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BELGIUM

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

Abuse

BCA Closes Investigation into Most Favored Nation Clauses After Immoweb Commitments

On November 7, 2016, the Auditorate closed its investigation into Most Favored Nation ("MFN") clauses included in contracts between Immoweb SA/NV ("Immoweb"), Belgium's leading real estate web portal, and software developers for real estate agencies.[1]

In January 2015, the Auditorate had initiated an *ex officio* investigation into Immoweb's practice of including MFN clauses in its contracts with developers, pursuant to which the developers had to offer Immoweb the same conditions as those afforded to competing web portals if such conditions were more beneficial.

Developers offer software that allow real estate agencies to automatically transfer their property listings to real estate web portals with search platforms, such as the web portal operated by Immoweb. Web portal operators contract with developers to be able to list the properties advertised by real estate agencies through the developers' software, and typically pay developers a fee per property listed through their software. This is in contrast to the market practice in other countries, where real estate agencies pay a fee to developers rather than web portals.

While Immoweb argued for a wider product market including real estate agencies' websites and newspaper or billboard ads, the Auditorate defined the relevant market as the national market for web portals dealing exclusively or primarily in real estate. According to the Auditorate's preliminary assessment, Immoweb held a dominant position in this market, with over 40% market share, based on the average number of daily visits, number of classified advertisements, and sales conversion ratio. Further, developers were in effect forced to contract with Immoweb, as real estate agencies would not deal with a developer not offering access to Immoweb.

The Auditorate preliminarily found that the MFN clauses prevented competing real estate web portals from negotiating more favorable conditions, which artificially increased their cost of entry. In August 2016, Immoweb offered to unilaterally terminate current MFN clauses and refrain from including such clauses in future contracts with developers, for a period of five years. The Auditorate found that these commitments were sufficient to address its concerns under Articles IV.1 and IV.2 CEL and Articles 101 and 102 TFEU.

This decision confirms the BCA's willingness to conclude investigations through commitments, and follows investigations by other national competition

[1] Auditorate, Decision no. ABC-2016-I/O-31-AUD of November 7, 2016.

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authorities into MFN clauses, in particular regarding Booking.com in the travel sector.

Brussels Court of Appeal Annuls bpost's Abuse of Dominance Fine on the Basis of the **Non Bis in Idem**[2] *Principle*

On November 10, 2016, the Brussels Court of Appeal annulled the BCA's decision fining bpost, Belgium's incumbent postal service provider, €37.4 million for abuse of dominance.[3]

In 2010, bpost introduced quantity rebates based on the volume of mail supplied by mailers (a per sender model). This rebate scheme however did not consider consolidators as individual mailers. Consolidators are intermediaries that provide senders services such as collection and sorting, but bpost remains responsible for mail distribution. Under the rebate scheme, consolidators did not get a single rebate for the entirety of the mail they supplied to bpost, and instead obtained multiple rebates based on the total mail supplied by their individual clients. As a result, their rebates were based on smaller volumes.

Following complaints from several consolidators, the Belgian Institute for Postal services and Telecommunications ("BIPT") investigated bpost's rebates. In July 2011, the BIPT found bpost's rebate scheme discriminatory to consolidators and fined bpost €2.3 million. In March 2016, following bpost's appeal, the Brussels Court of Appeal annulled the fine after a preliminary ruling of the Court of Justice holding that the per sender rebate model was not discriminatory to consolidators under the Postal Services Directive.

The BCA also investigated the conduct. In December 2012, the BCA found that bpost had abused its dominant position on the market for industrial domestic mail, because bpost's rebates had a loyalty-inducing effect that increased barriers to entry and expansion on the relevant market. The BCA fined bpost €37.4 million, after deducting the BIPT's initial fine. bpost appealed the decision to the Brussels Court of Appeal, arguing, inter alia, a claim of double jeopardy (*i.e.*, breach of the *non bis in idem* principle).

In its judgment of November 10, 2016, the Brussels Court of Appeal agreed with bpost's claim. It recalled that the *non bis in idem* principle was enshrined in Belgian law, as well as the EU's Charter of Fundamental Rights and the European Convention on Human Rights. The Brussels Court of Appeal decided to rely on the European Court of Human Rights' interpretation of the European Convention on Human Rights without reference to EU case law, pursuant to Article 52(3) of the EU's Charter of Fundamental Rights.

The Brussels Court of Appeal confirmed that the conditions for *non bis in idem* were met: (i) the sanctions that could be imposed by the BIPT and BCA were both of a criminal nature, under the European Convention on Human Rights; (ii) the last decision in the BIPT proceedings, *i.e.*, the Brussels Court of Appeal's judgment of March 2016, was definitive and no longer appealable; and (iii) the facts investigated were basically the same, because they involved the same defendant, behavior, companies concerned, and market. Therefore, the BCA should not have investigated bpost's conduct a second time, even though the legal basis for acting was different. Deducting the amount of the BIPT's fine from its own fine was insufficient to comply with the *non bis in idem* principle.

The BCA can appeal this judgment, on points of law, to the Court of Cassation (the highest court for civil and criminal matters). In any event, regulators and practitioners interested in the interplay between sectorial regulation and competition law should be aware of these proceedings.

Mergers and Acquisitions

BCA Conditionally Approves bpost's Acquisition of AMP and LS Distribution

On November 8, 2016, the BCA conditionally approved the acquisition of AMP NV ("AMP") and LS

[2] The legal doctrine that no legal action can be instituted twice for the same cause of action.

[3] Brussels Court of Appeal, Case 2013/MR/2, judgment of November 10, 2016.

Distribution Benelux NV ("LS Distribution") by bpost NV ("bpost").[4] bpost, controlled by the Belgian State, is Belgium's incumbent postal operator and the designated provider of the universal postal service. AMP and LS Distribution, affiliates of the Lagardère group, are mainly active in the distribution of newspapers and magazines to press shops and bookshops, in the delivery of small parcels, and in local retail through press shop chains "Press Shop" and "Relay".

The Auditorate and the College found that the merging parties' activities are mainly complementary, but identified certain serious horizontal, vertical, and conglomerate concerns. In particular, the BCA found that bpost largely dominated the market for the distribution of addressed newspapers and magazines, while AMP dominated the market for the distribution of unaddressed newspapers and magazines to press shops. The merging parties were also each other's main potential competitor in each market, so that the transaction would remove competitive pressure and strengthen the merged entity's dominant positions.

Another specific concern related to bpost's agreements with the Belgian State, which cover the universal postal service and certain services of general economic interest, including one for the subsidized distribution of addressed newspapers and magazines.[5] The College found that bpost could restrict competition between forms of unaddressed and addressed distribution, and make unsubsidized distribution services less attractive than the subsidized distribution services.

bpost offered 10 behavioral commitments. These included a commitment not to tie AMP's distribution services with other services or products offered by bpost and safeguards against discrimination between sales outlets of the merged entity and other sales outlets. In line with the Auditorate, the College found that these commitments addressed its concerns, including with respect to bpost's services of general economic interest.

The BCA therefore approved the transaction in Phase I, which was likely facilitated by a significant pre-notification process; bpost had submitted a first draft notification form in April 2016 and by formal notification on August 20, 2016, the BCA had already performed an in-depth assessment of the transaction, conducted a first market investigation, and reviewed proposed remedies. A trustee will monitor bpost's compliance with the commitments.

