canal + to competing distributors are non-discriminatory, and that the premiums offered by Canal + to independent thematic channels who broadcast exclusively through CanalSat are sufficiently low so as not to be loyalty-inducing and thus abusive.

These commitments will remain in force until 2017, when the FCA will launch a new investigation into competition in the pay-TV markets. The FCA may, in light of this investigation, extend the term of the Canal + commitments to 2022.

The FCA also approved the acquisition of Direct 8 and Direct Star by Canal +, which marks its entry into the free-TV markets. During its investigation, the FCA raised the concern that Canal + would, post-transaction, leverage its dominant position in the pay-TV markets to increase its market share in the free-TV markets.

To address this concern, Canal + offered a number of commitments, pursuant to which: (1) Canal + would not be allowed to conclude an output deal for the simultaneous acquisition of rights for pay-TV and free-TV with any one of six major American studios; (2) Canal + would not be able to simultaneously acquire the rights of more than twenty original French films per year for distribution in both pay- and free-TV; and (3) the teams that purchase rights for pay-TV and free-TV will be allocated to separate legal subsidiaries.

The FCA cleared the transaction subject to these commitments, which will remain in force 2017, when the FCA will consider whether or not their term will be extended to 2022.

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[7] French Competition Authority, Decision n°12-DCC-100 of July 23, 2012, Acquisition of TPS by CanalSatellite, Vivendi and CanalPlus Group, http://www.autoritedelaconcurrence.fr/ pdf/avis/12DCC100decision version_publication.pdf; French Competition Authority, Decision n°12-DCC-101 of July 23, 2012, Acquisition of Direct 8, Direct Star, Direct Productions, Direct Digital and Bolloré Intermedia by Vivendi and Canal Plus Group, http://www.autoritedela concurrence.fr/pdf/avis/12DCC101decision_version_ publication.pdf.

Sectoral Investigations

The French Competition Authority issues an Opinion on the e-commerce sector

The French Competition Authority assessed the competitive impact of online sales on traditional distribution channels and restates the competition rules governing online distribution.[8]

On September 18, 2012, the FCA published the findings of its sector inquiry into e-commerce (the "FCA Opinion"). The sector inquiry focused on the online distribution of electrical domestic appliances, cosmetic and personal care products, and luxury perfume and beauty products.

The FCA assessed the competitive impact of online sales on traditional distribution channels, particularly with respect to prices. The FCA Opinion concludes that, on average, the prices offered by online retailers (including shipping costs) are significantly lower than those offered by traditional brick-and-mortar retailers (*e.g.,* 10% lower for electrical domestic appliances or cosmetic products online). More generally, the FCA Opinion emphasizes the value of e-commerce in the economy as: (1) it puts downward pressure on prices, mainly due to lower distribution costs; (2) it widens the range of products that can be offered to consumers; and (3) the presence of certain players such as price comparison websites, additional marketplaces (*e.g.,* eBay, Amazon, etc.), and "pure players" *(i.e.,* players that operate exclusively through web shops), increase competitive pressure throughout the sector.

The FCA Opinion also identifies several practices followed by manufacturers that may restrict the development of e-commerce or limit the expansion of pure player retailers.

First, the FCA Opinion shows that distributors with a strong online presence may be offered less attractive terms of purchase than those offered to traditional retailers. The differences concern (1) the range of products being offered; (2) supply conditions; and (3) pricing conditions. Some manufacturers also refuse to supply pure players for a short period of time after the launch of a new product, or when there is a shortage of stock.

In particular, the prices offered by manufacturers to offline retailers can be up to 10% less than those offered to online retailers. According to the FCA, this gap is due to the use by manufacturers of sales terms that differ according to category of retailer. The FCA noted that the significant buyer power of traditional retailers also allows them to negotiate more favorable rebates than online retailers. Additional rebates may also be offered in exchange for commercial services that are underdeveloped in the e-commerce sector compared to traditional distribution channels.

The FCA restated that discriminatory practices do not constitute anticompetitive practices per se. Such practices may only be prohibited when implemented by a manufacturer holding a dominant position. In particular, practices may be deemed to be anticompetitive if the manufacturer and/or retailer have substantial market power in their respective markets, or if the products in question are highly attractive (*i.e.,* 'must-stock' products). Secondly, the FCA investigated the selective distribution systems administered by manufacturers, and in particular the conditions imposed on online retailers which want to join selective distribution networks.

The FCA's Opinion indicates that these conditions can usually be justified by reference to the product's technical characteristics (high-tech products), or by a desire to protect the high-end image of the product. A manufacturer may thus justifiably require that a retailer's website comply with certain quality standards that are applied to its offline retail outlets in order to ensure that the consumer receives a sufficiently high quality service (*e.g.,* secure websites, pages dedicated to products, limits placed on number of items sold to consumers to prevent parallel trade, etc.).

However, the FCA's Opinion stresses that offline distribution should not be favored over online distribution. EU legislation and the decisions of the FCA provide that the terms and conditions relating to online sales of products must be similar to those relating to traditional retail outlets for said products. In particular, a manufacturer cannot, under any circumstances, prohibit an approved distributor from selling its products online.

Finally, the FCA's Opinion emphasizes that the FCA intends to keep a close eye on the e-commerce sector in order to ensure that the need for specific distribution systems does not limit the opportunities for competition created by the internet.

Although the FCA's Opinion does not contain any finding of infringement, the FCA has announced that it is generally willing to follow-up on its sector inquiries with infringement

[8] French Competition Authority, Opinion n°12-A-20 of September 18, 2012, E-commerce, http://www.autoritedelaconcurrence.fr/pdf/avis/12a20.pdf.

proceedings if the companies within the sector do not take account of the FCA's recommendations.

The FCA issues an Opinion on the competitive functioning of the motor vehicles aftermarket and announces possible in-depth investigations in this sector

In an opinion dated October 8, 2012, the FCA announced possible in-depth investigations into the motor vehicles aftermarket and made several recommendations aimed at stimulating competition both in the provision of maintenance services and in the supply of spare parts. The opinion follows a preliminary sector inquiry that uncovered potential obstacles to competition in the market for repair and maintenance services for motor vehicles, and the market for the manufacture and distribution of spare parts.[9]

In France, between 2000 and 2010, prices for repair and maintenance services increased by nearly 30%, and prices for spare parts by 13%. In light of the fact that this increase was country-specific (other European Member States experienced a decline in prices over the same period), the FCA opened a sector investigation in June 2011 to determine if anticompetitive practices were behind the price increases.

Regarding repair and maintenance services, the French aftermarket for motor vehicles is broken down into two main categories of operators: (1) the car manufacturers' network, *i.e.* their authorized dealers' network; and (2) the independent aftermarket, which consists of independent repairers. The FCA found that car manufacturers hold significant market power in the markets for maintenance and repair services of their own vehicles, with their market shares amounting to about 50%, and the remainder of the market comprising multiple independent repairers, each maintaining only a small market share.

The upstream market for the supply of spare parts to the aftermarket is divided between three types of players: (1) car manufacturers, which supply spare parts to their authorized dealers' network; (2) original equipment suppliers, which supply both car manufacturers and independent repairers with parts used in the assembly of the vehicle; and (3) "second level" spare part suppliers, which supply independent repairers with spare parts of equivalent quality. The FCA found that car manufacturers may have a *de jure* or *de facto* monopoly on certain types of spare parts (mainly visible parts, since car manufacturers often own patents on the design of those parts), whereas competition between the three categories of players may be stronger for other components.

The central focus of the FCA's opinion is the factors that may allow car manufacturers to foreclose independent repairers from the markets for the repair and maintenance of automobiles. The opinion therefore puts forward several recommendations aimed at increasing competition in the aftermarket. Firstly, with respect to visible parts, the FCA recommends introducing a 'repair clause' into French law. The repair clause, which has already been adopted in eleven EU Member States, would prevent car manufacturers from enforcing the patents they hold on the design of visible parts in order to restrict the access of independent repairers to these parts. Secondly, the FCA suggests a modification of the French Intellectual Property Code to allow an original equipment supplier to remove the car manufacturer's brand from the parts they produce, thereby enabling the supplier to sell these parts to independent repairers without infringing the car manufacturer's IP rights. Thirdly, the FCA suggested that the implementing measures for Regulation No. 715/2007, regarding the access of independent operators to car manufacturers' technical information required for repair and maintenance, be reinforced.

The FCA announced that it may open in-depth investigations in order to examine more closely some of the issues identified in the opinion. In particular, the FCA may scrutinize (1) contractual provisions imposed by car manufacturers on original equipment suppliers to prevent them from supplying spare parts to independent aftermarket services providers; (2) the compliance of car manufacturers with provisions of Regulation No. 715/2007 regarding the access of independent operators to technical information required for repair and maintenance; and (3) provisions of warranty contracts that may prevent car owners from turning to independent repairers for repair and maintenance (*e.g.*, providing that the warranty is only applicable if the defect in question has not been caused by works on the vehicle performed outside of the car manufacturer's authorized network).

Finally, in addition to its concerns regarding the possible foreclosure of independent repairers by car manufacturers, the

[9] French Competition Authority Opinion, n°12-A-21 of October 8, 2012, Competitive functioning of the sectors of repair and maintenance services for motor vehicles and manufacturing and distribution of spare parts, http://www.autoritedelaconcurrence.fr/pdf/avis/12a21.pdf.

FCA also expressed serious concerns about the fact that car manufacturers, original equipment suppliers, and "second level" spare part suppliers all circulate recommended retail prices to their distributors and repairers (that are publically available), which are used as a basis for the sale of parts from suppliers to distributors, from distributors to repairers, and from repairers to customers. The FCA found that such practices may in fact amount to resale price maintenance (in particular if suppliers were found to exert pressure on their distributors and/or repairers to abide by the recommended prices) and may constitute an unlawful exchange of information between competitors that reinforces transparency on the market. An in-depth investigation could also be opened with respect to this issue.

The FCA's opinion constitutes only an initial analysis of the competition issues that may be present in the motor vehicles aftermarket; it did not reveal that any antitrust law violation actually occurred. However, the FCA may initiate in-depth investigations in the coming months or weeks in respect of particular manufacturers.

Germany

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

Horizontal Agreements

FCO imposes fines in several Railway Tracks cartel cases

On July 5, 2012, the FCO imposed a fine of €124.5 million on four rail manufacturers for bid rigging.[10] The participants were found to have coordinated quotas relating to the public bidding procedure of Deutsche Bahn AG. The investigation was triggered by the leniency applications of two companies, Voestalpine AG (regarding normal rails and head-hardened rails) and Kihn S.A. (with respect to switch blades). All companies involved cooperated with the FCO within the framework of the leniency program. The FCO closely cooperated with the public prosecutor who initiated proceedings against the individuals involved; bid rigging is a criminal offence under the German Criminal Code, and only the FCO has the competence to carry out administrative proceedings, while only the public prosecutor has the competence to pursue criminal proceedings.

Automatic Doors

On July 20, 2012, the FCO fined eight manufacturers of automatic door systems as well as their trade association, and one individual, a total of €2.4 million for entering into and maintaining, between 2000 and 2009, anti-competitive horizontal agreements which concerned, *inter alia*, price ranges and discounts.[11] The proceedings were triggered by the leniency application of GU Automatic GmbH, and GU Service GmbH & Co. KG, both affiliates of the Gretsch-Unitas group, which escaped the fine. The fines were moderate due to the gravity and duration of the infringements. All but Geze GmbH settled the case with the FCO. This is the first occasion the FCO has fined an individual working for a culpable trade association.

Haribo

On August 1, 2012, the FCO fined Haribo (a confectionary producer) and one of its employees a total of €2.4 million for engaging in anti-competitive information exchange practices, between 2006 and 2007.[12] In the so-called "Big Four" circle, the participants exchanged information regarding the status and the development of negotiations with several large retailers. The proceedings against two other participants are ongoing. The infringement was revealed by a leniency application submitted by Mars. The FCO did not find any hardcore infringements but concluded that the exchange of competitively sensitive information could influence the participants' decisions in negotiations with their customers.

Power Transformers

On September 19, 2012, the FCO imposed a total fine of €24.3 million on four manufacturers of power transformers (ABB AG, Alstom Grid GmbH, Siemens AG, and Starkstrom-Gerätebau GmbH) for bid-rigging and quota agreements.[13] From 1999 to

10 *See* FCO press release, available in English at: http://www.bundeskartellamt.de/wEnglisch/News/press/2012_07_05.php.

11 *See* FCO press release, available in English at: http://www.bundeskartellamt.de/wEnglisch/News/press/2012_07_25.php and FCO case summary, available only in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell12/Kartell_Fallberichte_12/B10-102-11.pdf?navid=54.

12 *See* FCO press release, available in English at: http://www.bundeskartellamt.de/wEnglisch/News/press/2012_08_01.php.

