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DENMARK

This section reviews the competition law developments under the Competition Act Consolidation Act No. 23 of January 17, 2013 (the "Danish Competition Act") enforced by the Danish Competition Council ("DCC"), and the Danish Competition Appeals Tribunal ("DCAT"), assisted by the Danish Competition and Consumer Authority ("DCCA").

Horizontal Agreements

The Danish Veterinary Association's Code Of Ethics Restricts Competition Among Veterinarians

On December 10, 2013, the DCAT upheld the DCC's decision finding that the Danish Veterinary Association's code of ethics restricts competition among veterinarians.

The Danish Veterinary Association is a professional organization for veterinarians in Denmark. Approximately 90% of all veterinarians in Denmark are members of the association.

The Danish Veterinary Association code of ethics was binding to members of the association. The code of ethics stated that it was good practice (i) not to pursue referred customers, (ii) not to establish a practice at the expense of an ill veterinarian, and (iii) not to establish a practice within a distance of 15 kilometers from a deceased veterinarian's practice until the practice is sold.

The DCAT upheld the DCC's decision. It found that these provisions had the object of restricting competition contrary to the DCA, and ordered the Danish Veterinary Association to terminate the offending provisions.

The Danish Competition Council Approves Commitments From The Danish Construction Association

On December 18, 2013, the DCC approved commitments from the Danish Construction Association regarding exchange of information within the Scaffolding Sector.

For several years, members of the Danish Construction Association ("DCA") within the Scaffolding Sector had agreed to exchange information on tenders; members were obliged to report tenders for scaffolding assignments of DKK 50,000 and above to the DCA. In return, the members received information about the total number of offers for the same assignment and the identities of the tenderers. This information was exchanged during the tender.

The DCC expressed concerns that this exchange of information made it possible for members to adjust their offers in the tenders, thus restricting competition on the scaffolding market.

The matter was settled: the DCA accepted certain commitments, inter alia, the termination of the agreement to exchange information.

Anti-Competitive Price-Fixing Agreement In The Real Estate Business

On December 18, 2013, the DCC ordered the small cooperative chain of independent real estate agents, BoligOne, to cease fixing prices for real estate services.

The cooperative chain of independent real estate agents, BoligOne, notified its commercialization agreement to the DCCA, requesting a declaration of non-intervention due to its small size and structure.

Under the commercialization agreement, the real estate agents agreed, inter alia, to fix prices for certain real estate services.

The DCC found that the price fixing constituted a serious violation of the DCA and, on that basis, that the *de minimis* rule did not apply. The DCC ordered BoligOne immediately to cease fixing prices and to abstain from entering into future agreements with a similar object or effect.

Vertical Restraints

Vila A/S Pays Fine In Settlement For Resale Price Maintenance

On October 30, 2013, the clothing company Vila A/S agreed to pay a fine of DKK 1.6 million (approx. €213,333) for having engaged in resale price maintenance. In addition, two individuals from the management team each agreed to pay a fine of DKK 22,000 (approx. €2,933) for having participated in the infringement.

In May 2013, the DCCA conducted an unannounced inspection of Vila's premises and found evidence that for a period of no less than two and a half years prior to October 2012, Vila had instructed its dealers that the company's recommended resale prices as should be treated as the minimum prices to be charged to customers.

Vila agreed to pay a fine of DKK 1.6 million (approx. €213,333), and two individuals from the management each agreed to pay a fine of DKK 22,000 (approx. €2,933) for having participated in the infringements. One of the managers had been aware of the anti-competitive practice but had not taken any actions to stop them, and the other had been actively involved in the infringement.

When setting the fines, the DCCA took into account the duration of the infringement, the size of Vila's turnover and the fact that the agreements on resale price maintenance applied to several dealers. As a mitigating circumstance, the DCCA took into account that Vila and the two individuals had cooperated with the authority.

Unilateral Conduct

The Danish Competition Council Approves Commitments From The Largest Broadband Provider In Denmark

On December 18, 2013, the DCC approved commitments from the largest broadband provider in Denmark, TDC A/S, in order to address concerns of a margin squeeze in relation to the sale of broadband products to private customers.

In 2011, a complaint was filed with the DCCA stating that TDC A/S ("TDC") had abused its dominant position by implementing a margin squeeze (i.e., TDC's retail prices were too low as compared to its wholesale prices). The complainant also alleged that competitors were not able to make a positive return on selling broadband to consumers. On foot of its investigation, the DCCA concluded that TDC's behavior could have represented abusive conduct in violation of the DCA.

In order to address the DCCA's concerns, TDC offered commitments aimed at ensuring that the ratio between its retail and wholesale prices could not result in a margin squeeze.

FINLAND

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

Horizontal Agreements

District Court Ruling In Precedent-Setting Asphalt Cartel Damages Case

On November 28, 2013, the Helsinki District Court rendered Finland's first cartel damages judgment. The claimants succeeded on nearly all points of law, suggesting that Finland is among one of the more claimant-friendly antitrust damages jurisdictions in Europe. Nevertheless, the damages awarded by the Court were conservative. The judgment is expected to be appealed to the Court of Appeal.

The State of Finland and 40 municipalities claimed in total €120 million from the cartel members in a follow-on damages case after the 2009 judgment by the Supreme Administrative Court confirming the existence of a nation-wide asphalt cartel violating both national and EU competition law. The State's €57 million claim was dismissed with costs because certain employees of the State were found to have known about and participated in the cartel. The municipal claimants were awarded €37 million out of their total claims of €65 million. The judgment contains a number of precedent-setting rulings.

The District Court considered the Supreme Administrative Court's infringement decision to be binding. Thus, it was not possible to dispute the existence of the cartel, the parties responsible or the infringement period. However, it was possible to prove longer infringement periods and new infringing parties, such as the State.

In a significant new interpretation, the District Court applied to antitrust damages the EU competition law doctrine of economic succession, which had previously been applied to administrative fines. Some of the respondents had not participated in the infringement but had acquired the shares of infringing companies and then their assets, before later liquidating those companies, seemingly leaving no suitable respondent. The District Court considered itself obligated by EU law to ensure the effectiveness of national remedies, but found that national law prevented effective relief. As a result, in order to ensure an effective outcome the District Court ignored national law and directly applied EU law, in this case the EU competition law doctrine of economic succession.

Multiple statutes of limitation were applicable, depending on, inter alia, whether and at what time the claimant knew or should have known of the damage and the parties responsible. As a main rule, the limitation period, which could be three or five years depending on whether the claimant was a trader, began to run from the Supreme Administrative Court's final decision. Before the final infringement decision, the claimants could not have been expected to know (as opposed to suspect) about the existence of the cartel and the parties responsible.

Liability was joint and several. It covered all the damage that the cartel had inflicted on a claimant during each cartel member's participation. Certain cartel companies pleaded that they never submitted bids to certain claimants, or that they were very small or geographically distant from a claimant. All these defenses were dismissed.

Interest typically increased total awards by more than 50%. Compensatory interest at the European Central Bank's reference rate was awarded from the time the overcharge was paid until the time the claims were lodged. Overdue interest at a rate equaling the European Central Bank's reference rate plus 7 percentage points was awarded from the lodging of the claims until the payment date.

(Damages case: 41 separate judgments, e.g., District Court of Helsinki, judgment 13/64929, on November 28, 2013)

(Infringement case: Supreme Administrative Court, judgment KHO:2009:83, on September 29, 2009)

FRANCE

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

Unilateral Conduct

FCA Fines EDF For Abuse Of A Dominant Position In The Area Of Photovoltaic Energy

The FCA found that EDF, the French incumbent electricity provider, abused its dominant position by confusing consumers about the distinction between its regulated and competitive activities. EDF leveraged its position in the market for the supply of electricity to residential customers in order to favor its subsidiary in the market for services to households producing photovoltaic energy (i.e., solar energy). In particular, the FCA considered that the use by the incumbent operator of its trademark in a distinct but related market should be considered abusive.[1]

On December 17, 2013, four years after the FCA imposed interim measures, Electricité de France ("EDF") was fined €13.5 million for abusing its dominant position as the French incumbent electricity provider in order to reinforce the position of its subsidiary EDF ENR in the market for services to households producing photovoltaic energy.

In May 2008, Solaire Direct, a company offering services to households interested in producing photovoltaic energy, filed a complaint with the FCA arguing that EDF was abusing the structural and commercial advantages resulting from its dominant position in the electricity markets to enter the photovoltaic sector and foreclose its competitors. On April 8, 2009, the FCA adopted an interim measure decision finding that EDF's communication on the photovoltaic sector could induce confusion between EDF's role as a provider of electricity (subject to regulated prices) and the competitive activities of EDF ENR. The FCA therefore ordered EDF to: (i) stop mentioning EDF ENR's activities in communications supporting EDF "Bleu Ciel" trademark; (ii) make sure that agents taking calls from EDF customers do not mention EDF ENR; and (iii) prevent EDF ENR from accessing information collected by EDF as the French provider of electricity.

On the merits, the FCA first analyzed the relevant markets. The FCA found that EDF enjoyed a dominant position in the market for the retail supply of electricity to residential customers below 36kVA because 98% of French residential customers opted for regulated prices, and 90%-95% of French customers having opted for regulated prices over the relevant period were EDF customers. The FCA also analyzed the market for services offered to residential customers interested in producing photovoltaic energy. Looking at a broad market for all kinds of offers regarding the provision and installation of photovoltaic panels, the FCA found that although EDF ENR, with less than 15% of the market, was not dominant, it was nevertheless a clear market leader, with most of its competitors each having less than a 0.5% share.

According to the FCA, both markets are related markets, because EDF is both a provider of electricity to customers who have opted for regulated prices as well as a buyer of photovoltaic electricity. Moreover, its ERDF subsidiary is in charge of connecting residential customers producing photovoltaic energy to the general electricity network. The FCA found that the association of all these services within the EDF entity created a close relationship between them, and that the reputation of the EDF brand encouraged customers to choose ERDF for photovoltaic services.

The FCA then found that EDF had abused its dominant position in the market for the retail supply of electricity to residential customers in order to favor its subsidiaries in the related photovoltaic markets. The FCA reaffirmed that while incumbent operators have a right to enter new markets opened to competition, they may not use their brand image or their privileged access to information to foreclose competitors.

[1] French Competition Authority, Decision No. 13-D-20 of December 17, 2013, available at http://www.autoritedelaconcurrence.fr/user/avisdec.php?numero=13D20.

First, the FCA considered that EDF abused its dominant position as the incumbent electricity provider by allowing EDF ENR to use its brand image and commercial force (including trademarks, logos, newsletters and marketing services) at a price that did not reflect the actual costs. EDF's brand image was considered as "a competitive advantage per se" and a determining element in consumers' choice. Therefore, by creating confusion in the minds of consumers between the activities of EDF and those of EDF ENR, EDF offered its subsidiary a non-replicable advantage in competition, at no cost because EDF ENR did not pay for the use of any EDF services or logos/trademarks. The FCA's finding of confusion – arising from the mere fact that the name "EDF ENR" is derived from "EDF", and its logo is close to EDF logo - is noteworthy.

Second, regarding the use by EDF ENR of EDF's client data, the FCA considered that this information could not be reproduced by competitors at reasonable costs and within a reasonable period of time, and should be regarded as "strategic information". Privileged access to this information therefore provided EDF ENR with an abusive competitive advantage in terms of marketing and prospection.

In terms of fine, the FCA took into account the limited value of the affected sales and the limited duration of the conduct, but imposed a 50% increase in consideration of EDF's worldwide turnover (€71.7 billion) and a subsequent 25% increase due to reiteration.

