BELGIUM

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

BCA Imposes Interim Measures Preventing Exclusive Broadcasting Rights For Superprestige Cyclocross Competition

On November 5, 2015, the President of the BCA imposed interim measures on Telenet NV ("Telenet") and the VZW Verenigde Veldritorganisatoren ("VV") regarding the exclusive licensing of the broadcasting rights of the Superprestige Cyclocross competition (*i.e.*, a form of cycling race).

Telenet provides retail television services in the Flemish region and owns two television channels. VV (the organizer of the Superprestige Cyclocross competition) and Telenet had concluded an agreement granting Telenet exclusive television broadcasting rights for the competition for five years. One of Telenet's competitors, Proximus, filed a complaint before the BCA claiming that Telenet had infringed Articles IV.1 and IV.2 of the Code of Economic Law ("CEL") and/or Articles 101 and 102 TFEU, and requested interim measures.

For the Competition College to grant interim measures, two cumulative conditions must be met: (i) the existence of a *prima facie* infringement of Article IV.1 and/or Article IV.2 CEL; and (ii) the urgent need to avoid a situation that is likely to cause a serious, imminent harm to companies affected by the practices and that is difficult to remedy, or a situation that is likely to harm general economic interest.

With respect to the *prima facie* existence of an infringement, the College addressed first the alleged infringement of Article IV.2 CEL and/or Article 102 TFEU. Because Telenet had acquired broadcasting rights for the Superprestige Cyclocross competition after acquiring similar rights for the UCI Worldcup cyclocross races for seasons 2016/2017 to 2019/2020, the College found that it was not manifestly unreasonable to assume that Telenet had acquired a dominant position on the market for the licensing of broadcasting rights for cyclocross races. Entering an exclusive agreement leading to a dominant position did not however entail a *prima facie* abuse of dominant position. The College nevertheless found that it was not manifestly unreasonable to consider that entering such an agreement could constitute a breach of Telenet's special responsibility as the dominant player on the retail market for the provision of television services, because broadcasting rights' driving force could strengthen Telenet's dominance. Therefore, College determined this to be a *prima facie* infringement of Article IV.2 CEL and/or Article 102 TFEU.

Regarding the alleged infringement of Article IV.1 CEL and/or Article 101 TFEU, the College considered that the agreement's exclusivity and long duration, the lack of transparent and non-discriminatory tender, and Telenet's high market share (30%) meant that it could breach these provisions.

The College ascertained there was an avoidable risk of serious, imminent harm to Proximus that would be difficult to remedy. The College found that the exclusion from the live broadcast of the Super Cyclocross represented a serious disadvantage to Proximus in a geographic market where the sport is very popular and attracts broad audiences. Proximus would suffer a loss of audience and

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a weakening of its credibility as a sports channel. Proximus's harm was immediate because Proximus was excluded from obtaining broadcasting rights for the 2016/2017 to 2019/2020 seasons. Although the financial consequences of a loss of subscribers could be compensated, the loss arising from Proximus's decreasing churn rate and weakened credibility were more challenging to remedy with *ex-post* damages. Finally, the College found the harm to be avoidable because non-exclusive agreements could still be concluded and transparent and non-discriminatory bids could still be organized.

As a result, the College ordered Telenet and VV to either: (i) suspend the exclusivity clause until a final decision is rendered by the BCA on the complaint, and offer the rights to interested parties on reasonable and non-discriminatory terms and conditions; or (ii) suspend the exclusive agreement from the end of season 2015/2016 and offer the broadcasting rights, exclusive or not, following transparent and non-discriminatory bidding procedures, until there is a final decision on the merits.

Suspension of Exclusivity Clause in International Show-Jumping Regulations: Brussels Court of Appeal Confirms Measures and BCA Clarifies their Scope

On July 27, 2015, the BCA's College had imposed interim measures on the *Fédération Equestre Internationale* ("FEI"), the governing body for equestrian sports, provisionally suspending the "exclusivity clause" contained in the FEI's General Regulations.[1] It had also ordered the FEI to communicate these measures to its members (national federations), athletes, officials, and organizers through its website. The FEI appealed the interim measures before the Court of Appeal of Brussels ("the Court"). At the same time, it asked the judges to suspend the interim measures while the appeal is pending.

On October 22, 2015, the Brussels Court of Appeal, ruling only on the FEI's request for suspension, confirmed the BCA's decision to suspend the exclusivity clause preventing horse riders from participating in non-FEI approved show-jumping competitions.

The Court found that the risk of serious and irreparable harm allegedly caused by the interim measures had not been established. The Court noted that the contested decision did not have a general application and that its effects were limited to horses' and athletes' participation in the Global Champions League ("GCL").

The Court also found that the FEI had failed to demonstrate its primary assertion, that the suspension of the exclusivity clause would compromise the organization and promotion of show-jumping. The Court noted that the FEI had regulated the sport for almost a century without such a clause. The Court added that the contested decision did not exonerate organizers from complying with clauses regarding the health, safety, and well-being of horses—clauses which were also applicable to the GCL. Finally, with respect to the FEI's argument that the interim measures were impairing its credibility as a regulating authority, the Court considered that such a risk derived not directly from the contested decision but from the FEI's own involvement in promotional activities alongside its regulatory activity.

The Court therefore dismissed FEI's request for suspension of the interim measures. Its judgment on the merits of the appeal against the interim measures is still pending.

Shortly after, on November 24, 2015, the College clarified the details of its interim measures imposed in July 2015. These measures include the publication of a message on the FEI's website informing athletes, officials and event organizers that sanctions will not be imposed as a result of the participation of an athlete or horse in a GCL event.

Interim measures aside, the BCA must still decide whether the FEI's regulations infringed competition law.

The proceedings on the merits are pending.

[1] Belgian Competition Authority, Case CONC-V/M-0016.

BCA Imposes Fine For Gun Jumping

On December 23, 2015, the BCA unconditionally approved a concentration between construction group Cordeel ("Cordeel") and Imtech Belgium ("Imtech"), a company active in the installation of electronic and sanitary fixtures. Cordeel was however fined for executing the transaction before notification to and approval from the BCA ("gun jumping").

Like EU merger control rules, Article IV.10, §5 CEL contains a "standstill obligation": a reportable concentration must receive the BCA's prior approval before execution.

On August 19, 2015, Cordeel had acquired Imtech in the context of bankruptcy proceedings. But Cordeel had failed to notify the transaction to the BCA despite the fact that the two companies' turnover far exceeded turnover thresholds. On September 22, 2015, the BCA contacted Cordeel about the applicable merger control rules.

Cordeel started by requesting a retroactive exemption from the standstill obligation. Although filed after the concentration had been implemented, the President of the BCA granted the request given the need to protect the validity of steps taken by the merged entity and ensure Imtech's continuity.

Cordeel subsequently notified the concentration to the BCA. While the absence of horizontal overlaps and the limited vertical links would normally have allowed for a simplified notification, the Auditorate considered Cordeel's early implementation of the concentration to be a special circumstance requiring a review under the ordinary merger control procedure. The Auditorate's decision could further be explained by its wish to involve the College, because only the College is entitled to impose fines, for example, in instances of "gun jumping," and is involved in ordinary, but not simplified notification procedures for which an Auditorate decision is sufficient.

The College unconditionally cleared the acquisition and fined Cordeel, emphasizing the importance of the notification and standstill obligations. However, the specific mitigating circumstances, including time pressure resulting from the bankruptcy proceedings, the fact that the infringement had not been intentional or result in any benefit for Cordeel, and the concentration's lack of restrictive effects justified a modest fine of €5,000. The Minister of Employment, Labor and Social Dialogue used his right to intervene in the procedure and advocated against the imposition of a fine or, in the alternative, only a symbolic one, given the specific circumstances of the case.

FINLAND

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

Policy and Procedure

On November 18, 2015, the SAC issued a ruling concerning access to file in a competition law proceeding. The SAC ruled that a party to the FCCA investigation has access to information which is provided to the FCCA by the company's competitors, even if this information contains confidential information (excluding, however, essential business secrets).

The case stems from an investigation by the FCCA in which it concluded that the Finnish dairy company Valio Oy ("Valio") had abused its dominant position in the market for production and wholesale of fresh milk in Finland by engaging in predatory pricing. On December 20, 2012, the FCCA proposed that the Market Court impose on Valio a €70 million penalty for abuse of dominant position in the production and wholesale market of fresh milk. The FCCA also ordered Valio to cease its antitrust violation which, according to the FCCA, had continued for almost three years.

During the investigation, the FCCA had requested that Valio's competitors, Arla Ingman Oy Ab ("Arla"), Osuuskunta Satamaito ("Satamaito"), and Osuuskunta Maitokolmio ("Maitokolmio"), among others, submit information concerning the alleged abuse. The FCCA gave Valio access to the public versions of these replies. The FCCA refused to give broader access to these documents on the basis that they contained Arla's, Satamaito's and Maitokolmio's business secrets which the FCCA has to treat as confidential under the Finnish Act on the Openness of Government Activities.

According to Valio, the FCCA had breached Valio's rights of defense by restricting the access to this documentation. Pursuant to the Act on the Openness of Government Activities, a petitioner, an appellant, or any other person whose right, interest or obligation in a matter is concerned (a party) shall have the right of access, to be granted by the authority which is considering or has considered the matter, to the contents of a document which is not in the public domain, if it could influence or may have already influenced the consideration of his/her matter. However, there is an exception to this rule in circumstances where the party's right to access is outweighed by an important public interest, for example, matters concerning a minor.

Valio appealed the FCCA's decision on the matter to the Helsinki Administrative Court, which upheld the FCCA's position. Valio further appealed the Administrative Court's ruling to the SAC, which partly overruled the Administrative Court's ruling. The SAC held that the documents contained Arla's, Satamaito's and Maitokolmio's business secrets. The SAC divided these business secrets, distinguishing the most essential business secrets, such as exact production figures, details of internal profitability accounting and exact grounds for price development, from other confidential information. The SAC did not give Valio access to the most essential business secrets contained in the contested documents, but it held that Valio should be granted access to the other confidential information, as this information may have influenced the FCCA's decision making in the case.

The FCCA's previous practice has been that it did not give access to confidential information if it did not rely upon in its final decision. The SAC's ruling broadens a party's right of access to documents in this regard, since it is sufficient that the information may have influenced the authority's consideration, which in effect could apply to all information submitted to the authority during an investigation.

The practical implication of the SAC's ruling is that companies can no longer rely on the FCCA maintaining confidentiality when responding to information requests form the authority. However, the ruling will not affect the treatment of the most essential business secrets of

companies, the confidentiality of which is still strictly protected by the Finnish law.

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").

The Paris Court of Appeals Dismisses Predatory Pricing Claim Against Google

On November 25, 2015, the Paris Court of Appeals overturned a first instance judgment having found Google liable for abuse of dominance in the online mapping sector.[2]

Bottin Cartographes is an provider of online mapping solutions which competes with Google in the market for the provision of maps to be inserted on companies' websites. In July 2009, Bottin Cartographes brought a private enforcement damage claim against Google based on an alleged abuse of dominance for predatory pricing conduct. In January 2012, the Paris Commercial Court considered that offering a free product online – not financed either by customers or advertising – amounted to a predatory strategy and therefore Google had abused its dominant position. It awarded €500,000 in damages to Bottin Cartographes. Google appealed this decision before the Paris Court of Appeals.

In a ruling issued on November 25, 2015, the Paris Court of Appeals overturned the previous judgment by the Paris Commercial Court. It dismissed all of Bottin Cartographes' claims and confirmed the legality of Google's business model for its online mapping solutions.

The market for online mapping services includes: (i) paid-for services (*e.g.*, Bottin), (ii) free services (non-profit making organizations such as OpenStreetMaps) and (iii) freemium providers, where the beast features must be paid for (*e.g.* Google Maps API). Bottin argued that Google Maps' freemium model amounted to exclusionary pricing and that Google eventually intended to recoup its losses once competitors had been driven out of the market.

Based on a detailed opinion issued by the FCA upon earlier referral from the Paris Commercial Court, the ruling found that irrespective of its market shares, Google was free to develop a "freemium" business model, whereby it offers a free basic version of a product to attract customers and prompt them to purchase the premium, paid-for version. In particular, in the context of online mapping, the Paris Court of Appeals confirmed that Google's business model did not amount to predatory pricing even though the revenues derived from Google's BtoB mapping solutions may not fully cover the acquisition costs of the maps, as those costs had to be incurred in any case for the search engine and Google Maps portal.

In additional, the Paris Court of Appeals did not produce evidence demonstrating that Google sought to exclude competitors from the market. In any event, it considered that given the fierce competition in the sector of online mapping, with a majority of competitors offering similar free or freemium products, any attempt of Google to eventually raise prices would inevitably fail, so that a predatory strategy would not make sense.

Therefore, the Paris Court of Appeals held that Google had not implemented an abusive predatory strategy, and the Court reversed the first instance judgment on that account.

The FCA Decides that the 2012 Commitments of the French Golf Federation Are No Longer Binding

On November 27, 2015, the FCA decided that FFG's commitments resulting from a 2012 decision had become irrelevant given drastic changes in the market and therefore were no longer binding.[3]

[2] Paris Court of Appeals, Decision n° 12/02931 of November 25, 2015, http://www.autoritedelaconcurrence.fr/doc/google_ca_25nov_15.pdf.

[3] French Competition Authority, Decision no. 15-D-16 of November 27, 2015, relating to the French Federation of Golf's request to review its 2012 commitments, http://www.autoritedelaconcurrence.fr/pdf/avis/15d16.pdf.

In December 2012, the FCA issued a decision accepting the commitments of the French Golf Federation (the "FFG"). Further to a complaint by the company Eurogolf, an insurance broker, the FCA had carried out investigations as to whether the FFG, a French association holding a legal monopoly for the issue of golf licenses, implemented anticompetitive practices in the supplementary insurance market for golf players.

At the time, the FCA identified three categories of golf insurance products: (i) individual multisport insurance, which covers numerous sports activities; (ii) mono-sport insurance offered by the sports federation to its licensees as part of a collective contract; and (iii) that offered by brokers to golf players outside the sports federation.

Eurogolf was present in the segment for individual and voluntary mono-sport insurance. It claimed that FFG took advantage of its dominant position as a sports federation by tying up the sales of licenses and supplementary insurance products. Eurogolf argued that FFG was preventing golf players from purchasing individual mono-sport insurance since FFG was leading them to believe that the license automatically included the supplementary insurance. In doing so, FFG restricted access to the 420,000 golf licensees who represented over half of all golf players.

The FCA expressed its competition concerns to FFG. It had indeed appeared that FFG was creating confusion among golf clubs and players between the golf license, which golf players must purchase should they want to compete, and the supplementary insurance products which should only be optional.

FFG offered to commit to unbundle the sales of supplementary insurance and the sales of the license, and to clearly present the insurance as an optional, paid, distinct product in order to waive any suspicion of tied selling. These commitments were made mandatory by the FCA by decision of December 2012.