13 *See* FCO press release, available in English at: http://www.bundeskartellamt.de/wEnglisch/News/press/2012_09_20.php and FCO case summary available only in German at:

2004, the cartelists' managing directors and sales managers typically met before or after official trade association meetings. While the managing directors agreed on general strategic matters such as market share quotas, the sales managers agreed on specific projects and tenders. All companies involved cooperated with the FCO within the framework of the leniency program. The cartelists also agreed to settle the case with the FCO. The FCO initiated the proceedings in 2008 after the European Commission had inspected manufacturers of power transformers in several Member States in 2007. While the FCO took over the national proceedings in Germany, the Commission pursued territorial protection agreements between European and Japanese manufacturers of power transformers and fined seven companies a total of €67.6 million in 2009.[14]

Vertical Agreements

FCO Fines Producer of High Quality Tools for Resale Price Maintenance

On August 20, 2012, the FCO imposed a fine of €8.2 million on TTS Tooltechnic Systems Deutschland GmbH ("TTS"), a producer of high quality electric tools, for resale price maintenance.[15] TTS distributed its products via a selective distribution system and forced its distributors to comply with the recommended retail price by threatening them with disadvantageous future contracts. The investigation was triggered by complaints from these distributors. Interestingly having received the complaints, the FCO warned TTS against continuing its retail price maintenance practices. It appears that TTS continued these practice in spite of the FCO's warning. Thereafter, the FCO questioned the distributors and based its fining decision on their oral statements, as almost no written evidence was available. TTS settled the case with the FCO.

Düsseldorf Court Of Appeal Holds in Interim Proceedings That a Most-Favored-Treatment Clause Imposed on Hotels by an Online Booking Portal violates Section 1 GWB

On February 15, 2012, the Düsseldorf Court of Appeal prohibited online hotel booking platform Hotel Reservation Service ("HRS"), in interim proceedings brought by a competitor, from enforcing a most-favored-treatment clause ("MFTC") contained in HRS' contracts with hotels.[16]

Under the contested clause, hotels undertook not to offer other Internet providers more favorable conditions than those offered to HRS with respect to prices, availability terms, and cancellation terms. According to the Court's rather brief judgment, the MFTC infringed Section 1 GWB, as it restricted the hotels' freedom to set prices independently. This ruling hinders competition among hotel booking portals, which is mainly price-driven (*i.e.*, customers tend to use the online platform offering the lowest hotel price). The Court's decision appears to be at odds with EU competition law: MFTCs imposed on the supplier are covered by the Vertical Block Exemption where the parties' market shares are below 30% on the upstream and downstream markets, while MFTCs imposed on the buyer with respect to its clients constitute hardcore restrictions that cannot be exempted under the Vertical Block Exemption.

The Court proceedings are independent from the action taken by the FCO in the beginning of February 2012 regarding HRS's MFTC.[17] In particular, the FCO, which in general takes a hostile stance towards MFTCs,[18] issued a statement of objections to HRS, arguing that HRS's MFTC restricts competition between online hotel booking providers and prevents market entry of newcomers.

Unilateral Conduct

The German Federal Court of Justice approves refund for customers of water supplier

On May 15, 2012, the German Federal Court of Justice ("FCJ") rejected a decision of the Stuttgart Court of Appeal of August 25, 2011 which had annulled an order of the cartel office of

http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell12/Kartell_Fallberichte_12/B10-101-11-DE.pdf?navid=54.

14 http://ec.europa.eu/competition/antitrust/cases/dec_docs/39129/39129_1161_1.pdf.

15 *See* FCO press release, available in English at: http://www.bundeskartellamt.de/wEnglisch/News/press/2012_08_20.php.

16 Düsseldorf Court of Appeal, decision of February 15, 2012, case number VI-W (Kart) 1/12 (decision available only in German at: http://www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2012/VI_W__Kart__1_12beschluss20120215.html).

17 *See* FCO press release of February 10, 2012, available in English at: http://www.bundeskartellamt.de/wEnglisch/News/press/2012_02_10.php.

18 *See* FCO's circular about competitive assessment of behavior during negotiations between manufacturers of branded goods, distributors and dealers dated 13.4.2010, available only in German, WuW 2010, p. 786-791 (790).

Baden-Württemberg to refund customers of a local monopolist water supplier for the unjustified overcharge they had paid.[19]

The cartel office had found that Energie Calw GmbH ("Energie Calw"), a local monopolist water supplier, had charged excessive prices, and consequently ordered Energie Calw to reduce their prices and refund customers the overcharge. To calculate the overcharge, the cartel office examined relevant price factors to determine a reasonable reference price. The Stuttgart Court of Appeal held that the cartel office should have applied other price control tests, namely the test explicitly mentioned in Section 19(4) No. 2 GWB, (*i.e.*, a comparison of the prices under scrutiny with those charged on similar markets with effective competition (the comparable market principle)).[20] The Court of Appeal argued that Energie Calw could not be ordered to disclose the basis of its calculations, as the burden of proof with regard to price abuses is on the investigating authority.

The FCJ, on the contrary, approved the test applied by the cartel authority to determine excessive pricing. The FCJ argued that even though market comparison was an important price control test, it was just one possible test provided by the legislator. In addition, the FCJ found that in the case at hand, there were no comparable markets for water supply with effective competition. Although the FCJ referred to previous decisions regarding water supply, where it had held that price abuse could also be determined by comparing the price in question with the net average water prices of other local markets with a monopolist market structure,[21] it held in this case that such a test would not reveal a reference price that would be charged under effective competition. The FCJ thus considered examining price factors to determine a reasonable reference price as a suitable price control test, in particular as regards determining whether a company subject to effective competition would have calculated its prices differently. The FCJ held that to account for remaining uncertainties, a safety margin would have to be added to the reference price. In addition, the FCJ held that companies had an obligation to cooperate with a cartel office in the course of the proceedings against them, which also comprises the disclosure of price factors. This obligation would not affect the burden of proof.

Policy and Procedure

District Court Of Bonn Rules On Exemption From Seizure

On June 21, 2012, the District Court of Bonn ruled once again on the matter of seizure of correspondence which was allegedly subject to attorney client privilege. It confirmed that documents found on the client's premises are exempt from seizure only if they were drafted for the client's defense in relation to specific proceedings. In the case at hand, the court found that the documents in question were neither prepared specifically for the defense of the appellant in the particular FCO investigation, nor was there an attorney-client relationship between the law firm and the appellant.

The appellant is a subsidiary of a larger corporate group that manufactures polyurethane foams, mattresses, and slatted frames. The parent company retained a law firm following a dawn raid by the Commission because of alleged horizontal competition restraints in an upstream market. The parent company charged the law firm with conducting an internal audit of all business lines of the corporate group, including downstream markets. This encompassed two interviews with the general manager of the appellant as a downstream subsidiary, *inter alia*, on alleged vertical restraints that were at the time the subject of a civil law suit. Shortly thereafter, the subsidiary was subject to a dawn raid by the FCO in proceedings in connection with alleged vertical restraints on the downstream market. After the local court had found the seizure of the lawyers' written interview summaries to be legal, the subsidiary filed an appeal with the district court, claiming the documents were subject to EU and German attorney-client privilege rules, and therefore were exempt from seizure.

The court rejected this appeal. It found that the documents seized were not created for the defense of the appellant. German case law only allows for an exemption from seizure if the documents in question were created after the initiation of proceedings and prepared specifically for the purpose of defense,[22] while according to EU legal privilege, documents

[19] FCJ, Decision of May 15, 2012, Case KVR 51/11, available in German at http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&Sort=12288&Seite=2&nr=61242&pos=82&anz=647.

[20] Stuttgart Court of Appeal, Decision of August 25, 2011, Case 201 Kart 2/11, available in German at http://lrbw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&GerichtAuswahl=Oberlandesgerichte&Art=en&Datum=2011-8&nr=14702&pos=8&anz=27.

[21] See, *e.g.*, National Competition Report, April – June 2012, p. 8.

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

prepared prior to the initiation of investigations can also be protected from seizure if they relate to the subject matter of a particular investigation.[23] In particular, the court found that the lawyers' interview summaries were not protected from seizure by EU or German legal privilege, because the lawyers had been retained by the parent company, not by the appellant, and only with regard to the Commission's investigation, as the power of attorney used in the Commission proceedings evidenced. The court emphasized that the investigations of the European Commission and the FCO did not concern the same subject matter as the product markets, geographic markets, and the nature of the alleged infringements differed from each other.

The judgment is generally in line with previous decisions of the court, whereby only documents created after the initiation of proceedings are prepared for the purpose of defense. Further, the judgment underscores that these documents are exempt from seizure only if there is an attorney-client relationship between the law firm and the specific company concerned. The decision, however, leaves open the question of whether the EU legal privilege is applicable if the FCO's investigation is based also on Article 101 TFEU. The court deemed this irrelevant because in its view, EU legal privilege could not be applicable given that there was allegedly no attorney-client relationship between the law firm and the subsidiary.

Düsseldorf Court of Appeal rejects access to leniency applications following the ECJ's Pfleiderer Decision

On August 22, 2012, the Düsseldorf Court of Appeal held that a potential plaintiff seeking damages for cartel violations does not have a right to access the corporate statements of a leniency applicant that are contained in the FCO's files.[24] Thus, the Düsseldorf Court of Appeal reached the same conclusion as the District Court of Bonn,[25] which issued the first German court ruling on access to the FCO's files in the aftermath of the ECJ's Pfleiderer decision.[26]

Customers of the coffee roaster cartel[27] had requested full access to the cartel file, including access to the leniency application. As two of the cartel members have appealed the FCO's fining decision, the Düsseldorf Court of Appeal is in possession of the FCO files and consequently had jurisdiction to decide on the access to the file request.

The Düsseldorf Court of Appeal rejected access to the leniency applications including voluntarily submitted documents as it found that leniency applicants had the legitimate expectation that these documents were treated as confidential vis-à-vis potential plaintiffs. The FCO's Leniency Program provides in para. 22 that the FCO will deny third parties access to leniency applications. Thus, the Düsseldorf Court of Appeal based its reasoning primarily on the leniency applicants' legitimate expectation, while the District Court of Bonn mainly relied on the full effectiveness of the leniency program.[28]

In addition, the Court found that the FCO's practice of rejecting access to leniency statements and voluntarily submitted documents was also in the public interest, as access might weaken effective public cartel enforcement. The Court held that in the case at hand the potential plaintiffs were not unduly burdened in obtaining damages without access to leniency applications, as civil courts were bound by the FCO's findings regarding the cartel infringement, and because the leniency applications would not contain information on the cartel overcharge.

The Düsseldorf Court of Appeal, however, granted access to the FCO's fining decisions, including the information therein derived from leniency applications, but redacting business secrets and personal information. The Court held that it was irrelevant that two of these decisions were not final yet, as the parties' appeal did not concern the cartel infringement, but only the amount of the fine. Nonetheless, the Court denied access to a non-confidential version of the case-file and evidence seized during the FCO's proceedings on the ground that this would significantly delay the proceedings in the appeal proceedings. Instead, the Court provided the potential plaintiffs with information on the kind of evidence seized, to enable them to further specify their access to file requests.

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23 ECJ, Judgment of May 18, 1982, Case 155/79, AM & S Europe Limited v Commission of the European Communities.

24 Düsseldorf Court of Appeal, Decision of August 22, 2012, Case V-4 Kart 5 + 6/11 (OWi), available in German at: http://www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2012/V_4_Kart_5___6_11__OWi_beschluss20120822.html.

25 See National Competition Report, January – March 2012, p. 12.

26 ECJ, Judgment of June 14, 2011, Case C-360/09, Pfleiderer v. Bundeskartellamt.

27 The FCO had imposed fines on Tchibo GmbH, Melitta Kaffee GmbH and Alois Dallmayr Kaffee OHG totaling € 159.5 million in 2009, see National Competition Report, October – December 2009, p. 6.

28 See National Competition Report January – March 2012, p.12.

Greece

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

Horizontal agreements

The Hellenic Competition Commission challenges a decision of an Association of Pharmacies to cease purchasing infant milk from those pharmaceutical companies which supplied such milk to supermarkets.

Pursuant to a ministerial decision adopted in 2008, infant milk could only be distributed through pharmacies. This decision was abolished in January 2012, allowing infant milk to be distributed through other channels, such as supermarkets. Generally, the prices charged by supermarkets for infant milk were lower than those charged by pharmacies. In March 2012, the General Assembly of the Association of Pharmacies of Achaia (the "Pharmacies Association"), resolved that the member pharmacies of the Pharmacies Association would cease to sell infant milk and milk for special medical purposes (the latter could only be sold through pharmacies following a prescription) produced by Friesland, Nestlé, Cana, and Biolac, as these companies also sold infant milk to supermarkets. The Pharmacies Association further resolved to monitor closely the prices at which milks of NOUMIL and Pfizer were sold, to ensure that the prices these companies offered to pharmacies were competitive relative to prices offered to supermarkets. Finally, the Pharmacies Association resolved that its members favor the sale of infant milks of other supplier companies (Frezylac, Novolac, Humana, Nutriben, and HIPP) that had continued to distribute these products only through pharmacies.