BCA Confirms that an Acquisition by a Dominant Company Is Not Automatically an Abuse

On November 21, 2016, the Auditorate rejected Alken-Maes NV's ("AM") request for interim measures to suspend Anheuser-Busch InBev NV's ("ABI") acquisition of Brouwerij Bosteels ("Bosteels").[6] ABI is the largest brewer in Belgium, AM is the second largest and is part of the Heineken group, and Bosteels is a small independent brewery.

Under Belgian merger control rules, concentrations must be notified if the merging parties have a combined Belgian turnover of over €100 million and at least two of the parties have individual turnovers of over €40 million. Because Bosteels's turnover was below €40 million, its acquisition by ABI was not notified. AM complained to the BCA, claiming that the concentration constituted an abuse of ABI's dominant position, in breach of Article IV.2 CEL and Article 102 TFEU.

AM applied for interim measures to suspend ABI's acquisition of Bosteels. Interim measures are granted if the BCA finds: (i) a *prima facie* infringement of Articles IV.1 or IV.2 CEL (and Articles 101 or 102 TFEU); and (ii) an urgent need to avoid a serious and imminent harm that is difficult to remedy, or a situation that is likely to harm the general economic interest.

In principle, concentrations are reviewed under merger control rules, rather than provisions on restrictive

[4] BCA, Decision no. BMA-2016-C/C-32 of November 8, 2016.

[5] These agreements have been notified to and approved by the European Commission, see Commission Decision C (2016) 3338 of June 3, 2016 (State Aid SA.42366 (2016/N)), OJ 2016 C 341/2.

[6] College, Decision no. BMA-2016-V/M-36 of November 21, 2016.

practices. The College however held that these provisions may still be applied,[7] and that concentrations can constitute an abuse of dominance. However, imposing interim measures against concentrations could be more harmful than in other cases of restrictive practices: transactions could be dropped while merging parties wait for the decision on the merits, easily two years later. The College therefore held that interim measures must be conditional on "strong indications" of an abuse of dominance resulting from a concentration. Such strong indications require: (i) *prima facie* adverse effects on competition beyond the result of the concentration itself; and (ii) *prima facie* evidence that these adverse effects may be qualified as an abuse of dominance.

In the case at hand, there were no strong indications that ABI's acquisition of Bosteels could constitute an abuse of dominance. ABI did have a dominant position in the Belgian on-trade and off-trade beer markets. However, the College found that the acquisition would lead to minimal increments in ABI's share of sales in these relevant markets, and limited or no increments when looking at narrower segments. It further found no strong indications in AM's arguments regarding the effects of the concentration. The College nevertheless indicated that if ABI were to engage in restrictive behavior in the future, for instance by encouraging businesses serving ABI brands to stop selling competing brands, it could examine such behavior at that time.

Therefore, while the request for interim measure was admissible, the College found that it was not well-founded. This decision is noteworthy in that it acknowledges the BCA's power to review non-notifiable concentrations under Articles IV.1 and IV.2 CEL, but sets a high bar for the imposition of interim measures.

[7] The College held that Articles IV.1 and IV.2 CEL could be applied, but not Articles 101 and 102 TFEU.

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").

Horizontal Agreements

Court of Appeal Rules in Precedent-Setting Asphalt Cartel Damages Case

On October 20, 2016, the Helsinki Court of Appeal rendered 40 judgments in the Asphalt Cartel damages case,[8] which is Finland's first cartel damages case. The Helsinki Court of Appeal's judgments were considerably more defendant-friendly than the District Court of Helsinki's judgments.[9] The Helsinki Court of Appeal awarded damages to most of the claimants, but in much smaller amounts than the District Court of Helsinki, and acquitted some defendants due to lack of causal connection. The judgments suggest that Finland may be a more defendant-friendly jurisdiction than previously thought, and that the EU Directive on Antitrust Damages may considerably change Finnish law. Both claimants and defendants have sought leave to appeal to the Supreme Court.

The Finnish Government's Roads Authority and 39 municipalities claimed €120 million from the cartel members. The damages claims are a follow-on case after a 2009 SAC judgment, which found a nationwide asphalt cartel in violation of both national and EU competition law.[10] The District Court of Helsinki dismissed the government's €57 million claim because certain government employees were found to have been aware of and participated in the cartel. The Helsinki Court of Appeal reversed the dismissal and ruled that the government was entitled to damages; however, the Helsinki Court of Appeal awarded only eight million euros. The judgments contain a number of other precedent-setting rulings.

The Helsinki Court of Appeal held that the SAC's infringement decision had no binding effect and no evidential value in the damages proceedings. The District Court of Helsinki, on the other hand, had ruled that the infringement decision was binding in the follow-on damages cases concerning the existence of the cartel, parties responsible, infringement period, and affected geographic area. The Helsinki Court of Appeal re-examined the existence of the cartel and found that the cartel had been nationwide only during 1997–2002, and not from 1994–2002 as the SAC had found. Therefore, the amount of damages was significantly reduced. If this decision becomes final, the claimants in follow-on damages cases will have to re-litigate their entire infringement proceedings until the EU Directive on Antitrust Damages takes effect. The directive makes previous infringement proceedings binding.

Another significant change in the District Court of Helsinki's decision concerned the applicability of the EU competition law doctrine of economic succession to antitrust damages. Some of the defendants had not participated in the infringement but had later acquired one of the responsible parties. The District Court of Helsinki considered itself obligated by EU law to ensure the effectiveness of national remedies, but found that national law prevented effective relief. Therefore the District Court of Helsinki directly applied EU law to ensure an effective outcome. The Court of Appeal reversed this decision and ruled that economic succession only applies to administrative fines, not antitrust damages. If this interpretation becomes final, company reorganizations and asset transfers could be used to avoid liability by an acquiring company. This differs from public enforcement where liability for fines may be imposed regardless of reorganizations or asset transfers.

Multiple statutes of limitation were applicable, depending, *inter alia*, on whether and at what time the claimant knew or should have known of the damage and the parties responsible. In line with the SAC's

[8] 40 separate judgments with case numbers S 14/1364–1403, *e.g.*, Helsinki Court of Appeal, judgment 1449, in case S 14/1364, on October 20, 2016.

[9] *See* National Competition Report, October–December 2013, p. 3.

[10] Supreme Administrative Court, judgment KHO:2009:83, on September 29, 2009.

interpretation, the limitation period began at the FCCA's fining proposal. This caused many of the claims to be partially or completely time-barred.

The Helsinki Court of Appeal reversed the District Court of Helsinki's ruling and found that small or geographically distant cartel members were not causally linked to certain claimants' public procurement bid-rigging, and that, as long as they did not submit bids, they were not jointly and severally liable for the conduct of the cartel. The District Court of Helsinki had previously found that liability covered all the damage that the cartel had inflicted on a claimant during each cartel members' participation. The Helsinki Court of Appeal acquitted some defendants with regards to certain claims.

Abuse

€70 Million Fine for Predatory Pricing Upheld in SAC

On December 29, 2016, the SAC upheld a €70 million fine on the Finnish dairy company Valio Oy ("Valio") for predatory pricing in the milk market.[11] The ruling, handed down after Valio's appeal of the Market Court's 2014 judgment, is the first case of market abuse in the form of predatory pricing as well as the largest fine for a competition infringement to be imposed on a single undertaking in Finnish history.

The case concerned Valio's underpricing practices between 2010 and 2012 with the intention of excluding competition, in particular its Nordic competitor Arla Oy's ("Arla") imports of Swedish milk, in the fresh milk market. Evidence presented earlier in the proceedings revealed that these practices constituted a deliberate strategy on the part of Valio's top management to solidify and further increase Valio's market share in fresh milk, which at the time exceeded 50%.