In October 2015, the FCA reexamined the case, following a request from FFG that its commitments be revised. The FCA carried out a new analysis of the market, focusing on the changes occurred over the period in order to determine whether the commitments taken by FFG in 2012 still appeared relevant.

Pursuant to the FCA's commitments notice, the FCA may review the commitments undertaken by a company if one of the facts on which the decision was based undergoes a substantial change.

In the case at hand, the FCA expected that, further to FFG's step backwards, insurance brokers such as Eurogolf would have developed their activity and gained customers. However, the FCA observed that over the last three years, not only has Eurogolf ceased its activity, but not a single new actor has entered the individual golf insurance market, demonstrating that this option does not constitute a viable economic alternative to the two first aforementioned models.

Since the FCA's first decision, the market has been dominated by multisport insurance companies. Furthermore, the number of golf licensees choosing a golf specific insurance drastically decreased, from 420,000 in 2012 to 700 in 2014. At the same time, FFG considerably increased its supplementary insurance premiums, which led to the disappearance of even more insured golf players because the prices had risen drastically.

With this background, FFG offered a revision of its commitments allowing it to provide a collective mono-sport insurance again, which it would clearly present as optional by allowing the licensees to opt-out. The FCA observed that because there had not been an expression of a need for individual mono-sport insurance over the last three years, there was nothing left to substantiate the commitments imposed on FFG. The commitments taken by FFG in 2012 were thus no longer mandatory.

The FCA Drops Resale Price Maintenance Charges Against Nintendo in the Wii Case

On December 1, 2015, the FCA dropped resale price maintenance charges against Nintendo and closed its

investigation concerning the Wii game console without any sanction.[4]

The decision arose from an enquiry conducted by the French Ministry for the Economy, which suspected a possible anticompetitive agreement between Nintendo and its distributors to fix the retail price of its "Wii" gaming console, as well as games and accessories, and referred the case to the FCA in 2009.

Under French law, in the absence of an actual agreement, the French RPM test is three-pronged and requires that (i) suppliers communicate recommended retail prices to their retailers; (ii) suppliers monitor that the recommended prices are complied with; and (iii) a significant proportion of the retailers effectively apply the recommended prices.

In its statement of objections, the FCA's investigation service alleged that Nintendo had issued recommended retail prices to its distributors, and monitored distributors' compliance with these prices by sending sales representatives to visit the points of sale, both when the Wii was launched in France in 2006, and later on in 2009. However, in its final decision, the FCA's decision-making body, the FCA's board, took the view that regarding the first objection, *i.e.*, the practices which supposedly took place when the Wii was launched, the case file did not contain enough evidence showing that Nintendo attempted to monitor compliance with the recommended resale prices since Nintendo only monitored retail prices on an occasional basis. In this respect, a number of retailers declared that Nintendo's sales representatives did not visit their point(s) of sale at all, or, alternatively, did not monitor prices during their visits. In addition, there was no evidence that Nintendo had ever blamed its retailers for not complying with the recommended retail price or implemented retaliatory measures. The FCA therefore concluded that the resale price maintenance charges could be dropped, without even checking whether the recommended retail prices had been significantly applied in practice.

Nevertheless, it is important to note that the FCA board found that the public announcement by Nintendo of a retail price during a press conference held for the launch of the Wii in 2006 was enough to conclude that Nintendo had indeed recommended a retail price. In particular, the board rejected Nintendo's arguments explaining that (i) the press conference had been held in London and in English, and did not specifically target the French market; and (ii) the President of Nintendo Co. Ltd had merely declared that "Wii launches across Europe […] at the estimated retail price of 249 euros." According to the FCA, the concept of "evocation of a retail price" is construed very broadly in France and encompasses "any form of communication which may be used by a supplier to relay recommended retail prices to its distributors."

Conversely, mentioning a wholesale price, even publicly, is not sufficient in itself to demonstrate resale price maintenance. As a consequence, the second objection, which alleged that Nintendo had publicly communicated on retail prices in 2009, was rejected, as the announcement concerned Wii's wholesale price.

The FCA Implements New Settlement Procedure and Fines Orange €350 Million for Abuse of Dominance

On December 17, 2015, the FCA implemented the France's settlement procedure and fined Orange €350 million for abuse of dominance in the markets for fixed and mobile telecommunications services. The abuse involved offering loyalty rebates and access to strategic information (that could not be accessed as easily by competitors).[5]

The FCA's investigation arose from complaints brought by Bouygues Telecom and by SFR, two competitors of Orange in the markets for fixed and mobile telecommunications services for professionals. Orange,

[4] French Competition Authority, Decision no. 15-D-18 of December 1, 2015, relating to the video games sector, http://www.autoritedelaconcurrence.fr/pdf/avis/15d18.pdf.

[5] French Competition Authority, Decision No. 15-D-20 of December 17, 2015, http://www.autoritedelaconcurrence.fr/pdf/avis/15d20.pdf.

the French incumbent telecom operator, was found to have engaged in three types of anticompetitive practice since 2002.

First, Orange benefited from a discriminatory access to strategic information regarding high-speed and very-high speed internet network in the mid-2000s. Orange could obtain such access because it was the incumbent national telecom operator and it maintained possession of technical databases related to this network. Orange was therefore able to access strategic information more quickly and more comprehensively than its competitors.

Second, Orange offered loyalty rebates on condition that customers renew their contract with Orange or increase the duration of their commitment. According to the FCA, this had the effect of locking in customers into multiple commitments of different durations. This practice also increased the costs of building a customer base for the other operators.

Third, Orange imposed exclusivity rebates for virtual private networks (VPNs) enabling companies to exchange data securely among several sites they own. Customers could only benefit from rebates for these VPNs if other operators were not allowed to connect to them. The FCA took the view that this had the effect of locking in customers and excluding competitors.

As a result, the FCA imposed a fine of €350 million on Orange. In addition, the FCA enjoined Orange to provide competing operators with an access to strategic information under the same conditions as those applicable to Orange and at an identical level of reliability and performance. In particular, Orange must respond to requests for information from ARCEP, the French regulator of electronic communications, which will make sure that such equal access is granted. The FCA also enjoined Orange to stop the loyalty and exclusivity rebate practices.

With respect to the settlement procedure, which entered into force on August 8, 2015, the FCA decided to apply this procedure to pending cases, including the present decision. The settlement procedure replaces the previous no-challenge procedure before the FCA. Under the new regime, the FCA can offer a settlement after the statement of objections. Companies involved can then negotiate the level of the fine with the FCA (whereas under the previous regime, companies could only give up their right to challenge the FCA findings in exchange for a fine reduction of 10%).

In that respect, the FCA imposed a fine within the agreed cap, but did not provide any specific calculation of the determinants of the fine, including the value of sales, the gravity rate, the duration of the infringement, or any aggravating or mitigating circumstances (as is normally required by the FCA's Fining Notice). Also, Orange agreed not to challenge the outcome of the case, as regards the fine or the injunctions.

GERMANY

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

Horizontal Agreements

FCC Confirms Coffee Roaster Melitta's Liability For a Fine Initially Imposed on its Legal Predecessor

On August 20, 2015, the Federal Constitutional Court ("FCC") dismissed an appeal on constitutional grounds against the FCJ's decision confirming that Melitta Europa GmbH & Co. KG ("Melitta Europe") as legal successor of its former affiliate Melitta Kaffee GmbH ("Melitta Kaffee") is liable for a €55 million fine,[6] which the FCO had initially imposed on Melitta Kaffee.[7]

In December 2009, the FCO had fined Melitta Kaffee and two further coffee roaster companies for price fixing in the retail coffee sector.[8] Melitta Kaffee appealed the FCO's decision and in 2012, merged into Melitta Europe at a time when the 8th Amendment of the GWB (the "Amendment"), which introduced a general liability of legal successors of a fined company, had not yet entered into effect and a fine could be imposed on the company only, whose executives had committed the infringement. However, in exceptional circumstances, according to the FCJ's pre-Amendment case law, the legal successor could be held liable if, from an economic perspective, its assets are (nearly) identical with those of the company that committed the cartel infringement. The DCA found that Melitta Kaffee and Melitta Europe were (nearly) identical since Melitta Kaffee's "liable" assets (i) remained nearly undiminished and separate from Melitta Europe's other assets; (ii) continued to be used in the same way as before; and (iii) accounted for a substantial part of Melitta Europe's total assets.[9] The FCJ upheld the DCA's findings.

On appeal, the FCC held that by applying its pre-Amendment case law, the FCJ did not infringed the principle of legal certainty. Melitta Europe could have foreseen to be held liable for Melitta Kaffee's fine since it is almost identical to the entity that was responsible for the infringement. Further, the FCJ's pre-Amendment case law is widely accepted by the higher regional courts in Germany, and the FCJ itself repeatedly confirmed it at several occasions for almost thirty years, even immediately before Melitta Kaffee's restructuring in 2011.

Non-exclusive Licensees Not Precluded From Challenging Patent Validity

On September 10, 2015, the DCA[10] upheld a decision by the Regional Court Düsseldorf according to which holders of a non-exclusive patent license may principally initiate nullity proceedings attacking the validity of the licensed patent.

A licensee had successfully brought a nullity action and subsequently refused to continue paying royalties. The licensor filed an action claiming, among others, that the licensee had acted in bad faith by initiating such a proceeding and therefore continued to owe royalties. The DCA found that the licensee did not act in bad faith.

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6 *See* FCJ, decision of January 27, 2015, case KRB 39/14, available in German on the FCJ's website; see also National Competition Report April – June 2015, p 7-8.

7 *See* FCC, decision of August 20, 2015, case 1 BvR 980/15, available in German on the FCC's website.

8 *See* FCO case report of December 18, 2009, case B11-18/08, and FCO press release of December 21, 2009, both available in English on the FCO's website; see also National Competition Report October-December 2009, pp. 6-7.

9 *See* DCA, judgment of February 10, 2014, case V-4 Kart 5/11 (OWi), available in German on the DCA's website, and FCO press release of February 11, 2014, available in English on the FCO's website; see also National Competition Report January – March 2014, p. 12.

10 *See* DCA, judgment of September 10, 2015, case I-15 U 124/14, available in German at: https://openjur.de/u/867557.html.

The licensee had argued that non-challenge obligations were, in principle, prohibited under German antitrust law. While the DCA noted that a non-challenge obligation would not have been invalid in this case pursuant to Section 2(2) GWB, Art. 5(1) lit. (c) of the Technology Transfer Block Exemption Regulation, given that these provisions had not been in force at the time the license agreement was concluded, it held that the parties had not concluded such non-challenge obligation, neither explicitly nor implicitly. For an implicit agreement on this issue, it would have been required that the licensor's interest in non-challenging had become apparent to the licensee. This was not the case. The DCA therefore also left open whether or not such non-challenge obligation could have been validly agreed upon under the old law applicable at the time (Section 17(2) No. 3 GWB).

Federal Court of Justice Sanctions Bundesverband Presse-Grosso's Central Negotiating Mandate

On October 6, 2015, the FCJ held the central negotiating mandate of the National Association of Press Wholesalers (Bundesverband Presse-Grosso "BVPG") for all press wholesalers to be in line with German and European competition law,[11] overturning prior decisions by the District Court of Cologne[12] and the DCA[13].

With its landmark decision, the FCJ not only sanctions the German press wholesalers' distribution system, but also confirmed that the newly introduced Section 30(2a) GWB is compatible with German and European law.

In Germany, nearly all newspapers and magazines are distributed via press wholesalers ("Presse-Grossisten"). They act as intermediaries between publishers and retailers, buying and selling at fixed rates. In addition, each wholesaler is allocated a certain supply area (generally exclusively, with limited exemptions of two authorized wholesalers covering the same area). The wholesalers' reimbursement depends on fixed terms negotiated and agreed upon with publishers for several years in advance. The wholesalers do not negotiate these agreements individually. Instead their nationwide association BVPG negotiates them collectively, based on a central negotiating mandate. As a consequence, uniform conditions and marketing terms apply nationwide to all publishers and wholesalers.

The Bauer Media Group ("Bauer") challenged the central negotiating mandate before the District Court of Cologne. Rejecting the BVPG's defense that the joint negotiation was beneficial for consumers and exempted under Art. 101(3) TFEU, it found that BVPG illegally coordinated price and supply conditions.

Following the District Court's ruling, the new Section 30(2a) was introduced in the GWB. The section, in conjunction with Art 106(2) TFEU, declares the antitrust rules inapplicable to industry agreements to the extent that these agreements "provide for a comprehensive and non-discriminatory distribution of newspaper and magazine lines by newspaper and magazine wholesalers." Further, the new legislation declares that publishers and wholesalers are "entrusted with the operation of services of general economic interest within the meaning of Article 106(2) TFEU in order to ensure a comprehensive and non-discriminatory distribution of newspapers and magazines in stationary retail." According to Art. 106(2) TFEU, the rules on competition shall generally not be applicable to undertakings entrusted with the operation of services of general economic interest if these operations would otherwise be obstructed.

In the appeal proceedings, the DCA did not consider the wholesalers to be entrusted within the meaning of Article 106(2) TFEU and found the central negotiation mandate to be anticompetitive and illegal. In particular, it

11 FCJ, Decision of October 6, 2015, Case KZR 17/14 – *Presse-Grosso*.

12 *See* National Competition Report January – March 2012, p. 7. The Decision of February 14, 2012, Case 88 O (Kart) 17/11, is available in German at https://www.justiz.nrw.de/nrwe/lgs/koeln/lg_koeln/j2012/88_O_Kart_17_11_Urteil_20120214.html.

13 Düsseldorf Court of Appeal, decision of February 26, 2014, Case VI-U (Kart) 7/12 – *Presse-Grosso*. Available in German at https://www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2014/VI_U_Kart_7_12_Urteil_20140226.html.

rejected the argument that Section 30(2a) GWB as such entrusted the publishers and wholesalers with the operation of services of general economic interest, because they were not legally obliged to provide any of the services.

On further appeal, the FCJ dismissed Bauer's claim based on Section 30(2a) GWB in conjunction with Art. 106(2) TFEU. The FCJ stressed that it was within the German legislator's discretion to acknowledge that the comprehensive and non-discriminatory distribution of newspapers and magazines by wholesalers constitute services of general economic interest.

The FCJ went on to find that Section 30(2a) GWB in fact entrusted the wholesalers with the operation of services of general economic interest within the meaning of Article 106(2) TFEU. The FCJ based its reasoning on the fact that the current distribution-system had been in place for decades, providing for comprehensive and non-discriminatory distribution of newspapers and magazines, which was consciously taken into account by the legislator in passing the relevant Section 30(2a) GWB. In particular, it rejected the argument that the entrustment was conditioned on the forming of binding industry agreements.

Referring to the European Court of Justice's wide interpretation of Art. 106(2) TFEU, the FCJ concluded that the exemption of Art. 106(2) TFEU was applicable even if the operation of services was not in fact obstructed, but—in the comprehensible view of the Member State—merely endangered. The FCJ held that the Member States had a broad margin of discretion in this assessment.