The FCA fines Schering-Plough and Reckitt & Benckiser for hindering generics entry in the French buprenorphine market

FCA Fines Schering-Plough And Reckitt & Benckiser For Hindering Generics Entry In The French Buprenorphine Market

On December 18, 2013, the FCA issued a decision finding that Schering-Plough abused its dominant position in the French non-hospital market for high dosage buprenorphine ("HDB") by: (i) implementing slandering practices against Arrow's HDB generic; and (ii) granting financial advantages to pharmacists without any economic justification. The FCA also found that Schering-Plough and its UK-based supplier Reckitt Benckiser entered into an anticompetitive agreement aimed at hindering Arrow's market entry.[2]

Schering Plough's HDB drug was sold under the Subutex brand and was indicated for opioid substitution treatment, *i.e.*, replacing heroin with a legal treatment under medical supervision. Schering Plough obtained marketing authorization for Subutex in France in July 1995 and began marketing it in 1996. Subutex is manufactured by Reckitt Benckiser. Arrow obtained marketing authorization in France for a generic HDB in January 2006 and started to market it on March 31, 2006. In November 2006, Arrow filed a complaint before the FCA regarding Schering Plough's alleged practices aimed at preventing the entry of Arrow's generic product into the French HDB market.

First, the FCA found that Schering-Plough abused its dominant position in the French non-hospital HDB market by implementing a slandering campaign against Arrow's HDB generic. According to the FCA, this practice took place from February 15, 2006 until May 2006, and affected the generic's market entry.

In the case at hand, the FCA found that the commercial communication at stake was aimed at casting doubts on Arrow's generic product. The FCA found that Schering-Plough implemented a global and structured slandering strategy both before and after the entry into the market of Arrow's HDB. Schering-Plough's communication first focused on the risk of misuse of the product and then focused on the difference of excipients between Subutex and its generic. According to the FCA, this communication was not based on any medical or scientific justification and had the effect of discouraging the switch to generics. Moreover, the FCA found that Schering-Plough's commercial communication could affect the market structure since it affected competition at two key phases of generic substitution: (i) at the prescription phase, by influencing doctors; and (ii) at the delivery phase, by

[2] French Competition Authority, Decision No 13-D-21 of December 18, 2013 relating to practices implemented in the French market for buprenorphine, available at http://www.autoritedelaconcurrence.fr/user/avisdec.php?numero=13D21.

discouraging pharmacists to switch. The FCA also found that the impact of such strategy resulted from its dominant position and notably the reputation and the confidence it inspired.

Second, the FCA found that Schering-Plough abused its dominant position by granting loyalty-inducing conditions to pharmacists – quantitative rebates, payment-extended terms and cash rebates – at the time of Arrow's entry in order to prevent them from switching. While the discounts were allegedly granted as a remuneration for a paid survey, the amount of the discounts depended upon the number of units purchased and therefore had an anticompetitive loyalty effect. Furthermore, the special discounts targeted the pharmacies which delivered the greatest quantity of Subutex in order to saturate their shelves with Schering-Plough product.

Third, the FCA found that Schering-Plough and Reckitt Benckiser entered into an anticompetitive agreement aimed at excluding Arrow from the French non-hospital market for HDB. According to the FCA, both companies conspired to design an anti-generic strategy against Arrow and jointly implemented a communication campaign aimed at casting doubt on Arrow's generic HDB.

As a result, the FCA imposed a fine of €15.3 million on Schering-Plough for abusing its dominant position and €414,000 for having entered into an anticompetitive agreement. Schering-Plough did not challenge the objections and therefore obtained a 20% fine reduction. The FCA also imposed a fine of €318,000 on Reckitt Benckiser for the anticompetitive agreement.

Mergers and Acquisitions

France's Highest Administrative Court Quashes The FCA's Clearance Of The Acquisition Of Direct 8/Direct Star By Canal Plus

On July 23, 2012, the French Competition Authority ("FCA") approved the acquisition of Direct 8 and Direct Star, two free-to-air TV channels, by Vivendi and Groupe Canal Plus, the French leader in pay-TV, subject to commitments. On December 23, 2013, France's highest administrative Court, the Conseil d'Etat, quashed this decision both on procedural grounds and on the merits, forcing Canal Plus to file the transaction with the FCA once more.[3]

In 2012, the acquisition of TV channels Direct 8 and Direct Star allowed Groupe Canal Plus, the largest pay TV operator in France, to strengthen its activities on the free-to-air television markets. The transaction raised doubts due to the very strong position of Canal Plus in the markets for the acquisition of broadcasting rights of both French and American films. The FCA was concerned about the potential conglomerate effects that would have resulted from Canal Plus' ability to leverage its position in the market for acquisition of broadcasting rights for pay TV in the markets for acquisition of broadcasting rights for free-to-air TV. Canal Plus negotiated commitments until the end of the Phase II investigation, and ultimately obtained conditional clearance on July 23, 2012. Specifically, Canal Plus committed that it would not simultaneously acquire the broadcasting rights for free-to-air and pay TV for more than 20 French movies per year.

The FCA's approval decision was challenged before the Conseil d'Etat by M6 and TF1, France's most significant free-to-air channels. On procedures, the Conseil d'Etat quashed the FCA's decision on the ground that Canal Plus' commitments had not been discussed collectively by the members of the FCA that were in charge of the case; because the FCA had had very little time to decide on whether or not to approve the commitments, each member had individually reviewed the commitments but no formal meeting had been called, with the result that members had not discussed the commitments collectively. On that basis, the Conseil d'Etat found that the clearance decision had been adopted in violation of the French Commercial Code.

In addition, and on the merits, the Conseil d'Etat quashed the FCA's decision on the ground that the commitments offered by Vivendi and Canal Plus were insufficient to remedy the conglomerate effects with respect to the acquisition of broadcasting movie rights for pay TV and free-to-air TV. The Conseil d'Etat found that, following the commitments, Canal Plus would not be able to acquire broadcasting rights for both pay TV and the first window of broadcasting on free-to-air TV (except for the 20 French movies per year), but would still be able to leverage its monopsony on pay TV broadcasting rights to acquire broadcasting rights for the second and third broadcasting windows on free-to-air TV. Such rights are typically negotiated at the pre-financing stage of movies production process, and were not covered by Canal Plus' commitments.

As a result, the Conseil d'Etat annulled the FCA's decision but delayed the effects of its judgment until July 1, 2014, in order to leave the parties enough time to refile the transaction with the FCA and obtain clearance. Canal Plus notified again the transaction to the FCA on January 15, 2014.

3 *Société Métropole Télévision – Société Télévision Française 1*, Conseil d'Etat, Case n° 363702 and 363719, December 23, 2013, available at http://www.autoritedelaconcurrence.fr/doc/ce_363702_23122013.pdf.

GERMANY

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

Horizontal Agreements

FCO Fines Manufacturers Of Household Porcelain

The FCO imposed a total fine of around €900,000 on two household porcelain manufacturers, the ceramic industry association and two individuals.[4] The FCO imposed these relatively moderate fines because it took into account the dire financial situation of the companies involved and the household porcelain industry in general. The FCO found that the companies had agreed on price increases in order to balance out an increase of VAT. The FCO could not prosecute two of the companies concerned because the companies were insolvent, and proceedings against two others were withdrawn for other reasons. The proceedings, which were triggered by the immunity applicant Villeroy & Boch, included inspections at the six companies involved in 2011. One of the fined companies settled with the FCO. The decisions are not yet final.

FCO Closes Proceedings Against Amazon

On November 26, 2013, the FCO closed its proceedings against Amazon after the online retailer eliminated its price parity clauses for retailers using its Marketplace service, by which retailers previously had agreed not to sell their products at lower prices through other online channels.[5]

Having initiated the investigation in February 2013, the FCO found that Amazon's price parity clause would reduce price competition between Amazon and other retailers and prevent new players from entering the market. The FCO considered the agreements between the parties as not purely vertical because Amazon competes with the contracted retailers on its Marketplace as well as providing a sales platform,. In the FCO`s view the agreements were horizontal trade cooperation which it qualified as a hardcore restriction of competition.[6] In order to address the FCO's concerns, Amazon announced in August 2013 that it would eliminate these clauses and that it had already made corresponding changes to its general terms and conditions for some retailers.[7]

Despite these announcements, the FCO remained concerned about whether these changes were sufficient to alleviate all competition concerns, in particular, the risk of recurring infringements, and insisted on improvements to Amazon's initial changes. Amazon abandoned its pure price parity clauses from all EU contracts sellers on its Marketplace platform and informed all these retailers about this change of its terms. As a result of these actions, the FCO agreed to close its proceedings against Amazon.

During the investigation, the FCO cooperated closely with the UK's Office of Fair Trading ("OFT"), which finally closed its proceedings against Amazon in November 2013.[8] These investigations did not concern Amazon's contracts outside of the Marketplace platform.

Düsseldorf District Court Finds Assignments Of Damage Claims To CDC Invalid And Dismisses Damage Claims Against Cement Cartel

On December 17, 2013, the Düsseldorf District Court dismissed cartel follow-on damage claims brought against various German cement producers by Cartel Damage Claims ("CDC"), [9] a Belgian company specialized in

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4 *See* FCO press release of October 17, 2013, available on the FCO's website.

5 *See* FCO press release of November 26, 2013, available in English on the FCO's website, and case summary of December 9, 2013, available only in German on the FCO's website.

6 *See* for another example of the use of most-favored Nation clauses the article on HRS`s best price clauses in the Vertical Agreement section.

7 *See* National Competition Report July – September 2013, p. 10 onwards; *see* also FCO press release of August 27, 2013, available in English on the FCO's website.

8 *See* OFT press release of November available on the OFT's website, and National Competition Report October – December 2013, p. 10 onwards.

9 District Court Düsseldorf, decision of December 17, 2013, case 37 O 200/09; also *see* CGSH Alert Memo of January 8, 2014, available at the CGSH website.

combining and pursuing cartel follow-on damage claims on behalf of third parties.

In 2003, the FCO imposed a record fine of ca. €660 million on several German cement producers for their involvement in a price-fixing cartel lasting from 1988 to 2002.[10] Following the FCO's decision, CDC began acquiring and bundling damage claims from various alleged victims of the cartel. As a result, between 2003 and 2005 (and again in 2008 and 2009), various cement purchasers assigned their claims to CDC. In 2005, CDC, through a minimally-funded special purpose vehicle, brought an action for damages against the cement producers before the Düsseldorf District Court and sought compensation of at least €131 million. In 2007, the Düsseldorf District Court issued an interlocutory judgment finding CDC's lawsuit to be admissible.[11] This decision was later upheld both by the DCA and the FCJ in 2009[12].

The Düsseldorf District Court has now held that the assignments of damage claims to CDC were null and void and, as a consequence, dismissed CDC's damage claims. The Court found the assignments that took place prior to June 2008 to be invalid because they violated the German Legal Consultation Act (Rechtsberatungsgesetz), which prohibited the commercial collection of third party claims without a license. The Court was of the view that CDC's business model[13] involved such commercial collection and violated, in the absence of a license, the Rechtsberatungsgesetz.

Regarding the assignments of damage claims after June 2008, the Court found that these were not in breach of the Legal Services Act ("Rechtsdienstleistungsgesetz") of 2008 which had replaced the Rechtsberatungsgesetz because CDC had by that point obtained a license to act as a collector of damage claims. However, the Court found the assignments invalid on the grounds that they violated public policy. Under the German Civil Procedure Code, the defeated party must pay the Court fees and reimburse the winning side for its costs. However, as CDC's special purpose vehicle was only minimally funded, it was not, in the event of a loss, able to cover such costs – as CDC had itself acknowledged early in the litigation. As a consequence, CDC would not take any risks of losing the claim, which was, in the Court's view, a violation of public policy.

The District Court's decision also contains interesting non-binding comments on the commencement of the relevant limitation period. According to German civil law, the limitation period commences at the end of the year in which the claim arose or, if later, in which the claimant obtained knowledge of all circumstances giving rise to the claim. In the absence of a published fining decision of the FCO, the Court found that the FCO's press release and subsequent extensive press coverage on the FCO decision was sufficient for the claimant to gain sufficient knowledge for the limitation period to begin.

It remains to be seen whether the decision of the Düsseldorf District Court will have a serious impact on CDC's business model in Germany. In any event, CDC may and likely will appeal the decision to the DCA.