The HCC considered that there was a breach of Article 1 of the Competition Act (the equivalent of Article 101 of TFEU) and initiated injunction proceedings against the Pharmacies Association in order to adopt interim measures pending the outcome of the HCC's sectoral investigation into the infant milk markets.

The HCC had little difficulty in accepting that the Pharmacies Association fell within the definition of 'association of undertakings', given that its members (pharmacies) were carrying out an economic activity. The HCC found that a simple recommendation issued by an association could constitute a decision of that association and therefore fall within the scope of Article 1. Even if such a recommendation was not binding, it could represent a 'decision' if it reflected the collective intention of the members of the association to coordinate their actions in a specific market.

The HCC found that the decision of the General Assembly had as its object the coordination of the actions of its members so as to restrict and control the distribution of infant milk products to the detriment of suppliers and consumers. The HCC found that although it is legitimate for an association to protect the business interests of its members and to prevent the loss of their clientele for infant milk, it is not acceptable to adopt measures infringing competition rules in the name of such interests.

The HCC suggested that the appropriate course of action would be for the Pharmacies Association to negotiate with the infant milk suppliers in order to obtain competitive prices in relation to those offered to supermarkets. In the view of the HCC, this would lead to intensified competition which would benefit consumers, since the infant milk would be available at a reduced price.

The adoption of interim measures by the HCC was considered necessary in order to protect the public interest in the protection of competition and the unrestricted supply of products necessary for the public health. The HCC considered that there was an urgent need to intervene at this stage in order to prevent the adoption of similar retaliatory measures in other areas, against companies which did not choose to distribute such milk exclusively through pharmacies.

A few days before the hearing, the Pharmacies Association held a General Assembly which revoked the contested resolution. Thereafter, the HCC ordered the Pharmacies Association to abstain from the adoption of any decisions or recommendations or announcements to its members that could lead to the exclusion of some suppliers of infant milk or to the favoring of others, since the members of the Pharmacies Association should decide autonomously on their business policies. In case of breach, the Commission threatened a daily penalty of €2,500.

Ireland

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

Mergers and Acquisitions

ICA intervenes to block acquisition of assets of Argosy Libraries Limited by Eason & Son Limited

On October 1, 2012, the ICA announced that it had received confirmation from Eason & Son Limited and Argosy Libraries Limited that they would not implement a proposed transaction whereby Eason would acquire certain assets of Argosy. The parties brought a halt to their plans following a decision by the ICA to bring proceedings against the companies for failure to notify the transaction.

Eason and Argosy are the only two Irish-based wholesalers of new books in Ireland. Eason is involved in the supply of books, newspapers, stationery, and magazines in Ireland and Northern Ireland. Argosy is involved in the supply of new books to retailers located in Ireland and Northern Ireland and also exports such material abroad.

The parties signed an agreement for the proposed acquisition on August 27, 2012, at which point the ICA launched an investigation into the proposed acquisition. The ICA has explained[29] that a number of competition concerns arose during the investigation, in particular, as a result of the absence of other competitors (actual or potential) on the market. The proposed transaction would have reduced the number of wholesalers of new books in Ireland from two to one. Further, the ICA found that there was a wide gap between Eason and the only other significant alternative suppliers in Ireland (UK wholesalers and publishers). In light of these considerations, the ICA found that the transaction would result in higher prices and a reduced selection of new books for consumers. The ICA therefore chose to investigate the proposal, which had not been notified (mergers and acquisitions that have not been notified can be challenged under sections 4 and 5 of the Competition Act 2002).

As a result, the parties decided not to implement the acquisition. They further promised to give the ICA advanced notice of 30 days of any future similar transaction in the coming year. The various aspects of the investigation by the ICA included: research; consultation with customers, publishers, and UK wholesalers; requests for information to the parties; and other regular contacts between the ICA and the parties. The Authority confirmed in its press release that the parties cooperated at all stages of the investigation.

This is the first time that the ICA has availed itself of its powers under sections 4 and 5 of the Competition Act 2002, resulting in the parties withdrawing their plans to proceed with an acquisition that had not been notified.

ICA clears acquisition of United Drug PLC ("United Drug") and its interests in 39 subsidiary companies by United Care Limited ("United Care")

On November 9, 2012, the ICA cleared the proposed acquisition of United Drug PLC ("United Drug") and its interests in 39 subsidiary companies by United Care Limited ("United Care"). The decision of the ICA in this case is worthy of note as it is an approval of a proposed acquisition in Phase 1 in a highly concentrated market. Pharmaceutical companies employ sales representatives to promote and market new and existing healthcare products to customers (pharmacies, general consultants, and hospital consultants). Most sales representatives are employed in-house by the pharmaceutical companies, but some are outsourced from CSOs (Contract Sales Organizations). There was a horizontal overlap between the parties for the supply of outsourced sales representatives to pharmaceutical companies in Ireland (although the ICA left the product market definition open, it based its analysis on this narrower view of the market).

The ICA found that the transaction fell into zone C of the Authority's Merger Guidelines,[30] as the CSO market in Ireland would be highly concentrated post-transaction. According to the Guidelines, zone C mergers occur in already highly concentrated markets and usually give rise to competitive concerns.[31] The ICA then proceeded to identify two relevant theories of harm that required analysis: coordinated effects and unilateral effects.

The ICA considered that the transaction would not make it more likely that the acquirer, United Drug, through its wholly owned subsidiary, Ashfield, would coordinate with some or all of its competitors to raise the prices of CSO outsourced services or otherwise harm competitors. A number of factors led the ICA to come to this conclusion, including: the view of all

[29] The ICA press release of October 1, 2012, is currently the only source of information the ICA has made public on the case. The press release is available at www.tca.ie/EN/News--Publications/News-Releases.

[30] Competition Authority, *Notice in Respect of Guidelines for Merger Analysis*, 2004, Decision No. N/02/004, available at www.tca.ie.

[31] Paragraph 3,10, page 11 of the Guidelines.

nine customers that credible alternative suppliers existed in Ireland; the asymmetric and unstable market shares of players on the market; the relative ease with which smaller CSO providers could access the market given the short-term contracts on offer; the fact that the fee charged by CSO providers is typically set via bilateral negotiations; the view of competitors that the transaction would not raise competition concerns; the significant buyer power of pharmaceutical companies; and the competitive constraint exercised by the fact that pharmaceutical companies could always employ more sales staff in-house. Interestingly, while taking account of views of competitors, the ICA highlighted the cautious approach it takes when considering such views in any market investigation carried out in the context of the merger notification process since, in the opinion of the ICA, views of competitors may or may not be consistent with the interests of consumers.

In relation to unilateral effects, the ICA found that the merged entity would not be in a position to raise the fee charged to pharmaceutical companies for the provision of CSO services unilaterally, irrespective of the reactions of its competitors. The ICA relied on considerations similar to those considered pertinent under the coordinated effects analysis, including the views of consumers and competitors in the market, and the important buyer power of pharmaceutical companies.

The ICA thus concluded that, despite the existence of a highly concentrated CSO market post-transaction, and notwithstanding the fact that the number of CSO providers active in the State would decrease from four to three, in light of consumer and competitor views, as well as numerous competitive factors, the combined entity would not be able to raise prices or otherwise harm competition on the market post-transaction.

Italy

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

Unilateral Conduct

The TAR Lazio annuls the ICA’s decision imposing a €39.4 million fine on Poste Italiane

On June 25, 2012, the TAR Lazio annulled a decision of the ICA that imposed a €39.4 million fine on Poste Italiane S.p.A. for breach of Article 102 TFEU (the “Decision”). According to the ICA, Poste Italiane adopted a complex exclusionary strategy aimed at foreclosing complainant TNT Post Italia S.p.A. (“TNT”) and other competitors from the markets for guaranteed time and date delivery services, and for notification services through messengers. In particular, the ICA found that Poste Italiane abused the market power it held on traditional postal services in order to enter newly liberalized markets, by: (1) handling the restitution of unstamped competing operators’ mail items found in its network in such a way as to obstruct their activity (*i.e.*, by directly contacting the sender and charging unfair prices for restitution of mail items); (2) offering its guaranteed time and date delivery services (PostaTime) at predatory prices to selected customers; and (3) charging predatory prices for time and date delivery services offered in tender procedures called by the Municipality of Milan and Equitalia S.p.A.

On appeal, the TAR Lazio quashed the Decision, by stating that the ICA failed to demonstrate to the required legal standard that the contested practices infringed Article 102 TFEU. In particular, the TAR Lazio ruled that the procedure for handling mail items found in Poste Italiane’s network was in compliance with the relevant sector regulation and, thus, could not be considered as part of an abusive strategy aimed at excluding its competitors. Hence, the TAR Lazio concluded that the ICA could not find such conduct to infringe Article 102 TFEU, unless the ICA had previously called into question the compatibility of the applicable sector-specific regulation with the Italian antitrust legislation.

Furthermore, according to the TAR Lazio, the ICA failed to prove that the prices offered by Poste Italiane to TNT’s customers for PostaTime services were below its long-run incremental costs. In particular, Poste Italiane successfully demonstrated that the ICA’s analysis was flawed, since it: (1) did not take into account the qualitative differences existing between its delivery services and those of TNT; (2) wrongfully identified the resources specifically allocated by Poste Italiane to the provision of time and date delivery services; and (3) assessed the related investment costs over an excessively

limited time period (the first year of activity). Moreover, there was no evidence of actual foreclosure of TNT, since it maintained a dominant position on the market for guaranteed time and date delivery services and was also capable of effectively competing for specific customers by charging prices lower than the allegedly predatory ones one offered by Poste Italiane.

According to the TAR Lazio, the deficiencies in the investigation also affected the ICA's conclusions as regards Poste Italiane's pricing strategy towards public tenders launched by the Municipality of Milan and Equitalia. In particular, the ICA failed to consider that the tender procedures related to a composite notification service and that the specific time and date delivery service (offered at an allegedly predatory price) was just a part of it. Moreover, the bids presented by Poste Italiane were not considered to be abnormally low by the contracting authority; to the contrary, the court noted that with relation to two lots of Equitalia's tender, competitors' prices were lower.

Finally, the TAR Lazio held that the ICA erred in law by taking as a reference, for the calculation of the basic amount of the fine, not only the turnover realized in the markets where the alleged abusive conducts took place, but also the turnover realized from its traditional bulk mail services, which was clearly not affected by the questioned conduct.

The ICA fines Ferrovie dello Stato italiane for alleged abuse of dominant position

By decision rendered on August 9, 2012, (the "Decision"), the ICA found that the Ferrovie dello Stato italiane S.p.A. ("FS", or together with its subsidiaries, the "FS Group") infringed Article 102 TFEU by hindering the access of a new entrant (Arenaways) to the railway passenger transport sector through its wholly owned subsidiaries Rete Ferroviaria Italiana S.p.A. (the Italian railway network manager, "RFI") and Trenitalia S.p.A. (an Italian railway transport operator, "Trenitalia"). In particular, the ICA found that RFI engaged in dilatory tactics by not promptly satisfying Arenaways' requests for railway network capacity allocation, while Trenitalia allegedly: (1) supplied misleading information to the railway services regulator within the proceedings initiated by the latter in order to assess whether Arenaways' access to the market should have been subjected to operative limitations, in accordance with the relevant sector regulation; and (2) engaged in "fighting trains" strategy against Arenaways.

Nevertheless, the ICA held that, in light of the novelty of the alleged infringement and the fact that the conduct at issue occurred during the very first phase of the implementation of the sector regulation regarding access to the railway network, the fines should be set at a "minimal" level. Consequently, the ICA levied a €100,000 fine on RFI and a €200,000 fine on Trenitalia. The ICA found no concrete evidence that FS played an active role in the alleged abuse, but relied on the presumption stemming from FS' 100% shareholding in its subsidiaries to hold FS and its subsidiaries jointly and severally liable for the payment of the fines.

The Decision represents the latest, but not the last, act of a complex antitrust saga initiated in December 2010.[32] All companies involved in the alleged infringements have appealed the Decision before the TAR Lazio.

The TAR Lazio overrules the ICA's decision imposing €10.7 million fine on Pfizer

On September 3, 2012, the TAR Lazio upheld the appeal lodged by Pfizer against the ICA's decision of January 11, 2012, which found that, by misusing the patent release procedures and engaging in dilatory litigation, Pfizer pursued an abusive strategy aimed at unduly prolonging the patent protection of its flagship drug Xalatan in Italy and hindering the commercialization of generic versions of the drug.[33]

The TAR Lazio held that, by filing its patent release applications with the competent regulatory bodies, Pfizer had merely sought to protect its rights and legitimate interests. Conduct regarded as legitimate by the sector-specific rules could not amount to an abuse of dominant position unless the existence of a clear exclusionary intent beyond the mere exercise of the rights and prerogatives conferred by the sector-specific regulation is proved.