In light of plausible price increases for the distribution of lower profile products and in rural areas, the German legislator's view that the comprehensive and non-discriminatory distribution of newspapers and magazines was likely to be obstructed if the competition rules were applied strictly was not objectionable. The FCJ emphasized the role of newspapers and magazines for the freedom of press and opinion.

Publishers of Advertising Journals Fined for Illegal Agreements

In December 2015, the FCO imposed €12.44 million in fines on three Saxon publishers of advertising journals and their persons in charge. Following a tip-off from the market, the FCO carried out dawn raids in June 2015 and found the companies had concluded illegal agreements on the discontinuation of competing advertising journals.[14]

The three companies involved are Chemnitzer Verlag und Druck GmbH & Co. KG ("Chemnitzer Verlag"), a subsidiary of Medion Union GmbH; WM-Beteiligungs- und Verwaltungs-GmbH & Co. KG ("WM"); and Dresdner Druck & Verlagshaus GmbH & Co. KG ("Dresdner Druck"), majority-owned by Gruner + Jahr GmbH & Co. KG.

The agreements began during a meeting at Leipzig Airport in April 2013. The companies agreed that Dresdner Druck and WM's "WochenSpiegel Sachsen," an advertising newspaper published in the Chemnitz region, would be discontinued. It had competed with Chemnitzer Verlag's "Blick." In return, Chemnitzer Verlag agreed to discontinue its "Sächsischer Bote," an advertising newspaper published in Dresden, so as not to compete with WM's "Wochenkurier" and Dresdner Druck's "DaWo" and "FreitagSZ." According to the FCO, the publishers knew that the coordinated discontinuations would minimize competition and are prohibited under competition law.

All companies and individuals involved agreed to settle the case. Because the companies cooperated with the FCO, their fines were further reduced. The fining decisions are not yet final, and may be appealed to the Düsseldorf Higher Regional Court.

[14] *See* FCO, press release of December 5, 2015, available in German at: http://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2015/08_12_2015_Anzeigenbl%C3%A4tter.html. A press release in English is available at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/08_12_2015_Anzeigenbl%C3%A4tter.html;jsessionid=412A4915A73C299DABC97BD184ED2485.1_cid387?nn=3591568.

FCO Concludes Proceedings Against Automotive Suppliers

On December 18, 2015, the FCO fined automotive supplier HP Pelzer Holding GmbH ("Pelzer") €15 million for price fixing. With this decision, the FCO concluded its proceedings against manufacturers of acoustically effective components for cars.[15] The FCO found that Pelzer and its competitors had agreed, inter alia, not to target each other's existing businesses or compete for new follow-up orders by car manufacturers.

In June 2015, the FCO had already fined five other automotive suppliers and the responsible individuals a total of €75 million for the same infringement.[16] The FCO reduced Pelzer's fine because the company cooperated and settled the case with the FCO under the FCO's leniency program. This decision brings an end to the FCO's first proceedings resulting in fines that were triggered by an anonymous notification to the FCO's electronic whistleblowing system ("BKMS").

Vertical Agreements

Hannover Regional Court Found Agreement on Minimum Resale Price Anticompetitive

On August 25, 2015, the Hannover Regional Court ruled that Almased Wellness GmbH ("Almased") violated German and European competition law by agreeing with pharmacies on a minimum resale price for its weight-loss drink "Almased Vitalkost."[17] Almased offered pharmacies a special discount of 30% on its product if they would present it in a proper way and would not undercut a price of €15.95 per box.

The Hannover Regional Court upheld the action brought by a German trade association committed to the protection of fair competition and found that the agreement between Almased and the pharmacies is a vertical restriction of competition pursuant to Section 1 GWB and Article 101 TFEU even though Almased did not directly determine the selling price but just set a minimum resale price.

It rejected Almased's argument that agreeing on a minimum resale price is justified under Article 101(3) TFEU, because the product is advice-intensive. This argument was not persuasive as Almased Vitalkost is not only distributed in pharmacies but also through several other distribution channels that do not offer any advice, such as drug stores or online shops.

Further, it found that the agreement's effect on competition is appreciable, even if the amount of products were limited to 90 units per pharmacy, because the agreement targeted all pharmacies in Germany (hence, a whole distribution channel). Finally, the Hannover Regional Court considered that the minimum resale price prevents pharmacies from competing with other sales channels by offering competitive prices. Almased appealed the decision to the Higher Regional Court of Celle.

FCO Closes Investigation in Mattress Case With an Additional Fine For Resale Price Maintenance

On October 22, 2015, the FCO fined mattress supplier Tempur Deutschland GmbH ("Tempur") €15.5 million for resale price maintenance.[18]

The FCO found that, between 2005 and 2011, Tempur agreed with its retailers to resell various products at Tempur's recommended end-consumer prices only. Tempur monitored retail prices, in particular of online sellers. If prices fell below the "recommended" price level, Tempur tried to persuade the respective sellers to increase prices, for example, by threatening to delay or stop deliveries, or revoking permission to use Tempur's brand name in online advertising.

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[15] *See* FCO press release of December 18, 2015, available in English on the FCO's website.

[16] *See* National Competition Report April – June 2015, p. 10; *see* FCO press release of June 24, 2015, available in English on the FCO's website.

[17] Hannover Regional Court, decision of August 25, 2015, case 18 O 91/15.

[18] *See* FCO, press release of October 22, 2015, available in English on the FCO's website.

The investigation was triggered by various complaints whereupon the FCO carried out dawn raids in August 2011 at Tempur's and several other companies' premises of the mattress industry. Tempur cooperated and reached a settlement with the FCO. It is the third and final fine the FCO imposed during its investigation of the mattress sector. In February 2015 and August 2014, the FCO had already fined Recticel Schlafkomfort GmbH[19] and Metzler Schaum GmbH[20] for resale price maintenance. The FCO closed remaining proceedings against two other mattress suppliers, two purchasing associations and an online retailer for discretionary reasons.

FCO Terminates Proceedings Against Three Car Manufacturers

On November 11 and December 1, 2015, the FCO terminated proceedings against car manufacturers Ford, Opel and PSA Peugeot Citroën concerning so-called "internet standards" imposed on car retailers, which contained specific requirements for the distribution of new cars via internet-based car portals such as "autohaus24" and "meinauto.de."[21]

Via these internet portals, customers can configure new vehicles in accordance with their preferences and will get a price indication for the car. If the customer ultimately decides to buy the vehicle, he concludes an intermediary contract with the portal. The portal then looks for a retailer able to sell the chosen car at the indicated price. If the portal is successful with its search, the customer concludes a purchasing contract directly with the retailer. The portal in turn gets a commission from the retailer.

While "internet standards" did not explicitly prohibit the sale of cars via those platforms, the FCO found they had a similar effect because any cooperation with these platforms would result in a loss of the retailers' bonuses or sales support. Indeed, the FCO's market investigation confirmed that many retailers refrained from cooperating with internet portals due to the threat of losing their bonuses or support from the car manufacturers.

The FCO held that the "internet standards" infringed Section 1 GWB and Article 101 TFEU as far as they restricted the activity of the internet portals as intermediaries between the retailers and the consumers. The FCO found that they were not exempted under the vertical block exemption regulation (VBER), because the restrictions at issue would constitute a hardcore restriction according to Article 4 c) VBER. Notably, the FCO found that the internet portals would have to be considered intermediaries in the sense of the supplementary guidelines on vertical restraints in the motor vehicle sector,[22] although according to those guidelines an intermediary is someone who buys a car for the end customer, whereas in the case at hand the intermediary only arranges the sale (without ever actually buying the cars), while the purchasing contract is concluded directly between the retailer and the end customer.

After the car manufacturers committed that their "internet standards" would not apply to internet-based car portals acting as intermediaries, the FCO terminated proceedings.

Asics Challenges FCO's Decision Concerning Online Sales Restrictions

On November 13, 2015, Sporting goods producer Asics announced that it was challenging the FCO's decision of August 27, 2015. The FCO had found that certain clauses in Asics' selective distribution agreements regarding the use of online price comparison websites and Asics's trademarks and brands on third-party websites constituted

[19] *See* National Competition Report July – September 2014, pp. 12-13.

[20] *See* National Competition Report January – March 2015, p. 10.

[21] A press release in English is available at the FCO's website: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/15_12_2015_Neuwagenportale.html?nn=3599398; a case report is available in German only at: http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Fusionskontrolle/2015/B9-28-15.pdf?__blob=publicationFile&v=5.

[22] Supplementary guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles, 2010/C 138/05.

excessive resale restrictions, and therefore unlawful restrictions of competition.

While Asics has changed its distribution policy after the FCO's decision, the company apparently still adheres to its view that its former selective distribution system, launched in 2011, was in compliance with German and EU competition law. Its persistence distinguishes Asics from other manufacturers of branded products, such as Adidas, whose distribution systems have fallen under the FCO's closer scrutiny and who immediately eliminated problematic clauses from their selective distribution agreements. Asics has, so far, been the only company who was not willing to cooperate with the FCO and has consequently been also the first company that was subject to a formal decision by the FCO because of allegedly anticompetitive restrictions of online sales.

FCO Initiates Proceedings Against Audible and Apple

On November 16, 2015, the FCO initiated administrative proceedings against Amazon subsidiary Audible.com ("Audible") and Apple Computer Inc. ("Apple") concerning a long-term distribution agreement.[23] According to this agreement, Audible is the exclusive provider of audiobooks to Apple's iTunes store in Germany.

Audible is one of the largest producers and a leading distributor of (digital) audiobooks in Germany and Europe, while the iTunes Store is one of the largest digital media trading platforms in the world. Given the strong market position of Audible and Apple, in particular with respect to the market for digital audiobooks, the FCO investigates the agreement in order to ensure that publishers have sufficient alternatives for the distribution of audiobooks.

The FCO's investigation was triggered by a complaint of the German Publishers and Booksellers Association ("Börsenverein des Deutschen Buchhandels"). As the complaint has also been sent to the European Commission, which is in parallel investigating separate allegations of market abuse by Amazon in the e-book sector, the FCO is in close consultation with Brussels.

Frankfurt Higher Regional Court Partially Annuls the Frankfurt Regional Court's Decision Concerning the Selective Distribution of Deuter Backpacks

On December 22, 2015, the Frankfurt Higher Regional Court partially annulled an injunction of the Frankfurt Regional Court, prohibiting the backpack manufacturer Deuter to refuse supplying the plaintiff, a retailer which sold Deuter products via amazon.de and also cooperated with price comparison websites.[24]

The plaintiff had originally filed his action for injunction after Deuter had established a selective distribution system in March 2013, not only prohibiting sales via internet auctioning platforms (*e.g.*, ebay) and market places (*e.g.*, amazon), but also cooperation with price comparison websites without Deuter's written consent.

The Frankfurt Regional Court granted the injunction because it found that both prohibitions restricted competition and thus violated Article 101 TFEU and Section 1 GWB.[25]

The Frankfurt Higher Regional Court reversed this decision as far as it concerned Deuter's ban to sell its products via third-party online sales platforms, particularly amazon.de. It found that Deuter did not abuse its position on the German market for outdoor backpacks when it enforced this prohibition. In particular, it held that Deuter did not impede the plaintiff's business in an unfair manner, because it considered the ban of sales via amazon.de to be a valid qualitative requirement under Deuter's German distribution agreement. The Frankfurt Higher Regional Court accepted Deuter's argument that the characteristics of its backpacks required the introduction of a selective

[23] *See* FCO press release of November 16, 2015, available in English on the FCO's website.

[24] Frankfurt Higher District Court, decision of December 22, 2015, case 11U 84/14 (Kart), available in German only at: http://www.lareda.hessenrecht.hessen.de/lexsoft/default/hessenrecht_lareda.html#docid:7475076.

[25] *See* National Competition Report July – September 2014, p. 13.

distribution system, including a ban of sales via amazon.de, because customers would need professional advice to choose the right backpack for their needs and because Deuter had a legitimate interest to uphold its brand image as a high quality product, which would be at risk if sales were allowed via amazon.de.

However, the Frankfurt Regional Court concluded that Deuter's rules concerning the use of online price comparison websites did in fact constitute a restriction of competition. It held that such a restriction was not required to satisfy the end consumers' need for professional advice or to uphold Deuter's brand image.

The Frankfurt Higher Regional Court's decision is the latest in a series of decisions by German courts dealing with restrictions on the use of third-party online sales platforms and price comparison websites. Interestingly, the Court did not follow the FCO's request to submit the case to the ECJ for a preliminary ruling, holding that the case did not affect trade between Member States.

Unilateral Conduct

Supply Obligation in High-End Suitcase Market

On September 17, 2015, the Munich Court of Appeals ruled that Rimowa, a leading manufacturer of suitcases in Germany, is under an obligation to conclude a supply contract with the plaintiff, a local retailer, due to Rimowa's dominant position on the high-end suitcase market.[26]

As regards market definition, the court held that while functionally comparable to low-cost luggage, the prestige and status associated with suitcases in the high-price segment rendered them non-substitutes for consumers and thus identified a separate product market for high-end suitcases. The Munich Court of Appeals found that Rimowa holds a dominant position in that market because the quality, unique design, and widespread distribution of Rimowa's suitcases made retailers dependent upon stocking them in order to remain competitive.

While acknowledging that Rimowa is in the process of reducing the number of retailers offering Rimowa suitcases in order to protect the brand image, the court found that there was no objective justification for Rimowa not to supply suitcases to the plaintiff, and that by doing so, Rimowa was abusing its dominant position.

In particular, the Munich Court of Appeals rejected Rimowa's argument that the plaintiff's bargain-based in-store presentation would not meet the qualitative criteria of Rimowa's selective distribution system. In fact, Rimowa's agreement allowed retailers a 12 months period to comply with all qualitative criteria. Since the plaintiff had not refused to change its store presentation accordingly, it held that Rimowa had violated the principle of non-discrimination by refusing to conclude a supply contract.

DCA Annuls FCO's "Wedding Rebates" Decision Against Retailer EDEKA

On November 18, 2015, the DCA annulled the FCO's "wedding rebates" decision[27] against retailer EDEKA[28] from July 3, 2014.[29] The FCO had found that EDEKA had abused its dominant position by demanding so called "wedding rebates" and other improved payment terms from four manufacturers of sparkling wine within the context of the acquisition of the "Plus" discount markets by EDEKA. "Wedding rebates" are retroactive rebates demanded by a (often dominant) customer from its suppliers as a consideration for (alleged) cost synergies resulting from a merger by the customer.

According to the DCA, it could not be established that EDEKA had abused its dominant position following the takeover of approximately 2,300 "Plus" discount markets.

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[26] *See* Higher Regional Court of Munich, judgment of September 31, 2015, case U 3886/14 Kart, available in German at: http://tlmd.in/u/1631.