Vertical Restraints

Berlin Court Of Appeals On Selective Distribution Of Satchels

On September 19, 2013, the Berlin Court of Appeals ruled that a seller of satchels had to stop obliging its sellers not to resell its satchels over eBay or comparable internet portals, such as Amazon.[14] However, the Court also held that the satchel producer was free to use a selective distribution system, provided that he did not discriminate against certain distributors.

The seller had obliged retailers not to resell its satchels on eBay or similar internet platforms and had enforced this contractual obligation by not supplying retailers who did

[10] *See* National Competition Report April – June 2003, p. 6.

[11] *See* National Competition Report January – March 2007, p. 12.

[12] *See* National Competition Report April – June 2009, p. 7; decision of the FCJ of April 7, 2009, case KZR 42/08.

[13] As consideration for the assignments, CDC paid the cement purchasers a fixed €100 fee and undertook to share between 65% and 85% of any damages obtained in damage actions with the purchasers. Thus, the quota limit of CDC would be up to 35% of the obtained damages.

[14] Berlin Court of Appeals, decision of September 19, 2013, case 2 U 8/09.

not comply with this obligation. The seller argued that sales over eBay would negatively affect its brand image.

The Court of Appeals upheld an earlier decision of the Berlin District Court which had prohibited the practices of the seller. The Court of Appeals held that the conduct in question violated Sections 1 and 21(2) GWB. [15] Referencing European Court of Justice (the "ECJ") precedents, the Court of Appeals found that selective distribution systems do not violate Section 1 GWB (or Article 101 TFEU) provided that resellers are chosen on the basis of objective criteria of a qualitative nature relating to the reseller; these conditions are laid down uniformly for all potential resellers and are not applied in a discriminatory fashion, and the selective distribution system is necessary with respect to the individual product.

The Court of Appeals found that these criteria were not met in the case at hand. While the Court of Appeals indicated that a selective distribution system that prohibits the resale of satchels over eBay may in general be compatible with German antitrust law, the Court of Appeals found that the seller in this case had not applied its selective distribution system in a non-discriminatory way because the seller had itself sold satchels to discount markets. According to the Court of Appeals, this behavior discriminated against internet resellers, as sales in discount markets – just like sales over eBay and comparable internet platforms – could negatively affect the sellers' brand image. The Court of Appeals recognized that the mere existence of certain exceptions to a selective distribution system does not make the system discriminatory as long as there is a reasonable justification for these exceptions. However, the Berlin Court of Appeals found that there was no such justification in this case. In contrast, in 2009, the Karlsruhe Court of Appeals came to the opposite conclusion in an almost identical case also involving satchels, finding that it was justified to argue that only remainders were sold in discount markets.[16]

Further, the Berlin Court of Appeals held that the restriction of competition was a hardcore restriction and therefore appreciable. In this context, the Berlin Court of Appeals drew an analogy to the list of hardcore restrictions in the European Commission's (the "Commission") vertical block exemption regulation (Regulation 330/2010 on vertical agreements, "Vertical BER") and held that the exclusion of sales over the internet constitutes a hardcore restriction according to Article 4(b) of the Vertical BER. In this respect, the decision of the Berlin Court of Appeals is at odds with an earlier decision of Munich Court of Appeals, which in 2009 had found that not every restriction of resale over the internet constitutes a hardcore restriction.17

Sennheiser Abandons Ban On Online Sales Over Amazon Marketplace

On October 24, 2013, the FCO announced that Sennheiser, a German manufacturer of consumer audio products, has agreed to change its online sales terms and will no longer prohibit its dealers from selling its products on Amazon Marketplace. As a consequence, the FCO refrained from initiating formal proceedings against the company.[18]

In April 2012, Sennheiser entered into new selective distribution agreements with its authorized dealers, by which Sennheiser prohibited them from selling its products via third party online platforms such as eBay and Amazon Marketplace. Following several complaints, the FCO started an investigation of these agreements.

The FCO's preliminary conclusion was that a manufacturer of standardized consumer electronic products could not prohibit its authorized dealers from selling its products via a third party online platform if this platform is fully integrated into the online distribution

15 According to Section 21 (2) GWB, companies are not allowed to promise benefits or threaten disadvantages which under German antitrust law or under Articles 101 and 102 TFEU may not be the subject of a contractual obligation.

16 *See* National Competition Report January – March 2010, p. 9; Karlsruhe Court of Appeals, decision of November 25, 2009, case 6 U 47/08 Kart.

17 Munich Court of Appeals, decision of July 2, 2009, case U (K) 4842/08.

18 *See* FCO case summary of October 24, 2013, available only in German on the FCO's website.

system of another authorized dealer. In the case at hand, the FCO took into account that Amazon was an authorized dealer and its third party online distribution system complied with Sennheiser's quality requirements.

In order to address the FCO's preliminary competition concerns, Sennheiser informed its dealers in writing that it would no longer enforce its ban on online sales via Amazon Marketplace. As a consequence, the FCO refrained from initiating formal proceedings against the company, even though Sennheiser still upholds its ban on online sales over third party online platforms of non-authorized dealers such as eBay. It is noteworthy that the FCO has already opened several other proceedings regarding the prohibition of online sales via third party online platforms of non-authorized dealers.

Kiel District Court Finds Ban On Sales Via Online Platforms Unlawful

On November 8, 2013, the Kiel District Court ruled that a manufacturer of digital cameras must refrain from banning its authorized dealers from selling the contractual products on online platforms on the grounds that such a prohibition constitutes an illegal hardcore restriction of competition.[19]

The action was brought by "*Wettbewerbszentrale*", a German trade association committed to the protection of fair competition, against a digital camera supplier that contractually restricted its dealers' online sales freedom. The defendant supplied authorized dealers on the basis of a distribution agreement, but also sold directly to wholesalers, who in turn could supply unauthorized retailers. Although authorized dealers were allowed to operate their own online shop, they were prohibited from selling through online auction platforms, online market places and independent third parties. According to the claimant, this clause violated Section 1 GWB because it amounted to an illegal limitation of potential customer groups.

The District Court ruled in favor of the claimant. In its view, the object of the contested clause was to deprive authorized dealers of the possibility of reaching customers buying via online platforms. Since the defendant's distribution system for the cameras concerned was not selective, because the defendant did not apply the selectivity criteria uniformly, the customer restriction was not justified. Referring to the Commission's Vertical Guidelines,[20] the Court concluded that a restriction of sales via online platforms in non-selective distribution systems constitutes a restriction of passive sales and a hardcore competition restriction within the meaning of Article 4(b) Vertical BER.[21]

The Court further held that for the purpose of establishing an unlawful restriction of passive sales to a customer group, it is not necessary to show that a dealer is precluded from supplying a particular group of customers. Rather it suffices to demonstrate, as in the case at hand, that a clause substantially restrains a dealer's possibility to reach certain customers.

In the District Court's view, its conclusions do not run counter to the Commission's statement in the Vertical Guidelines that suppliers may require, especially in the context of selective distribution, that its distributors use third party online platforms only according to the supplier's standards and conditions.[22] The Court took the view that the Commission considers an absolute ban on the use of third party online platforms unlawful.

DCA Awards Damages To Retailer Of Bathroom Fittings

On November 13, 2013, the DCA awarded damages of €820,000 plus interest to bathroom fittings retailer Reuter GmbH ("Reuter") because of losses Reuter suffered due to anticompetitive distribution clauses by Aloys F. Dornbracht GmbH & Co. KG ("Dornbracht"), a manufacturer of luxury bathroom fittings.[23]

From 2008 to 2011, Dornbracht had entered into so-called "specialized trade" clauses in distribution agreements with

19 Kiel District Court, decision of November 8, 2013, case 14 O 44/13 Kart.

20 Commission Guidelines on Vertical Restraints, 2010 OJ C130/1.

21 Commission Regulation No 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, 2010 OJ L102/1.

22 Vertical Guidelines, para. 54.

23 DCA, decision of November 13, 2013, case VI-U (Kart) 11/13.

wholesalers. These clauses granted wholesalers a considerable (additional) discount if they sold Dornbracht fittings to retailers with offline shop premises and a certain level of service quality (*i.e.*, professional installation, adequate after-sales service). The distribution agreement also stipulated that wholesalers must pass on part of this discount to retailers that meet the clause's requirements. In 2011, the FCO found that such clauses, as far as they relate to internet retailers that would not usually meet the requirements of the clause, decreased the incentive to supply them and were hardcore restrictions because they restricted passive (online) sales to customers.[24] Dornbracht agreed to remove the clauses from the distribution agreements, and the FCO did not impose a fine.[25]

Reuter distributes bathroom fittings in two stationary branches and through an online shop. In 2012, Reuter filed a lawsuit against Dornbracht claiming that it suffered damage because the rebate for its fitting purchases from wholesalers was lower in the period of 2008-2011 than before the introduction and after the removal of the clause. Although the claim was dismissed at first instance , the DCA awarded damages to Reuter.

The DCA found that the specialized trade clause infringed Article 101 TFEU and Section 1 GWB because it restricted competition between retailers that met the clause's requirements and other retailers including internet retailers. It awarded damages to Reuter for lost profits due to higher purchase prices between 2008 and 2011 on the grounds that Reuter had not passed on the higher purchase prices to its customers and had experienced lower gross margins. However, the Court stated that Reuter could not be granted damages for the failure of growth in sales due to Dornbracht's agreements because Reuter had not sufficiently proved these losses.

The Court also ruled that Dornbracht's CEO was jointly and severally liable to Dornbracht. The Court held that damage claims for antitrust law infringements may not only be brought against companies but also against individuals that caused or instigated an infringement by another person or company. The Court identified that Dornbracht's CEO had initiated Dornbracht's entering into the specialized trade clauses and promoted the clauses publicly in the press in order to strengthen specialized retailers with offline shop premises and to hinder internet sales.

FCO Blocks HRS's Best Price Clauses And Opens Proceedings Against Other Online Hotel Booking Portals

On December 20, 2013, the FCO prohibited HRS's "best price" clauses and ordered HRS to remove them from all contracts and general terms and conditions with contracting hotels by March 1, 2014.[26]

HRS's best price clauses were so-called most-favored nation ("MFN") clauses, under which contracting hotels agreed to offer their most favorable conditions for prices, availabilities, and booking and cancellation terms only for online bookings via HRS. HRS' MFN clauses applied to bookings via other online platforms as well as to rooms offered by hotels directly at their reception desk.

HRS's best price clauses came under scrutiny both from the FCO[27] and German Courts following civil actions filed by competitors.[28] The FCO decided that HRS's MFN clauses restrict competition between online hotel booking platforms and prevent market entry of newcomers, and issued a decision prohibiting HRS from using the clauses. However, the FCO`s legal assessment of MFN clauses in vertical cases involving platform operators is still unclear because the FCO has not yet published the decision nor has it published a case summary. In particular, and in relation to market definition, it is unclear whether the block exemption market share thresholds applied in the case and whether the FCO considered HRS as benefiting from the network externalities of its platform in an excessive

24 *See* National Competition Report October – December 2011, p. 9.

25 A case summary is available in German at the website of the FCO.

26 *See* FCO press release of December 20, 2013, available in English on the FCO's website.

27 *See* National Competition Report July – September 2013, p. 10; *see* also FCO press release available in German only at the FCO's website.

28 Düsseldorf Court of Appeals, decision of February 15, 2012, case VI-W (Kart) 1/12.

way. The prohibition decision is not yet final as HRS is able to appeal to the DCA.

The FCO has also initiated proceedings against two other online booking platforms, Booking.com and Expedia, which apparently use similar best price clauses in their contracts with hotels.

Gardena And Bosch Siemens Haushaltsgeräte Drop Dual-Pricing Rebate Systems

On November 28 and December 23, 2013, respectively, the FCO announced that German garden product manufacturer Gardena [29] and household appliances manufacturer Bosch Siemens Haushaltsgeräte GmbH ("BSH")[30] would amend their retailer rebate systems and no longer differentiate between online and offline retailers in their rebate policy.

Following several complaints from online and hybrid (that is, retailers selling products both online and in shops) retailers about the rebate systems of Gardena and BSH, the FCO initiated proceedings against each of the companies.