According to the TAR Lazio, the ICA failed to prove the existence of any such exclusionary intent. In particular, the TAR Lazio stated that the ICA failed to take into consideration the fact that Pfizer's applications for patent protection of Xalatan in Italy were filed several years before the entry of generics into the Italian market and, therefore, absent any further contrary evidence, such conduct qualified as a legitimate exercise of Pfizer's legal rights. Moreover, the court

[32] *See*: National Competition Report, 1st Quarter 2012, Italy.

[33] *See*: National Competition Report, 1st Quarter 2012, Italy

pointed out that, contrary to what happened in the AstraZeneca case, there was no evidence suggesting that Pfizer provided the competent authorities with misleading information when applying for patent protection.

Finally, the TAR Lazio held that Pfizer's behavior in the context of the patent infringement proceedings between Pfizer and the generic manufacturers (pending before several Italian courts) did not reveal any exclusionary intent. This was so in light of the fact that, in such proceedings, Pfizer was a defendant and not a plaintiff. Therefore, according to the TAR Lazio, the ICA erred in law by holding that Pfizer engaged in vexatious litigation aimed at foreclosing its competitors.

Policy and Procedure

Amendment to the Italian merger control rules

Article 5-bis (2)(c) of Law Decree n. 1/2012, as implemented by Law n. 27/2012, has recently amended Article 16(1) of Law n. 287/1990 (the "Italian Competition Act"). Article 16(1) of the Italian Competition Act currently provides that a concentration must be notified to the ICA prior to its implementation if, in the last fiscal year: (1) the parties' combined Italian turnover exceeded €474 million (unless the target did not have any turnover in Italy in the course of the last three years and will not begin to have any Italian turnover as a result of the transaction); or (2) the target's Italian turnover exceeded €47 million. Therefore, the statutory turnover thresholds are alternatives.

Under the new merger control rules, effective as of January 1, 2013, concentrations will be subject to mandatory pre-merger notification to the ICA only if both the above-mentioned thresholds are met (in other words, as from January 1, 2013, the relevant thresholds will become cumulative).

The above-mentioned amendment has raised some debate among Italian antitrust practitioners, in particular with regard to the set of thresholds applicable to transactions whose relevant agreements are signed before January 1, 2013, but whose closing will take place after this date. The ICA has not yet given official guidance on this issue.

NETHERLANDS

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

Horizontal Agreements

NMa imposes fines on pepper producer cooperatives for exchanging and coordinating prices, dividing the market, and agreeing to influence auction prices.

In a decision issued on May 15, 2012, and published in September 2012, the NMa fined three pepper producer cooperatives for participating in a cartel, which consisted of: (1) coordinating daily and weekly prices; (2) dividing the market; (3) exchanging price information; and (4) agreeing to influence auction prices.[34] This behavior was well documented in agreements between the cooperatives. The cooperatives would, for example, coordinate the prices they would charge for peppers on a daily basis.

In its fining decision, the NMa took into account that two of the parties involved were essentially cooperatives that sold large quantities of peppers for and on behalf of their members (the pepper producers). Therefore, the revenues gained through the agreements benefitted these pepper producers as well. Additionally, there was no proof that the pepper producers had jointly mandated the cooperatives to make such anti-competitive agreements on their behalf. Finally, these cooperatives qualified as producer organizations in the sense of the GMO-Regulation (Regulation 1234/2007), under which producer organizations are responsible for performing a number of tasks designed to help achieve the goals of the common agricultural market. Taking all these factors into account, the NMa feared that the fine would significantly impede competition with respect to cooperatives for pepper producers, as well as impede their functioning as producer organizations. It therefore set the fines on these two cooperatives at €7 million each. The third cooperative benefitted from a leniency application and was granted immunity from fines.

Policy and Procedure

Rotterdam District Court cuts fines for non-compliance with remedies and cancels or reduces fines to individuals.

In the first case on the NMa's ability to impose fines for non-compliance, the District Court of Rotterdam (Rechtbank Rotterdam) (the "Court") ordered the NMa to lower the fines imposed for non-compliance with remedies and to lower or

[34] Case Nr. 7036 / Paprika (sanction decision), NMa decision of May 15, 2012.

cancel fines imposed on individuals engaged in the monitoring of the remedies.[35]

In its decision in 2000, the NMa approved the publisher Wegener's takeover of VNU Dagbladen and BN/De Stem subject to Wegener's commitment to keep the newspapers separate from each other.[36] In July 2010, the NMa found that Wegener had breached its commitment as the two newspapers had cooperated by coordinating their commercial policies, had merged their editorial committees and had appointed the same individuals to their management and supervisory boards.[37] The NMa imposed a fine of €19 million on Wegener for non-compliance with the remedy. Additionally, five Wegener employees in charge of monitoring the remedies were fined approximately €1 million.

The Court found that the principle of legal certainty limited the NMa's ability to impose a fine on Wegener for non-compliance to the extent to which the requirements of the remedies package were unambiguous. The remedies in this case, however, only introduced limits to editorial cooperation and did not cover commercial cooperation. The Court upheld the fine on Wegener on the basis that the management and supervisory boards of both newspapers consisted of the same individuals and both newspapers had the same editor-in-chief.

As regards the fines imposed on the individual employees, the Court cancelled the fines imposed on the supervisory board members as these did not qualify as employees in control of management (leidinggevenden), given that under Dutch competition law, individuals may be personally fined for competition infringements when they had management control over the infringing behavior. The other fines on individuals were reduced to (1) €100,000 as the remedies were breached to a lesser extent than the NMa had alleged; and (2) €50,000 as the respective individual had left the company before the personnel overlap in the supervisory boards occurred.

Advisory Committee of appeal: unequal treatment for inability to pay

In its decision of December 16, 2010, the NMa fined fifteen Dutch, Belgian and German flour producers for participating in a cartel which consisted of: (1) an agreement not to compete for each other's customers; (2) the acquisition of a competitor that refused to participate in the cartel; and (3) the compensation of a cartelist for lost revenues due to its participation in the cartel.[38]

One of the flour producers, Meneba, was held liable for the infringement, while its parent company, a private equity firm, was not held liable. In contrast, the other flour producers were held jointly liable with their respective parent companies. Based on the financial position of Meneba, the NMa subsequently granted Meneba a reduction as it was unable to pay the fine.

The other flour producers appealed to the Advisory Committee on Administrative Appeals under the Competition Act (Adviescommissie Bezwaarschriften Mededingingswet) (the "Committee") on the basis of unequal treatment, as their parent company was in fact held liable for the infringement of the cartel prohibition. The Committee concluded that Meneba had potentially been treated differently than the other cartelists.[39] It advised the NMa to either not attribute liability for the infringement to the other parent companies or hold Meneba's parent company liable. Following the advice, the NMa decided to maintain the fines on the other flour producers and to open an investigation into attributing liability for the infringement to Meneba's parent company.[40]

NMa lowers fine for gun-jumping

In its decision of August 17, 2012,[41] the NMa lowered the fines imposed on Soprol S.A.S. and its parent Sofiprotéol S.A. (the "Sofiprotéol Group") for failing to notify a concentration to the NMa. The transaction concerned the change from joint control by Bunge Holdings France S.A.S. ("Bunge") and the

[35] Case Nr. LJN: BX8528, District Court of Rotterdam, judgment of September 27, 2012.

[36] Case Nr. 1528 / Wegener-VNU Dagbladen (clearance), NMa decision of March 13, 2000.

[37] Case Nr. 1528 / Wegener (sanction decision), NMa decision of August 24, 2011.

[38] Case Nr. 6306 / Meel (sanction decision), NMa decision of December 16, 2010.

[39] Case Nr. 6306 / Meel, Advice by the Advisory Committee on Administrative Appeals under the Competition Act of August, 12 2011 (published in March 2012).

[40] Decision Nr. 6306 / Meel (decision on appeal), NMa decision of March 14, 2012.

[41] Case Nr. 6905 / Niet-gemelde concentratie Saipol S.A.S. (decision on appeal), NMa decision of August 17, 2012.

Sofiprotéol Group over the target to sole control by the Sofiprotéol Group. In its initial decision of December 17, 2010, the NMa had fined both Bunge and the Sofiprotéol Group.

The NMa withdrew the fine imposed on Bunge following a decision of the Industry Appeals Tribunal (College van Beroep voor het bedrijfsleven) holding that a seller cannot be fined for gun-jumping.[42] The Sofiprotéol Group also objected to the fine imposed, in particular because the NMa had classified the gun-jumping as a serious infringement under the NMa fining guidelines. These fining guidelines list categories of infringements with corresponding base fine amounts; accordingly, the failure to notify a transaction by the purchaser falls into a certain category. The explanatory memorandum to the guidelines explains that the different categories reflect the seriousness of the relevant infringements. It further sets out that the NMa is only allowed to increase the fine for gun-jumping on the basis of gravity if its gravity was is not adequately reflected by its category allocation. On appeal, the NMa decided that there was no cause for increasing the fine beyond the category base amount and lowered the fine from €677,000 to € 484,087.

Portugal

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

Policy and Procedure

Guidelines on the PCA's future operations under the new legislative framework

Portugal's new Competition Act entered into force on July 7, 2012. In July and August, as part of a public consultation process, the PCA issued draft guidelines, regulations and an informative notice, which will implement some of the most important aspects of the new legal framework. Brief descriptions of these documents are set out below:

- **Draft guidelines on enforcement priorities**. This document outlines how the PCA intends to make use of the prosecutorial discretion it acquired under the new Competition Act. On a related note, the PCA also published on December 20, 2012, a report containing policy priorities for 2013.
- **Draft guidelines on the conduct of proceedings concerning anti-competitive practices.** This document details procedural aspects of the investigative phase and the phase preceding a prohibition decision, voluntary commitments, settlements, confidentiality/access-to-file issues, and the publication of decisions.
- **Draft Guidelines on the method of setting fines**, dated December 20, 2012. This document sets out the PCA's proposed methodology for: (1) the setting of a basic amount (calculated based on affected sales, gravity, duration, and an entry fee); (2) the computing of aggravating and mitigating factors; (3) deterrence multipliers; and (4) the application of pertinent discounts.
- **Draft Guidelines on pre-notification contacts in merger control cases**, dated December 27, 2012. This document sets out proposed guidelines for informal meetings between the PCA and notifying parties to speed up the merger review process.
- **Regulation and informative notice on the amnesty/leniency program**, final version released on December 4, 2012, and regulation officially published on January 3, 2013. This document sets out the proposed operation of the immunity mechanism under the new Competition Act. Full immunity is available to the first company to come forward and provide adequate evidence of the commission of a cartel offense, while fine reductions are available to other companies adding significant value to the PCA's case.
- **Draft regulation setting out the ordinary and simplified forms for merger control notifications.** The draft regulation sets out criteria to be used by merging/acquiring parties to determine what kind of form they need to submit for a particular transaction.

The documents summarized above will bring the enforcement practices of the PCA into closer alignment with those of the European Commission, and those of the competition authorities of other member states.

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[42] *See* National Competition Report, January-March 2012, p. 20

Spain

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

Mergers and Acquisitions

The Spanish Government overrules CNC decision on Antena 3/La Sexta concentration

On July 13, 2012, the CNC authorized the acquisition by Antena 3 de Televisión, S.A. ("Antena 3") of Gestora de Inversiones Audiovisuales La Sexta, S.A. ("La Sexta") subject to certain conditions imposed by the CNC after it rejected Antena 3's commitments. However, in an unprecedented decision, the Spanish Government overruled the CNC decision and softened the conditions imposed.

On December 30, 2011, Antena 3 notified its acquisition of 100% of La Sexta's share capital. After examining the information provided, the CNC Directorate for Investigation ("ID") determined that the concentration may have had a community dimension, and accordingly requested the European Commission (the "Commission") to decide upon the matter. The Commission concluded that the concentration did have a community dimension, but that the CNC would be best placed to investigate the transaction. On March 15, 2012, Antena 3 notified the concentration to the CNC for the second time. On March 21, 2012, the CNC Council opened an in-depth investigation into the transaction on the basis that "the concentration [could] hinder the maintenance of effective competition in all or part of the national market."[43]

The proposed transaction would affect three markets in the Spanish audiovisual sector: (1) the market for the production and sale of audiovisual content; (2) the market for the distribution of channels and free-to-air television; and (3) the television advertising market. The CNC was primarily concerned with the effects of the transaction on the television advertising market. In 2011, the distribution of shares in this market was as follows: 43.6% - Mediaset; 30.5% - Antena 3; 11.4% - La Sexta; and 8.9% - regional government channels. After RTVE's departure from the market,[44] the channels of the other broadcasters (especially Telecinco, from Mediaset, and Antena 3) became indispensable to advertisers. Mediaset and Antena 3 exploited this indispensability by preventing advertisers from buying advertising time on their more popular channels without also buying advertising time on their low-viewership channels. The CNC determined that these bundling practices resulted in higher prices and the foreclosure of competition from smaller broadcasters, and that these anti-competitive effects would be considerably strengthened if Antena 3 was to gain control of La Sexta, which pre-merger applied considerable competitive pressure on Antena 3. The CNC noted that the competition concerns arising from this transaction were more pronounced than those that were identified in respect of the Telecinco/Cuatro merger, given the fact that the number of main operators would now be reduced from three to two. Specifically, the CNC raised concerns regarding the disappearance of La Sexta's competitive pressure, and the strengthening of Antena 3's position in the market. The CNC also found that the merger could facilitate collusion between the two remaining major players, Mediaset and Antena 3.