[27] *See* FCO press release of July 3, 2014 (case B2-58/09) available in English, and FCO decision of July 3, 2014 available in German on the FCO's website. *See also* National Competition Reports Q3 2013 and Q2 2014.

[28] EDEKA group is a German retailer *inter alia* operates supermarkets, hypermarkets as well as discount markets in Germany.

[29] *See* DCA, decision of November 18, 2015, Case VI-Kart 6/14 (V), press release available in German at: www.olg-duesseldorf.nrw.de, decision available in German at: www.justiz.nrw.de.

The rebates and improved payment terms agreed between EDEKA and the sparkling wine manufacturers were the result of negotiations between parties of approximately equal negotiating power. This was confirmed by numerous witnesses. EDEKA's market power was balanced by the countervailing market power of the sparkling wine manufacturers. EDEKA depends on the sparkling wine manufacturers' products as consumers expect to find these in a supermarket. In light of this, the negotiations between EDEKA and the sparkling wine manufacturers were typical commercial negotiations with demands and counter demands between parties with equal negotiating power. To some extent, all four sparkling wine manufacturers were able to significantly reduce EDEKA's initial demands and negotiate substantial compensation.

The DCA also found that some of the FCO's accusations were unsubstantiated. Contrary to the FCO's assumption, EDEKA did not, for example, "unilaterally impose" improved payment terms on the sparkling wine manufacturers. Instead, EDEKA made new payment terms dependent on the approval of the sparkling wine manufacturers and entered into negotiations regarding future payment terms after the sparkling wine manufacturers had rejected EDEKA's initial demands.

The DCA's decision has been appealed to the FCJ. This appeal is still pending.[30]

Mergers and Acquisitions

FCO Announces Demerger of Organic Dairies Andechser and Söbbeke

On October 5, 2015, following a merger control proceeding, the FCO announced that the two largest dairies in Germany, Andechser Molkerei Scheitz GmbH and Molkerei Söbbeke GmbH, demerged and will compete independently once again.[31]

The large French dairy Savencia SA acquired 24.7% of Andechser's shares in 1999. Savencia subsequently acquired Söbbeke between 2011 and 2013 after receiving merger clearance from the FCO. As of 2011, both Andechser and Söbbeke were integrated into the Savencia group.

Upon realizing that Savencia gave false information during the merger control proceeding in 2011, the FCO started investigations and initiated divestiture proceedings. The investigations showed that Savencia submitted incorrect sales figures, failed to correctly reflect the market situation, and did not fully explain its potential influence on Andechser. Furthermore, Savencia did not distinguish between conventionally and organically produced dairy products, which represent independent markets. Together, Andechser and Söbbeke's organic dairy products achieved combined market shares of well over 50%. As a result, the Decision Division found that the merger significantly impaired the effectiveness of competition in several markets. Savencia proposed to sell its shares of Andechser to avoid the dissolution of the merger between Savencia and Söbbeke. The FCO agreed and stopped the divestiture proceeding as to Savencia and Söbbeke.

FCO Approves BMW, Daimler and Audi's Acquisition of Mapping Service HERE

On October 6, 2015, the FCO approved the acquisition of the mapping service HERE by the consortium of German car manufacturers BMW, Daimler, and Audi in Phase I proceedings.[32] HERE offers digital mapping databases, which together with navigation software form the basis of standard navigation applications. Customers include primarily the automotive and automotive supply industry,

[30] *See* FCJ, Case KVZ 1/16.

[31] *See* FCO, press release of October 5, 2015, available in German at: http://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2015/05_10_2015_Entflechtung%20_Molkereien.html. A press release in English is available at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/05_10_2015_Entflechtung_Bio_Molkereien.html?nn=3591568.

[32] *See* FCO, press release of October 6, 2015, available in German and English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2015/06_10_2015_HERE.html;jsessionid=5E828663EABD831B92509610C5A08A5D.1_cid387.

as well as smartphone and tablet manufacturers, and fleet management companies. The digital live maps together with sensors fitted into cars provide precise, individually tailored guidance for the cars which are key to the automated and eventually autonomous driving of cars.

HERE competes with TomTom and Google in the market for digital navigable databases with EEA-wide coverage. Google does not currently supply digital mapping technology to car manufacturers, as it is in the process of developing its own self-driving car.[33] Apple, which has a global agreement with TomTom for maps data and related information,[34] according to the FCO, has no specific plans regarding this area.

The FCO's assessment focused on the effect the concentration would have on the access of HERE's competitors to other car manufacturers and automotive suppliers and *vice versa*. It approved the merger after ruling out any foreclosure effects.

The approval in Germany is subject to the acquisition falling into the jurisdiction of the FCO, which still needs to be confirmed. Under European law, acquisitions of joint control which meet certain turnover thresholds and other criteria have a community dimension and therefore fall within the jurisdiction of the European Commission. The European Commission is still in the process of completing its assessment regarding whether it has jurisdiction. It could be argued that the FCO is trying to influence the conclusions of the European Commission with its approval. In a recent interview, the president of the FCO, Mr. Mundt, made it clear he considers a positive outcome in this case crucial in order for the German car industry to remain independent of and competitive with US corporations like Google on the market for autonomous cars in the future.[35]

German Car Manufacturer Porsche Must Deliver New Cars and OEM Spare Parts to Tuning-Company

On October 6, 2015, the FCJ ruled that German car manufacturer Porsche is obliged to supply new Porsche cars and original Porsche spare parts to Techart, a company specialized in tuning Porsche-cars individually and according to customers' preferences.[36]

In 2007 Porsche terminated its business relations with Techart, stopped any delivery of new cars and original spare parts, and denied access to its diagnosis and information system. Porsche argued that its selective distribution system was threatened because Techart was purchasing cars for its own account but on behalf of clients. The FCJ found Porsche's refusal to supply Techart to constitute an abuse of a dominant position pursuant to Sections 19(1), (2) No. 1, 20(1) GWB.

Techart's only business activity consists of individualizing and tuning Porsche cars. Over the years, it had developed brand-specific know-how and Porsche-specific programs and it was essential for Techart to be able to show its work results on new Porsche cars, as customers would expect this from a high-end tuning company. Consequently, the FCJ found that Techart was, as a medium-sized company dependent on Porsche as a supplier of its goods or commercial services pursuant to Section 20(1) GWB. The FCJ found no objective reasons that would have justified Porsche's refusal to supply Techart.

Additionally, the FCJ ruled that Porsche has to supply Techart with original Porsche spare parts. It FCJ found that Article 4 (b) (iv) of the vertical block exemption regulation (VBER), allowing the restriction of the buyer's ability to sell components, supplied for the purposes of incorporation, to customers who would use them to

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33 https://www.google.com/selfdrivingcar/.

34 http://www.reuters.com/article/tomtom-idUSnBw186851a+100+BSW20150519.

35 *See* FCO, interview with the newspaper "Rheinische Post", available in German at: http://www.bundeskartellamt.de/SharedDocs/Interviews/DE/2016/RP_Kunden_duerfen_nicht_eingeschlossen_sein.html.

36 *See* Federal Court of Justice, decision of October 6, 2015, case KZR 87/13.

manufacture the same type of goods as those produced by the supplier, was not applicable in this scenario because Techart would use the parts solely for tuning and individualizing Porsche cars.

Yet the FCJ determined that as long as Techart demanded the supply of original Porsche spare parts that were used by Porsche in its own tuning program, Porsche was allowed to deny supply, given that the parties are direct competitors to that end.

Finally, the FCJ decided that Porsche was required to grant Techart access to its diagnosis- and information system software because Techart needs this access in order to configure the new spare parts built in the Porsche cars.

Acquisition of EliteMedianet GmbH by Oakley Capital Limited Approved

On October 22, 2015, the FCO approved the acquisition of all the shares in EliteMedianet GmbH following Phase II proceedings, by an investment fund of Oakley Capital Limited. In assessing the transaction, the FCO particularly took into account user surveys it had conducted.

In its assessment of the relevant product market, the FCO reviewed whether dating platforms had to be divided into different markets based on the purpose of their use, the gender of the user, or the price charged. It identified three different purposes for using dating platforms: for finding a long-term partner, for dating, and for having an affair. The FCO concluded that the three categories of platforms had to be considered one product market, since users do not clearly distinguish between the three and very often use several platforms from different categories simultaneously. However, the FCO excluded social networks from the market because users joined these to stay or get in touch with friends, rather than to meet other singles. Once a user had set up his social network on one platform, switching to a different network was difficult. Such obstacles did not exist with dating platforms, according to the FCO. Regarding the gender distinction, the FCO concluded that the platforms were generally two-sided markets, because indirect network effects exist between the different users. The fact that some platforms are cheaper or free of charge for female users, but subject to a fee or more expensive for male users did not make a difference. A market is subject to indirect market effects, where the value of one side of the market increases (positive) or decreases (negative) for a user, the more the other side is used. The reason for users joining the platform was that the user wanted to get in touch with the users of the opposite gender, so the service was to establish that connection between the two user-groups—the market structure therefore required the market to be two-sided. Platforms displaying adverts were considered to be three-sided. The third side amounted to a separate market, as users joining the dating websites did not do so with the intention to see adverts. It was also determined that pricing should not be a criteria considered in dividing up the market. Though pricing varied substantially between the platforms, many expensive platforms offered discounts to users to ensure the proportion between men and women was always equal. Platform-providers confirmed this approach in the survey conducted by the FCO.

The geographic market was considered to be national in scope, since most platforms allowed users to search for candidates at national level, but redirected searches outside a country to the respective national platform.

The concentration was held to not significantly impede competition. With users relying on several platforms (multi-homing) and only using the platform for a specific period of time (generally until they meet someone), the FCO considered it unlikely that the market power of the involved parties would tip as a result of the transaction. In addition, it concluded that the transaction would not increase the market power of the involved parties, enabling them to substantially increase prices. The pressure to innovate and low barriers to entry prevented this.

Interview with FCO President Regarding Sector Enquiry Into Rolled Asphalt Industry

On December 14, 2015, the president of the FCO, Mr. Mundt, gave an interview to the industry magazine "Asphalt and Bitumen" regarding the sector enquiry into the market for rolled asphalt.[37] In its sector enquiry, the FCO came to the conclusion that the rolled asphalt sector was characterized by a dense network of corporate links between competitors, through reciprocal shareholdings in a substantial part of all the asphalt plants set up as joint ventures. Particularly the four major suppliers Werhahn, STRABAG, EUROVIA, and KEMNA held stakes in many of the joint ventures. The structure of the market led to shareholders and JVs being active in the same market resulting in the companies not actively competing against each other.

In its initial report following the sector enquiry, the FCO had outlined the conditions under which it applied the rebuttable presumption that the joint venture agreement was restrictive under Section 1 GWB.[38] As a consequence of its findings, the FCO opened proceedings relating to 104 joint ventures with the aim of introducing more effective competition in the rolled asphalt market by dissolving anticompetitive company interlocks.[39] Mr. Mundt confirmed that 98 of these proceedings have been completed: 81 joint ventures have been dissolved or their shares divested. Two proceedings are very close to completion and four joint ventures still need to be assessed.

Policy and Procedure

CDC Files Another Damages Action Against Cement Producer in Germany

On September 16, 2015, the Belgian special purpose vehicle CDC filed yet another cartel follow-on damages action in the long-standing German cement cartel saga, in this instance, before the Regional Court of Mannheim.[40]

After the DCA had confirmed in February 2015 the Düsseldorf District Court's dismissal of CDC's initial action against various cement producers, CDC filed an action against only one of the cartel members, namely HeidelbergCement, after settlement negotiations between the parties had failed. CDC alleges damages of more than €138 million based on claims assigned to it by 23 mostly medium-sized companies which had purchased cement in HeidelbergCement's distribution area during the cartel period.

CDC's earlier action before the Düsseldorf District Court was rejected, primarily because, in the DCA's view, CDC lacked standing. The DCA found the former assignments of damages claims to CDC to be in breach of public policy because they threatened to undermine the German "loser pays" principle, since CDC's insufficient funding would have prevented it from reimbursing court costs if defeated.[41] To take account of the funding requirements established by the DCA, CDC announced that it had not only paid all court fees and adverse legal costs in the Düsseldorf proceedings to the full extent, but that it had also provided security of €2.3 million to the benefit of HeidelbergCement and the court cashier before filing its action with the Mannheim court.

[37] For a summary of the status report regarding the divestiture and dissolution proceedings, *see* National Competition Report, June – September 2015, pp.17-18.

[38] For a summary of the sector inquiry, *see* National Competition Report, October - December 2012, p. 15.

[39] For a summary of the status report published by the FCO on July 17, 2015 regarding the divestiture and dissolution proceedings, *see* National Competition Report, June – September 2015, pp.17-18.

[40] *See* CDC press release of October 29, 2015, available in English on CDC's website at: http://www.carteldamageclaims.com/wordpress/wp-content/uploads/2014/02/Press-Release-Cement-II-151029.pdf.

[41] *See* Düsseldorf Court of Appeals, decision of February 18, 2015, case VI-U (Kart) 3/14; also see CGSH Alert Memo of April 20, 2015, available on the CGSH website.

Regional Court of Berlin Renders Landmark Decision With Regard to Prima Facie Evidence in Cartel Follow-on Damages Actions

On December 16, 2014, the Regional Court of Berlin rendered a landmark decision with regard to cartel follow-on damages actions in Germany. It favored the plaintiff in an action against a member of the rail cartel and its legal successor.[42]

In July 2013, the FCO had imposed fines on eight companies for anticompetitive bid-rigging in the period from 2001 through 2011.[43] As part of the settlement procedure with the FCO, the defendant had admitted its participation in the cartel.

When assessing whether the plaintiff suffered any causal damage, the Regional Court of Berlin held that, *prima facie*, the circumstances of the case were sufficient to assume that the plaintiff had suffered harm from the defendant's participation in the cartel. The fact that the defendant had been a member of a broad, supra-regional cartel indicated that the contracts between the parties were affected by the cartel infringement and therefore financially detrimental to the plaintiff.

In order to rebut *prima facie* evidence, the defendant was obliged to present facts as to the actual scope of the bid-rigging conspiracy. A rebuttal required more than the mere assertion that the transactions at hand were not specifically affected by the cartel – particularly when that finding resulted from the defendant's own internal investigations.

In the case at hand, the defendant had failed to overcome the presumption of the cartel's effect on the parties' transactions. Even though the Regional Court of Berlin conceded that it might well be unreasonable to ask defendants to incriminate themselves, a plaintiff's lack of evidence weighted more heavily.

Interestingly, the Regional Court of Berlin further upheld a lump-sum compensation clause in the parties' agreements, which required the defendants to pay 5% of the gross invoice price in case of bid-rigging. It relied on a previous judgment by the Higher Regional Court of Karlsruhe which upheld a similar clause awarding the defendant as much as 15% of the purchase price.[44]

Finally, with regard to the suspension of limitation due to the initiation of cartel proceedings, the Regional Court of Berlin's decision, which was only published in November 2015, comports with a February 2015 landmark decision by the DCA.[45] Both held that the GWB's rules on suspension, that only came into force in July 1, 2005, also apply to damages claims that arose prior to July 1, 2005 if (i) the damages claims in question were not time-barred at the time, and (ii) the decision of the competition authority was not final and legally binding at the time.