Gardena had recently introduced so-called 'functional rebates' by which Gardena tied the rebate level to the type of the distribution channel used (offline or online). However, under Gardena's rebate system, only offline sales could qualify for the full rebate. Similarly, BSH's newly introduced rebate system had linked the rebate for BSH's hybrid retailers to the percentage of their online sales. Under this system, the more sales BSH's hybrid retailers generated online, the less rebate they received.

The FCO considered that both systems constituted illegal anticompetitive dual-pricing systems discriminating against online sales. The FCO decided that only in exceptional circumstances can differences in a supplier's pricing practice for online and offline sales comply with competition law, for example, where selling offline leads to substantially higher costs for the retailer, the supplier may agree a fixed fee with the retailer to support the retailer's offline sales efforts.[31]

In order to meet the FCO's concerns, both companies agreed to amend their rebate policies and to grant equal conditions for online and offline sales by their retailers.

Unilateral Conduct

FCJ Holds That Merck's Rebate System For Laboratory Chemicals Distributors Is Unlawful

On July 12, 2013, the FCJ affirmed a DCA decision of December 21, 2011 which had confirmed the FCO's conclusion that the rebate system of Merck KGaA ("Merck") that applied to distributors of its laboratory chemicals violated Section 20 GWB.[32]

In May 2011, the FCO found that Merck's rebate scheme, which consisted of a fixed rebate and an additional rebate linked to the distributor's annual sales, factually discriminated against low-volume distributors that were dependent on Merck. Due to the deliberately high turnover threshold, practically only VWR –which was, until 2009, Merck's exclusive distributor for laboratory chemicals– could benefit from significant additional discounts. As there was no objective justification for such dissimilar treatment, the FCO ordered Merck either to abandon the discount system or to reduce spreads between the lowest and highest rebate.[33] Merck argued on appeal that there was no discrimination because the rebate scheme applied equally to all distributors, that its

29 *See* FCO press release of November 28, 2013, available in English on the FCO's website and case summary of December 5, 2013, only available in German on the FCO's website.

30 *See* FCO press release of December 23, 2013, available in English on the FCO`s website and case summary of December 23, 2013 available in German only on the FCO`s website.

31 *See* Commission Guidelines on Vertical Restraints, OJ 2010 C130/1, para. 52 lit. d).

32 FCJ, decision of July 12, 2013, case number KVR 11/12, available in German on the FCJ's website.

33 *See* FCO, decision of May 19, 2011, case number B3-139/10, available in German on the FCO's website. *See* also National Competition Report July - September 2011, p. 8. The case goes back to July 2009, when the FCO ordered Merck, the key supplier of laboratory chemicals in Germany, to terminate its exclusive distribution agreement with VWR International Europe BVBA and to supply also other distributors in a non-discriminatory way (FCO, decision of July 14, 2009, case number B3-64/05, available in German on the FCO's website; *see also* National Competition Report July – September 2009, p. 6). Following a DCA ruling in injunction proceedings in December 2009 that upheld the FCO decision only with respect to those products where Merck's market share exceeded 30% and whose exclusive distribution was, thus, not covered by the Vertical Block Exemption Regulation (DCA, decision of December 9, 2009, case number VI-Kart 5/09 (V)), Merck decided to supply distributors on the basis of a contract with the rebate scheme at issue. The main appeal against the FCO's 2009 decision is still pending before the DCA.

structure was objectively justified due to VWR's exceptional position in the distribution system, and that the maximum rebate spread set by the FCO was arbitrary. The DCA was not persuaded by these arguments and dismissed Merck's appeal.[34]

The FCJ further held that the DCA did not err in confirming the FCO's assessment. In the FCJ's view, third-party distributors depend on Merck's supply as they must have Merck's laboratory chemicals in their product portfolio in order to be able to compete in the market; this conclusion not being altered by the possibility to switch to alternative suppliers' products because it is the end consumers' demand that matters in cases of dependence relating to "must-have" products. The FCJ also held that the DCA did not err in finding that the objectives of the discount scheme, *i.e.*, ensuring high quality sale services and rewarding successful distributors, could not justify dissimilar treatment of equivalent distributors.

According to the FCJ, the DCA was also correct to hold that application of German provisions banning 'relatively' dominant companies from unjustifiably discriminating against small and medium-sized undertakings dependent on them was not precluded by the primacy of Article 101 TFEU. Referring to the ECJ *Adalat* judgment,[35] the FCJ clarified that the distribution contract with the rebate scheme clause at issue did not constitute an anticompetitive agreement falling under Article 101 TFEU, but rather a unilateral policy by Merck.

Mergers and Acquisitions

FCO Publishes Two Decisions On Acquisitions Of Rhön-Klinikum

The FCO has recently published two significant decisions relating to the acquisition of 25% of the shares of Rhön Klinikum AG ("Rhön") by B. Braun Melsungen AG and B. Braun Holding GmbH & Co. KG ("B. Braun"), and to the acquisition of 43 hospitals and 15 medical treatment centers of Rhön by Fresenius SE & Co. KGaA ("Fresenius").

FCO Clears Acquisition Of 25% Of Rhön By B. Braun

On October 10, 2013, the FCO approved the acquisition of 25% of the shares of Rhön by B. Braun in a Phase I decision.[36] Rhön is active in the markets for acute care hospitals, inpatient rehabilitation centers, and ambulatory care. B. Braun is a manufacturer of medical devices and thus active in an upstream market.

The FCO decided that the transaction would not lead to customer foreclosure or input foreclosure. The FCO considered customer foreclosure unlikely because the 25% shareholding and the corresponding agreement did not afford B. Braun with actual influence on Rhön's procurement decisions; Rhön would only account for a limited share of demand; and there was no economic incentive for B. Braun to foreclose competitors, despite its share of over 30% on 11 relevant product markets for medical products. The FCO considered input foreclosure unlikely because there were sufficient alternative sources of supply in the market for medical products apart from B. Braun. As for revenue from the affected medical products, the FCO identified that this only accounted for a fractional amount of the total working costs of a hospital; the FCO stated that it did not expect that the revenue loss that would result from such behavior would create any incentive for B. Braun to foreclose competitors of Rhön.

FCO Clears Transaction In The Aerospace Industry

On October 23, 2013, the FCO cleared the acquisition of Permaswage Holding SAS ("Permaswage") by Precision Castparts Corporation ("PCC") in a Phase II decision.[37] US-based PCC and France-based Permaswage manufacture and supply permanent and detachable fluid fittings, which are used in the aerospace industry to connect hydraulic tubes and piping systems in aircrafts. The FCO considered that even though the deal would lead to PCC becoming (initially) the biggest supplier on the worldwide market for aerospace fluid fittings, post-merger,

[34] DCA, decision of December 21, 2011, case number VI-Kart 5/11 (V).
[35] *Bundesverband der Arzneimittel-Importeure eV v. Commission/Bayer AG* (Joined Cases C-2/01 and C-3/01 P) 2004 ECR I-00023, para. 101.
[36] *See* FCO case summary of October 18, 2013, available in German at the FCO's website.
[37] Case summary of October 31, 2013, available in German on the FCO's website.

existing smaller fluid fittings suppliers would still be able to compete with PCC due to low entry barriers and easy switching of production from permanent to detachable fluid fittings and *vice versa*. The FCO also considered that the highly concentrated demand side- the aircraft manufacturers Airbus and Boeing, and major component suppliers to the aerospace industry- could sufficiently control PCC's market conduct by switching suppliers or by supporting the market entry of a new manufacturer.

FCO Requests Referral Of Telefonica/E-Plus Merger Review

On November 20, 2013, the FCO filed a formal request with the Commission for referral of the review of the proposed acquisition of German mobile operator E-Plus by Spanish telecommunications operator Telefónica.[38] The transaction had been notified to the Commission on October 31, 2013.[39] Telefónica is active in Germany as a mobile operator through its O2 brand. Its E-Plus buyout reduces the number of mobile network operators in Germany from four to three, leaving Deutsche Telekom and Vodafone as O2 rivals. The FCO sought the referral on the grounds that the transaction exclusively affects the German mobile-communications market.[40] Although the Commission has not formally rejected the FCO's referral request, it opened a Phase II investigation on December 20, 2013.[41] This means that the deal will be reviewed in Brussels, unless the Commission accepts the referral request, which it may do up until February 12, 2014.

FCO Clears Acquisition Of Several Newspapers And Magazines Of Axel Springer AG By Funke Mediengruppe

On December 3, 2013, the FCO cleared the acquisition of several regional newspapers (Hamburger Abendblatt, Berliner Morgenpost), advertising journals and women's magazines ("Bild der Frau" and "Frau von heute") of Axel Springer AG ("Axel Springer") by the Funke Mediengruppe ("Funke").[42] The acquisition of these journals was part of a wider transaction, which included the acquisition by Funke of TV guides as well as the creation of two marketing and distribution joint ventures between Axel Springer and Funke. Funke and Axel Springer had intended to notify the entire transaction (including the creation of the joint ventures and the acquisition of the TV guides) to the FCO, but after discussions with the FCO the parties decided to split up the transaction to enable the FCO to clear the less problematic parts of the transaction more quickly.

The FCO considered that the transaction would not create any competitive concerns because Funke had not yet been active on the newspaper markets in Berlin and Hamburg. The FCO also concluded that although the transaction would lead to Funke obtaining higher shares of the markets for women's magazines, Funke would continue to face significant competition on these markets.

Policy and Procedure

DCA Confirms Interest On Cartel Fines In Insurance Cartel Case

On September 25, 2013, the DCA confirmed the FCO's decision to claim €1.77 million of default interest on a cartel fine against an insurance company.[43]

The FCO had imposed a fine on an insurance company for violating Section 1 GWB in March 2005. Although the company appealed the fine, it withdrew the appeal in 2009 and consequently paid the fine. In 2011, the FCO demanded default interest on the fine. The company appealed the interest claim to the DCA, alleging that Section 81(6) GWB, which provides for the bearing of interest on cartel fines, was unconstitutional. The DCA referred the question to the Federal Constitutional Court ("FCC"), which ruled in December 2012 that the provision complies with constitutional law.[44]

38 *See* FCO's press release of November 20, 2013, available in English on the FCO's website.

39 *See* Joaquín Almunia's speech at the Harvard University on September 26, 2013, available in English on the Commission's website.

40 *See* FCO's press release of November 20, 2013.

41 *See* Commission's press release of December 20, 2013, available in English on the Commission's website.

42 *See* FCO press release of December 3, 2013, available in English on the FCO's website.

43 DCA, decision of September 25, 2013, case V-1 Kart 7/11 (OWi).

44 *See* National Competition Report 2013 January - March, p. 24 *et seq*. Please note that contrary to the facts presented in the previous report on page 24, the appeal had already been withdrawn in 2009 (not 2011).

After the FCC ruling, the DCA had to decide whether Section 81(6) GWB applied under the specific circumstances of the case because the provision only entered into force in July 2005, several months after the FCO had imposed the fine. The provision had been introduced into the GWB in order to prevent companies from appealing fining decisions simply for financial reasons. Prior to this, there had been no obligation to pay interest on cartel fines.

The DCA ruled that the insurance company had to pay default interest starting on the day the provision entered into force until the day the fine was paid. The Court held that the principle of non-retroactivity did not prevent the application of Section 81(6) GWB in the case at hand. According to the Court, the obligation to pay interest on fines does not constitute a criminal (quasi-)sanction, which could not have been imposed with retroactive effect. Moreover, as Section 81(6) GWB would only be applied from the day it entered into force, there was no retroactivity.

FCO Publishes Draft Guidelines On Domestic Effects In German Merger Control

On December 5, 2013, the FCO published draft of guidelines on domestic effects in merger control (the "Draft Guidelines").[45] German merger control law, including the notification and approval requirements, applies only to transactions that have domestic effects in Germany.

The Draft Guidelines confirm that transactions will have domestic effects where the parties meet the German filing turnover thresholds. This differs from the approach of the Commission, which requires automatic notification whenever (European) turnover thresholds are met, irrespective of whether a transaction could conceivably produce any effect on the European market.