Antena 3 claimed that the transaction would generate efficiencies, and argued that absent the transaction, La Sexta would cease to operate. The CNC rejected both claims, and concluded that the merger gave rise to serious competition concerns.

Over the course of the CNC's investigation, Antena 3 submitted various commitments, but the final proposal was rejected by the CNC. However, the CNC itself suggested commitments for Antena to offer, which the CNC would accept. Antena 3 agreed to submit the CNC's suggested commitments, a main condition of which required Antena 3 to establish separate companies for selling advertising space on Antena 3 and La Sexta. These commitments were in turn accepted by the CNC.

However, for the first time since the creation of the CNC, the Spanish Government relied on its power to reassess a conditionally cleared merger by invoking public interest considerations. On August 28, 2012, the Spanish Government announced its decision to modify the commitments. The

43 (Article 57.2(c) Spanish Competition Act, "LDC").

44 RTVE is a national operator that has not broadcast advertisements since 2012.

amendments brought the commitments closer to those accepted in the previous Telecinco/Cuatro transaction. Antena 3 has indicated that it plans to go ahead with the transaction.

Unilateral conduct

The CNC fined an intellectual property rights collecting society for abuse of its dominant position

On July 3, 2012, the CNC fined Sociedad General de Autores y Editores ("SGAE") €1,766,744 for engaging in two forms of abusive conduct in the management of an intellectual property rights market where the society enjoyed a dominant position.

After a complaint was lodged by three restaurants, in November 2010 the CNC Directorate for Investigation ("ID") opened formal proceedings against SGAE for a possible infringement of Article 2 of the LDC and Article 102 TFEU. In June 2011, SGAE submitted commitments, which were rejected by the ID on the basis that they did not properly address the competition concerns raised.

The relevant market was the national market for the licensing of public broadcasting and performance rights for musical works (*e.g.*, for performance at public events, in hotels, public houses, etc.). SGAE is an intellectual property rights collecting society which, as acknowledged by the ID and the CNC Council, is dominant in this market. SGAE's dominant position had also been previously recognized by the Spanish High Court ("Audiencia Nacional").

The allegedly abusive conduct which was the subject of the investigation involved: (1) unjustifiably discriminating between various hotels and associations with respect to discounts; and (2) charging an unfair and discriminatory substitution fee to those businesses that did not notify the number and capacity of the events organized for the following month.

The CNC emphasized that competition law does not prohibit dominant firms from treating its clients/providers differently where there is an objective justification to do so. It is thus possible for a dominant firm to offer different discounts to similarly placed parties as long as these differences result from the application of objective, transparent criteria, that are made known to the relevant parties beforehand. In this case, the discounts offered to similar associations differed for no objective reason, and as such were determined by the CNC to represent abusive conduct. Similarly, the CNC found the substitution fee to be unjustifiably discriminatory and therefore determined that the maintenance of this few by SGAE constituted an abuse of dominance.

Accordingly, the CNC concluded that SGAE's practice amounted to a complex infringement in violation of Articles 2 LDC and 102 TFEU consisting of two different practices, neither of which were objectively justified, which were engaged in over a protracted period of time, and which were targeted at companies with no countervailing buyer power. The CNC categorized the infringements as very serious and imposed a fine of €1,766,744 on SGAE.

The CNC closed an investigation into Google Adwords for an alleged abuse of dominant position

On September 10, 2012, the CNC decided to close proceedings against Google Ireland Limited ("Google"), accused by an advertiser of cannabis seeds of refusing to provide its advertising services.

In July 2012, a seller of cannabis seeds filed a complaint against Google for refusing to advertise its products in Google Adwords. The complainant claimed that Google's conduct was discriminatory, since Google provided its Adwords service for other companies in the market. In response, Google claimed that the cannabis seeds advertisements were not compatible with Google's policy on drugs.

The CNC Directorate for Investigation ("ID") decided to conduct a reserved information investigation before opening formal proceedings and concluded that there was no evidence of abuse of a dominant position. Indeed, although Google had a very significant position in the Spanish market for Internet searches and in the Spanish market for online advertising linked to Internet searches, there was no reason to conclude that Google had abused its dominant position. The ID found that no abuse could be established as (1) Google does not compete in the market for the selling of cannabis seeds; and (2) Google is under no obligation to provide its advertisement services to every advertiser that requests them. In addition, the ID found that it is reasonable to expect that Google may establish objective, transparent and non-discriminatory criteria to deny certain types of advertisers its services.

The ID concluded that Google was not discriminating against the complainant in favor of other cannabis seed sellers, as Google's search engine did not display advertisements for any cannabis seed sellers in response to the entering of search

terms such as "cannabis", "buy cannabis" or "buy cannabis seeds."

In light of the above, the CNC Council concluded that there was no evidence that Google had infringed Article 2 of the LDC and closed the proceedings.

Horizontal Agreements

The CNC imposes fines on companies in a post-tensioning and geotechnical cartel

On July 31, 2012, the CNC fined seven companies more than €16 million for a cartel in the post-tensioning and geotechnical system market.

On April 23, 2010, the controlling shareholders of Dywidag Sistemas Constructivos S.A. ("DSC") submitted a leniency application in relation to a breach of Article 1 of the LDC. The information provided by DSC indicated that seven companies had engaged in market sharing practices with respect to the market for post-tensioning and geotechnical systems for a period of 14 years.

After carrying out the relevant inspections, the CNC Directorate for Investigation ("ID") decided to open formal proceedings against the seven companies involved, which together represented the main operators in the market (some of the seven companies were subsidiaries of large construction companies). The relevant markets in this case were: (1) the market for post-tensioning systems (systems that reinforce the concrete structures of some buildings); and (2) the market for geotechnical tensioning systems (systems that fix the structures and stabilize the ground).

The CNC Council found that there was sufficient evidence that the seven companies had entered into and put into effect: (1) agreements to share contracts for post-tensioning systems and supply of bars in the market for post-tensioning systems; and (2) agreements for customer-sharing in the geotechnical market. The CNC based its conclusions on evidence demonstrating that: periodic meetings took place between the seven companies; quotas were set for each company; the companies would structure bids in such a manner to ensure that the relevant contract would be won by the company designated in the sharing arrangements; and compensation mechanisms for the seven companies were put in place which were tied to the quotas.

The CNC took the view that the practices of the seven companies amounted to a single and continuous breach of Article 1 LDC and Article 101 TFEU and issued fines against all companies except DSC on the grounds of leniency.

Sweden

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

SCA adopts an interim decision prohibiting the Swedish Hockey League from preventing its member clubs to sign contracts with players of the National Hockey League.

On September 20, 2012, the SCA adopted an interim decision which prohibits the Swedish Hockey League ("SHL") from imposing sanctions on any of its member clubs which enter into short term contracts with players from the North American based National Hockey League ("NHL"). The decision empowers the SCA to impose a fine of SEK 20 million on the SHL if the interim decision is not followed.

The SHL is owned by the twelve ice hockey clubs who are qualified to play in the first division in Sweden. Prior to the start of the 2006/2007 season, the SHL introduced an internal regulation which provides that its member clubs must not enter into any agreement with a player that allows the player to leave the club before the end of the season. The internal regulation was renewed prior to the start of 2011/2012 season.

Following the expiration of NHL's collective bargaining agreement, NHL and the NHL players' union failed to reach a new agreement on how to share the revenues for the 2011/2012 season. As a consequence, on September 16, 2012, the NHL implemented a lockout of all NHL players. Following the lockout decision, the SHL decided, on the basis of its internal regulation, that short term agreements between any of its member clubs and NHL players would be prohibited. The SHL stated that the decision was adopted to guarantee a fair and proper running of the league.

The SCA held that the member clubs fall under the definition of undertakings.[45] The decision of the SHL was held to control and limit the player costs of the member clubs. Following the decision, the member clubs would not be able to make

[45] See C-41/90, Klaus Hofner and Frtiz Elser vs Macroton GmbH.

independent decisions regarding player recruitment. The restriction on investments in the player squad directly affects the clubs' consumers, sponsors and purchasers of broadcasting rights, and restricts competition between the member clubs as the member clubs are not able to offer the best possible product.

The disputed decision of the SHL was held to infringe 2 Ch. 1§ of the Swedish Competition Act and Article 101 of the TFEU. An interim decision was implemented to prohibit the SHL from keeping its member clubs from entering into short-term agreements with NHL players. The interim decision included a conditional fine of SEK 20 million which can be imposed on the SHL if the decision of the SCA is not followed. The interim decision applies until the SCA investigation is completed and a final decision has been adopted.

SCA clears acquisition of Pocket Shop by Bonnierförlagen.

On September 19, 2012, the SCA approved the share transfer agreement that will give Bonnierförlagen AB ("Bonnierförlagen") control over Pocket Shop AB ("Pocket Shop").

Bonnierförlagen is Sweden's largest publishing group and owns 14 publishing houses, an author agency, and the book distributor Pocketgrossisten. It is present on the retail market through the online bookstore Adlibris AB and through a number of book clubs. Bonnierförlagen is a wholly owned subsidiary of media group Albert Bonnier AB, which holds over 170 companies in 17 countries.

Pocket Shop operates fifteen retail pocketbook stores in Sweden, one in Finland, and one in Germany. A majority of the retail stores are located at travelling hubs, such as train stations and airports.

On May 16, 2012, the SCA had issued an order compelling Bonnierförlagen and Pocket Shop to notify their concentration to the SCA. The transaction did not meet the merger notification thresholds, but the SCA had grounds to believe the transaction could impede effective and potential competition on the Swedish market.

The SCA found that Pocket Shop's brick and mortar retail of pocketbooks and Bonnierförlagen's retail of books through book clubs and/or online outlets did not belong to same product market. Even if the product markets were to be broadly defined to include the activities of both undertakings, the post-merger market share of 20-30 % was held to be too low to impede effective competition.

The SCA found that Bonnierförlagen would not have the ability to foreclose upstream rivals by restricting their access to a broad customer base post-transaction. The market share of Pocket Shop was deemed insufficient to enable customer foreclosure as publishers and consumers have a significant number of other outlets to turn to. Likewise, the merger was held not to be likely to raise the costs of downstream rivals by restricting their access to the distribution from Bonnierförlagen; Pocket Shop as a distribution channel was deemed to be too small to facilitate input foreclosure.

The SCA held that the merger did not facilitate anticompetitive information exchange as, prior to the merger, a majority of the books sold at Pocket Shop were distributed by the Bonnier-owned wholesaler, Pocketgrossisten.

The SCA held that the merger will not significantly impede effective competition. Thus, the SCA cleared the merger unconditionally.

SCA opens an in-depth investigation into the proposed concentration of Akademibokhandelsgruppen and Bokia.

On September 13, 2012, the SCA declared that it will conduct an in-depth (Phase II) investigation into the proposed acquisition of joint control over Akademibokhandelsgruppen AB ("Akademibokhandelsgruppen") and Bokia AB ("Bokia") by KF Media and Stiftelsen Natur & Kultur and Killbergs Bokhandel ("the Parties").

KF Media is wholly owned by the Swedish cooperative union, KF, which is a retail group. KF Media includes two publishing houses, an online bookstore, and Akademibokhandelsgruppen. Akademibokhandelsgruppen operates Akademibokhandeln, which is the leading bookstore chain in Sweden with 66 stores nationwide.

Stiftelsen Natur & Kultur and Killbergs Bokhandel are the controlling stakeholders of Bokia, which constitute one of the largest bookstore chains in Sweden with 22 own-retail stores, 48 franchise stores and an online store.

There is a horizontal overlap between Akademibokhandeln's and Bokia's activities with regards to the brick and mortar and online sale of books. Further horizontal concerns may be

identified, as both KF Media and Stiftelsen Natur & Kultur are active on the publishing level.