Düsseldorf Labor Court of Appeal Denies Sales Manager's Liability for Cartel Fines

On November 27, 2015, the Düsseldorf Labor Court of Appeals found that a former sales manager is not liable for cartel fines or related costs incurred by his former employer,[46] thereby confirming the preceding decision by the Essen Labor Court.[47]

A former sales manager had sued a ThyssenKrupp subsidiary for bonuses and outstanding salary. By way of a counter claim ThyssenKrupp claimed payment of a part

[42] Regional Court of Berlin, decision of December 16, 2014, case 16 O 384/13.

[43] FCO press release of July 23, 2013, available in English at http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/23_07_2013_Schienen.html.

[44] Higher Regional Court of Karlsruhe, decision of July 31, 2013, case 6 U 51/12 (Kart); *see also* National Competition Report January – March 2015, p. 7.

[45] DCA, decision of February 18, 2015, case VI-U (Kart) 3/14; *see also* National Competition Report January – March 2015, p. 19.

[46] *See* Düsseldorf Labor Court of Appeals, decision of November 27, 2015, Case 14 Sa 800/15, press release available in German at: http://www.lag-duesseldorf.nrw.de, decision available in German at: www.justiz.nrw.de.

[47] *See* Essen Labor Court, decision of October 9, 2012, Case 2 Ca 298/12, available in German at: www.justiz.nrw.de.

of the cartel fines, attorneys' fees as well as other costs (in total €300,000) relating to the German rail cartel decision, in which the FCO had imposed fines of €88 million on ThyssenKrupp and its subsidiaries. Furthermore, the company had filed an action for declaratory judgment, stating that the sales manager is liable for all damages resulting from cartel agreements concerning certain contracts.

The Essen Labor Court dismissed the company's counter claim as well as the declaratory judgment. Upon appeal the Düsseldorf Labor Court of Appeals upheld the Essen Labor Court's decision.

It found that with regard to a number of contracts the company could not prove that the sales manager had participated in the relevant cartel agreements. According to the Düsseldorf Labor Court of Appeals, witnesses questioned by the Court either did not confirm the company's allegations or made use of their right to refuse to give evidence in order to avoid self-incrimination.

Düsseldorf Labor Court of Appeals also stated that the company's management and executives had created a system of cartel agreements. Furthermore, the management and executives had encouraged employees to make use of this system during a conference in 2001. Consequently, the degree of contributory negligence by the company's management and executives was so significant that the sales manager was not liable towards the company even if it were assumed that the sales manager had participated in the cartel agreements. Additionally, it stated that it would have been the company's responsibility as an employer to ensure that its business conduct did not violate antitrust laws.

Düsseldorf Labor Court of Appeals' decision has been appealed to the Federal Labor Court. This appeal is still pending.[48]

[48] *See* Federal Labor Court, Case 8 AZN 1150/15.

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").

Abuse of Dominance

The Hellenic Competition Commission Imposes a €31 Million Fine to Athenian Brewery SA, the Greek Subsidiary of Heineken N.V., For Abuse of Dominant Position

The issuance of the HCC Decision no. 590/2014, published in the Government Gazette in December 2015, consisting of 586 pages, may be the longest in its history. It represents the end of a long *ex officio* investigation initiated in 2001 into the commercial practices of Athenian Brewery ("AB"). Also considered during the course of the investigation was a 2006 complaint filed by competitor Mythos Brewery SA ("MB"), a subsidiary of Carlsberg Brewery A/S. Ultimately, the Commission found a single and continuous infringement, lasting from1998 until the issuance of the decision in September 2014.

MB's complaint pointed at a number of anticompetitive exclusionary practices by AB, including the imposition of exclusivity to its customers for its beer products, loyalty rebates, beneficial credit terms to big wholesalers in order to ensure competitor foreclosure, etc.

Regarding the definition of the relevant product market, AB submitted that the market included not only beer, but also bulk and bottled wine and ready-to-drink beverages. Influenced by a stable line of decisions by the European Commission, the HCC opted for a narrow definition solely comprised of beer. It further distinguished a wholesale from a retail market, and additionally bisected the retail market into impulsive consumption (*e.g.*, Horeca –hotels, restaurants, cafeterias) or cold channel and future consumption comprised of supermarkets and more broadly all off-licensed points of sale ("POS") or warm channel.

With respect to dominance, the HCC first examined market shares. On the basis of volume of consumption, AB held a stable share of [75–85]% since the year 2000 which fell to [55–65]% in the years 2011 and 2012. The complainant MB followed at a long distance with a share starting from [5–15] % in the year 2000 and reaching [15–25%] in the years 2011-2012. The remaining three smaller breweries held together a share of [0–5]% until 2009. The HCC noted that AB's position in the Greek market was much stronger than that held by other Heineken subsidiaries in other member states and that these very high shares were recognized in AB's internal documents collected during inspections by the Directorate.

AB argued that the decline of its market share over the years and the respective increase of the share of its competitors proved that it was not dominant. Additionally, it pointed out that it did not profitably increase its prices above the competitive level for a significant period of time. AB continued, citing that during the last 8 years approximately 14 new breweries had entered the market, although admittedly with minimal shares, and that despite arguments raised by competitors, that the size of required advertising expenditure and tight control over the wholesale distribution network constituted barriers to entry, such obstacles did not actually exist.

The HCC based its finding of dominance primarily on the market share, as this was stable and substantially high for a number of years while that of its competitors was considerably smaller. On a number of occasions, it referred to the annual reports of the Heineken Group and other AB internal reports stating that AB was the leading brewery in Greece. Also, the HCC held that economic power is not measured by profitability and that AB's economies of scale, high value brands, and widely expanded wholesale distribution network made it an unavoidable trading partner, and combined with the costs involved in the creation of a competitive distribution network did, in fact, constitute barriers to entry.

Concerning the abusive practices of AB, the HCC divided them in three groups and examined each one separately: (i) exclusivity of its beer products in the impulsive market (key accounts and individual POS), (ii) loyalty rebates granted as reward for satisfactory AB shelf share in supermarkets, and (iii) ,the beneficial treatment of wholesalers involved in foreclosing competitors. It is important to note that the HCC viewed all of these practices as constituting a single continuous infringement because the behavior lasted for many years, it was successive and complementary, and served the common purpose of foreclosing AB competitors. Although varied, these practices as a whole were the expression of an AB planned strategy to restrict competition.

As regards the exclusivity of its beer market, the HCC examined a large number of contracts with AB key accounts, *eg.* chains of restaurants, fast food, hotels, etc., and unanimously concluded that it had imposed exclusivity. In an unprecedented degree of detail, the HCC described the infringing terms in AB contracts dating from 1998 until 2013, thus the length of the decision. AB had concluded long term or successively renewed short-term contracts which included terms on the exclusive purchase and sale of AB beer products, as well as the provision of loyalty rebates and other substantial financial advantages as a reward for this exclusivity. On top of such clauses, there was a range of complementary clauses reinforcing such exclusivity and dependence, for example, that the customer could obtain beer from a competitor only if AB were unable to provide its products, in which case it was instructed to inform AB of the identity of the competing source of supply and if, on that occasion, it had to pay a higher price, AB would compensate the difference, etc.

In addition, AB rewarded its customers by offering target rebates which were individualized and retroactive, with a long reference period, and were paid to the customer in advance. If the target sales (which were equal or even higher than the sales of the reference period) were not achieved, the customer was responsible for returning them.

Lastly, AB secured its exclusivity by conferring economic benefits in exchange for the promotion of its products. The amount of these benefits was calculated as a percentage on the wholesaler's turnover with AB. Frequently, this amounted to 80–90% of their expected turnover for future years with AB, although the benefits were granted in advance, from the first year of their collaboration. In view of these tying characteristics, the HCC concluded that despite appearing to be benefits exchanged for promotion and advertising, their intended purpose was to secure exclusivity.

The HCC stated that of the AB contracts examined with more than 50 fast food chains, evidence of an explicit or *de facto* exclusivity was identified in 78% of the cases. The Commission found that although contracts from more recent years for example, 2010 and 2011, did not contain the exclusivity clause (and in some instances explicitly stated it was non-exclusive), the agreed target rebates and other economic benefits achieved the same result. The HCC rejected AB's argument that the exclusive purchase of their beer reflected the will of these customers to have an efficient and uniform source of supply for all their outlets, which would also reduce their administrative costs. The HCC held that an undertaking which is dominant and ties purchasers, even if it does so at their request, by an obligation or promise on their part to obtain all or most of their requirements exclusively from said undertaking, abuses its dominant position whether the obligation in question is stipulated without further qualification or is undertaken in consideration of the grant of a rebate.

The decision further analyzed a number of documents collected during inspections in AB's premises, mainly reports from salespersons to their supervisors from their visits to customers and case studies used to train sales teams, and found that they revealed an underlying commercial policy designed to foreclose competition. In fact, the success of the sales methods was determined based on their ability to exclude the competitor's product. The HCC rejected as unfounded AB's argument that these were incidents of employees misinterpreting guidance,

and that foreclosure tactics which may have been adopted in a small number of cases did not reflect the position of senior management.

Additionally, the decision referred to numerous incidents involving the complainant whereby, shortly after the complainant approached a POS to make an offer for collaboration, the POS rejected that offer claiming that AB had made a very attractive counter offer involving substantial financial advantages, sometimes so high as to absorb any profit of AB, or other kinds of benefits (free replacement of furniture and equipment, covering the cost of printing of price lists, etc.) and as a result the POS decided to collaborate exclusively with AB. The complainant also presented incidents of "aggressive" offers by AB sales representatives aimed at inducing the POS to terminate its cooperation with competitors and to establish an exclusive relationship with AB. Requests for information issued by the Directorate to POSs and AB competitors and wholesalers generated evidence of provisions linking substantial economic benefit with exclusivity. It was also discovered that AB frequently refrained from executing written agreements regarding such benefits, which were granted "indirectly" through a wholesaler, such as by way of issuance by the wholesaler which supplied a POS of an invoice for provision of services or a credit note. Therefore, the HCC concluded that AB sought to prevent its customers from obtaining supplies from rival undertakings with or without financial advantages.

The HCC then examined the second group of AB practices which involved granting a reward for what it considered to be "satisfactory" shelf share. The majority of the HCC members concluded that such rebates had a foreclosure effect because they were individualized, retroactive, and granted by the leader of the market. However, a strong minority determined that based on evidence in the Statement of Objections it did not result that this financial advantage was related to the achievement of a specific target by the supermarket because it is commercially reasonable for an undertaking to want to secure a presence on the shelf reflecting its potential. According to the minority view, the Directorate should have substantiated that the space or the number of the SKUS included in the rebate scheme was unjustifiably large therefore access to the shelf by actual or potential competitors was precluded.

The third group of abusive practices examined by the HCC included practices extending beneficial treatment and economic advantages to wholesalers in return for their exclusivity or competition foreclosure. The evidence suggested that AB guided the POSs in a given region to conclude supply agreements with a specific (preferred) wholesaler in that region. Further, AB encouraged a triangular relation in that AB sold and invoiced the POS but the product was delivered directly to the POS by the local wholesaler, and the local wholesaler received a commission for this service, thereby increasing his income. AB also extended the length of payment terms in anticipation of forthcoming price increases for example, in the summer season, which induced wholesalers to stock bigger quantities of AB products at the old prices eliminating space for competing products. Additionally, AB offered better credit terms to those wholesalers with exclusive (or nearly exclusive) contracts, for example, granting them long term loans so as to increase their dependence on AB. Conversely, AB revoked advantageous credit terms from those wholesalers which decided to purchase competing products The HCC unanimously held that the above practices with the objective of excluding competitors.

Regarding the fine, the HCC decided that despite the different expressions of AB's abusive conduct, as described above, they were part of a single, serious and long lasting infringement of article 2 of the Greek antitrust law and 102 TFEU. Although their combined actions were varied, they had one common goal which was to restrict competition therefore a single fine was appropriate. Since the infringement lasted a total of 16 years, from September 1998 through September 2014, the HCC calculated the basic fine using the value of sales of AB beer products for these years. The HCC did not find any aggravating or mitigating circumstances. Given that the

basic fine exceeded the 10% of the total turnover in the preceding business year (2013), it was reduced to that amount, totaling €31million.

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.

Taxi Licensing Outside the Scope of Competition Law

On October 16, 2015, the High Court handed down its decision finding that taxi licensing is not an economic activity, and thus outside the scope of competition law.[49]

The case concerned the regulation of taxi licenses, and the alleged unlawfulness of State and local authorities permitting a licensing regime to operate in such a way that significant losses resulted from overnight market liberalization in November 2000. The restrictive nature of the initial regulatory regime had given rise to a valuable secondary market in taxi licenses that was eliminated on liberalization. As a result, the plaintiffs lost significant capital value that had built up in their licenses. The plaintiffs sought a declaration on the unlawfulness of the relevant regulations,[50] including on grounds of abuse of a dominant position contrary to Article 102 TFEU and section 5 of the Competition Act 2002.

On abuse of dominance, the High Court was concerned only with the question of whether the relevant public authorities were undertakings—that is, whether they were performing an economic activity when determining the number of and issuing taxi licenses.

The High Court identified that the relevant public authorities can only perform taxi licensing activities if so empowered by the State; private actors cannot perform such functions unless similarly authorized by Regulation. The High Court also highlighted that "[i]*n deciding on the number of licenses, and issuing same, and charging a license fee, the councils are performing only a regulatory function or an administrative function in the public interest*," it emphasized the public service nature of the taxi industry and the public interest of the relevant Minister in making regulations for that public service.[51]

On the facts, the High Court rejected the application of the 'comparative criterion test.'[52] The High Court dismissed theoretical evidence that private actors could perform taxi licensing activities, and even compete with each other for the authorization of taxi licenses: "*It bears no real relationship to a taxi industry regulated in the public interest*."[53] Looking at the commercial reality, it was not convinced that "*the activity of determining the number of licenses* […] *is something which in any sensible way could even in principle be seen as something which could be done by a private operator or a number of private operators*," particularly given the cooperation needed between public actors.[54]

On this basis, the plaintiffs' competition law claims failed.

Subsidized Harbor Charges Did Not Constitute an Abusive Price

On December 15, 2015, the Supreme Court found that local authority Galway County Council ("GCC") had not abused its dominant position in the supply of harbor services.[55]

The case concerned fees for the use of harbors Cill Rónáin on Inis Mór (an Aran Island) and Ros a' Mhíl on the West Coast of Galway. The Supreme Court considered competition law only in relation to charges imposed by GCC for access to Cill Rónáin, charges that had been introduced in 2014 to assist in the upkeep and supervision of the harbor. GCC decided to subvent the

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49 *Muldoon v. The Minister for the Environment & ors* [2015] IEHC 649.