The Draft Guidelines identify two particular categories of transactions, namely, those which the FCO considers as clearly having domestic effects and those it considers as clearly having no domestic effects; they also provide general guidance for case-by-case analysis in all other cases. Finally, the FCO discusses certain practical considerations, including the suggestion that in cases that do not raise substantive issues the filing of a precautionary notification may be more efficient and speedy than trying to resolve the sometime complex issue of domestic effects.

The FCO operates on the assumption that transactions involving only two parties (that is, and primarily, the acquisition of full control by one party over another) will always have the requisite domestic effect on the German market if both domestic filing thresholds are met, because in such cases both parties are active in Germany in a meaningful way. On this basis, under the Draft Guidelines, domestic effects can only be absent for transactions involving more than two parties (*e.g.*, the creation of joint ventures, or transactions that relate to target companies in which two or more companies hold an interest of at least 25% which are assimilated to mergers under German rules). However, the Draft Guidelines stipulate that any such transaction involving a joint venture (or target company) that generates German revenues over €5 million (or is expected to generate such turnover within the next three to five years) would have the requisite domestic effect, regardless of whether there are any overlaps between the parties.

The FCO operates on the assumption that transactions with more than two parties are expected to lack domestic effects if the following conditions are cumulatively met: (i) the joint venture (target company) is not and will not be active in Germany in the next three to five years (or on any wider geographic market that comprises Germany); and (ii) spill-over effects between the parent companies can be excluded. This means that the parent companies are neither competing in the same market as the joint venture (or related upstream or downstream markets) or in any other market which is unrelated to the joint venture that comprises all or part of Germany. In all other cases, the FCO will examine each case on an individual basis, but will mainly consider similar criteria for the case-by-case analysis.

45 *See* FCO press release of December 5, 2013 and Draft Guidelines, available in English on the FCO's website.

While the Draft Guidelines interpret the concept of domestic effects rather broadly, it remains to be seen whether these and other aspects of the Guidelines will be modified in the course of the ongoing public consultation.

FCO Publishes Note On Settlement Procedure [ARO]

On December 23, 2013, the FCO published a short note setting out its settlement procedure in cartel cases. This is the first official guidance provided by the FCO on settlement procedures; until the publication of this note, the FCO had only mentioned some basic principles in its case and activity reports.

The note clarifies that settlements are possible in all restrictive practices – unlike the EU settlement procedure, which is only applicable in horizontal investigations. However, the amount of reduction remains unclear for vertical cases: the FCO provides clarification in this regard for horizontal cases, for which, it indicates, the fine can be reduced by a maximum of 10%. Such a reduction would operate differently than similar reductions in the EU settlements procedures: the 10% fine reduction is applied to the amount already reduced based on the party's leniency cooperation, which results in a lower fine reduction in Germany. The FCO also explains that hybrid cases are possible – a settlement does not necessarily have to be reached with all parties. In addition, the note confirms that a party to settlement waives its right to a full access to file, and provides some procedural guidance on this issue. The FCO also makes clear that even though settlement does not exclude a party's right to appeal the FCO's decision, an appeal would result in the withdrawal of the settlement and a full Statement of Objections and decision.

GREECE

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

Horizontal Agreements

Council Of State Approves HCC Approach To Concerted Practice Enforcement

The Greek council of state has annulled the Appeal Court's decision which held that the participation at a meeting only for a short time is sufficient to exclude the participating undertaking from concerted action adopted by the other participants

The HCC decided that seven large supermarket chains had acted in a concerted manner by coordinating their respective positions on so-called 'hard discounters'. In 2004, representatives of seven large supermarket chains met with representatives of 35 food industry suppliers seeking to secure agreements from each of the suppliers that they would cease to supply or cease to offer beneficial treatment to specific competitors that were perceived as a threat. These included certain hard discounters (such as Lidl), and retailers who would sell products below cost (in particular, Carrefour). Although the official reason provided for these meetings was to discuss general problems faced by the retail supermarket sector in Greece, the HCC determined that the meeting participants also discussed the these hard discounters, and that although no agreement had been reached, the chains had nevertheless acted in a concerted manner.

On appeal, the Administrative Appeal Court ("AAC") annulled the fine imposed in respect of one participant on the grounds that (1) the supermarket had only participated in the meeting for a short time, and (2) the HCC had not sufficiently proven the supermarket's participation in the concerted action.

The HCC appealed the decision of the AAC to the Council of State, and was successful. The Council of State overruled the AAC decision and held that it is sufficient for the HCC to prove that an undertaking participated in a meeting were decisions that restrict competition are adopted and the undertaking did not clearly oppose those decisions. The Council of State also held that it is for the undertaking itself to prove that its participation lacked any anticompetitive intention and that it had declared to the other participants a different approach to the matters discussed.

The Council of State also found error with the AAC's approach to fining. the Council of State found that the Appeal Court was not entitled to reduce the fines imposed down to an absolute figure of €120,000 for each participant, as it had done because such a flat figure indicated that the Appeal Court had not taken into account the size and economic power of each of the undertakings and its resulting influence in the market. The Council of State referred the case back to the AAC for a judgment on these two points.

IRELAND

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

Mergers and Acquisitions

ICA Clears Acquisition In The Pork Industry

On October 23, 2013 the ICA cleared the proposed acquisition of McCarren 2000 Limited ("McCarren") by Razzle Concepts Limited ("Razzle"). Razzle, a holding company established for the purpose of the proposed transaction, is jointly controlled by four members of the Keating family, the ultimate shareholders of the Kepak Group ("Kepak"). Post transaction Razzle was to hold [60-65]% of the shares in McCarren, the rest held by Ulster Bank and the McCarren family.

Although the ICA found that the transaction gave rise to horizontal overlaps in the market for the secondary processing of pork the production of burger ribs, and the production of primary pork cuts for retail convenience products, the ICA determined that the parties did not overlap on these subdivisions, and also noted McCarren's modest market share (8%) of the primary pork processing market.

In addition, although the ICA also considered that the transaction gave rise to vertical overlaps in respect of the supply of uncooked ribs and the provision of international sales agency services, it assessed that these did not give rise to competitive concerns. Regarding the market for uncooked ribs, the ICA found that Keepak would have neither the ability nor the incentive to foreclose rivals or customers post transaction; with respect to rivals, the ICA noted the strong competition from Irish and EU suppliers, and for customers, it took into account the high degree of intra-European trade.

As for the provision of agency services for the sale of pork products on international markets, the ICA considered it unlikely that Keepak would be able to foreclose rival international pork traders post transaction due McCarren's modest share of the primary pork processing market and strong competition from other Irish primary pork processors. The ICA also decided that Keepak would not be able to foreclose upstream pork processors due to the presence of two other rival international pork traders in Ireland.

Policy and Procedure

ICA Publishes Guidelines For Merger Analysis

On December 20, 2013, the ICA published its Revised Guidelines for Merger Analysis following a review of consultation responses. The new guidelines represent a move to a more holistic and less rigid procedure for merger review. The use of the small but significant and non-transitory increase in price test (the "SSNIP" test) has been de-emphasized as a key indicator of a product market to an ancillary test limited "in practice due to the absence of actual price data." In response to consultation submissions, the ICA has clarified the role of market shares in its analyses: the new guidelines explain that market definition is "not an end in itself" and that the ICA can be flexible in how comprehensive a definition is made, but they also underline that defining the market is important and that the ICA will "normally" identify the part of the economy most affected by the merger under review.

A significant change in the guidelines is the ICA's use of the Herfindahl-Hirschman Index ("HHI"). The HHI is a general measure of market concentration used by the ICA to gauge how closely to scrutinize concentrations. Though both the current and proposed guidelines note that the HHI thresholds do not establish fixed safe harbors (although they do clarify that a post-merger HHI below 1,000 is unlikely to cause concern) the new guidelines update the HHI values for concentration to align with those in the United States and the EU.

They also remove the previous "Zone" system in favor of fixed market and delta thresholds for determining the level of concentration. The guidelines also place greater emphasis on the equal importance of theories of harm other than unilateral and coordinated effects.

The EC's guidelines on non-horizontal mergers have been incorporated into the guidance, as have examples of conduct that the ICA has encountered in the decade since the current guidelines were published. In addition, "maverick" firms and the failing firm defense are given more complete treatment. Guidance on how the ICA will treat evidence of efficiencies has been updated, and sets out the high threshold that parties must attain to rely on the efficiency defense.

Notably absent from the new guidelines is any guidance on voluntary notification or on remedies. In its initial consultation on reform published on December 3, 2010, the ICA had suggested the inclusion of guidance on the availability of behavioral and structural remedies, along with examples of both. More generally, the new guidelines represent an update which incorporates a decade of practice by the ICA, and lessons learned from other jurisdictions and the International Competition Network's best practices.

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 (the "Council of State").

Vertical Restraints

Revamping Of The ICA's Enforcement Activities In Connection With Vertical Restraints

On October 22, 2013, and on November 20, 2013, the ICA opened two parallel Article 101 TFEU cases aimed at investigating alleged resale price maintenance ("RPM") and other vertical restrictions.

On October 22, 2013, the ICA initiated proceedings against Power-One Italy S.p.A. ("Power-One"), [46] a multinational manufacturer of power inverters and other components for renewable energy power systems, in order to investigate possible RPM put in place by Power-One vis-à-vis its distributors. In opening the decision, the ICA alleged that the conduct could possibly hamper intra-brand competition and facilitate collusion among manufacturers in light of the oligopolistic nature of the market and the fact that manufacturers, to a large extent, commercialize their products through the same distributors.

On November 20, 2013, the ICA opened an investigation of possible RPM conduct by Enervit S.p.A. ("Enervit"),47 a multinational producer of energy drinks and other sport food supplements, in relation to offline and online sales, territorial sale restrictions and single branding obligations. Regarding the RPM conduct for online channel in particular, the ICA's investigation focuses on Enervit's rebate system, through which distributors are granted extra rebates on the wholesale price if they comply with the retail price recommended by Enervit.

The ICA Opens A Formal Proceeding In The Large Distribution Sector

On December 4, 2013, the ICA opened formal proceedings under Article 101 TFEU against Centrale Italiana and its affiliates.[48]

Centrale Italiana S.c.a.r.l. ("Centrale Italiana") is a buying group of four leading Italian large distribution chains (Coop, Despar, Il Gigante and Disco Verde). Another large distributor, Sigma, had entered into a cooperation agreement with Coop, according to which it benefited from the purchasing efficiencies achieved by Centrale Italia.

The decision to open an investigation into Centrale Italiana and its members follows the ICA's recent sector inquiry, which included analysis of the competitive dynamics of the Italian large distribution market and the relationship between large distribution and suppliers.[49]

The ICA identified two potentially affected relevant markets, the upstream procurement market and the downstream selling market. Regarding the procurement market, the ICA confirmed the traditional distinction between the "home" market, concerning goods for domestic consumers (which can be further segmented into large and traditional distribution) and the "away from home" market, relating to goods for commercial activities. The ICA also noted that, for a significant number of suppliers, the large distribution channel accounts for about 70% of their total sales. The geographic scope of the procurement market was deemed national (with the exception of some fresh and/or regional food products), and the geographic scope of the selling market deemed local. In the procurement market, Centrale Italiana's market share amounts to around 23% (i.e., well above its main competitors, Sicon and ESD, whose market shares are around 14% and 13%, respectively). The ICA also noted that the seven main buying groups active in Italy in the large distribution sector represent approximately 75% of total national demand. A total of 20 independent

46 I766 – Inverter solari ed eolici – Imposizione di prezzi minimi.
47 I718 – Enervit – Contratti di distribuzione.

48 I768 – Centrale d'acquisto per la Grande Distribuzione Organizzata.
49 *See* National Competition Report (Italy) 2013 – 3nd Quarter.

distribution chains are affiliated to these seven buying groups.