The SAC upheld in full the Market Court's earlier ruling.[12] Citing case law by the European Court of Justice, the SAC found Valio to have priced fresh milk below its average variable costs of production, which is an indication of abuse of dominance. The SAC took into account, only Valio's pricing of fresh milk in relation to its production costs. The SAC rejected Valio's arguments relating to its competitors' production costs, profitability of its other dairy products, and opportunity costs. Valio's procedural arguments were also rejected.

The SAC's ruling and the €70 million fine are exceptional on the national and European level. As instances of predatory pricing are relatively rare throughout the EU, the SAC's Valio ruling may become an international precedent despite the matter not being referred to the European Court of Justice for a preliminary ruling. Furthermore, the ruling provides the latest example of increased attention by Finnish competition authorities to the consolidation of domestic foodstuffs markets in recent years.

The SAC's ruling is the final resolution of Valio's market abuse and the related fine. However, there is still approximately €100 million in pending civil claims for damages against Valio, filed by its competitors after the Market Court's 2014 ruling. While a new statute implementing the EU Directive on Antitrust Damages, the Finnish Antitrust Damages Act, entered into force on December 26, 2016, it is not applicable to these claims.

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[11] Supreme Administrative Court, judgment KHO 2016:221, on December 29, 2016.

[12] *See* National Competition Report, April–June 2014, pp. 4–5.

FRANCE

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

Horizontal Agreements

The FCA Fines Engineering and Technical Consulting Companies for Collusive Tendering and Market Sharing

In two decisions issued in December 2016, the FCA fined SETIS and Société Services, Conseil, Expertises et Territoires ("SCET"), two engineering and technical consulting companies, for collusive tendering and market sharing.[13]

In August 2011, the West Rhône-Alpes Public Land Institution ("*Etablissement public foncier de l'Ouest Rhône-Alpes*", hereinafter "EPORA") called for tenders for land management and assistance missions. Although EPORA initially sought to award framework agreements to multiple contractors, it eventually awarded one lot each to SCET, a subsidiary of the French *Caisse des Dépôts et Consignations*, and SETIS. A few months later, in April 2012, EPORA sought to award a number of additional procurement contracts on the basis of the two framework agreements it had concluded with SCET and SETIS.

The FCA found that SCET and SETIS had exchanged confidential price information and discussed their respective interests prior to submitting their bids for the procurement contracts. Furthermore, the two companies allocated bids between each other and agreed to not to compete for contracts designated to the other. As a result, out of the eight procurement contracts awarded by EPORA, SETIS and SCET were able to win four procurement contracts each, and at the maximum price allowed by the framework agreements.

SCET challenged the FCA's allegations but SETIS did not. The FCA therefore issued two decisions, one of which was adopted under the new settlement procedure introduced in August 2015.

Although the settlement decision concerning SETIS contains fewer details on the determinants of the fine, it is interesting to note that in both decisions, when assessing the gravity of the parties' conduct, the FCA took into account EPORA's behavior during the bidding process. According to the FCA, EPORA's decision to award the tendering framework agreement to two contractors, rather than the usual practice of at least three, facilitated the exchange of competitively sensitive information between the parties, contributing to the anticompetitive effects.

The FCA fined SCET €560,000 and SETIS €40,000. Given the lack of details contained in the settlement decision, the significantly lower turnover achieved by SETIS (approximately ten times smaller than SCET) and the fact that both decisions were adopted under the simplified procedure—pursuant to which the maximum amount of the fine is capped at €750,000—it is difficult to assess whether SETIS benefitted from a significant fine reduction.

SCET has appealed the decision before the Paris Court of Appeal.

Abuse

The Paris Court of Appeal Confirms Award of Damages Against SNCF

On December 14, 2016, the Paris Court of Appeal confirmed a first instance decision in a follow-on private enforcement claim against Société Nationale des Chemins de Fer Français ("SNCF").[14]

[13] French Competition Authority, Decisions no. 16-D-27 of December 2, 2017 and 16-D-28 of December 6, 2016 relating to practices in the land assistance procurement market of the West Rhône-Alpes Public Land Institution, http://www.autoritedelaconcurrence.fr/user/avisdec.php?numero=16D27 and http://www.autoritedelaconcurrence.fr/user/avisdec.php?numero=16D28.

[14] Paris Court of Appeal, December 14, 2016, *SNCF v. Gilles Pellegrini,* https://groupes.renater.fr/sympa/d_read/creda-concurrence/CaP/14dec2016/sncf.pdf.

In December 2011, Switch, an online travel agency, brought a damage claim against the French incumbent rail operator SNCF on the basis of an FCA fining decision issued on February 5, 2009. Following complaints by three online travel agencies, the FCA found that: (i) SNCF had abused its dominant position in the market for the sale of train tickets; and (ii) SNCF and Expedia, the world's biggest online travel agency, had entered into an anticompetitive agreement in the market for travel agency services. Specifically, SNCF and Expedia had established a joint venture called Agence voyages-sncf.com ("Agence VSC"), which combined the sale of train tickets and online travel agency services through a single online distribution channel. The joint venture's aim was to redirect Internet traffic generated by SNCF's customers for the sale of train tickets towards non-rail services (*i.e.*, travel agency services). SNCF did not challenged the objections, and the FCA's decision was subsequently confirmed by the Paris Court of Appeal in 2010 and the French Supreme Court in 2013.

Building on the FCA's decision, Switch claimed that the anticompetitive agreement between SNCF and Expedia had unfairly favored VSC by diverting potential customers to its voyages-sncf.com website, and thus caused the losses suffered by its competitors. In April 2013, the Paris Commercial Court awarded €8.9 million of damages to Switch. SNCF challenged the judgment.

In line with well-established case law, the Court of Appeal held that a victim of anticompetitive practices must, in order to obtain an award of damages, prove the existence of a civil wrong ("*faute*"), damage, and causation, in accordance with Articles 1240 and 1241 of the French Civil Code (formerly, Articles 1382 and 1383).

Regarding the existence of a civil wrong, the Court of Appeal considered that a company's decision not to challenge the objections notified by the FCA does not amount to an admission of guilt, and that in any event fining decisions issued by the FCA are not binding upon courts. Interestingly, the latter statement runs contrary to the 2014 EU Directive on Antitrust Damages,[15] pursuant to which a final infringement decision of a national competition authority shall constitute full proof before civil courts in the same Member State that the infringement occurred[16] (the implementation deadline was set at December 27, 2016, France has yes to adopt implementing legislation).

Notwithstanding this comment, the Court was instead able to rely on the court judgment upholding the fining decision after SNCF's appeal: since a civil court had definitely concluded that SNCF had participated in an anticompetitive agreement, which had distorted competition in the market for leisure travel agency services to the detriment of VSC's competitors, the Court of Appeal ruled that such conduct necessarily amounted to a civil wrong as defined by the French Civil Code and had caused direct, personal, and definite harm to the claimant.

With regard to quantifying the harm, the Court of Appeal referred to the European Commission's Damages Guidance,[17] comparing the claimant's profits during the period when the infringement produced effects with the profits that the claimant would have made had the infringement not taken place (*i.e.*, a "counterfactual scenario"). The Court of Appeal also held that full compensation should not only cover actual loss and loss of profit, but also financial losses caused by the unavailability of cash, which could have been invested.

The Court of Appeal fully upheld the Paris Commercial Court's judgment and rejected SNCF's appeal.

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15 Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ [2014], L 349/1.

16 *Ibid*, article 9(1).