The Parties have defined the relevant product market on the retail level as the market for the sale of books through any retail channel (*e.g.*, brick and mortar book stores, online, in supermarkets, department stores, book clubs, *etc.*). However, a consumer survey conducted by the SCA indicates that brick and mortar book stores are not entirely substitutable with online bookshops. Thus, if the relevant product market were to be defined more narrowly, the concentration will bring about very high market shares. Furthermore, the geographic market may be local.

The SCA will investigate further whether the concentration leads to the strengthening of KF Media's purchasing power in relation to the publishers of the KF group. Concerns have been expressed that the concentration may make the publishers fully dependent on the KF group.

Switzerland

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

Horizontal Agreements

The Swiss Competition Commission fines IFPI Switzerland and Phononet for preventing parallel imports

In July 2012, the Swiss section of the International Federation of the Phonographic Industry (IFPI Switzerland), one of the largest associations in the music industry, as well as Phononet AG, a platform for the electronic data exchange in the Swiss entertainment industry, reached an amicable settlement with the Swiss Competition Commission in the context of an investigation launched for alleged restrictions of parallel imports. IFPI Switzerland and Phononet agreed upon a fine in the amount of CHF 3.5 million and CHF 20,000 respectively. They also committed not to restrict or impede parallel imports of phonograms and/or videograms in Switzerland in the future.

In its decision of July 16, 2012, the Competition Commission approved the amicable agreement with IFPI Switzerland and Phononet AG that was proposed by its Secretariat. Whilst the exact terms of the settlement have not been released, it is known for certain that IFPI Switzerland and Phononet AG have committed: (1) not to demand in the future the signing of a waiver for parallel imports of phonograms and/or videograms (*e.g.*,CDs) from new members of IFPI Switzerland; and (2) not to restrain or prevent unduly such imports.[46] The investigation, which was opened by the Competition Commission on June 6, 2011, has shown that members of IFPI Switzerland had agreed, within the association, to impede the parallel importation of phonograms and/or videograms into Switzerland. According to the Competition Commission's press release, Phononet AG supported this agreement. The investigation also concerned the terms of joining the IFPI, the organization of the Swiss music charts (the "offizieller Schweizer Hitparade,") and possible discrimination with respect to the use of the Music Promotion Network (Switzerland) (a technology used to provide promotion information and tracks to media partners). However, no violation of the Swiss cartel act was found in respect of these issues. Concerning the Hitparade, IFPI Switzerland has agreed to make its practice more transparent.

Under Swiss law, the Competition Commission may impose a fine of up to 10% of the respective companies' turnover in Switzerland in the previous three business years. The amount of the sanction is dependent on the duration and severity of the unlawful behavior. A remedy may consist of reaching an amicable settlement, which will be decided on by the Competition Commission following a proposal of its Secretariat. According to the Competition Commission's practice, reaching an amicable settlement does not rule out the imposition of fines in respect of infringements that took place before the amicable settlement's conclusion.

A restriction on parallel imports is a type of restraint which is of particular importance to the Competition Commission. The Competition Commission has announced that it will be particularly vigilant in its fight against any contractual provisions or measures aimed at foreclosing the Swiss market.

The Competition Commission puts an end to the tariff recommendations in Neuchâtel's real estate sector

The Competition Commission has found that the utilization of tariff recommendations for the management fees in the Canton

46 A version in French and German is available at: http://www.news.admin.ch/message/index.html?lang=fr&msg-id=45436.

of Neuchâtel violated the Swiss cartel act. The real estate professionals of USPI Neuchâtel, the local section of the Swiss Association of Real Estate Agents, agreed to reach an amicable settlement with the Competition Commission, on the basis of which the Competition Commission pronounced a reduced sanction of CHF 35,000.

The aide-mémoire of the USPI-Neuchâtel contained price recommendations; it set ranges of rates for the services billing related to the property management, and provided fixed rates for the real estate brokerage. According to the Competition Commission's press release,[47] the investigation has shown that more than a third of the association members were following these price recommendations in the management sector. As to the brokerage sector, the investigation has been closed due to a lack of significant restriction on competition being demonstrated.

United Kingdom

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

Horizontal Agreements/Restraints

Court of Appeal refuses to strike out Toshiba Carrier's damages claim against UK companies in the KME and Outokumpu groups arising out of the European Commission's industrial tubes cartel infringement decision

On September 13, 2012, the Court of Appeal dismissed an appeal against a High Court judgment refusing to strike out or summarily dismiss a cartel damages claim brought against a UK-domiciled defendant whose non-UK parent company had been the subject of the European Commission's December 2003 industrial tubes cartel infringement decision (the "Decision").

In the Decision, the European Commission found that Outokumpu Oyj of Finland, Wieland-Werke AG of Germany and German, French, and Italian companies in the KME group (together, the "Non-UK Defendants") had participated in a price-fixing and market-sharing cartel in the market for industrial copper tubes. In December 2009, Toshiba Carrier UK Limited and various associated companies (together, the "Claimants"), each of which had been purchasers of copper tubes (or related products) during the period of the cartel, brought actions for damages in the High Court against both the addressees of the Decision and certain of their UK subsidiaries (the "UK Defendants"). The UK Defendants sought an order striking out the damages claims against them, on the basis that they disclosed no reasonable grounds for finding that the UK Defendants had infringed Article 101 TFEU, and, in the alternative, summarily dismissing the actions. The Non-UK Defendants, against whom jurisdiction was asserted under Article 6(1) of the Brussels Regulation, sought orders declaring that the courts of England and Wales did not have jurisdiction to try the claims against them in the event that the claims against the UK Defendants were struck out and/or summarily dismissed.

On appeal, the Court of Appeal upheld the High Court's decision not to strike out or summarily dismiss the action against KME Yorkshire Limited (which, following a series of settlements, was the sole remaining UK defendant):

(1) The Claimants' amended particulars of claim, as supplemented by responses to requests made by the UK Defendants pursuant to CPR 18 (which formed part of the Claimants' statements of case by virtue of CPR, r.2.3(1)), clearly included an allegation that KME Yorkshire Limited "with knowledge of the cartel agreement and arrangements" had obtained and exchanged information with competitors with a view to promoting the unlawful cartel arrangements. It was, therefore, not "seriously arguable" that the pleadings did not give rise to a standalone claim for infringement of Article 101 TFEU and a corresponding breach of statutory duty;

(2) The High Court had been entitled to exercise its discretion to refuse to dismiss the action summarily, despite the lack of evidence to support the allegations made, since cartels are, by their very nature, "shrouded in secrecy" and the strength of such a claim would be difficult for the Claimants to particularize until after disclosure.

Although it was not necessary to reach a final conclusion on this point in light of the Court of Appeal's finding that the Claimants had pleaded that KME Yorkshire Limited knew of the unlawful cartel arrangements, the Court nonetheless

[47] A version in French and German is available at: http://www.news.admin.ch/message/index.html?lang=fr&msg-id=45378.

addressed the Defendants' objection that where actual knowledge of the cartel is not pleaded, it is necessary to plead that a defendant had entered into a "concurrence of wills" with rival entities and the Claimants had failed to do so (which could not be remedied by pointing to the fact that the UK Defendants were part of the same undertaking as an addressee to the Decision which had been found to have the requisite "concurrence of wills"). The Court of Appeal did accept that where a subsidiary carries out "in all material respects" the instructions given to it by its parent, and the parent is therefore presumed to have decisive influence over it, there is scope for the unlawful conduct of the subsidiary to be imputed to the parent company.[48] However, where two companies are merely part of the same corporate group (*e.g.*, their share capital is held by the same person), that is insufficient to establish that the two companies are part of the same economic entity for the purposes of Article 101 TFEU and thereby to impute liability between them. In that regard, the Court considered that the judgment of Aikens J in Provimi[49] had been overtaken by the subsequent judgment of the European Court of Justice in Siderurgica Aristrain Madrid.[50]

Nonetheless, in endorsing the Court of Appeal's statement in *Cooper Tire*[51] that the secretive nature of cartels is such that a generous approach to pleadings should be taken prior to disclosure, the judgment is likely to promote claims against UK subsidiaries, alleging knowing implementation of a cartel involving other companies in a subsidiary's corporate group, in the knowledge that such claims are unlikely to be struck out and will therefore provide a jurisdictional anchor in the UK for follow-on claims against non-UK-domiciled addressees of a Commission infringement decision who would otherwise be liable to sued in the country of domicile.

CAT rules on 2 Travel damages action against Cardiff Bus

On July 5, 2012, the CAT published its judgment on the action brought by 2 Travel Group plc ("2 Travel") under section 47A of the Competition Act, in which it required Cardiff City Transport Services Limited (trading as Cardiff Bus), ("Cardiff Bus") to pay 2 Travel compensatory damages of £33,818.79 (plus interest) and exemplary damages of £60,000 in consequence of predatory conduct established by the OFT in an infringement decision dated November 18, 2008. This is the first time that damages have been awarded pursuant to an action brought under section 47A of the Competition Act.

In its 2008 infringement decision, the OFT found that Cardiff Bus, established in 1986 following the sale by the local authority of municipal bus operations, had engaged in predatory conduct contrary to Chapter II of the Competition Act between April 2004 and February 2005, aimed at excluding 2 Travel, a small "no-frills" bus and coach company established in 2000, from competing with its services in order to protect Cardiff Bus' dominant position in the market. The OFT found that, at around the same time that 2 Travel established its "no-frills" services in Cardiff, Cardiff Bus introduced its own "no-frills" services (the "White Services"). These services ran on the same routes and at the same times as 2 Travel's "no-frills" services, were priced below 2 Travel in three out of four fare zones, operated at a loss and were withdrawn by Cardiff Bus following 2 Travel's exit from the market.

Despite the OFT's finding of infringement, the fact that Cardiff Bus' annual turnover was below £50 million meant that it benefitted from immunity from fines. On January 2, 2011, 2 Travel (in liquidation) brought an action for damages against Cardiff Bus under section 47A of the Competition Act. The CAT ruled as follows:

Compensatory Damages

The CAT considered that, for the purposes of its assessment of damages, the relevant counterfactual was the scenario absent Cardiff Bus' introduction of the White Services. It accepted 2 Travel's claim for loss of profits, determining that the revenue lost (taking into account the number of White Services passengers who would have been likely to have used 2 Travel's services) amounted to £33,818.79, against which no running costs were to be offset since these costs had already been incurred. The CAT concluded that, since this revenue would not have prevented 2 Travel from ceasing operations in

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48 Case C-97/08P Akzo Nobel NV and others v Commission [2009] ECR 1-8247, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0097:EN:HTML.

49 Provimi Ltd v Roche Products Ltd [2003] EWHC 961, (Comm), http://www.bailii.org/ew/cases/EWHC/Comm/2003/961.html.

50 Case C-196/99 P Siderurgica Aristrain Madrid SL v Commission [2003] ECR I-11005, para. 99, http://curia.europa.eu/juris/showPdf.jsf;jsessionid=9ea7d2dc30dbd5b99d1ab7d64aeebca2dc9d95112f2d.e34KaxiLc3qMb40Rch0SaxuKbx10?text=&docid=48682&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3999409.

51 Cooper Tire & Rubber Company Europe Ltd v Dow Deutschland Inc [2010] EWCA Civ 864, para. 43, http://www.bailii.org/ew/cases/EWHC/Comm/2009/2609.html.

December 2004 and from entering into liquidation in May 2005, it would be inappropriate to award damages for loss of revenue beyond December 2004. The CAT also rejected 2 Travel's claim that liquidation was caused by Cardiff Bus' actions, as well as 2 Travel's claims for loss of a capital asset and for losses that 2 Travel claimed to have incurred in the sale of its Swansea depot (which the CAT considered would have had to have been sold in any event).

Exemplary Damages

Referring to *Devenish Nutrition*[52] (which concerned a breach of Article 101) the CAT noted that exemplary damages can be awarded when there is an intentional or reckless breach of the law (recklessness requiring the knowing disregard of an unacceptable risk of causing injury).[53] It considered that, through two executive directors who constituted the company's controlling mind, Cardiff Bus had acted in knowing disregard of the risk of injury (as evidenced, inter alia, by the failure of those directors to obtain legal advice) and that its conduct had been both outrageous and in cynical disregard of 2 Travel's rights (satisfying the tests for unacceptable conduct).[54] Consequently, and taking into account the absence of any policy reasons to the contrary (in particular that Cardiff Bus had not been subject to fines from the OFT), the CAT determined that exemplary damages were appropriate in this particular and exceptional case. These were awarded in the amount of £60,000, a relatively small amount, reflecting Cardiff Bus' size and the fact that, as an entity associated with a local authority, the CAT expected Cardiff Bus to take full account of the judgment. The Chief Executive of Cardiff Bus subsequently resigned.

There have been no appeals against this judgment, which is now final.

Market Investigations

CAT upholds appeal against Ofcom's pay-TV decision

On August 8, 2012, the CAT upheld an appeal brought by British Sky Broadcasting Limited ("Sky") against the "wholesale must offer" remedy imposed by Ofcom in relation to pay-TV sports content.