50 The Road Traffic (Public Service Vehicles) (Licensing) Regulations, 1978 (S.I. No. 292/1978); and Road Traffic (Public Service Vehicles) (Amendment) (No. 3) Regulations, 2000 (S.I. No. 367/2000).

51 Para. 253.

52 That is, determining whether a task performed by a public authority is an economic activity by considering if, in principle, that task is capable of being performed by a private actor.

53 Para. 254.

54 Para. 256.

55 *Island Ferries Teoranta v. Minister for* Communications*, Marine and Natural Resources & ors* [2015] IESC 95.

annual costs by €70,000 every year, and these subsidized charges were based on passenger numbers: for non-regular users, the fee was €0.80 per capita. The action was brought by Island Ferries, sole operator of ferry services from Ros a' Mhíl, possessing a public contract to operate a year-round service.

GCC accepted that it and the State held a dominant position in the market for the provision of harbors for ferries operating to the Aran Islands. Thus, the Supreme Court was concerned only with the nature of the price of the fee and its justification.[56] Island Ferries claimed that GCC's exclusive control of the harbor enabled it to fix an unfair price for bringing visitors to the islands.

The Supreme Court rejected this claim. It found that the charges had "been depressed in order to maintain revenue in the context of price non-elasticity and not for any predatory or unfair purpose."[57] Drawing on United Brands,[58] the Supreme Court identified that the subsidized pricing was not abusive because GCC was not gaining any trading benefit. The Supreme Court highlighted that price by itself is not the sole determinant, but price in relation to a product's economic value—and thus took into account that the price for using the harbor would have been much higher without the subsidy.

The Supreme Court also found that the charges had not distorted competition. On the supply side, it was costs that would prevent another economic operator from entering the market (whether by building a new harbor or taking over the operation of Cill Rónáin); on the demand side, the €0.80 fee would not inhibit new entrants, only the economies of scale in operating a ferry service. Indeed, the Supreme Court found no market foreclosure, but that the modern harbor, made possible through the charges, enhanced competition between ferry operators.

[56] Neither side brought arguments concerned with social utility. Indeed, the Supreme Court noted that there is no provision in the Competition Act 2002 equivalent to Article 106 TFEU; GCC was unable to argue that its pricing took into account the social utility of keeping transport connection between Ireland its offshore islands.

[57] Para. 55.

[58] *United Brands Company and United Brands Continentaal BV v. Commission of the European Communities* (Case C-27/76) EU:C:1978:22.

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").

Antitrust

The TAR Lazio Endorses the ICA's Practice of Re-Opening a Past Investigation Concluded with Remedies and of Initiating, at the Same Time, Proceedings for Breach of Remedies, but Requires in Such a Case a Stronger Standard of Proof to be Satisfied by the ICA

On November 4, 2015, the TAR Lazio quashed a number of ICA decisions against various shipping companies, which had allegedly participated in a cartel regarding ferry services provided in the Gulf of Naples.[59]

In 2008, the ICA started a cartel investigation concerning the market for passenger sea transport services in the Gulf of Naples and Salerno. The ICA concluded the investigation without finding any competition law infringement because it accepted the commitments proposed by the investigated shipping companies and made them binding.

Then, on May 30, 2013, the ICA initiated proceedings for breach of these commitments and, at the same time, exercised its power to re-open the investigation on its own initiative. On January 28, 2015, the ICA concluded that the companies did not respect the binding commitments, finding "*a systematic exchange of sensitive information*" and "*an anticompetitive agreement realized through a complex and articulated strategy by all the main local ship-owners to share costs and revenues on the basis of predefined historical quotes and not of the activity effectively carried out.*"[60]

The shipping companies appealed to the TAR Lazio. The TAR Lazio rejected the procedural grounds put forward by the appellants and endorsed the ICA's decision of carrying out two parallel proceedings (namely, the re-opening of the investigation and proceedings aimed at imposing a sanction for breach of the commitments, pursuant to paragraphs 2 and 3 of Article 14-ter, Law No. 287/90, respectively). In doing so, the TAR Lazio made reference to the fact that the acceptance of remedies does not imply any evaluation—either positive or negative—of the anticompetitive nature of the investigated conduct.

However, the TAR Lazio upheld the appeal on the merits, finding that the ICA had failed to sufficiently prove the existence of the concerted practice put in place by the shipping companies. First, the TAR Lazio affirmed that the conclusions drawn by the ICA pointing to the existence of a concerted practice were not the only plausible explanations for the parallel behavior of the investigated companies and that it could be explained differently in light of the companies' defenses.

In addition to noting the lack of sufficient evidence, the TAR Lazio highlighted the contradictory behavior of the ICA. During the first investigation concluded with the acceptance of commitments in 2009, the ICA had taken into account the fact that the investigated parties' activity took place in the context of a regulatory framework inducing the companies to cooperate through the creation of specific associative bodies (*e.g.*, CLMP, ACAP). The ICA had deemed it sufficient to accept the commitment of dissolving these bodies. On the contrary, in the 2013 infringement proceedings, the ICA did not consider the regulatory framework at all and took a completely different

[59] *Alicost SpA, Alilauro Gruson SpA, Servizi Marittimi Liberi Giuffré & Lauro Srl; Alilauro SpA v. ICA* (Judgment No. 12416), TAR Lazio decision of November 4, 2015; *Snav SpA v. ICA* (Judgment No. 12421), TAR Lazio decision of November 4, 2015; *Consorzio Linee Marittime Partenopee in Liquidazione, Associazione Cabotaggio Armatori Partenopei e Gescab Srl v. ICA* (Judgment No. 12422), TAR Lazio decision of November 4, 2015; *Medmar Navi SpA v. ICA* (Judgment No. 12423), TAR Lazio decision of November 4, 2015; and *Navigazione Libera del Golfo Srl v. ICA* (Judgment No. 12428), TAR Lazio decision of November 4, 2015.

[60] *Organizzazione Servizi Marittimi nel Golfo di Napoli* (Case I689C), ICA decision of January 28, 2015.

stance in examining the companies' behavior, even dating the cartel back to 1998. This inconsistency, together with a lack of substantial proof and presumptive conclusions, led the TAR Lazio to conclude the ICA had not adequately proven the existence of a concerted practice.

The Italian Supreme Administrative Court Affirms that Penalties for Delay in Payment of Antitrust Fines Cannot be Imposed From the Expiry of the Deadline Set in the Decision of the ICA, When the Decision is Annulled at First Instance and then Definitely Reaffirmed on Appeal

On June 28, 2011, the ICA levied a €5.1 million fine on Bayer CropScience s.r.l. ("Bayer").[61] At that time, Bayer did not pay the fine. On May 16, 2012, following Bayer's appeal, the TAR Lazio set aside the ICA decision,[62] which was later restored by the Italian Supreme Administrative Court ("CdS") on January 29, 2013.[63]

On January 30, 2013, the ICA served Bayer with a payment request for the initial fine plus a surcharge of 10% for each semester of delay in payment, imposed pursuant to Article 27, paragraph 6, of Law No. 689/1981. The delay (for the surcharge) was calculated as starting from the expiry of the first deadline set for the payment of the fine (*i.e.*, October 3, 2011), established in the ICA decision, and as ending at the moment that the CdS ruling was issued.

Bayer appealed the ICA's request for payment, maintaining that, because the TAR Lazio had annulled the ICA decision *before* the expiry of the payment deadline set out in the decision, the 10% surcharge should have instead been calculated as starting from the day that the CdS issued its decision. On June 11, 2013, the TAR Lazio annulled the ICA's request for payment affirming that the surcharge was only due starting from the date of the CdS ruling which reinstated the ICA antitrust decision.[64]

The ICA appealed to the CdS arguing that the TAR Lazio's interpretation frustrated the deterrent function of penalty surcharges imposed for delay in payment. However, on December 1, 2015, the CdS, upheld the TAR Lazio finding..[65]

In its ruling, the CdS distinguished administrative sanctions having a restorative nature from those having a punitive one. In particular, it determined that the surcharge for delay in payment should be confined to punitive sanctions, which require the presence of both an objective (*i.e.*, the delay itself) and a subjective element (*i.e.*, responsibility for the delay). According to the CdS, neither of the two elements was present. Indeed, the TAR Lazio annulment of the ICA decision imposing the fine was retroactive to the day on which the appeal was served (*i.e.*, March 28, 2012), while the deadline to pay the fine was set to expire only after that date (*i.e.*, on April 4, 2012). The TAR Lazio ruling suspended the effectiveness of the request for payment and, as a consequence, the period set for the timely payment of the fine. According to the CdS, this period restarted in January 2013 following its ruling reinstating the effectiveness of the ICA's decision. Consequently, there had been no delay attributable to the company.

The TAR Lazio Annuls an ICA Decision Establishing a Concerted Practice of Two Insurance Companies in the Market for Insurance Services for Civil Liability of Public Transport Vehicles

On December 18, 2015,[66] the TAR Lazio annulled the decision of the ICA of March 25, 2015[67] that found

[61] *Sapec Agro/Bayer-Helm* (Case A415).

[62] *Bayer v. ICA* (Judgment No. 4403/12).

[63] *Bayer v. ICA* (Judgment No. 548/13).

[64] *Bayer v. ICA* (Judgment No. 5822).

[65] Judgment No. 5425/15.

[66] *Generali Italia S.p.A. v. ICA* (Judgment No. 14281/15), TAR Lazio decision of December 18, 2015; and *Unipol Assicurazioni S.p.A v. ICA* (Judgment No. 14282/15), TAR Lazio decision of December 18, 2015.

[67] *Gare RCA per trasporto pubblico locale* (Case I744).

Generali Italia S.p.A. ("Generali") and Unipol Assicurazioni S.p.A. ("Unipol") liable for bid rigging practices in the market for insurance services for civil liability of public transport vehicles.

The ICA had sanctioned Generali and Unipol for a single overall agreement aimed at reducing the number of bidders in several tender procedures, thus compelling the relevant contracting authorities to negotiate, on less favorable terms, a new agreement with the incumbent company, *i.e.*, the company that was awarded the concerned insurance services in the previous tender.

The TAR Lazio allowed the claims of Generali and Unipol, recognizing that the ICA decision was based on single and isolated elements lacking in clear meaning and sufficient probative value. The ICA had selectively identified these elements and interpreted them in such a way as to substantiate its allegations. The TAR Lazio stated that reasoning based on legal presumption can only be upheld when it relies on clear unequivocal elements. The TAR Lazio noted that pursuant to settled European and national case-law, indirect evidence should be subject to an overall evaluation that, while not imposing a meticulous analysis of each element, still requires the evidence collected to be consistent. Therefore, the ICA should have gathered evidence that unequivocally confirmed that the companies' parallel behavior in the tender procedures was the consequence of collusion.

Moreover, the TAR Lazio stressed the fact that potential competitors with an aggregate market share of about 60–70% had not presented a bid in the investigated tender procedures confirming that the affected market did not appear profitable enough for insurance companies, or at least that Generali and Unipol's behavior did not appear anomalous. Consequently, it was plausible that the decision by sanctioned companies not to submit a bid could have been an economically rational decision, individually taken by each of them, thus representing a reasonable alternative explanation for their behaviour on the market than the contested collusion.

The TAR Lazio further noted that an agreement among two undertakings not having, individually or jointly, significant market power, is *per se* unable to produce a distortion of competition on the market.

NETHERLANDS

This section reviews developments under the Competition Act of January 1, 1998 (the "Competition Act"),[68] which is enforced by the Netherlands Authority for Consumers and Market (Autoriteit Consument & Markt, "ACM").[69]

Legislation

Consultation Dutch Implementing Measure of the Directive on Antitrust Damages Actions

In December 2014, Directive 2014/104/EU on antitrust damages actions entered into force. Almost one year later, in October 2015, the consultation on the Dutch implementation of the directive was published .[70] The proposed implementation only concerns damages claims that result from violations of Articles 101 or 102 TFEU. Damages claims relating to purely national infringements are excluded from its scope and will be regulated in a separate measure. The directive is envisaged to be implemented through amendments of the Dutch Civil Code ("BW") and Civil Procedural Code ("Rv").

The Dutch legislator considered that disclosure requirements laid down in the directive are already safeguarded by Article 843a Rv which offers even broader access to documents than the directive itself, albeit with one exception, namely, access may be refused when it can be reasonably assumed that proper administration of justice can be guaranteed despite refusal. Because this exception contradicts the directive, the proposal introduces a whole new section which provides for *Access to Documents in Cases Concerning Infringements of Competition Law* (Section 1A), while only exempting leniency statements and settlement submissions from the disclosure obligation. Even though the legislator considers this disclosure framework to be wider than required by the directive, practitioners and academics have questioned the practical application of disclosure norms. They point out that in practice, gaining access to certain documents can actually be more difficult than what legislation suggests.[71]

Moreover, Section 1A, closely follows the directive on the matter of consensual settlements, including the provision that the share of the injured party's damage claim that is attributed to the infringer engaged in a settlement is deducted from the claim following consensual settlement.

The proposal also amends the BW by adding a section on *Infringements of Competition Law* (Section 3A of Book 6) that implements the directive's provisions on joint and several liability and passing-on defense, including burden of proof provisions, almost word-for-word.

With regard to the provisions on limitation periods, there is a difference between the directive and the proposal that stems from a different structure of limitation periods under Dutch civil law. In accordance with the directive, the proposal prescribes a limitation period of five years for bringing an action for damages, after the infringement has come to an end and the claimant knows, or can be reasonably expected to know, of the anticompetitive behavior that caused harm to him/her and the identity of the infringer. According to the directive, a suspension shall end at the earliest either one year after the infringement decision has become final or after the proceedings are otherwise terminated, which means that the limitation period *continues* running after one year of suspension. Under Dutch law, however, there is no suspension ("stopping the clock") of the limitation period (*schorsing*) – it only provides for interruption (*stuiting*) upon which the limitation period starts running *anew*. According to the proposal, the new limitation period upon interruption equals the original period but cannot exceed three years. Nevertheless, the limitation period shall not

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

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

[70] Available at: https://www.internetconsultatie.nl/implementatiewet_richtlijn_privaatrechtelijke_handhaving_mededingingsrecht.

[71] *See* for example E. Beumers and A. Karpetas, 'The Proposal discussed from a Dutch law point of view', *@lert, International League of Competition Law*, Newsletter no. 1, September 2014, p. 14.

expire before it would have expired according to the original period. This means that a claimant in the Netherlands may have an additional two years, compared to the provisions of the directive, to bring a damages claim.

The Directive must be transposed into national law by December 27, 2016.

ACM Increases Maximum Fines

On December 22, 2015, the Dutch Parliament approved a legislative proposal to increase the level of maximum fines which the ACM can impose for competition law infringements. The law was published on January 14, 2016,[72] and the new maximum fines are expected to take effect in July 2016. The purpose of increasing the ACM's maximum fines is to increase the preventive deterrent effect of the ACM's monitoring and supervision of the market.