17 Practical guide on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the TFEU, available at: http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_guide_en.pdf

Mergers and Acquisitions

The FCA Sets a Record Fine in its First Gun-Jumping Decision

On November 8, 2016, the FCA fined Altice and its subsidiary Société Française du Radiotéléphone (now Numericable-SFR, "SFR") €80 million for taking steps to implement two acquisitions prior to obtaining merger control clearance.[18] The decision is noteworthy due to the role of SFR's competitors in providing the FCA with evidence of pre-approval coordination.

In 2014, Altice and its cable operator subsidiary Numericable Group ("Numericable") filed two merger notifications with the FCA: one for the acquisition of SFR, the second largest French telecom operator, and the other for the acquisition of Omer Telecom Limited ("OTL"), which markets telecommunication services under the "Virgin Mobile" brand. On October 30, 2014, following an in-depth investigation, the SFR transaction was cleared subject to commitments. The OTL transaction was unconditionally cleared a few weeks later.

The FCA subsequently uncovered evidence—part of which was provided by competing telecom operators—suggesting that the merging companies had started coordinating their commercial behavior prior to obtaining clearance. As a result, the FCA conducted dawn raids at the premises of Numericable, SFR, and OTL in April 2015. A formal investigation was opened *ex officio* in May 2016.

In its decision, the FCA concluded that although no assets were transferred during the standstill period, Altice nevertheless enjoyed *de facto* control as it exercised decisive influence over SFR and OTL's various business activities.

Regarding *Altice/SFR*, the FCA found that numerous information exchanges had taken place in the months preceding clearance. Moreover, Altice had interfered with SFR's operational management, as SFR regularly sought approval from Altice's board regarding strategic decisions, including the renegotiation of a major network sharing agreement between SFR and Bouygues, the third largest French telecom operator. The FCA also focused on the marketing of a range of high speed internet access offers using Numericable's network under SFR's brand. The new range was launched on November 18, 2014, less than three weeks after the *Altice/SFR* merger was cleared.

According to the FCA, whilst the share purchase agreement prevented SFR, as the target company, from making investments above a certain amount during the period between signing and closing, it only provided that Altice should receive financial compensation should SFR infringe its obligations. In no event did it stipulate that SFR should ask for Altice's approval of business decisions.

Regarding the *Altice/OTL merger*, the FCA's criticisms focused on the content of the share purchase agreement. In particular, a price adjustment clause that stipulated that Altice's approval was required for investments exceeding a certain amount, which the FCA deemed too low, and for the conclusion of strategic contracts. The FCA also noted that OTL's CEO had participated in various Altice projects before his official appointment to Altice's executive committee.

In exchange for a fine reduction, Altice and SFR did not challenge the FCA's findings, but were still fined over €80 million. The FCA thus imposed the highest fine ever for gun-jumping (by comparison, the highest fine imposed to date by the European Commission is €20 million). The FCA had previously sanctioned companies for failure to notify a transaction or to comply with merger remedies, but had never before imposed a fine for gun jumping.

[18] French Competition Authority, Decision no. 16-D-24 of November 8, 2016 relating to the situation of the Altice group with respect to Article L. 430-8, II, of the French Commercial Code, http://www.autoritedelaconcurrence.fr/pdf/avis/16d24. pdf.

GERMANY

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

Horizontal Agreements

FCJ Rules on the Unlawfulness of Coordinated Termination of Retransmission Contract

On July 12, 2016, the FCJ annulled a decision by the DCA, which had found the German public broadcasting services' termination of a retransmissions contract to be valid, and referred the case back to the DCA.[19]

Until 2012, the public broadcasters, in particular the Consortium of Public Broadcasters in Germany ("ARD") and the Second German Television ("ZDF"), paid an annual fee of €27 million to the Kabel Deutschland, a cable network operator, to retransmit their programs on the plaintiff's cable network. On April 30, 2012, the public broadcasters decided to cease retransmission of their programs on the cable networks, and instead switch to digital broadcasting technology. They agreed to no longer pay fees to any cable network operator and to terminate all retransmission contracts at the end of 2012.

The FCJ held that the public broadcasters' termination of the retransmission contract was invalid because it infringed competition law. When the public broadcasters—being direct competitors—aligned their strategies and agreed to terminate the feed contract, they eliminated any uncertainty as to their future conduct on the market. The FCJ also concluded, that there was a causal link between this exchange of information and the public broadcasters' subsequent market behavior.

€128 Million Fine Unenforceable as a Result of Enterprise Restructuring

On October 19, 2016, the FCO terminated its proceedings against two companies of the Zur Mühlen Group (an associated company of Mr. Clemens Tönnies), namely Böklunder Plumrose GmbH & Co. KG ("Böklunder") and Könecke Fleischwarenfabrik GmbH & Co. KG ("Könecke"), because its previously imposed €128 million fine became unenforceable due to internal restructuring.[20]

In 2014, the FCO fined 21 sausage manufactures and 33 individuals approximately €338 million (one of the highest fines in the FCO's history) for participating in a price fixing cartel.[21] While 11 sausage manufacturers and 15 individuals settled the case with the FCO, the other participants, including Böklunder and Könecke, appealed the fine. Following the appeal, major assets of Böklunder and Könecke were transferred to other companies held by the Zur Mühlen Group and both Böklunder and Könecke were dissolved. Under German law—which is different from EU law—liability for violations of antitrust rules is limited to the legal entity that participated in the cartel infringement. Therefore, there was a legal loophole (the so-called "sausage gap", named after this cartel) allowing, companies to escape fines by restructuring.

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[19] *See* FCJ, decision of April 12, 2016, case KZR 31/14, available in German at: http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=e00d5e2aa1181a3ae628f2c388887343&nr=75099&pos=1&anz=2.

[20] *See* FCO, press release of October 19, 2016, available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/19_10_2016_Wurst.html?nn=3591568.

[21] *See* FCO, press release of July 15, 2014, available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2014/15_07_2014_Wurst.html?nn=3591568; *see also* National Competition Report July–September 2014, p. 11.

To ensure effective enforcement of German antitrust law and to harmonize national law with European standards, the "sausage gap" will be addressed in the upcoming ninth amendment to the GWB. Pursuant to the draft law amending the GWB, legal responsibility for cartel infringements will not be limited to the legal entity violating antitrust law but will extend to the legal and commercial successor of this company as well as to the ultimate parent company. The ninth amendment to the GWB is expected to enter into force in spring 2017.

FCO Determines Savings Banks May Offer Joint "Kwitt" Payment Function

On November 25, 2016, the FCO decided not to initiate proceedings against the "Kwitt" payment function, which enables German savings banks (*Sparkassen*) group customers to transfer money between mobile phones.[22] The FCO examined Kwitt for possible restriction of competition as the function was jointly developed by independent savings banks.

The function allows requests for payment only between customers registered with Kwitt. If each German savings bank uses Kwitt, 4.5 million app users will be able to transfer money to a third party, whether inside or outside the savings banks group (although the procedure is more complex for transfers outside the savings banks group).

The function puts the savings banks group in competition with parties who do not belong to a banking group and who offer comparable apps on the market, which they license to banks. Kwitt could potentially restrict competition because independent, third-party providers have no direct access to end customers. The FCO found, however, that considerable efficiencies outweigh any restrictions, noting that customers could also transfer money to individuals not registered with the customer's bank.

[22] *See* FCO, press release of November 25, 2016, available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/25_11_2016_Sparkasse_Kwitt.html;jsessionid=EFE92122CC04EC28DA3E65488373038A.1_cid362?nn=3591568.