The CAT upheld Sky's "root-and-branch" challenge of the substantive findings relating to Sky's sports channels in Ofcom's Pay TV Statement, concluding that there was no evidence to suggest that Sky had exploited its market power by restricting wholesale distribution of its premium channels to potential new retailers in a manner that was "prejudicial to fair and effective competition" (the relevant competition test under the Communications Act 2003). More specifically:

(1) Ofcom had concluded that Sky had deliberately withheld from other retailers wholesale supply of its premium channels and that, acting on strategic incentives unrelated to normal commercial considerations of revenue/profit-maximization, had preferred to be entirely absent from those retailers' platforms rather than to give them wholesale access. The CAT disagreed, stating that Ofcom's analysis misinterpreted evidence from Sky's wholesale supply negotiations with rivals. While Ofcom had attributed responsibility for the failure of negotiations to a refusal on the part of Sky to engage constructively with counterparties, the CAT considered that Sky had, on the whole, engaged constructively with prospective licensees and that "regulatory gaming" on the part of Sky's rivals had played a much more important role in the lack of progress in commercial negotiations than Ofcom had recognized.

(2) With respect to Virgin Media and the regulatory rate-card governing the licensing of Sky Sports channels to Virgin Media, the CAT found no evidence to support Ofcom's finding that Sky has (or has acted upon) an incentive to weaken Virgin Media or its corporate predecessors as competitors. The current rate card terms did not obstruct fair and effective competition in the retail of core premium sports channels by Virgin Media. Virgin has strong commercial and financial incentives to win and retain all customers interested in core premium sports channels and any cost advantage which Sky enjoys over Virgin by reason of Sky's larger subscriber base is relatively small. The CAT considered that all the evidence indicated that Sky rightly regarded Virgin Media as a serious, well-established rival capable of constraining Sky's actions in the market, and that Virgin does in fact compete effectively

[52] Devenish Nutrition Ltd v Sanofi-Aventis SA [2007] EWHC 2394 http://www.bailii.org/ew/cases/EWHC/Ch/2007/2394.html.

[53] R v G [2004] 1 AC 1034 at [32], http://www.bailii.org/uk/cases/UKHL/2003/50.html.

[54] *See* Rookes v Barnard [1964] 1 AC 1129, http://www.bailii.org/uk/cases/UKHL/1964/1.html, and Broome v Cassell & Co Ltd [1972] 1 AC 1027.

with Sky in the retail supply of packages that include core premium sports channels.

(3) The CAT observed that Ofcom, as a specialist regulator, was "required by the legislation to exercise a degree of judgment" in its analysis. While the CAT considered that it should give due weight to Ofcom's decision and its reasoning, the CAT was nevertheless satisfied that Ofcom's decision was wrong. The CAT also noted that Ofcom had sought, but had not been granted, the reopening of proceedings following the announcement of the results of the latest Premier League rights auction. At the time, the CAT said that its reasons for doing so would be set out in its final judgment. As the CAT notes, these reasons are now clear.

The CAT has ordered that the one-month period for requesting permission to appeal the decision shall not start to run until the publication of a full non-confidential version of the judgment.

CC publishes final report on movies on pay-TV market investigation

On August 2, 2012, the CC published its final report (the "Final Report")[55] in its "Movies on Pay TV" market investigation, in which it confirms the conclusion reached in its Revised Provisional Findings of May 23, 2012, that Sky's position in relation to the acquisition and distribution of first subscription pay-TV window ("FSPTW") movie content does not adversely affect competition in the pay-TV retail market.

The CC's conclusions in the Final Report are based, principally, on the following factors:

(1) Evidence gathered by the CC (confirming the decreasing share of UK viewing hours accounted for by Sky Movies channels), which demonstrates that, when choosing between "traditional" pay-TV services, the availability of Sky Movies is significant to only a small minority of consumers and that consumers place greater weight on factors other than the newness of the movie content available;

(2) Netflix's launch of a stand-alone "over-the-top" ("OTT") subscription video on demand ("SVOD") service with movie content, as well as the significant enhancement of LOVEFiLM's streaming service and LOVEFiLM's launch of that service on a stand-alone basis independent of its DVD-by-post offering. The CC considers that these developments are consistent with an overall trend in the growth of OTT video services that has increased competition and consumer choice, and notes that LOVEFiLM and Netflix have already started to acquire the FSPTW rights of several non-major studios as well as the rights to movies of many of the major studios in subsequent pay-TV windows. The CC expects that, as these rival services increase their subscriber numbers, the barriers to them acquiring further FSPTW rights will continue to fall and that there is a "realistic prospect" of an OTT pay-TV retailer being able to outbid Sky for the FPSTW rights of at least one major studio;

(3) Sky responsed to these developments with the launch of an OTT service ("Now TV") offering Sky Movies (and additional content in the future) on an unbundled basis (*i.e.*, separately from subscriptions to basic paid-for content as well as separately from any direct-to-home subscription). This gives consumers the option of subscribing to Sky Movies separately from their main pay-TV subscription.

The CC retains its provisional view that competition in the pay-TV retail market overall remains "ineffective" but emphasises that the scope of the reference from Ofcom was limited to the supply of FPSTW movie content and Sky's position with regard to these rights.

Given the absence of any finding of an adverse effect on competition in this market, the Final Report does not propose any remedies. The CC states that given the fast-moving nature of the sector, it expects Ofcom to keep developments "under review" and notes that if there were a "material change" in the circumstances that have led the CC to its findings, this might warrant renewed scrutiny of the issues.

Court of Appeal dismisses BAA appeal against divestment of Stansted Airport

In a judgment dated July 26, 2012 (the "Judgment"),[56] the Court of Appeal dismissed an appeal brought by BAA Limited ("BAA") against a decision by the CAT dated February 1, 2012

55 http://www.competition-commission.org.uk/assets/competitioncommission/docs/2010/movies-on-pay-tv/main_report.pdf.

56 BAA Limited v Competition Commission [2012] EWCA Civ 1077, http://www.bailii.org/ew/cases/EWCA/Civ/2012/1077.html.

(the "Decision"),[57] which upheld the CC's decision to require BAA to divest Stansted airport. The Court of Appeal found that the CAT had not misconstrued the conclusions reached by the CC in its report of March 19, 2009 (the "2009 Report")[58] in relation to the substitutability of Heathrow, Gatwick and Stansted airports and that the CAT had been entitled to dismiss BAA's claims in relation to the failure of the CC to consider the cost to BAA of the divestment timetable imposed.

In the 2009 Report, the CC concluded, *inter alia*, that BAA's common ownership of airports in the south east of England and lowland Scotland gives rise to adverse effects on competition in connection with the supply of airport services by BAA. To address the adverse effects identified, the CC decided on a package of remedies which required BAA to divest both Stansted and Gatwick airports and either of Edinburgh or Glasgow airports. In October 2010, the Court of Appeal found in favour of the CC and in February 2011, the Supreme Court refused leave to appeal further.

In the face of ultimately unsuccessful attempts by BAA to quash the CC's decision on the grounds of procedural bias, in November 2010 the CC invited evidence on whether there had been any relevant developments since the 2009 Report sufficiently significant to engage Section 138(3) of the Enterprise Act 2002 (which requires that any remedy decisions taken by the CC be consistent with decisions taken in the market investigation report unless there has been a material change of circumstances since the preparation of the report or the CC otherwise has a special reason for deciding differently). On July 19, 2011, the CC published its final decision, finding that there were no material changes of circumstances or special reasons that would justify amending the decision in the 2009 Report. This was upheld by the CAT in the Decision. BAA's application for permission to appeal was rejected by the CAT but accepted by the Court of Appeal on May 28, 2012.

In the Judgment, the Court of Appeal first considered BAA's claim that the CAT had misconstrued the 2009 Report by failing to recognise that the CC had, in fact, not concluded that there was strong substitutability between Heathrow, Gatwick and Stansted. The Court of Appeal dismissed this claim on the basis that the Decision provided an accurate summary of the CC's conclusions on substitutability and that the CAT should be "very slow to conclude" that the CC had arrived at a perverse result (which would have been the case had it required BAA to divest Stansted having found there was not a strong degree of substitutability between Heathrow and Stansted).

BAA's second claim was that the CAT had erred in dismissing BAA's argument that the CC had, in assessing the proportionality of the remedy requiring BAA to divest Stansted, failed to take into account the significant cost to BAA of the sale of Stansted under compulsion. The Court of Appeal rejected this claim on the grounds that it was either a wholly new submission that had not been raised in the consultations leading up to the CC's 2009 and 2011 reports (and which, therefore, could not properly have been raised before the CAT in 2011) or that it was a repetition of the "timetable" point raised in 2009 by BAA and rejected by the CAT (which BAA did not appeal at the time and could not do so now). The Court of Appeal noted that, in any event, BAA's failure to quantify the loss meant that it could not have been taken into account by the CC in assessing proportionality, and that, in more general terms, where the CC has concluded that a divestment remedy is necessary and proportionate and the undertaking is given an appropriate opportunity to realize a fair market price, no further complaint can properly be made.

BAA has announced that it will not appeal the Court of Appeal's decision to the Supreme Court[59] and Stansted airport has been put up for sale.

OFT issues call for information on UK petrol and diesel fuel sector

On September 5, 2012, the OFT announced that it was issuing a call for information on the UK petrol and diesel sector in light of continuing public concern about pump prices as well as concerns about the operation of the road fuels markets identified by competition authorities in other jurisdictions.[60]

In February 2012, the OFT received a submission from the Retail Motor Industry Federation (the "RMIF"), in which the

[57] BAA Limited v Competition Commission [2012] CAT 3, http://www.catribunal.org.uk/237-7271/1185-6-8-11-BAA-Limited.html.

[58] http://www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/non-inquiry/rep_pub/reports/2009/fulltext/545.

[59] http://www.londonstockexchange.com/exchange/news/market-news/market-news-detail.html?announcementId=11302846.

[60] http://www.oft.gov.uk/news-and-updates/press/2012/76-12.

RMIF raised concerns about the ability of independent fuel retailers to continue to compete in the market. Having examined the issues raised by the RMIF, the OFT decided in April 2012 that it had not received sufficient evidence of competition issues to justify launching an investigation into the operation of the sector.

However, the OFT has now decided to request further information about the operation of the petrol and diesel sector in the UK in view of continuing public concern about pump prices as well as:

(1) A Fuel Price Report published by the Automobile Association which indicated that, between June 2007 and June 2012 the pump price of petrol rose by 38% and the pump price of diesel rose by 43%; and

(2) Recent investigations by the German, Spanish and Australian competition authorities, each of which identified competitive concerns relating to the structure of and behaviour of key participants in the sector in their respective jurisdictions.

Consequently, the OFT wishes to explore a number of claims about how the road fuels sector in the UK is functioning, including:

(3) Whether reductions in the price of crude oil are being reflected in falling pump prices;

(4) Whether the practices of supermarkets and major oil companies are having a detrimental effect on competition;

(5) Whether there is a lack of competition between fuel retailers in certain remote communities; and

(6) Whether concerns about the structure of and the behaviour of participants in road fuels markets identified by other national competition authorities are relevant in the UK.

The OFT will be gathering information during a six week period starting on the date of this announcement and will be engaging directly with market participants, trade bodies, government and regulatory organisations, consumer bodies and motoring groups. The OFT invited any views and evidence from customers or other interested parties to be submitted by October 17, 2012 and intends to publish a summary of its findings and announce any proposed next steps in January 2013.

OFT launches review of the UK personal current account market

On July 13, 2012, the OFT announced a review of the personal current account ("PCA") market in the UK.[61] This review seeks to establish how the market has evolved since the OFT's 2008 market study[62] and forms part of a wider programme of work on retail banking, in which the OFT will also consider the operation of payments systems and the small and medium sized banking markets.

In the 2008 market study, the OFT identified the following three areas of concern in the PCA market:

(1) Low switching levels and real and perceived difficulties in switching between PCA providers;

(2) Low levels of transparency of PCA charges and other costs, and

(3) Complexity combined with a lack of control over the use of unarranged overdrafts.

In order to address these concerns, the banking industry agreed to take steps to improve the switching process and to improve transparency by publishing illustrative charging scenarios, introducing annual summaries and increasing the information available on monthly statements. It also agreed to incorporate into the Lending Code minimum standards on opt-out and best practice guidelines on how to treat customers in financial difficulty who incur unarranged overdraft charges.

The OFT published follow-up reports on switching and transparency (in October 2009),[63] and on unarranged overdraft charges (in March 2010)[64] and in March 2010 expressed its intention to conduct a review of the PCA market during the course of 2012. The review will assess the following:

(1) Progress made by PCA providers in implementing the initiatives agreed with the OFT, as well as those derived from initiatives stemming from the recommendations made by the Independent Commission on Banking (the "ICB"),[65]

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[61] http://www.oft.gov.uk/news-and-updates/press/2012/62-12.