As for the selling market, the ICA confirmed that it may be divided into three sub-segments, based on the size of retailers' premises: 400 m^2; between 400 and 2,500 m^2; and over 2,500 m^2. In the selling market, Centrale Italiana's affiliates' market share exceeds 40% in 20 provinces (in 11 of them, the market share is above 50%) and 30% in six other provinces. Taking into account only large scale retailers (above 1500 m^2), their market share exceeds 40% in 38 provinces (in 12 of those, the market share exceeds 70%).

Based on the above, the ICA noted that a number of local selling markets are highly concentrated. Moreover, competitive dynamics in these markets may be influenced by multimarket contacts, which reduce incentives to compete. Finally, the ICA noted that distribution markets are characterized by administrative obstacles preventing market entry by new competitors.

In this context, the ICA maintains that the cooperative agreements regulating the activities of Centrale Italiana and its affiliates, as well as the conditions under which these agreements are implemented (including a possible exchange of sensitive information), may have anticompetitive effects.

More specifically, the ICA has preliminarily identified the following possible concerns in the procurement market: a significant reduction of producers' bargaining power, with strong implications in terms of varieties and quantities of products, and investments and efforts for innovation, also due to the squeezing of suppliers' profits. In the selling market, the ICA is concerned by the possible coordination of sales policies and/or the reduction of incentives to compete among large distribution operators (for instance, a potential reduction of competition in the downstream selling market could result from the sharing of procurement costs, which is the main cost item for distributors).

Moreover, the ICA has stressed that supply agreements tend to be very complex and quite blurred (*i.e.*, the supply period is not clearly identified; contracts are subject to unilateral amendments by large retailers; they are sometimes concluded verbally; and economic terms are often ambiguous). Finally, the ICA also identified the possible anticompetitive affects stemming from the retailers' "trade spending" practice, which consists in requesting suppliers to contribute to larger retailers' distribution costs through up-front access payments, which often have no real commercial justification.

Policy and Procedure

The TAR Lazio Quashes The ICA's Decision For Repeatedly And Unjustifiably Postponing Proceeding Deadlines, Which Resulted In An Excessive Duration Of Proceedings

On October 7, 2013, the TAR Lazio annulled the ICA's decision that the continuous postponements by the ICA of the proceeding deadlines were based on generic and stereotypical arguments.[50]

On September 28, 2012, the ICA imposed a total fine of €37,317,565 on seven undertakings in connection with a cartel aimed at sharing the market and fixing prices on the Italian market for road barriers (*i.e.*, guardrails).[51] The undertakings appealed the decision before the TAR Lazio.

The key ground of appeal related to the excessive length of the ICA proceedings, which lasted approximately three years, with three subsequent decisions extending the initial deadline set by the ICA.

The TAR Lazio affirmed the principle according to which the ICA is bound to respect investigation deadlines, noting that otherwise multiple and unjustified delays would render procedural deadlines nugatory. The TAR Lazio also underlined the necessity of the duration of an investigation being predetermined and foreseeable, given the strong economic prejudice which may arise from antitrust sanctions and the potential damage that may be caused to the reputation of the companies under investigation. Consequently, the ICA must adequately justify any decision extending the length of an ICA investigation.

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[50] TAR Lazio decisions of October 8, 2013, nos. 8671, 8672, 8674, 8675, 8676 and 8677.

[51] Case I723 – Intesa nel mercato delle barriere stradali.

In the case under scrutiny, the TAR Lazio found that the arguments put forward by the ICA to justify the extension of the deadline were "generic" and "stereotypical." The TAR Lazio noted that the ICA acted as "if it had an indefinite period to complete its investigation," And that this caused unjustifiable and illegitimate delays. Consequently, the TAR Lazio annulled the decision of the ICA.

In addition, the TAR Lazio found that the ICA had illegitimately broadened proceedings by including, two years after the opening of the investigation, the parent company of one of the undertakings involved. The TAR Lazio took into account that the ICA's decision to involve this company had not been triggered by newly-acquired evidence and information on the ownership structure had been available from the outset of the investigation. The TAR Lazio found that the extension of the proceedings to Marcegaglia S.p.A. hindered its right of defense, because it occurred at a time when the investigation was nearly concluded and several interim deadlines had already expired.

THE NETHERLANDS

This section reviews developments under the Competition Act of January 1, 1998 (the "Competition Act"),[52] which is enforced by the Netherlands Authority for Consumers and Market (Autoriteit Consument & Markt, "ACM").[53]

Horizontal Agreements

ACM Notice On The Intended Shutdown Of Five Coal Plants

On September 26, 2013, the ACM published a notice on possible competition concerns relating to the intended shutdown of five coal powered plants in the Netherlands.[54] This shut-down was announced by an association of energy companies within the framework of the so-called *Energieakkoord*.[55] Without going into the compatibility with competition law, the ACM made it clear that because the targets could be met individually, any further agreements between competitors would remain subject to the competition rules.

The ACM noted that the shutdown decision qualified as an agreement of an association of undertakings within the meaning of Article 101(1) TFEU which would likely limit the electricity production capacity, and ultimately raise prices. The ACM reviewed possible arguments under 101(3) TFEU by quantifying the economic effects of emission reductions. It concluded that the positive effects could be quantified at €80 million, whereas the expected price increase due to reduced capacity would amount to €450 million. The ACM concluded that the agreement would likely restrict competition and that any positive effects under Article 101(3) TFEU were unlikely.

ACM Fines Magazine-Folder Cartel €6 Million

On November 7, 2013, the ACM fined 13 companies €6 million for involvement in a magazine portfolio (*leesmappen*) cartel.[56] The authority started investigating the distribution, sale and rental of magazine portfolios in 2011 and conducted a series of dawn raids at ten companies' premises, securing evidence of cartel-like behavior.

The ACM defined the market for magazine portfolios as a bound collection of magazines periodically delivered to subscribers . A further distinction was made between *leesportefeuilles* (collections of magazines that are leased to several customers consecutively) and *leestafels* (collections of (mostly) monthly magazines that are sold to customers). Magazine portfolio companies buy varying selections of magazines, bundle them, and attempt to secure subscribers. Customers are usually companies with waiting rooms, such as hospitals, dentists and hair salons.

In 2004 and 2010, the companies concerned entered into two market partitioning agreements for new and existing customers. The 2004 agreement contained clauses that competitors should: (i) refrain from recruiting each other's subscribers; (ii) deny requests from competitor's subscribers to terminate contracts; (iii) levy €150 fines on competitors for violating the agreement; and (iv) enter into exclusive territorial division agreements. Under the 2010 agreement, the undertakings further stipulated against 'stealing' subscribers through door-to-door sales, and also agreed to share customer lists. These agreements were strengthened through a series of fining mechanisms, information exchanges, bi- and multilateral territorial division agreements on customers and takeovers. The companies were to provide updates on new clients on a weekly basis to facilitate enforcement of the territorial market partitioning.

The ACM concluded that the agreements constituted a single and continuous infringement within the meaning of Article 101 TFEU and Article 6 Mw. Additionally, given

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

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

54 ACM, Notitie over sluiting van 5 kolencentrales in SER Energieakkoord, notice of September 26, 2013.

55 The *Energieakkoord* of September 6, 2013, is an agreement between *inter alia* the Dutch government, environmental organizations and energy companies, in which a target has been set to reach a renewable energy production of 14% by 2020 and 16% in 2023.

56 ACM, Case 7244, decision of November 7, 2013, published on January 20, 2014.

their strong anti-competitive nature, the agreements formed a restriction by object. The ACM considered that it was not bound to qualify the infringement as an 'agreement' or 'concerted practice', as continuous infringements often contain elements of both types of unlawful behavior.

The ACM rejected arguments that the agreements were 'ancillary restraints', similar to franchise agreements, that would fall outside the scope of Article 101 TFEU/Article 6 Mw. The ACM referred to the criteria set out in the General Court of the European Union *MasterCard* judgment, and disputing that the downstream market partitioning was 'objectively necessary' and 'directly connected' to the undertakings' upstream collective purchasing agreements. The ACM also decided that the behavior should not fall under the Dutch *de minimis* exemption because the undertakings greatly exceeded the 10% market share threshold.

The ACM used a gravity factor of two due to the horizontal and 'by object' nature of the infringement (for all but one company whose involvement had ended earlier). Because competition had not been completely eliminated, the ACM refrained from imposing a maximum basic fine. In addition, the ACM fined the responsible managers of each undertaking between €10,000 and €137,500 depending on their respective levels of involvement and financial positions. The fines of both Leesland and its director were increased by 10% for their coordinating and facilitative roles in the cartel: Leesland's director had not only chaired the meetings that led to the 2010 agreement, but had also played a crucial role in designing the cartel's enforcement mechanism.

ACM Concludes Investigation Of Mobile Operators With Commitments

On January 7, 2014, the ACM concluded its investigation into possible cartel-like behavior in the market for mobile telephone services.[57] Although the ACM did not find evidence of price fixing, it concluded that public statements by mobile operators about intended market behavior could give rise to competition concerns about tacit collusion. Mobile operators had made public statements on intended price rises and commercial terms for consumers at conferences, in journals and other media. The ACM took action by pursuing commitments from Vodafone, KPN and T-Mobile to remove any possible tacit collusion concerns. The parties committed: (i) that senior management would refrain from making any verbal or written statements concerning future pricing and other commercial terms before any final internal decisions are made to that effect; and (ii) to introduce compliance and training programs for senior management on these issues.

57 ACM, Case 13.0612.53, decision of January 7, 2014.

PORTUGAL

This section reviews competition law developments under the new Competition Act of May 8, 2012, Law No. 19/2012, which entered into force on July 7, 2012 (the "2012 Competition Act"). Previous pending cases are governed by Competition Act of January 18, 2003, Law No. 18/2003 (the "2003 Competition Act"). Both Acts are enforced by the Portuguese Competition Authority (the "PCA").

Vertical Restraints

The Court Of Appeals Confirms Fine In A Resale Price Maintenance Case Involving The Country's Largest Dairy Producer

On January 29, 2014, the Lisbon Court of Appeals upheld the decision of the PCA fining the country's largest dairy producer Lactogal – Produtos Alimentares S.A. ("Lactogal") for restrictive practices in the distribution and marketing of dairy products.

In July 2012, the PCA fined Lactogal €341,000 for imposing minimum resale prices, fixing sales margins, and including other direct and indirect remunerations in its contracts with its distributors. Following a 2010 investigation the PCA discovered that Lactogal had been implementing such practices in 59 dairy product contracts with 55 distributors between 2003 and 2006. Under these contracts, distributors were forced to comply with the resale prices and margins predetermined by the dairy company.

Lactogal challenged the decision before the Court of Competition, Supervision and Regulation. By a decision dated May 24, 2013, which is considered to be its first substantive ruling since the court was established in 2012, the Court upheld, in its entirety, both the PCA's decision and the amount of the fine.

Lactogal appealed that decision before the Lisbon Court of Appeals which has now affirmed the two previous decisions and the €341,000 fine.

Lactogal's conduct constitutes an anticompetitive vertical agreement that prevents its distributors from freely pricing the relevant products. Interference in the determination of prices violates Article 1(1) of the 2003 Competition Act (now Article 9 of 2012 Competition Act) because it has the object of preventing, distorting or restricting competition. In the context of Lactogal's conduct, the PCA has underlined the seriousness of such anticompetitive behavior.

This resale price maintenance case proved an important test for competition law enforcement in Portugal and a significant endorsement of the PCA's activities; it also shows the efficiency of the new specialized judiciary system, which took less than two years for a final ruling on the case.

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"),which comprises the CNC Directorate of Investigation ("DI") and the CNC Council.

Horizontal Agreements

The CNC Imposes Fines Of More Than €43 Million In Fines On Several Container Carrier Associations In Port Of Valencia

On September 18, 2013, the CNC Council published a decision stating that several associations involved in container transport at the Port of Valencia, had engaged - in collaboration with the Valencia Port Authority and the Department of Infrastructure and Transport of the Valencia Community Government - in anti-competitive practices consisting of price fixing and market sharing between 1998 and 2011, contrary to the LDC 15/2007.