The German savings banks announced they will update their apps with the new function shortly. The FCO assumes that a vast majority of the savings banks will make Kwitt available to their customers.

At the time of the savings banks' announcement, the German cooperative banks (*Volks- und Raiffeisenbanken*) announced that they would incorporate a comparable payment function in their online banking apps. The FCO did not object, following the same line of arguments.

There have been plans, however, for savings banks and cooperative banks to jointly introduce a similar payment function, called "Geldbote". Such cooperation may raise further competition issues because participants would have access to a substantial share of the customer base in Germany. The FCO has not made a decision on the matter as the project is still in the planning stage.

Abuse

FCJ Admits Appeal Against the DCA'S Wedding Rebates Decision

On November 15, 2016, the FCJ admitted the appeal[23] against the DCA's November 2015 decision,[24] which had annulled the FCO's 2014 "wedding rebates" decision against retailer EDEKA Zentrale AG & Co. KG ("EDEKA").[25] The FCO found that EDEKA had

[23] *See* FCJ, decision of November 15, 2016, case KVZ 1/16, available in German at: http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=f0c9062aec9c4a03c376b882859aae70&nr=76793&anz=474&pos=0&Frame=4&.pdf.

[24] *See* DCA, decision of November 18, 2015, case VI-Kart 6/14 (V), press release available in German at: https://www.justiz.nrw.de/JM/Presse/presse_weitere/PresseOLGs/archiv/2015_02_Archiv/18_11_2015_1/index.php, decision available in German at: https://www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2015/VI_Kart_6_14_V_Beschluss_20151118.html.

[25] *See* FCO press release of July 3, 2014 available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2014/03_07_2014_edeka.html, and FCO decision of July 3, 2014, case B2-58/09, available in German at: http://www.bundeskartellamt.de/SharedDocs/En

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 approximately 2,300 "Plus" discount markets. "Wedding rebates" are retroactive rebates demanded by a (often dominant) customer from its suppliers as a consideration for (alleged) cost synergies resulting from a concentration at the customer level.

The DCA found that it could not establish that EDEKA had abused its dominant position. The rebates and improved payment terms agreed between EDEKA and the sparkling wine manufacturers were the result of typical commercial negotiations with demands and counter demands between parties of approximately equal negotiating power.

The FCJ admitted the appeal because of its "fundamental importance" (which is the legal standard) regarding the interpretation of Section 19(2) no. 5 GWB. According to this provision, an abuse of dominance exists if a dominant undertaking uses its position to invite or cause other undertakings to grant advantages without any objective justification. There is no established interpretation of the terms "*to invite*" or "*objective justification*". The FCJ needs to clarify the extent to which market power of the suppliers and the general conditions of supply should be considered. Furthermore, there is no established interpretation regarding whether there needs to be a causal link between the dominant position and the behavior requested by the dominant undertaking. Finally, the FCJ needs to analyze whether an objective justification can only be found when there is a specific consideration by the dominant undertaking or if general investments by the dominant undertaking allegedly increasing the attractiveness of its stores can be regarded as sufficient.

Following this, the next step for the parties will be to substantiate their appeal.

tscheidung/DE/Entscheidungen/Missbrauchsaufsicht/2014/B2-58-09.html. *See also* National Competition Reports, July–September 2013. pp. 9–10, April–June 2014, pp. 13–14, and October–December 2015, pp. 16–17.

Vertical Agreements

FCO Fines Food Retailers, Concludes Proceedings in Grocery Sector

On December 15, 2016, the FCO announced that it had fined two EDEKA retailers €18.3 million for agreeing on resale prices for beer.[26] This was the last fining decision in its proceedings regarding vertical price fixing practices in the food retail sector. The investigation in the grocery sector concerned confectionery, coffee, pet food, beer, body care products, baby food, and baby cosmetics. It was one of the most extensive investigations in the FCO's history and resulted in fines for 27 companies (including both manufacturers and retailers) totaling €260.5 million.

The FCO recently published its most important findings and the scope of the prohibition of vertical price fixing, including practical examples, in a draft guidance note. The FCO also concluded the proceedings and published case summaries of its findings on vertical price fixing of beer and Haribo confectioneries.[27]

Beer. The FCO fined several beer retailers approximately €112 million. While the FCO's leniency notice did not apply, as it only covers horizontal agreements, Anheuser Busch InBev Germany Holding GmbH ("AB InBev") and REWE–Zentral-Aktiengesellschaft ("Rewe") did receive full immunity from fines because they fully cooperated with the FCO. All other companies involved—namely METRO AG ("Metro"), NETTO Marken-Discount AG & Co. KG ("Netto"), Kaufland Warenhandel GmbH & Co. KG ("Kaufland"), and several EDEKA retailers—settled the case with the FCO.

[26] FCO, press release of December 15, 2016, available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/15_12_2016_Vertikalfall%20Abschluss.html?nn=3591286.

[27] FCO, case summary of December 14, 2016, available in German at: http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2015/B10-40-14.pdf?__blob=publicationFile&v=4.

The FCO found that, between 2006 and 2009, these retailers had committed to AB InBev to maintain a certain minimum resale price level, *i.e.*, to implement AB InBev's "desired prices" (prices slightly below AB InBev's recommended resale prices) for its premium beer brands Beck's, Franziskaner, and Hasseröder. In turn, AB InBev agreed to coordinate competitors' resale prices by means of so-called "price-care" measures to avoid a price war among retailers.

The retailers actively participated in the infringement. In particular, they informed AB InBev when a competitor did not comply with the agreed price level and threatened to decrease their own prices or to demand financial compensation if AB InBev did not successfully intervene.

The infringement occurred at a time when beer prices were falling, in particular due to overcapacity and decreasing demand in Germany. This situation led several breweries to enter into anti-competitive (horizontal) agreements. AB InBev helped uncover this cartel.[28]

Haribo. The FCO fined Haribo's successor company Edmund Münster GmbH & Co. KG and seven food retailers (Edeka, Rewe, Kaufland, Metro, Aldi Nord, Aldi Süd, and Lidl) more than €60 million for agreeing on resale prices of Haribo confectionaries (fruit gum and licorice) between 2004 and 2009.[29]

The FCO found that Haribo tried to systematically influence its retailers' resale prices and to ensure a minimum price level. In 2004 and 2007, when increased commodity costs caused two purchase price increases, Haribo coordinated a uniform resale price increase for all retailers, including discounter Aldi. Subsequently, Haribo monitored resale prices and intervened when a retailer deviated from the acceptable price level. Haribo would first try to verbally persuade the retailer to increase its resale price. If it did not succeed, Haribo would offer financial incentives, threaten to delay or stop delivery, sometimes actually implementing the threats.

The food retailers took an active role in the infringement, as they not only passively complied with Haribo's demands, but also requested Haribo to coordinate simultaneous price increases for all retailers and, in particular, to ensure that Aldi would comply. Further, the retailers informed Haribo when another retailer decreased its resale prices below a certain level. This active involvement resulted in a rare case of the FCO fining retailers for resale price maintenance.

Mergers and Acquisitions

FCO Clears Acquisition of Coop by Rewe Subject to Conditions

On October 28, 2016, the FCO cleared Rewe Markt GmbH's ("Rewe") acquisition of Coop eG ("Coop"), subject to conditions.[30]

Coop operates approximately 200 supermarkets in Mecklenburg-Western Pommerania, Brandenburg, and Hamburg under the brand name "Sky." In 2015, Coop's turnover was €1.23 billion. Rewe, the second largest food retailer in Germany, operates around 6,000 supermarkets throughout Germany. In 2015, Rewe's turnover was around €36 billion. Rewe notified the FCO of its intention to acquire at least a 55% shareholding in Supermärkte Nord Vertriebs GmbH & Co. KG i.G., into which the Coop supermarkets will be incorporated.