[62] www.oft.gov.uk/shared_oft/reports/financial_products/OFT1005.pdf.

[63] www.oft.gov.uk/shared_oft/personal-current-accounts/oft1249.pdf.

[64] www.oft.gov.uk/shared_oft/personal-current-accounts/oft1216.pdf.

[65] ICB Final Report Recommendations (September 2011), http://bankingcommission.s3.amazonaws.com/wp-content/uploads/2010/07/ICB-Final-Report.pdf.

the government's Consumer Credit and Personal Insolvency Review[66] and the super-complaint on travel money;[67]

(2) The impact of the transparency, switching and control initiatives that PCA providers agreed to put in place following the 2008 market study; and

(3) How the PCA market has evolved since the 2008 market study and whether there are further options for helping consumers make better informed current account choices and to increase competition.

The OFT will publish its findings by the end of 2012 and the review will help inform the OFT's response to the ICB's recommendation that it consider making a market investigation reference to the CC if sufficient improvements in the market have not been made by 2015.

Mergers and Acquisitions

CC approves McGill's Bus Services' acquisition of Arriva Scotland West

On September 21, 2012, the CC published its final report on the acquisition by McGill's Bus Services Limited ("McGill's") of Arriva Scotland West Limited ("ASW"),[68] which was completed on March 26, 2012. This was a reference made by the OFT under section 22(1) of the Enterprise Act 2002. In spite of the fact that the parties were each other's closest competitors, the CC confirmed its provisional conclusion that that the acquisition had not resulted in an actual or potential loss of competition within or outside the Renfrewshire area.

Both McGill's, a family-owned bus operator, and ASW, a subsidiary of Arriva plc (the UK's third-largest regional bus operator and itself a subsidiary of Deutsche Bahn AG), provided commercial local bus services in the Inverclyde, Renfrewshire and East Renfrewshire areas, with some services to Glasgow. In its reference decision, the OFT concluded that, as a consequence of the acquisition, there was the realistic prospect of a substantial lessening of competition in the supply of commercial local bus services on ten flows (*i.e.*, individual journeys between two points whose origins and destinations are within 500 meters of each other and which show a broadly similar level of frequency and frequency distribution over time), with the number of effective competitors being reduced from two to one on seven of these flows, and from three to two on the remaining three of these flows. The OFT also expressed its concern that the merger could impact on the supply of commercial local bus services at a network level as a result of the removal of potential competition in the Renfrewshire and East Renfrewshire areas.

In its final report, the CC noted that prior to the acquisition more than three-quarters of McGill's revenues and concession trips were subject to some degree of competition from ASW, identified 15 services on which there was at least one significant overlap flow between McGill's and ASW (which, the CC stated, were each other's closest competitors prior to the transaction) and concluded that the acquisition would give McGill's a significant market share on a number of overlap flows. However, the CC considered that the level of competitive interaction between the parties was largely the result of ASW's reaction to McGill's expansion in the Renfrewshire area since 2009 and that, absent the acquisition and in light of the fact that both McGill's and ASW's profitability had been declining for a number of years, competitive interaction between the parties was likely to be substantially reduced in the foreseeable future, reducing the attractiveness of the parties' competitive offerings.

In relation to competition from other operators, the CC concluded that neither providers currently active on the overlap flows (which have fewer services and lower frequencies and are unlikely to increase frequencies or modify routes), nor providers not currently active on the overlap flows (which, in spite of the absence of structural factors representing barriers to entry, would not find it profitable to launch services to compete with McGill's) would be likely to exert a sufficient competitive constraint on McGill's post-acquisition. However, the CC reached the conclusion that McGill's perceived First Glasgow (a larger company with far greater resources that would be willing to enter new flows if a profitable opportunity were to arise) to be a credible threat, and that this threat was both credible and likely to exert a competitive constraint on McGill's post-transaction offering.

[66] Department for Business Innovation & Skills Final Response on Consumer Credit (November 2011), http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/c/11-1341-consumer-credit-and-insolvency-response-on-credit.pdf.

[67] http://www.oft.gov.uk/OFTwork/markets-work/super-complaints/travel-money/.

[68] http://www.competition-commission.org.uk/assets/competitioncommission/docs/2012/mcgills-arriva-west-scotland-inquiry/fr_final_report.pdf.

On these grounds, the CC concluded that the acquisition of ASW by McGill's had not resulted in a substantial lessening of competition.

CC formally clears DCC Energy UK Limited's acquisition of certain oil distribution businesses from Rontec Investments LLP

On September 4, 2012, the CC published its final report (the "Report")[69] on the completed acquisition of heating and transport fuel distribution businesses owned by Rontec Investments LLP ("Rontec") by DCC Energy UK Limited ("DCC Energy"). The CC's report, which confirmed its provisional findings, concluded that the acquisition would be unlikely to give rise to a significant lessening in competition for customers in the oil distribution market.

In June 2011, Rontec acquired a number of businesses active in retail fuel and oil distribution in the UK from Total UK Ltd ("Total"). In September 2011 DCC Energy, a supplier of oil products in the UK whose principal operating company in the UK is GB Oils Limited, agreed to buy three of these businesses from Rontec: (i) the Butler Fuels business (active in the sale and distribution of heating and transport fuels and other petroleum products to domestic and business customers); (ii) the Dealer business (a non-trading company which owned the contractual rights to supply transport fuels to certain dealer-owned, dealer-operated ("DODO") retail service stations trading under the Total brand); and (iii) the Islands business (Total's oil distribution and retail service station businesses on the Isle of Man and the Channel Islands).

The transaction was referred by the OFT to the CC on April 4, 2012. In the Report, the CC assessed the competitive impact of the transaction by reference to three customer types: bulk customers (typically requiring deliveries in full articulated lorry loads); DODO retail forecourts (which also usually typically require deliveries in full articulated lorry loads); and non-bulk customers that require smaller deliveries (the CC sub-divided these customers into single-site and multi-regional customer segments). The CC reached the following conclusions in relation to each of these markets:

(1) For the supply to bulk customers, the CC concluded that the parties faced competition from a large number of distributors, traders and oil majors and that bulk customers were willing and able to switch supplier (all bulk customer respondents to the customer survey who mentioned the parties as feasible suppliers also mentioned at least two other suppliers and 89% of bulk customers who mentioned more than one supplier stated that they used several suppliers);

(2) In relation to DODO retail forecourts, the CC concluded that the parties were not particularly important suppliers (only 6% of all DODO respondents did not state an alternative supplier besides the merger parties);

(3) For single-site non-bulk customers, although the CC identified twelve local catchment areas where the number of alternative suppliers post-transaction (besides the merger parties) was fewer than three, it concluded that, because these twelve areas were located near to terminals or refineries, a new entrant would be able to compete without needing to invest in a depot;

(4) For multi-site non-bulk customers, although the CC noted that there were few suppliers with a nationwide scope for direct deliveries, it concluded that customers were able and willing to split their orders across several suppliers and there were no significant factors constraining customers from switching suppliers.

Accordingly, the CC determined that, for each of these customer segments, the merger would not be likely to give rise to a substantial lessening of competition in any market in the UK.

Policy and Procedure

OFT publishes response to BIS consultation on private actions

On August 1, 2012, the OFT published its response (the "Response")[70] to the consultation on private actions in competition law issued by the Department of Business, Innovation and Skills ("BIS") on April 24, 2012[71] (the "Consultation").

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69 http://www.competition-commission.org.uk/assets/competitioncommission/docs/2012/dcc-rontec/dcc_rontec_final_report.pdf.

70 http://www.oft.gov.uk/shared_oft/reports/oft_response_to_consultations/OFT1434resp.pdf.

71 http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/p/12-742-private-actions-in-competition-law-consultation.pdf.

BIS' objective, as set out in the Consultation, is to increase the ability of private individuals and companies who have suffered a loss as a result of anti-competitive behavior to obtain redress. BIS considers that a greater role for private actions would complement public enforcement in deterring anti-competitive behavior. The Consultation contains a number of proposals which aim:

(1) To extend the remit of the CAT to allow it to hear stand-alone as well as follow-on cases (with a new power to grant injunctions), to enable cases to be transferred to the CAT from the High Court, to create a fast-track procedure and to introduce a rebuttable presumption of loss in cartel cases;

(2) To extend collective actions so that they can be brought on behalf of businesses as well as consumers and to introduce an 'opt-out' model, where all parties who fall within the defined represented group are bound by the outcome of the case, unless they opt out;

(3) To encourage the use of Alternative Dispute Resolution ("ADR") and give the OFT the power to oblige businesses to take steps to make redress to those that have suffered loss due to anti-competitive behaviour; and

(4) To protect certain aspects of leniency documents from disclosure and leniency applicants from joint and several liability.

The OFT's Response is supportive in general of the proposals set out in the Consultation and also stresses its support for a number of specific proposals (*e.g.*, the proposed rebuttable presumption of a 20% overcharge in cartel cases). The OFT emphasizes that creating effective routes for consumers and businesses adversely affected by breaches of competition law to obtain redress through private actions will optimize the effectiveness of the overall competition regime and considers that an effective private actions regime can complement public enforcement by creating additional deterrence and bringing a greater number of competition law infringements to the attention of public authorities.

However, the OFT cautions that the new regime must not undermine the role played or the tools used by public competition agencies and stresses that difficulties and risks in funding present a major obstacle to bringing such actions (such that cost-capping may be appropriate and that not allowing contingency fees may present an unnecessary restriction). It therefore identifies a number of specific points to ensure the effective implementation of the proposals:

(1) The OFT supports the proposals to extend the CAT's remit, but suggests that BIS considers extending the fast-track scheme to consumers and consumer bodies and stresses that the CAT must be provided with sufficient resources;

(2) From a procedural perspective, the OFT stresses that it should be notified of claims and should have the right to intervene in proceedings. It also considers that there should be provisions to enable court proceedings to be stayed where there are concurrent administrative investigations and private actions and that the CAT (and other UK courts and tribunals) should be required to have regard to OFT and CC decisions and guidance;

(3) Although strongly supportive of BIS' proposals to introduce opt-out collective actions, the OFT suggests that appropriate safeguards should be put in place (such as including a permission stage in which the court decides whether a collective action is appropriate, as well as strong case management as the case proceeds), and suggests that the High Court may be equally well placed as the CAT to hear collective actions, especially given the uncertainty as to the potential increase in the number of competition cases (but notes in this regard that limitation periods and other relevant procedural rules would need to be harmonized);

(4) Although parties should be encouraged to pursue ADR, the OFT considers that they should not be required to do so. The OFT also notes that its role in facilitating redress for consumers should be limited and should not divert resources from its core enforcement work.

(5) The OFT welcomes BIS' recognition that leniency incentives should be safeguarded and stresses that certain leniency documents should be protected from disclosure to this end, especially in light of the *Pfleiderer* case[72] which, in its view, has made the disclosure of leniency documents more likely.

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72 Case C-360/09 Pfleiderer AG v Bundeskartellamt.

BIS aims to publish the Government response to the Consultation by October 24, 2012.

OFT Issues New Guidance on Penalties under the Competition Act 1998

On September 10, 2012, following a consultation period which ended in January 2012 and having obtained the consent of the Secretary of State on August 10, 2012, the OFT published revised guidance (the "Guidelines") as to the appropriate amount of penalties imposed by the OFT under the Competition Act 1998.

Under the Guidelines, financial penalties will be calculated using the following six-step approach:

(1) Calculation of the starting point having regard to the seriousness of the infringement and the relevant turnover of the undertaking;

(2) Adjustment for duration;

(3) Adjustment for aggravating or mitigating factors;

(4) Adjustment for specific deterrence and proportionality;

(5) Adjustment to ensure the statutory caps are not exceeded;

(6) Adjustment for leniency, settlement discounts and/or financial hardship.

In addition, the Guidelines introduce the following changes:

(1) An increase from 10 to 30% of relevant turnover as the maximum starting point for penalty calculations, giving the OFT the greater flexibility to set penalties that better reflect the relative seriousness of infringements;

(2) Clarification that the relevant turnover to be used in calculating the starting point for penalties is that achieved in the last business year before the infringement ended, rather than the last business year before the decision (which is the relevant year for assessing the statutory cap);

(3) A new aggravating factor for "persistent and repeated unreasonable behaviour that delays the OFT's investigation" as well as clarification on "recidivism" (*i.e.*, where an undertaking continues or repeats behaviour that has been the subject of a previous infringement decision); and

(4) Further detail on the OFT's approach to adjusting penalties in light of mitigating factors such as steps taken by undertakings to comply with competition law (which must constitute a "clear and unambiguous commitment to competition law" together with other "appropriate steps").

The Guidelines came into effect on September 10, 2012, and will apply to all cases where a statement of objections is issued after this date.

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