The changes are significant. All maximum absolute fines are doubled from €450,000 to €900,000. Moreover, an even higher relative maximum fine for participation in a cartel can now be imposed because, in addition to the already existing gravity multiplier, the number of years of cartel duration is used as a multiplier as well. The new maximum is calculated by multiplying the amount equal to 10% of the annual turnover by the number of years that the cartel lasted, with a cap at four years, which means that fines can go up to 40% of the annual turnover of an undertaking. That is a significantly higher amount than the previous 10% cap on annual turnover which is also applied by the European Commission and competition authorities of Member States such as the UK, Germany, and France.

Additionally, all fines can be doubled in case of repeated offence, *i.e.*, if within five years preceding the statement of objections, a previous fining decision for an infringement of the same or a similar legislative provision has become irrevocable. Doubling the fine for repeated offence cannot exceed the absolute or relative maximum amount of fine as described above – whichever is higher.

The new maximum fines do not have retroactive effect; they cannot be applied to infringements that were committed and brought to an end before the new rules take effect.

Judgments

Trade and Industry Appeals Tribunal Rules There is no Difference in Judicial Review Standard for Phase I and Phase II Merger Decisions

On October 6, 2015, the Dutch Trade and Industry Appeals Tribunal ("CBb") upheld a ruling of the Rotterdam District Court in which the latter endorsed a Phase I merger clearance decision of the ACM concerning the creation of a joint-venture in the Netherlands between telecommunications company KPN and Reggefiber, an optical fiber company providing a fiber network.[73] For the first time, the question arose before the CBb whether the same judicial review standard should be applied to both Phase I and Phase II merger decisions.

Until now, the CBb only dealt with judicial review of Phase II merger decisions for which it held that administrative courts are required to assess whether the ACM had (i) exercised due care in the decision-making process, (ii) duly substantiated its decision, and (iii) interpreted the legal terms correctly and made plausible that the facts and circumstances at issue meet the legal requirements. In particular, administrative courts must not only check the accuracy, reliability, and consistency of the evidence, but must also assess whether such evidence forms the relevant factual framework and is capable of substantiating the conclusions drawn from it.

[72] Law of December 23, 2015 regarding the amendment of a number of laws within the competence of the Ministry of Economic Affairs and the competence of the Ministry of Infrastructure and Environment concerning an increase of the maximum fines applicable to the Authority for Consumers and Markets; Official Gazette of the Kingdom of the Netherlands 2016, 22.

[73] Case 6397 (KPN/Reggefiber), ACM decision December 18, 2008.

The ACM had claimed that, because it has more discretion in assessing mergers in Phase I, *i.e.*, because it must carry out an in-depth investigation in Phase II, the judicial review standard of Phase I decisions should be marginal and thus lower than the review standard in Phase II. However, the CBb rejected the ACM's claim. It recognized that the structure of concentration control – a procedure in two phases – indeed provides for a more thorough and more intrusive ACM assessment in Phase II. However, it held that this does not lead to a different standard of review of the legality of such decisions by administrative courts. Both in Phase I and Phase II clearance decisions, the administrative courts need to assess whether the ACM has fulfilled its duty in demonstrating that the concentration does not effectively impede competition in the Dutch market.

ACM and District Court Lower Fines to Ensure Compliance with the Principle of Proportionality

On October 12, 2015, the ACM published the non-confidential version of its August 31, 2015 decision on administrative appeal in the "magazine bundles" cartel (*leesmappen*), in which it reduced the fines of several undertakings so as to comply with the principle of proportionality.[74]

Currently, the maximum fine levels the ACM can impose for cartel participation are €450,000 or 10% of the annual turnover – whichever is higher. In the meantime, a legislative proposal to increase the maximum fine levels has been adopted (*see ACM increases maximum fines*). In the case at hand, several fined undertakings argued that the imposition of a €450,000 fine was disproportionate because it exceeded 10% of their annual turnover.

The ACM followed the advice of the Advisory Committee (*Adviescommissie bezwaarschriften Mededingingswet*) which concluded that the fined undertakings rightly invoked the principle of proportionality in their argument that the fines were too high. It agreed with the complainants that by imposing a €450,000 fine on companies with an annual turnover below €4,500,000, such companies are punished relatively harder than those that benefit from a fine capped 10% of their annual turnover, even when the absolute amount of the fine exceeds €450,000. The Advisory Committee took the view that fines should be more connected to the gravity of the infringement and the turnover of undertakings so as to ensure a punishment proportionate to the degree of market power of those fined undertakings.

Similarly, on November 26, 2015, the Rotterdam District Court lowered fines imposed by the ACM on several undertakings for participation in a construction cartel because it found that the fines breached the principle of proportionality.[75] The fined undertakings had engaged in cover pricing – submitting bids in tenders that are not expected to be successful. However, in its fining decision, the ACM had applied a gravity multiplier for bid-rigging – agreeing in advance which firm will win the bid. The Rotterdam District Court found that cover-pricing is a less serious infringement than bid-rigging because, unlike the latter, it does not eliminate competition altogether. Therefore, it concluded that the imposed fines were too high and lowered them accordingly. One of the undertakings received an additional fine reduction of five per cent because the reasonable time period (of maximum three and a half years) between the ACM issuing the statement of objections and the final imposition of the fine by the District Court had expired.

Trade and Industry Appeals Tribunal Rejects Confidentiality Claim of Leniency Documents in Flour Cartel Proceedings

The Dutch Trade and Industry Appeals Tribunal ("CBb") rejected the ACM's request for confidential treatment of

[74] Case 7244 (Leesmappen), ACM decision on administrative appeal of August 31, 2015; case 7244 (Leesmappen), ACM decision of November 7, 2013.

[75] Rotterdam District Court, Judgment of November 26, 2015, ECLI:NL:RBROT:2015:8610.

transcripts of oral leniency statements in a ruling of December 2, 2015.[76]

In the flour cartel appeal proceedings, the ACM submitted several transcripts of oral leniency statements to the CBb. Relying on a provision of Dutch law which stipulates that parties obliged to submit documents to an administrative court, may, when there are compelling reasons to do so, require that only the court has access to the submitted materials, the ACM indeed only granted access to the panel of judges. The CBb resorted to a balancing of interests to decide whether or not it was justified for the ACM to limit the disclosure of the transcripts.

On the one hand, the CBb pointed out the parties' interest in having equal access to relevant information in the appeal proceedings and its own interest in having access to all relevant information so as to be able to properly and carefully adjudicate. On the other hand, it recognized that disclosure of certain information can affect one or more parties disproportionately, and noted that the ACM has an interest in guaranteeing confidentiality so as not to discourage leniency applicants from coming forward with information in the future. Additionally, it referred to Article 6 and the case law of the European Court of Human Rights, according to which a defendant's right to access to all relevant evidence is not absolute, but must be weighed against other interests.

In its balancing exercise, the CBb rejected the ACM's request for confidential treatment of the transcripts of the oral leniency statements. In particular, it took into account that the content of the leniency statements was already known to the fined undertakings that did not apply for leniency, and that the leniency applicants' involvement in the competition law infringement could also be inferred from other non-confidential evidence.

According to the CBb, the interest of limiting access to those transcripts to the panel of judges was thus outweighed by the interest of guaranteeing the rights of the defense. Therefore, it ordered the ACM to prepare new versions of the transcripts of the oral leniency statements and to distribute them amongst all parties to the proceedings.

In its judgment, the CBb carried out a balancing exercise introduced by the ECJ in *Pfleiderer*,[77] according to which EU law does not generally prohibit national competition authorities from granting access to information and documents obtained from a leniency applicant. It is for the national courts to determine the conditions for granting such access by balancing the competing interests protected under EU law – effective public enforcement on the one hand and effective private enforcement on the other hand.

Nevertheless, the CBb's order risks to undermine the effectiveness and attractiveness of the leniency program because it increases the likelihood that damage claimants will try to seek access to documents via cartel members, and are not confined to seeking such access via the ACM. This may deter potential leniency applicants from coming forward to unveil the existence of a cartel.

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[76] Trade and Industry Appeals Tribunal, Judgment of December 2, 2015, ECLI:NL:CBB:2015:388.

[77] *Pfleiderer AG v. Bundeskartellamt* (Case C-360/09) ECLI:EU:C:2011:389.

SPAIN

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

Antitrust

The CNMC Fined €9.3 Million Seven Construction Undertakings for Having Participated In A Cartel In The Modular Construction Market

On December 3, 2015, the CNMC imposed a €9.3 million fine on seven undertakings for implementing a cartel in the market for the manufacturing, sale and rental of modular constructions in violation of Article 1 of the LDC.

In particular, the CNMC considered that these undertakings participated in anticompetitive practices consisting of price-fixing, client-sharing and big-rigging in the market for the manufacturing, sale and rental of modular constructions consisting of pre-made parts that are assembled together to be used as temporary or permanent stays. These practices took place between 2008 and 2013, with their effects extending to 2014, in the Autonomous Communities of Valencia, Murcia, Andalusia, Catalonia, Galicia, The Basque Country, Aragon and Castilla-La Mancha.

In calculating the amount of the fine, the CNMC took into account the Supreme Court judgment of January 29, 2015[78] which broadly defined an undertaking’s “total turnover” to include all active markets, as opposed to the sole market affected by the infringement. The CNMC concluded that the infringement was a “very serious” restriction of competition thereby justifying the imposition of fines of up to 10% of the total turnover of the undertakings.[79]

As a result, the CNMC imposed fines of between 4% and 6.50% of the total turnover of the undertakings. In particular, the authority fined ABC Arquitectura Modular, S.L. €144,241, Algeco Construcciones Modulares, S.A. (“Algeco”) €1,591 million, Alquibalat, S.L. (“Alquibalat”) €461,847, Alquileres Barceló Sáez, S.L. €43,487, Arlan, S.A. €90,475, Dragados, S.A. €8,567 million and Renta de Maquinaria, S.L. €340,868. Under the Leniency Program, Algeco was granted an exemption from €1.591 million of the fine for having been the first company to inform the CNMC of an undetected cartel, whereas Alquibalat was granted a 30% fine reduction, for having provided added-value evidence of the infringement.

It is noteworthy that, according to the CNMC, the gravity and other characteristics of the infringement would have justified the imposition of a fine of 5.3% of the total turnover of Dragados. However, to ensure that this company was not disproportionately fined for being a large company operating in different sectors (*i.e.*, its turnover in the market affected by the infringement only represented 2% of its total turnover), this percentage was reduced to 1.10%. In any case, the fine imposed on Dragados was the highest.

Mergers and Acquisitions

The CNMC Fines Grifols for Failing to Notify a Merger Before Obtaining the Authorization of the Authority

On October 16, 2015, the CNMC fined Grifols S.A. (“Grifols”) for having acquired another company with a 52.2% market share in the relevant market for the blood transfusion diagnostics through Nucleic Acid Technology

[78] Case 2872/2013, Judgment of the Supreme Court of January 29, 2015.

[79] According to the Judgment of the Supreme Court of January 29, 2015, the 5/10% upper limits for fines set out in Article 63(1) LDC do not constitute a capped ceiling, applicable *ex post* once the fine has been calculated, but rather, they act as the upper limit of a range or scale within which the fine must be determined based on the gravity and the duration of the specific infringement.

(NAT).[80] In fact, as part of its international expansion, Grifols acquired in November 2013 the Novartis blood transfusion diagnostics unit.

The CNMC became aware of the transaction through press releases and Grifol's website. Subsequently, it started an investigation in February 2014, sending a request for information to Roche España S. A., which was the sole competitor of Novartis (the acquired company) in Spain.

According to Article 8.1(a) of the Spanish Competition Act, if the turnover of the target has not reached €10 million in the accounting year previous to the concentration, the concentration has only to be notified if the participants have an individual or joint share equal or higher than 50% in any of the relevant markets (*de minimis* rule).

In this case, the turnover of the acquired business in Spain (Novartis) was less than €10 million, so the applicable market share threshold which had to be considered was 50%. Grifols argued that the market share threshold was not exceeded because the market share in volume was only 49%. The CNMC decided that an examination of the market share in value of 52.2% provided a more accurate representation for assessment than the market share in volume. With market share in value, the parties' revenues could easily be compared. By contrast, the market share in volume was more problematic because the number of products or volume did not necessarily correlate with the market share. The CNMC found that the concentration in itself did not involve any horizontal overlaps.

The CNMC imposed a fine of €106,500 on Grifols (0.05% of its turnover). This decision shows that the CNMC applies the market share threshold strictly. Thus, attention has to be paid when determining the value of assets with an activity in Spain, particularly in instances where the relevant market has not previously been defined.

80 *See* Decision of the CNMC from October 16, 2015, SNC/DC/0037/15, *Grifols*.

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").

Cartels

The FCC Fines Four Dealers of the VW Group

In a decision dated October 19, 2015, the FCC imposed a fine on GISA Auto-Service SA, SA Autoweibel, City-Garage AG, St. Gallen, and Garage Gautschi Holding SA, in an amount ranging from CHF 10,000 to CHF 320,000 for price-fixing agreements. The four Swiss dealers of Volkswagen group brands and AMAG RETAIL (*i.e*. retail sector of AMAG Automobil- und Motoren AG) concluded a common list of conditions in early 2013. It concerned discounts and flat-rate reductions in the context of the delivery of the first offer of new cars of VW group brands. According to its press release,[81] the FCC found that in March 2013, within the framework of meetings ("*Stammtisch*") of the Association of regional partners of the VW group (VPVW), these traders coordinated a policy on rebates, the purpose of which was to ensure that all authorized dealers of VW Group brands in Switzerland would implement the same agreed upon conditions.

The fact that such price agreements have been in force for only a short period was taken into account in the calculation of the fine.

The investigation was opened on May 22, 2013 as a result of a self-denunciation of AMAG Automobil- und Motoren AG. In a prior decision of August 8 2014,[82] the FCC approved an amicable settlement between the Secretariat and AMAG Automobil- und Motoren AG and terminated the proceeding against the company under investigation.

The decision of the FCC can be challenged before the Federal Administrative Court.

The FCC Prohibits Anticompetitive Clauses in Hotel Booking Platforms

On November 16, 2015, the FCC announced that it has terminated its investigation into the online booking platforms Booking.com, Expedia, and HRS. Amsterdam-based Booking.com is a subsidiary of Priceline, the largest online hotel booker in the world. Expedia Inc., including Expedia.com, Hotels.com, and Venere, ranks second. HRS is a Germany-based on-line travel agency ("OTA"). The investigation was launched on December 11 2012. It was suspected that the OTAs best-rate guarantees ("*Bestpreisgarantien*") with hotels, and additional contract terms pertaining to room availability, could constitute illegal restraints. Under these rate parity rules, the OTAs require hotels to give them their lowest rates, and they are barred from offering discounted rates elsewhere, including on the hotels' own websites. On October 19, 2015, the FCC found that the use of such general contractual terms amounts to a violation of the Swiss competition act.