In its assessment, the FCO applied the same criteria that it applied in the Edeka/Tengelmann merger case, examining 45 mainly rural northern German regional market areas and seven municipal districts in Hamburg.

[28] *See* National Competition Report January–March 2014, pp. 12–13.

[29] *See* National Competition Report April–June 2015, pp. 12–13.

[30] *See* FCO, press release of October 28, 2016, available in German at: http://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2016/28_10_2016_Rewe_Coop.html. A press release in English is available at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/28_10_2016_Rewe_Coop.html?nn=3591568.

The FCO found Rewe's acquisition of Coop would have impeded competition in eight regional markets and two districts of Hamburg. During the proceedings, Rewe and Coop sold 11 branches in the affected regional markets to Bartels Langness group.

The FCO determined that Rewe's takeover of Coop would not significantly impede competition, including in the relationship between retailers and suppliers. Coop's procurement volume is small, less than 0.5% of the total procurement volume of the German food retail sector. In addition, for nearly ten years, Rewe and Coop have been members of a purchasing cooperation through which Coop has purchased 65–70% of its products. Therefore, even before the merger, Coop and Rewe did not represent independent alternatives for many suppliers.

FCO Clears Merger of Titanium Dioxide Mining Companies

On November 21, 2016, the FCO cleared the acquisition of Sierra Rutile Limited ("Sierra") by Iluka Resources Limited ("Iluka").[31] The merging parties are both active in the mining of minerals in Australia and Sierra Leone and the sale of raw materials to industry customers, generating a combined turnover in the three digit million euro range.

The parties mine, among other minerals, ilmenite and rutile, which both contain titanium dioxide. Titanium dioxide, also known as titania or titanium white when used as a pigment, cannot be found in its pure form in nature. It is used as a pigment in a wide range of applications, such as in paint, sunscreen, toothpaste, and food coloring.

The transaction had to be notified with the FCO because the parties both sell significant amounts of raw material for titanium dioxide production to pigment manufacturers in Germany.

The FCO identified several different types of minerals that can be used as raw material for the production of titanium dioxide. Moreover, the FCO established that there are several not yet exploited mineral deposits. Therefore, the FCO concluded that pigment producers would continue to have sufficient alternative sources to procure the necessary raw materials for their production. In addition, several pigment manufactures are vertically integrated (they mine the raw materials themselves). The FCO therefore did not oppose the merger.

REWE Withdraws Appeal Against Ministerial Authorization of EDEKA/Kaiser's Tengelmann Merger and May Acquire 67 EDEKA Locations

On December 8, 2016, the FCO authorized the divestment of 67 food retail locations from EDEKA to REWE, following REWE withdrawing its application for an interim injunction against the ministerial approval of the EDEKA/Kaiser's Tengelmann ("Tengelmann") merger.[32]

The FCO had blocked the proposed acquisition of Tengelmann by EDEKA in March 2015.[33] The Minister for Economic Affairs overruled the FCO decision in March 2016 by granting a ministerial authorization requested by EDEKA and Tengelmann. In July 2016, the DCA suspended the ministerial authorization, following an application for an interim injunction by Tengelmann's competitors REWE, Markant, and Norma.[34]

[31] *See* FCO, press release of December 8, 2016, available in German at: http://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2016/23_11_2016_Sierra_Rutile.html; *see also* FCO, case summary of December 7, 2016, available in German at: http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Fusionskontrolle/2016/B1-150-16.pdf?__blob=publicationFile&v=2.

[32] *See* FCO, press release of December 8, 2016, available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/08_12_2016_Edeka_Rewe.html?nn=3591286.

[33] *See* National Competition Report, January–March 2015, p. 15.

[34] *See* DCA, press release of July 12, 2016, available in German at: http://www.oberlandesgericht-duesseldorf.de/behoerde/presse/archiv/Pressemitteilungen_aus_2016/20160712_PM_Eilentscheidung-Minister-Edeka_Tengelmann/index.php. *See also* National Competition Report, July–September 2016, p. 10–11.

Norma and Markant had already withdrawn their appeals against the ministerial authorization when REWE withdrew its appeal. As all applications have been withdrawn and the legal deadline for appeals has expired, the DCA will not rule on the legality of the ministerial authorization. The authorization is therefore now final and effective, which means that EDEKA can finally acquire Tengelmann.[35]

Following the transaction, EDEKA will be the clear market leader in all affected markets. The FCO found that while the acquisition of Tengelmann by EDEKA in itself would not promote competition, the divestment of EDEKA's locations to REWE would cause "a relative improvement in competition." [36]

Policy and Procedure

Foreign Arbitration Awards Fully Reviewable by Courts with Regard to Cartel Infringements

On October 14, 2016, the Higher Regional Court of Celle ruled that foreign arbitration awards may be fully reviewed by a court with regard to alleged cartel infringements. However, a court generally will not set aside the award if the tribunal's decision is justifiable.[37]

The claimant in the court and arbitration proceedings produced, cultivated, and sold different kinds of sugar beet seeds. The respondent was a company involved in the cultivation and marketing for sugar beets and seeds. After the respondent had lost almost all its germplasm due to relocation, the parties started a cooperation that lasted for many years. In the final cooperation agreement, the claimant agreed to grant the respondent access to its germplasm and technology in exchange for a license fee. It was agreed that the claimant would be proprietor of all used and developed germplasm and technology. The agreement further contained non-competition clauses and prohibited the cooperation of the respondent with third parties. After a dispute, the respondent refused to fulfill its contractual duties.

In the following arbitration proceedings, the foreign tribunal found that the agreements between the parties did not infringe competition law. It decided in favor of the claimant and ruled that the respondent was obliged to pay damages for breach of contract, return all germplasm and technology, and refrain from using the germplasm gained through previous agreements. The claimant then petitioned the Higher Regional Court of Celle to recognize and enforce this arbitration award. The respondent argued that the award could not be recognized because this would contradict public policy (*ordre public*) and that the underlying agreement violated European and national competition law.

The Higher Regional Court of Celle declared the arbitration award to be partly enforceable with regard to the damages claim. It held that foreign arbitration awards may be fully reviewed by courts with regard to competition law infringements if a violation of public policy is in question. An award contradicts public policy if it contradicts major legal principles of the enforcing country, including mandatory European and German competition law.

However, the Higher Regional Court of Celle also found that the agreements did not infringe European or German competition law and thus did not contradict public policy. While the clauses are in principle hardcore restrictions pursuant to the R&D Block Exemption Regulation and TTBER, the Higher Regional Court of Celle found that—contrary to the tribunal's decision—these clauses were ancillary restraints, which did not infringe Article 101 TFEU.

[35] *See* DCA, press release of December 8, 2016, available in German at: https://www.justiz.nrw.de/WebPortal_Relaunch/JM/Presse/presse_weitere/PresseOLGs/archiv/2016_02_Archiv/08_12_2016_1/index.php.

[36] *See* FCO, press release of December 8, 2016, available at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/08_12_2016_Edeka_Rewe.html?nn=3591286.

[37] Higher Regional Court of Celle, decision of October 14, 2016, case 13 Sch 1/15 (Kart), available in German at: http://www.rechtsprechung.niedersachsen.de/jportal/portal/page/bsndprod.psml;jsessionid=17A553EF156BDF699063AFFEA2E6E7B8.jp27?printview=true&feed=bsnd-r-og&showdoccase=1¶mfromHL=true&doc.id=KOR E227512016.