The Council of the CNC concluded that the Port of Valencia associations had committed a very serious infringement of competition rules, by distorting the normal functioning of supply and demand in container transport services on a continual and repeated basis, doing so by concluding agreements to unify the price of road transport and other transport-related services and by implementing in a coordinated fashion the official inflation price increases and diesel increments.

The CNC concluded that the Authority of the Port of Valencia participated with the associations in making agreements and arrangements in over-the-road transport of containers in the Port of Valencia that involved fixing prices and commercial conditions, limiting or controlling fleets and market sharing. The CNC also considered that the Department of Infrastructure and Transport of the Valencia Community Government (*Consellería de Infraestructuras y Transportes de la Comunidad Valenciana*) played an active role in organizing and monitoring enforcement of the price fixing agreement, making a considerable contribution to its operation, and, as a result, to a serious and prolonged constraint of competition in the market.

In light of the above, the CNC Council imposed fines ranging from €100,000 to €13 million.

The CNC Imposes A Fine Of €15 Million On Mediapro And Four Football Clubs

On December 2, 2013, the CNC imposed a fine of €15 million on Mediapro and four football clubs (Real Madrid Club de Fútbol, Fútbol Club Barcelona, Sevilla Fútbol Club SAD, Real Racing Club de Santander SAD) for the infringement of the CNC Council Decision of April 14, 2010 on the acquisition of broadcasting rights in football competitions. In 2010 the CNC Council had adopted a decision that contracts signed by football clubs relating to the acquisition of broadcasting rights in the National League and Copa de El Rey (except the final) with a duration greater than three seasons, had to be considered agreements between undertakings prohibited under Article 1 of the LDC and Article 101 of the TFEU. The CNC launched monitoring proceedings to supervise the implementation of this decision; it subsequently asked the Directorate of Investigations to prosecute disciplinary proceedings for breach of the decision. As a result, the CNMC Council imposed a fine of: €6.573 million on Mediaproducción S.L., €3.9 million on Real Madrid Club de Fútbol, €3.6 million on Fútbol Club Barcelona, €900,000 on Sevilla Fútbol Club SAD and €30,000 on Real Racing Club de Santander SAD.

SWEDEN

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

Horizontal Agreements

The SCA Discontinues Its Investigation Of Potentially Anticompetitive Statistics Cooperation In The Book Sector

On November 20, 2013, the SCA decided to discontinue its investigation of the planned statistics cooperation between the Swedish Booksellers' Association ("SBA") and the Swedish Publishers' Association ("SPA").

SBA and SPA had agreed to jointly compile detailed statistics regarding consumer book sales in Sweden through an association owned by large publishers. The coordination was to be between SBA, SPA, 16 book resellers and all publishers that are members of SPA. Initially, it was intended to involve daily exchanges of very detailed and recent price and sales volume information on a county-by-county basis. To alleviate the SCA's concerns, the SBA and the SPA agreed to exchange and publish the information less frequently and only after a certain delay, and to break down the information into five large regions rather than into 21 counties. The SBA and the SPA also agreed to make the statistical reports available to the public without delay.

In its decision to discontinue its investigation the SCA explained that an exchange of information should be assessed in light of the strategic nature of the information, the level of aggregation, the age of the information, the frequency of the exchange, and the level of concentration of the relevant market. The SCA noted that an exchange of information is more likely to restrict competition when it involves recent, individualized, and strategic information and when the exchange occurs frequently and in a market which is concentrated and characterized by high barriers to entry.

On the basis of the changes that the SBA and the SPA agreed to implement to their statistics cooperation, the SCA considered that there were no reasons to pursue its investigation further. The SCA stated, however, that it would continue to survey market developments.

SWITZERLAND

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

Horizontal Agreements

FCC Closes Preliminary Investigation Into The Transfer Of Exchange Rate Advantages To Retail Brand Pricing

The FCC Secretariat (the "Secretariat") closed its investigation into unlawful restraints of competition for the transfer of exchange rate advantages on grounds of insufficient evidence.

The Secretariat had been investigating whether 22 major suppliers of branded goods and three leading food retailers in Switzerland—Coop, Denner and Migros—had failed to pass on exchange rate gains on the price of certain daily consumer goods to Swiss end customers, and whether this failure may have been caused by unlawful restrictions on competition. However, the investigation showed no evidence to indicate the existence of unlawful agreements. The investigation revealed, *inter alia*, that exchange rates have little effect on final sales prices; survey results indicated that the exchange rate had an impact of less than 50% on costs borne by suppliers.

FCC Investigation Into The Road Construction Sector In The Canton Of St Gall

On October 15, 2013, the FCC launched an investigation into engineering and construction companies in the area of See Gaster, in the canton of St Gall, and its environs. On October 21, 2013, the investigation was extended to additional engineering and construction companies of the region. The FCC conducted searches of the companies' premises.

The investigation was launched following indications that engineering and construction companies are involved in unlawful cartel agreements aimed at, among other things, coordinating the award of tenders in the road construction sector.

FCC Agrees With Gradual Reductions In Delivery Of Mechanical Watch Parts

Following the renegotiation of an amicable settlement, on October 21, 2013, the FCC closed the investigation launched on June 6, 2013, into the implementation of the new delivery policy of the Swatch Group.

The new settlement principally concerns the delivery of mechanical movements, and it permits the Swatch Group to gradually reduce its deliveries until December 31, 2019. The reduction is to be gradual, increasing year-on-year, and is based on the quantities sold from 2009 to 2011. Although under the agreement the Swatch Group committed to treating all clients equally, the agreement also provides that the Group may, under certain conditions, depart from this rule for small and medium size companies. The FCC has reserved the right to reexamine the terms of the obligation to deliver in the event of substantial changes in market conditions.

As for deliveries of assortments, although the FCC has accepted in principle that the Swatch Group may also reduce deliveries, the FCC considered that any reduction appeared premature given current market conditions and the uncertainty of any developments in that area. Consequently, the FCC declined to allow reductions of delivery assortments before seeing developments in relation to reductions through consent and, in particular, the completion of cases pending before the Swiss Federal Patent Court. The FCC has indicated that this would not prevent the Swatch Group from initiating negotiations with the FCC Secretariat in the future.

Vertical Restraints

FCC Closes The Investigation On Cosmetic Products

On November 28, 2013, the FCC announced that the investigation on cosmetic products had been closed by decision of October 21, 2013.

According to the FCC, the vertical agreements analyzed during the investigation, which concerned cosmetic products sold by beauty institutes and contained territorial restrictions, price recommendations and online trading bans, did not have a substantial impact on competition. The FCC reached this conclusion by taking into account the small market shares held by the undertakings in the relevant market, the fragmented nature of the market, and the small price differences at the international level. The undertakings subject to the investigation modified the relevant contractual provisions and declared that the price recommendations in question were not binding, and informed their buyers accordingly.

Policy and Procedure

FCC Recommends The Free Movement Of Notaries Public And Notarial Deeds

The FCC has recommended that notaries public benefit from free circulation between the Swiss cantons, so that cantons would recognize the professional qualifications of notaries public coming from other cantons. The FCC has also recommended that the Swiss Federal Council adopt legislation enabling parties to a real estate transaction to have the deed notarized by a notary public from a different canton than where the property is situated.

In Switzerland, there are, broadly speaking, three forms of notaries public: (i) independent notaries public (*libre, freiberufliche Notariat*), mostly in the French-speaking cantons; (ii) official notaries public (*fonctionnaire, Amstnotariat*), in the cantons of Zurich and Thurgovie; and (iii) a combination of systems elsewhere. Each of these institutions has its own fee structure.

In general, Swiss notaries public may not obtain recognition of their certificate of professional competence in a different canton. This contrasts with the position of notaries public from the EU who may assert the recognition of their professional qualifications in Switzerland[58] and their right to access the market[59]. In this respect, Swiss notaries public may not receive the same treatment as notaries public from the EU. The Swiss Federal Act on Internal Market ("AIM") is designed, among other things, to prevent such discrimination, and guarantees to Swiss workers rights at least equal to those conferred on foreigners by international treaties. Following an investigation, the FCC has announced its view that the provisions of the AIM are sufficient for notaries public to benefit from free circulation between the Swiss cantons.

The FCC has recommended that the cantons recognize the professional education of independent notaries public from other cantons, and that they abolish obstacles such as nationality requirements, residency requirements, and reciprocity clauses.

The FCC has also recommended that the Swiss Federal Council adopt legislation allowing notaries public to notarize real estate transactions from any canton, and make the relevant entries in the land registry. The provisions of the Final Chapter of the Swiss Civil Code concerning the notarization of legal transactions, currently under revision, provide for the possibility of adopting such legal basis. Currently, a real estate transaction must be notarized by a notary public where the property is located. A broader recognition of real estate notarial deeds within Switzerland would give clients the opportunity to notarize legal documentation more easily in any canton, thereby enabling them to better address their business needs.

The FCC's recommendations do not affect the cantons' competence to determine and organize the profession based on their business needs; nor do the FCC's recommendations question the separate institutions of independent and official notaries.

58 On the basis of the Federal Act concerning the duty of service providers to declare their professional qualifications in the context of regulated professions, and concerning the verification of said qualifications.

59 On the basis of the Agreement on the Free Movement of Persons.

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

Court Of Appeal Allows Esso's Appeal Against The Commercial Division Of The High Court's Decision To Allow Ryanair To Proceed With Claims Against Esso Under Article 101 TFEU, In England On The Basis Of An English Jurisdiction Clause In A Supply Contract

On November 19, 2013, the Court of Appeal allowed Esso Italiana's ("Esso") appeal against a decision by the Commercial division of the High Court, which had found that Ryanair's claims against Esso fell within the jurisdiction of the English Courts. Ryanair is an Irish airline; Esso is a part of the ExxonMobil group, and supplies jet fuel in Italy to Ryanair, along with a number of other fuel companies.

On 14 June 2006, the Italian Competition Authority ("ICA") determined that Esso had participated in a price-fixing cartel for the supply of jet fuel, contrary to Article 81 of the EC Treaty (now Article 101 TFEU), and consequently fined Esso €66.7 million.

Article IV of Ryanair's fuel supply contract with Esso provided that, where a contract price did "[…] not conform to the applicable laws, regulations or orders of a government or other competent authority, appropriate price or fee adjustments would be made […]". Further, where Ryanair was required to pay more than the adjusted price provided by the agreement, it could terminate the contract for a given airport. The agreement also contained a non-exclusive English jurisdiction clause, upon which Ryanair sought to bring its claims in England.

Ryanair brought two claims before the English High Court. Ryanair claimed that: (i) its overpayment due to Esso's cartelist behavior was in breach of Article IV, for which Ryanair was entitled to contractual damages amounting to the inflation in price caused by the cartel; and (ii) Esso's cartelist behavior was a breach of a "statutory duty". The second claim had two limbs:

The First Limb was that Esso's breach of Article 101 TFEU under Italian law sounded in damages pursuant to Article IV (it thus covered the same ground, and was a necessary component of the contractual claim).

The Second Limb was that Ryanair could seek damages from Esso for damages arising from the behavior of the other cartelists that supplied Ryanair, under Article 101 TFEU, because Esso was jointly and severally liable.

Ryanair argued that the non-exclusive English jurisdiction clause in the contract meant that the contractual and statutory claims could be heard in England because: (i) the second limb of the statutory claim was "closely knitted together" with the first (which was itself nearly identical to the contractual claim); and (ii) the jurisdictional clause caught the statutory claims.

Citing *Fiona Trust*,[60] Ryanair argued that the jurisdictional clause covered all legal questions arising out of the contract, on the presumption that rational business people would have intended all of their legal disputes to be adjudicated in the same forum.[61] As such, Ryanair's jurisdictional argument depended on whether the contractual claim had a reasonable prospect of success. The Court of Appeal found that this was essentially a question as to the width of Article IV, *i.e.*, whether Article IV's scope included claims pursuant to Article 101 TFEU.