According to the FCC's press release,[83] it is forbidden to Booking.com and Expedia to reintroduce unlawful contractual clauses. HRS is still required to make the corresponding changes. No fine will be imposed against such companies, insofar as their conduct does not fall into the category of those directly punishable as a matter of Swiss law. Clues pointing towards to a possible abuse were not confirmed.

[81] A version in German or French is available at the following address: https://www.news.admin.ch/message/index.html?lang=fr&msg-id=59269.

[82] *See* the press release of Competition Commission of August 19 2014: https://www.news.admin.ch/message/index.html?lang=fr&msg-id=54100.

[83] A version in German or French is available at the following address: https://www.news.admin.ch/message/index.html?lang=fr&msg-id=59358.

The decision of the FCC can be challenged before the Federal Administrative Court.

The FCC Launches an Investigation Against Husqvarna Schweiz AG

On December 16, 2015, the FCC opened an investigation into Husqvarna Schweiz AG and its affiliated companies for alleged influence on the resale prices of its dealers as well as possible obstacles to the direct and parallel imports of Husqvarna products. A search was also conducted at the Husqvarna premises.

The investigation mainly focuses on potential illegal vertical price fixing linked to possible influences exerted by Husqvarna Schweiz AG on the resale prices of its dealers. According to the FCC's press release,[84] there are also indications that the parallel or direct import of Husqvarna products into Switzerland might have been impaired and/or hindered. The investigation aims to examine whether Husqvarna and its affiliates have actually concluded unlawful vertical price agreements and/or have granted absolute territorial protection.

Abuse of Dominance

The FCC Fines Swisscom for Abuse of a Dominant Position in the Market for Broadband Connections for Business Customers

On September 21, 2015, the FCC imposed a fine of CHF 7,916,438 on Swisscom, the leading telecommunications provider in Switzerland. According to the FCC's press release,[85] the telecommunications company has a dominant position in the market for broadband connections for business customers. The FCC found that Swisscom abused that position when bidding to supply broadband connections for Switzerland's postal service.

The FCC imposed the fine following a bidding contest to supply broadband connections for Switzerland's postal service dating back to 2008. In its offer, Swisscom charged wholesale broadband prices so high that rivals could not compete with the telecoms company's own bid, which was 30% cheaper than its rivals. In addition, according to the FCC, Swisscom forced the postal service to pay inflated prices.

The decision of the FCC can be challenged before the Federal Administrative Court.

Merger control

The FCC Clears the Creation of the Joint Venture Between Swisscom, SRG SSR and Ringier in the Field of Marketing of Advertising Content

The FCC has conducted an in-depth examination (Phase II) into the creation of the joint venture between Swisscom, SRG SSR and Ringier. Swisscom is the leading telecommunications provider in Switzerland, SRG SSR is Switzerland's public service radio and television broadcaster and Ringier is one of the most important media enterprises in the Swiss home market. The joint venture will market the advertising spaces of Swisscom SRG SSR and Ringier as well as those of third parties. Alongside the increased collaboration in online marketing advertising, TV, radio and in print media, the partners plan to introduce into Switzerland through Swisscom TV television advertising tailored to target groups. The three partners are motivated by a strong international competitive pressure exerted by search engines like Google and social networks such as Facebook.

According to the FCC's press release, it is anticipated that the joint venture will rank among the strongest market players in the field of marketing of advertising content.[86] However, the joint venture will have to face other significant competitors in the sectors of online advertising,

[84] A version in German or French is available at the following address: https://www.news.admin.ch/message/index.html?lang=fr&msg-id=60026.

[85] A version in German or French is available at the following address : https://www.news.admin.ch/message/index.html?lang=fr&msg-id=59555.

[86] A version in German or French is available at the following address : https://www.news.admin.ch/message/index.html?lang=fr&msg-id=59997.

TV, radio and print media. In addition, the development of the market for targeted TV advertising is currently uncertain. Under the circumstances, the FCC considers that a removal of effective competition in the relevant market is unlikely. Therefore, it found that the conditions for a prohibition (or an authorization subject to conditions) were not fulfilled. The FCC can intervene later if it appears that the joint venture has achieved a dominant market position.

It should be noted that compared with other jurisdictions, the Swiss merger control regime features a very high standard of assessment which is sometimes referred to as the dominance-plus test. Pursuant to article 10 of the Swiss competition act, the FCC must prohibit a concentration or authorize it, subject to conditions or commitments, if the investigation indicates that the concentration creates or strengthens a dominant position, is capable of eliminating effective competition, and causes harmful effects that cannot be outweighed by any improvement in competition in another market.

UNITED KINGDOM

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

CMA Structural Merger Remedies Review

In its Annual Plan for 2015/2016, the CMA set out its intention to review systematically existing merger remedies and potentially to remove measures that are no longer necessary, or that now have the effect of restricting or distorting competition.[87] This review is consistent with the CMA's statutory duty to maintain under review undertakings made under the Fair Trading Act 1973 and the Enterprise Act 2002.

On March 26, 2015, the CMA announced that it had begun to review 76 structural merger undertakings given by companies before January 1, 2005. These involved a variety of commitments, including not to proceed with a contemplated merger; to proceed only with divestments; or not to reacquire a divested business or part of a business.

Over the course of 2015, the CMA regularly published provisional and final decisions on such remedies. The CMA's conclusions include that (i) certain remedies had lapsed and should therefore be removed from its register of undertakings and orders; (ii) some ought to be retained, absent evidence of a change in circumstances justifying their release or variation; and (iii) some undertakings were no longer appropriate given the lapse of time and changes in circumstance in the market and/or the companies involved. Examples of cases falling within the latter category, and in which the parties were thus released from their undertakings include: (i) Sara Lee Corporation/Reckitt and Coleman plc (1992), for which the CMA considered that the undertakings were no longer appropriate because Sara Lee is no longer active in the products concerned; and (ii) Interbrew SA Assets/Bass plc (2001), where the CMA found that the steep decline in Interbrew's share in the relevant market meant the undertakings – which had been signed to allay concerns about Interbrew's high market share post-concentration – were no longer necessary. The review is ongoing.

CMA Decides to Proceed with Civil Investigation into Suspected Galvanised Steel Water Tanks Cartel

On October 5, 2015, the CMA announced its decision to proceed with its civil investigation into suspected cartel conduct involving the supply of galvanized steel tanks for water storage.

The related criminal cartel investigation concluded earlier in 2015, with two individuals having been acquitted of the Enterprise Act 2002 cartel offense in June 2015, and one individual - Peter Nigel Snee, the former Managing Director of Franklin Hodge Industries – having been given a suspended sentence of six months' imprisonment and 120 hours of community service in September 2015 following a guilty plea.[88] The infringements concerned the supply of galvanised steel tanks for water storage, which are used for sprinkler systems, and took place between 2005 and 2012.

In his entry of September 29, 2015 on the CMA blog and a speech published on November 13, 2015, Stephen Blake, Senior Director in the CMA's Cartels and Criminal Group, stated that the outcome of the criminal case demonstrated the difficulties of proving dishonesty and bringing a successful prosecution for pre-April 2014 cartels, thus providing support for the decision to remove the dishonesty requirement from the criminal cartel offense. In sentencing Mr. Snee, the judge made clear that, although those convicted of the cartel offense can expect to receive a prison sentence, pleading guilty and cooperating will generally contribute to a reduction in the sentence. Mr. Blake noted that this should incentivize cooperation, particularly in cases involving cartel conduct

[87] CMA Annual Plan 2015/2016, Presented to Parliament pursuant to paragraph 13(2) of Schedule 4 to the Enterprise and Regulatory Reform Act 2013, paragraph 4.12.

[88] *See* National Competition Report, April – June 2015, p. 37.

on or after April 1, 2014, in which the defense of a lack of dishonesty will no longer be available.

The CMA intends to provide a further update on the progress of its civil investigation in this case by the end of May 2016.

The Court of Appeal Limits the Extent of Disclosure and Types of Claim Permitted in Private Follow-on Damages Claims

On October 14, 2015, UK Court of Appeal of England & Wales held that non-operative parts of European Commission decisions may not be disclosed to claimants, and that economic torts for anticompetitive loss must establish that a defendant is legally capable of intending harm.

On October 14, 2015, the Court of Appeal handed down a judgment upholding two appeals from the High Court in the context of the *Emerald Supplies v. British Airways* damages litigation arising out of the air freight cargo cartel.[89] The litigation involved 565 claimants (the "Claimants") in total, and covers their alleged losses as purchasers of air freight services in a period spanning from 1999 to 2007.

The damages action was based on three separate tortious claims, namely that: (i) BA had breached its statutory duty under Article 101 TFEU; (ii) BA had unlawfully interfered with the Claimants' businesses through unlawful means; and that (iii) BA had conspired to injure the claimants by unlawful means (the latter two claims are the "Economic Tort" claims).

To substantiate their claims, the claimants sought principally to rely on the Commission's 2010 and now-annulled infringement decision,[90] which fined British Airways ("BA") and 10 other airline-undertakings for infringing Article 101 TFEU through the formation of a price fixing cartel. BA brought claims for contribution against 19 airlines that belonged to the fined airline-undertakings (the "addressee airlines") and four which were not found to have infringed Article 101 TFEU, but whose conduct was described in the decision (the "non-addressee" airlines). A number of the addressee and non-addressee airlines—including six non-addressee airlines who were not defendants—were involved in the appeals.

BA and the other appellants appealed on two grounds, namely that: (i) the High Court Judge's order to release the Commission's un-redacted infringement decision to a confidentiality ring should be set aside in light of the General Court's *Pergan* judgment;[91] and that (ii) the Judge's refusal to strikeout the Economic Tort claims should be reversed.[92]

The Pergan Appeal

The first ground of appeal challenged the High Court's order that BA make its un-redacted version of the Commission's decision available to a confidentiality ring comprising of the Claimants' legal and economic advisers.[93] The first ground of appeal challenged this order.

In *Pergan*, the General Court drew on the presumption of innocence enshrined in Article 48 of the Charter of Fundamental Rights of the European Union, and ruled that a non-addressee of a Commission's decision was entitled to have any conduct relating them redacted from any public versions of that decision; as the non-addressee

[89] *British Airways v. Emerald Supplies Limited & Others*, [2015] EWCA Civ 1024.

[90] On December 16, 2015, the General Court annulled the Commission's decision in several unjoined cases that were decided on the same grounds. *See*, *inter alia*, Air Canada v. Commission (Case T-9/11) EU:T:2015:994. *See too*, European Competition Report, October – December 2015, p. 2.

[91] *Pergan Hilfsstoffe für industrielle Prozesse v. Commission* "*Pergan*" (Case T-474/04) EU:T:2007:306.

[92] BA also brought an appeal over the award of costs on an indemnity basis with respect to the strikeout claim. In light of the successful appeal, the Court invited written submissions from the parties as to the appropriate order of costs.

[93] Since this appeal, the Commission has published a preliminary public version of the decision. *See*: http://ec.europa.eu/competition/antitrust/cases/dec_docs/39258/39258_7008_7.pdf

would have no standing to challenge the decision's findings in court.

Applying *Pergan*, the Court ruled that the non-addressees of the Commission's decision were entitled to redact any references to their conduct. The Court also extended the principle's application and held that the addressees themselves were entitled to redact the non-operative parts of the decision that described their conduct but were not relied upon to establish the Article 101 infringement.

The Strikeout Appeal

Because the Commission's decision only covered Article 101 infringing conduct that had an effect within the EEA, and because the decision only covered conduct between the EEA and third countries since the May 2004, a considerable amount of the international dimension of the cartel was not covered by the breach of statutory duty claim.[94] The Claimants therefore brought Economic Tort claims against BA in order to recover damages for conduct that fell outside the applicability of Article 101. The second ground of appeal challenged whether it was legally feasible for these claims to succeed.

The Court—after considering the nature of the two torts and acknowledging their availability in antitrust follow-on claims—found that the principal question was whether BA had intended to cause loss or harm to the Claimants. The Court held that because it was not inevitable that the Claimants would suffer loss (including, *inter alia*, by the ability of the Claimants to pass-on any costs) and because BA's could not have known whether its conduct would cause loss or harm to any specific type of claimant, the High Court should have struck out the claims due to a legal inability for BA to possess the required intent.

The Pergan Appeal is significant, as it appears to confirm that claimants in any follow-on litigation arising out of a European Commission decision will by-and-large be prevented from using the decision to claim for any losses arising out of conduct that is ancillary to the Commission's formal conclusions.

The Strikeout Appeal represents a considerable restriction of the ability for claimants to use common law torts to extend their claims for losses beyond the geographic and chronological scope of a Commission decision. In cases where there is a clear possibility to pass-on costs (*i.e.*, in almost any claim where an infringement does not target specific types of customer or end users), it appears that such claims are essentially inadmissible absent compelling evidence of intent. The Court, obiter, remarked that it was "not unhappy" that its reasoning would restrict such claims, noting that litigation under foreign antitrust rules and umbrella pricing claims could offer some relief to affected claimants.

Supreme Court Ruling in Eurotunnel/SeaFrance

On December 16, 2015, the Supreme Court allowed an appeal by the CMA, overturning the Court of Appeal's finding that the CMA did not have jurisdiction to review the Eurotunnel/SeaFrance merger because Groupe Eurotunnel S.A. ("Eurotunnel") had not acquired an "enterprise" within the meaning of the Enterprise Act 2002 ("EA 2002").

By majority decision, the Court of Appeal had held that the CMA acted irrationally in concluding that the acquisition by Eurotunnel of substantially all the assets of SeaFrance – comprising ships and former SeaFrance employees – constituted the acquisition of an "enterprise". The Court of Appeal emphasized that for a target to be an "enterprise" under the EA 2002, it would have to be a 'going concern.' The Court of Appeal found that SeaFrance did not satisfy this criterion as it had been judicially prohibited from continuing activities, and its employees had been made redundant before being reemployed by the acquiring entity.

However, the Supreme Court held that, although statutory merger control does not apply to concentrations arising from the acquisition of bare assets, it may apply where the

[94] The general applicability of Article 101 TFEU was exempted from air transport between Member States and third countries until the passing of Council Regulation (EC) No 411/2004, which came into effect in May, 2004.

target business is not a going concern. The Supreme Court considered that although a mere suspension of “activities” by the target is relevant to whether the concentration involves the acquisition of an “enterprise” or “bare assets”, it is by no means determinative. The Supreme Court also confirmed the CAT’s analysis that in order to acquire an “enterprise” rather than “bare assets,” the assets must have some “economic continuity” with the former business activities, making them different to assets otherwise available on the market.

Following the Supreme Court judgment, the CMA issued an update on December 18, 2015, in which it reported that it has begun to work on agreeing next steps with Eurotunnel and on the form of the Supreme Court’s order.

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