Without these provisions, there would not have been any competition between the parties since the respondent had lost most of its germplasm before entering into the first agreement. In addition, the infringement of one clause did not lead to the invalidity of the entire contract. The court further held that the mere misapplication of law by a tribunal did not contradict public policy, because when a foreign decision or award is recognized a review of the merits by the recognizing court is generally not allowed (so-called prohibition of *revision au fonds*). The tribunal's errors made with regard to the application of competition law could not infringe public policy and therefore also could not prevent recognition of the award.

Higher Regional Court of Karlsruhe Rules on Prima Facie Evidence of Umbrella Pricing

On November 9, 2016, the Higher Regional Court of Karlsruhe decided on a follow-on damages action of a construction material supplier Kemmler against a cement manufacturer HeidelbergCement AG and ruled, *inter alia*, on the standard of proof concerning so-called "umbrella pricing."[38]

In April 2003, the FCO decided that the defendant and its competitors had operated a cartel by entering into quotas and market sharing agreements from, at least 1993 to 2002.[39] The plaintiff purchased cement from the cartelists as well as from a cement manufacturer, who was not involved in the cartel. The plaintiff had filed a declaratory action for damages against one of the cartelists in relation to supplies from both cartelists and non-cartelist, arguing that the cartel infringement led to price increases in the whole cement market, and, as a consequence, even suppliers not in the cartel had charged higher prices ("umbrella pricing").

The ECJ previously found in *Kone* that umbrella pricing is a legitimate basis for damages claims in order to guarantee the full effectiveness of Article 101.[40] The Higher Regional Court of Karlsruhe specified that under the specific conditions of the case there is a *prima facie* evidence for umbrella pricing: (i) the market coverage of the cartel was high (71.3%); and (ii) it was a long-term cartel infringement in a market with high transparency. It can be assumed that the non-cartelist knew about the prices charged by the cartelists since the beginning of the cartel and, therefore, also raised their prices .

The Higher Regional Court of Karlsruhe relied on previous case law holding that quota cartels, *prima facie*, increase prices and that the claimant who purchased cement from the cartelists and the non-cartelist paid an overcharged fee. The defendant was not able to sufficiently rebut this claim.

The Higher Regional Court of Karlsruhe decided on several other procedural and material aspects for follow-on damages actions in Germany, such as the "knowledge of the circumstances justifying the claim", which is relevant for the beginning of the limitation period for follow-on damage claims. It found that the plaintiff could not have acquired such knowledge from the FCO's press release but only from an extensive examination of the FCO's files. The decision is subject to appeal to the FCJ.

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[38] Higher Regional Court of Karlsruhe, decision of November 9, 2016, case 6 U 204/15 Kart (2), available in German at: http://lrbw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&nr=21561.

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

[40] *Kone* (case C-557/12) EU:C:2014:1317; *see also* European Competition Report, April–June 2014, p. 1.

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

The HCC Accepts Commitments in Electricity Sector Abuse of Dominance Investigation

In the second half of 2016, the HCC published its decision regarding a 2013 complaint by Aluminium of Greece ("AoG"), against the Public Power Corporation ("PPC") for infringement of Articles 2 of the Competition Act and 102 TFEU, in particular for refusal to supply and imposition of unfair trading conditions.[41] In February 2015, AoG submitted further evidence which, in its opinion, justified the HCC's order of interim measures against PPC.

Aluminum production is an electricity intensive industry and AoG is the largest electricity consumer in Greece. AoG and PPC signed a supply agreement in 1960, which had a 46-year term, expiring in March 2006. PPC found the supply price under the agreement injurious and, in February 2004, it notified AoG that it did not intend to extend the agreement. AoG challenged this action before the courts.

In 2008, AoG signed a new supply agreement based on PPC's pricelist for its other high voltage customers. However, a dispute arose regarding subsequent unilateral increases by PPC on AoG. The parties arbitrated the matter before the State's Regulatory Authority for Energy ("RAE") in 2011, who then in October 2013, issued a decision setting new terms for the supply of electricity from PPC to AoG.

PPC shortly after terminated the supply agreement, claiming AoG owed it outstanding debts and that the RAE's decision obliged it to supply energy to AoG at a price below cost; according to PPC, this constituted illegal state aid. AoG challenged this termination. In March 2015, the European Commission found that the measure did not constitute state aid.[42]

The HCC concluded that the object of the dispute was the applicable pricelist and that, since the RAE decision, each party applied a different pricelist, which it deemed reasonable and fair.

The HCC found that PPC's actions constituted an unjustified refusal to supply. According to the principles of proportionality and good faith, AoG's outstanding debt did not constitute an objective reason to interrupt the supply of electricity, especially because debt and the pricelist that led to it were a matter of legal dispute.. The HCC concluded that PPC should have waited for the outcome of the ongoing negotiations and judicial proceedings. Given that PPC was dominant in both the electricity generation and retail markets, it could have reasonably anticipated that the sudden interruption of supply would destabilize AoG and undermine its ability to pay its debt .

Regarding the imposition of unfair trading conditions, the HCC held that the terms and prices charged to a large customer should be proportional and account for individual circumstances. The prices should not distort competition or deter the entry of new participants in the market. The HCC found that PPC should negotiate with its customers regarding the price of electricity on the basis of non-discrimination, ensuring equivalent treatment of similar customers and rational treatment of customers with special characteristics. Unilateral pricing, which does not account for individual characteristics, as well as abandoning negotiations were not compliant with the principles of proportionality and equal treatment.

Notwithstanding these findings, the HCC accepted commitments from PPC in lieu of an admission of wrongdoing. PPC undertook, *inter alia*, to:

— continue to supply AoG with electricity under the current terms and conditions;

[41] HCC decision no. 621/2015,

[42] Commission Decision C (2015) 1942 of March 25, 2015 (State Aid C (2015/NN) (ex 2013/CP)), OJ 2015 C 219/1.

- negotiate with AoG on the basis of the Code of Supply of Electric Energy to Customers and propose new prices for the supply of electricity. Such negotiations would last for 3 months from the day the HCC accepted the commitments;
- abstain from any declarations until negotiations are concluded or the dispute is resolved, provided AoG continues to pay the currently applicable prices.

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").

Horizontal Agreements

The TAR Lazio Quashes the ICA's Decision on Serie A Championship TV Broadcasting Rights

On December 23, 2016,[43] the TAR Lazio upheld the appeals brought by the Italian top tier football league (Lega Nazionale Professionisti Serie A, "Lega"), its advisor Infront Italy S.r.l. ("Infront"), and TV broadcasters Sky Italia S.r.l. ("SKY") and Reti Televisive Italiane S.p.A. (through its subsidiary Mediaset Premium S.p.A. ("Mediaset")) and annulled the decision of the ICA in Case No. I790.[44]

According to the ICA decision, the parties had entered into an anticompetitive agreement, in breach of Article 101 of the TFEU, to alter the award of TV broadcasting rights for Lega's 2015–2018 seasons.