The Court of Appeal accepted Esso's submissions that Article IV provided a remedy in circumstances where Esso's prices did not "conform with the law" (and adjustments were not made), but also agreed that prices inflated by cartelist activity were not illegal *per se*, and did not fall within the ambit of Article IV. The Court held that cartelist behavior invalidates agreements between the cartelists, not between cartelists and consumers. Ryanair's interpretation also rendered the clause otiose

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60 *Fiona Trust & Holding Corp v. Yuri Privalov* [2007] EWCA Civ 20

61 Especially where it would have been "forensic nightmare" to adjudicate them separately, as per *The Angelic Grace* [1995] 1 Lloyd's Rep 87 (CA)

because the clause was triggered by a statutory breach for which there was already a statutory remedy.

Further, the Court of Appeal was persuaded by Esso's submissions that the purpose of Article IV was to provide a mechanism by which Ryanair could seek the adjustment of fuel prices, where the parties were mutually aware of the law and its effect on contract prices. The Court was not satisfied that Ryanair had explained how the ICA's cartel findings constituted a "price adjustment" imposed by law, within the meaning of Article IV. The Court of Appeal further rejected that Article IV was intended as a broad catch-all form of redress, as it would thereby be liable to an "infinitely broad process of interpretation […]".

As to jurisdiction, the Court of Appeal found that the jurisdictional clause did not catch the statutory claims, *a fortiori* where Ryanair had no contractual claim. Applying the *Fiona Trust* doctrine, the Court held that no rational business person would have intended the jurisdiction clause to govern entirely non-contractual claims between the buyer and third parties.

Mergers and Acquisitions

Competition Commission Prohibits Dorset Hospital Merger

On October 17, 2013, the CC published a report prohibiting the anticipated merger between the Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust ("RBCH"), and the Poole Hospital NHS Foundation Trust "(PH", together the "Parties").[62] The decision followed a reference by the OFT to the CC on January 8, 2013, and is the first merger review of NHS foundation trusts to be reviewed by the CC.

The Parties both provide publicly-funded healthcare services in the UK. The CC noted that the sector had a number of unique features that distinguished it from others, including the heavily-regulated nature of foundation trusts' operations, and the on-going changes to introduce competition in the sector by the Health and Social Care Act 2012. The CC observed that each foundation trust maintained a degree of independence within the NHS system, being able to take on debt, invest in new services, and generally try to attract more patients through competition. The CC identified two primary models of competition: (i) competition in the market, where patients choose services from foundation trusts; and (ii) competition for the market, where commissioners of healthcare services select a foundation trust to provide services to patients after a competitive process.

Noting that there was effectively no demand-side substitutability between different types of medical treatment, the CC identified a number of specialties of medical care, which had further sub-specialties with limited supply-side substitutability. Each specialty could be divided between private and NHS markets, and within each of these, the CC identified separate markets for: (i) elective inpatient services; (ii) non-elective inpatient services; (iii) outpatient services; and, potentially, (iv) community services, where offered. The CC considered the maternity services markets separately, because they had features of both elective and non-elective markets. The CC identified the relevant geographic market as consisting two drive-time based areas from which the Parties attracted most of their patients.

The CC identified a number of markets where unilateral effects would arise:

Elective inpatient and outpatient services. The CC decided that the transaction would give rise to unilateral effects in 19 overlapping in-patient specialties, and 33 interdependent out-patient specialties. The CC assessed that patients and GPs place a large emphasis on treatment quality, and that this was a factor on which the parties compete.

Non-elective services. The CC concluded that the Parties did not have strong incentives to compete with one another because patients exercise little choice over non-elective service providers (this decision is usually made for patients by others, *e.g.*, by emergency services).

[62] Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust/Poole Hospital NHS Foundation Trust, Competition Commission report of October 17, 2013, available at http://www.competition-commission.org.uk/assets/competitioncommission/docs/2013/royal-bournemouth-and-christchurch-poole/131017_final_report.pdf.

Maternity services. The CC concluded that despite RCBH attracting fewer patients than PH, their proximity and similar catchment areas meant that the latter acts as a competitive constraint on RCBH. The CC also identified incentives for the two to compete, and pointed to decision to refurbish PH's maternity unit as evidence of the Parties' recognition of this.

Community services. The CC concluded that there were no competition concerns because there were no overlaps, and ease of market entry meant that any future unilateral effects could be offset.

Private services. The CC found that, despite overlaps, the Parties would be constrained by competing providers in all markets except for the private in-patient cardiovascular specialty, where unilateral effects would arise for reasons similar to other elective inpatient services outlined above.

With respect to competition for the market, where each party competes with the other to be selected as a service provider, the CC allowed that competition between two foundation trusts could exist generally, but after considering evidence provided by service commissioners, concluded that there would be no substantial effects. The CC considered whether any relevant consumer benefits would arise from the merger. In a number of specialties, the Parties submitted possible benefits, including rota-sharing, more efficient consolidation of services, and the construction of a new maternity unit. The CC ultimately concluded that none of these benefits were sufficiently certain to arise, or that they could be achieved without merging. Additionally, the CC noted that the planned maternity unit would not provide a benefit within a reasonable time.

Due to the unilateral effects in several product markets, and the absence of any relevant consumer benefits, the CC concluded that there would be a substantial lessening of competition in the affected markets, and prohibited the merger.

Competition Appeal Tribunal Dismisses Global Radio Holdings' Appeal Against The CC's Finding That Global's Acquisition Of Real And Smooth Limited Would Cause A Substantial Lessening Of Competition, And Corresponding Divestitures

On November 15, 2013, the CAT upheld the CC's decision that the acquisition of Real and Smooth Limited ("RSL") by Global Radio Holdings' ("Global") would not cause a substantial lessening of competition ("SLC"). Global is the largest commercial radio operator in the UK (with e.g., Classic FM, Heart, Capital,) and RSL is the third largest.

Following notification from the OFT, the CC had determined that the Purchase of RSL would result in an SLC in the supply of advertising services to "non-contracted" advertisers (*i.e.*, advertisers who buy airtime on a campaign-by-campaign basis through smaller agencies). The CC identified seven areas in England in which it considered that acquisition might lead to significant anti-competitive effects. Further, it considered that barriers to entry were high in the market for radio, due to the scarcity of FM licenses. This meant that potential market entry could was not likely to offset the SLC.

Accordingly, in May 2013, the CC identified remedies, including the divestiture of certain of Global's radio businesses in the affected areas. Global appealed the CC's decision on a number of grounds.

"Substantial Lessening of Competition" Global argued that the CC had incorrectly interpreted the test, and should have held taken "substantial" to mean "large", "considerable", or "weighty". Global argued, *inter alia*, that the First Protocol of the European Convention on Human Rights required a high standard before an interference with property rights was justified.

Real and Smooth as alternatives. Global criticized the CC's conclusion that Real and Smooth (RSL's two stations) in Greater Manchester represented alternatives to other Greater Manchester stations, for advertisers. Global argued that the CC had only assumed this to be the case, and had not suitably considered contrary evidence before ordering divestiture.

The CC's Reliance on "Significant adverse effects" in the North-West. Global criticized a paragraph of the CC's findings in which the CC required divestiture on the basis of "significant adverse effects" effects in the North-West of England. Global argued that the CC had only identified 'reduced competition' in the North-West and not "significant adverse effects" when requiring remedies. Global argued that the irrelevant consideration meant that the decision should be set aside.

CC's response to Global's remedy proposal. Global argued that the CC had simply compared the stations Global proposed to divest, namely 'Gold, 'Real XS', or 'Xfm', with its suggestion, 'Capital', without evaluating the merits of Global's proposal independently. Global argued that the CC had not properly evaluated whether the proposed divestiture was a sufficient remedy.

The CAT rejected all of Global's grounds. As to the legal question, the tribunal was not persuaded that meaning of "substantial" was that argued for by Global, *inter alia*, because the term substantial appeared elsewhere in the applicable legislation (in the context of defining a 'relevant merger situation') and should not be ascribed different meanings in the same legislation, absent express indications to the contrary.

As to Real and Smooth, the tribunal found that the relevant test, pursuant to *BAA Ltd v. Competition Commission*[63] was whether the CC had acted irrationally in deciding that the loss of regional alternatives might hamper competition. In this regard, the CAT was satisfied that the CC had discharged its burden, but suggested that the CC could have addressed the evidence more thoroughly in its report.

The tribunal also found that Global had placed too much weight on the wording of "significant adverse effects". Further, it found that the CC's statement was defensible on semantic grounds as the North-West included Manchester, in which severe adverse effects had been found, in any event. Eventually the CAT concluded that the CC had asked itself whether Global's proposed divestitures would remedy the competition concerns, and so the decision should not be set aside.

CAT Partially Allows Groupe Eurotunnel And SCOP Appeals

On December 4, 2013, the CAT delivered its ruling on the applications by Groupe Eurotunnel S.A ("Eurotunnel") and Société Coopérative de Production SeaFrance S.A. ("SCOP") for review of the CC's final report on the acquisition by Eurotunnel of three Dover-Calais ferries previously owned and operated by

SeaFrance S.A ("SeaFrance"). The judgment breaks new ground in distinguishing "assets" from an "enterprise" for the purpose of determining the "CC" jurisdiction under section 23 of the Enterprise Act 2002 (the "Act") and clarifies the "fairness" requirements that apply to the CC's conduct.

First, relating to the issue of jurisdiction, the CAT agreed that the CC had erred in its consideration of whether Eurotunnel had acquired an "enterprise", as defined in section 129(1) of the Act. The CAT noted that a legal distinction can be drawn between "bare assets" and "something more than bare assets", with the key to the distinction being defining exactly what, over-and-above "bare assets", the acquiring entity obtained, and how this placed the acquirer in a different position than if it had simply gone out into the market and acquired the assets. The fact that the acquiring entity emulates the business of the acquired entity, and even uses that entity's assets, does not necessarily mean that the acquiring entity has acquired an enterprise; the statutory test is not whether the acquiring entity is carrying out the same activity that was once carried out by the acquired entity, even with the same assets, but whether two enterprises come under common ownership or control as a result of the acquisition. The CAT doubted whether the facts, as found by the CC, supported a conclusion that Eurotunnel had acquired something more than bare assets, citing that SeaFrance had been inactive for more than seven months prior to the transaction, its berthing slots in Dover and Calais had been surrendered, and its workforce had been dismissed. Accordingly, the CAT remitted the question to the CC for its reconsideration. Three other grounds of appeal relating to the issue of jurisdiction were dismissed

63 [2012] CAT 3.

either on the merits or as a consequence of being deemed immaterial to the case.

Second, the CAT dismissed claims that the CC breached natural justice by failing to disclose certain information to the parties during its investigation. It found, in particular, that "fairness" does not require the automatic disclosure to the parties of a wide-range of supporting, background and possibly exculpatory material. It held that it can be lawful and proper for the CAT to redact and withhold certain information, provided that the "gist" of the case against the parties is properly disclosed, all the time recognizing that this is an acutely fact sensitive issue.

State Aid

BIS Publishes Guidance On The "Basics" Of State Aid

On November 27, 2013, the UK Department for Business, Innovation, and Skills ("BIS") published a guidance document entitled "State Aid: The Basics". The document, which is aimed primarily at the grantors of state aid, provides a quick and easy guide for organizations to self-assess their compliance with EU state aid rules. It does so in three parts:

- **Is it state aid?** The first part sets out, and briefly explains, four key questions to ask when assessing whether a financial assistance falls within the definition of state aid.
- **What do I do if it might be state aid?** The second part provides direction on what a policy-maker may do if a measure is suspected to involve state aid. Where possible, policy-makers should consider re-designing the measure, relying on an established exception, and seeking legal advice. The guidance stresses that a project must be assessed for state aid compliance before any money is paid out.
- **How can state aid be granted legally?** Finally, the third part explains the ways in which state aid can be granted legally. These include *de minimis* aid (less then €200,000 spread over three fiscal years), aid that falls within the General Block Exemption Regulation, and aid that, following notification, is approved by the Commission to be remedying a market failure. The guidance notes that exporting aid (aid for "export-related activities") is never allowed, and that operating aid (aid to cover costs which a company could expect to pay in the normal course of business) is legal only if it is *de minimis*.

The guidance refers to and complements similar earlier papers published by BIS.