On May 19, 2014, Lega launched a tender procedure for the TV broadcasting rights of five different football packages. Despite the fact that SKY was the highest bidder for packages A and B,[45] Lega and Infront decided to award package A to SKY and package B to Mediaset, based on the assumption that the tender rules prevented the award of both packages to a single operator. Lega also awarded package D to Mediaset,[46] despite its bid being conditional and therefore invalid under the tender's rules. Mediaset then sub-licensed package D to SKY, upon authorization granted by the ICA under Article 19(1) of Legislative Decree No. 9/2008 (the so-called "Melandri Decree").[47]

The ICA asserted that the parties had entered into a restrictive agreement, aimed at altering the "natural" outcome of the tender. In particular, it found that: (i) Lega and Infront should have awarded both packages A and B to SKY;[48] (ii) Lega should have launched a new tender procedure for package D because Mediaset's offer for the package was conditional and therefore void; (iii) the restrictive agreement was further enforced by the sub-license agreement of package D between Mediaset and SKY; and (iv) the restrictive agreement was entered into after the bids had already been presented but before the final award.

According to the ICA, Lega and Infront facilitated the breach of Article 101 TFEU by unduly approving the sub-license agreement and by misapplying the tender rules, so that the actual award of the TV broadcasting rights substantially differed from the outcome of the tender. Mediaset was the main beneficiary of the restrictive agreement, while SKY played a marginal and defensive role aimed at obtaining one of the two packages it was entitled to under the tender rules. Overall, this was an infringement by object with the additional effects of freezing Mediaset's and SKY's market shares and foreclosing potential entrants.

In a hearing at the TAR Lazio, the parties put forward two central arguments before the TAR Lazio.

First, they successfully challenged an "anomalous time lapse" between the tender procedure and the ICA's

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[43] TAR Lazio judgments of December 23, 2016, No. 12811, 12812, 12814, and 12816.

[44] ICA decision of April 19, 2016, *Vendita diritti televisivi serie A* 2015-2018 (Case No. I790).

[45] Packages A and B included the rights related to eight football teams in the Italian top tier football league, to be broadcast via satellite and digital terrestrial television, respectively.

[46] Package D included exclusive "cross-platform" rights for matches played by the remaining minor football teams and one of the eight top tier football teams.

[47] The Melandri Decree sets out the legal framework under which broadcasting rights for live sports events must be offered in Italy.

[48] No explicit provision prohibited the award of both packages to a single operator. In particular, the tender rules did not mention any such prohibition and Article 9(4) of the Melandri Decree only prohibits a single operator from being awarded all packages concerning live events. According to the ICA, a lawful alternative would have been for Lega and Infront to withdraw the tender procedure and publish a new tender, explicitly prohibiting the award of packages A and B to a single operator.

decision to open proceedings against the parties. Prior to the tender procedure, the ICA the ICA had issued a favorable opinion on the tender's rules. And after the tender was concluded, the ICA specifically approved the sub-license agreement of package D. All in all, between April and September 2014, the ICA had assessed the tender four times (either on its own motion or following a complaint). Yet, the ICA nonetheless opened proceedings in February 2015, after the owner of a Lega club boasted about his ability to mediate an agreement between the parties. The ICA went on to impose fines in April 2016.

The TAR Lazio found that the ICA, in deciding on a case almost two years after its material facts, infringed the parties' rights of defense. In particular because, the ICA was, as of July 2014, already in possession of all the elements on which the decision to open proceedings was based. Indeed, the ICA decision does not mention the alleged mediation claim made by the club owner.

Second, the parties successfully contested the ICA's conclusion that their behavior resulted in an infringement by object.

The TAR Lazio reasoned that before the ICA can qualify an agreement as restrictive, it first needs to establish that a common interest exists for all the parties. It is only after such a commonality of interest is established, that the ICA may opine on the nature of any agreement. Moreover, even where the ICA addresses possible restrictions by object, an assessment of the economic and legal context, as well as of the aim pursued through the parties' conduct, is required. Here, the TAR Lazio concluded that the ICA had directly arrived at the conclusion that the agreement amounted to an infringement by object without assessing the context and without establishing the existence of a common interest.

According to the TAR Lazio, the need to avoid long and expensive legal proceedings could represent a lawful common interest. The parties had, in fact, reached an outcome that was more competitive than the one that would have followed the "natural" tender procedure. The mere existence of such an agreement was not, therefore, sufficient to establish an infringement by object.

In addition, the TAR Lazio found that the ICA had mistakenly defined the relevant market. The TAR Lazio considered that the market for pay-TV broadcasting rights in Italy has always been duopolistic (with SKY and Mediaset continuously holding almost 97% of the market shares). In its decision, the ICA fined the parties for foreclosing Eurosport, a potential entrant. The TAR Lazio, however, found that Eurosport is not active in the same market as SKY and Mediaset because Eurosport is only a "content provider" and its activity therefore occurs at the wholesale level of the pay-TV market, not at the retail level.

In light of the above, the TAR Lazio concluded that the agreement did not have the aim of "sharing out" the TV broadcasting rights and did not have the object or effect of restricting competition in the market for pay-TV broadcasting rights.

In light of the difficulty and the novelty of the case, the TAR Lazio ordered that each party bear its own legal costs.

Abuse

The Italian Competition Authority Fines Aspen for Charging Excessive Prices for Oncological Drugs

In a decision published on October 14, 2016, the ICA fined Aspen Pharma Trading Ltd., Aspen Italia s.r.l., Aspen Pharma Ireland Ltd., and Aspen Pharmacare Holdings Ltd. ("Aspen") more than five million euros for breaching Article 102(a) TFEU. According to the ICA, Aspen had charged excessive prices, abusing its right to renegotiate prices with the Italian Medicines Agency (the "AIFA"). Aspen's renegotiation strategy had resulted in an increase of between 300% and 1500% in prices for the oncological drugs Leukeran, Alkeran, Purinethol, and Thioguanine (the so-called "Cosmos").[49]

[49] ICA decision of September 29, 2016, *Incremento prezzo farmaci* Aspen (Case No. A480).

The Cosmos are drugs whose patents have expired and that are irreplaceable lifesaving drugs for the treatment of oncohematological patients, in particular for children and elderly people. In 2009, Aspen entered the Italian Cosmos market by acquiring GlaxoSmithKline's ("GSK") division. Aspen is currently the only drug maker authorized to market Cosmos drugs in Italy.

After holding that Aspen was dominant in the Italian Cosmos market, the ICA assessed whether the Italian Cosmos prices resulting from the renegotiation with the AIFA in 2013 were excessive. Relying on EU case law on excessive pricing,[50] the ICA first considered the disparity between the prices and costs of production of the oncological drugs. It then addressed the issue of unfair prices, comparing the then current prices with those charged at the time the drugs were first introduced on the market and approved by the AIFA. The ICA concluded that there was no objective justification (considering, in particular, the existence of additional R&D costs) for the contested price increase, which were deemed to be excessive.

The ICA not only found that the prices were excessive, but also contested Aspen's extremely aggressive negotiation strategy.[51] According to the ICA, this complex negotiation strategy could be split into three distinct categories of conduct: (i) Aspen repeatedly requested the AIFA to grant a C Class classification for Cosmos drugs; (the price of a C Class drug is not subject to the renegotiation procedure, can be freely determined by the seller, is paid by the patient and no reimbursement is provided for by the Italian National Health Service - the "SSN"); (ii) Aspen threatened to withdraw the drugs from the Italian market; and (iii) Aspen abused its "stock allocation mechanism".

With respect to the first type of negotiation strategy, Aspen repeatedly requested a C Class classification for all Cosmos drugs, even though it was allegedly aware that lifesaving and irreplaceable drugs like Cosmos cannot obtain this classification.

Aspen also repeatedly threatened to withdraw the Cosmos drugs from the Italian market if the requested prices and the C Class classification was approved. The ICA noted this was a serious threat because Aspen had already withdrawn the Cosmos drugs in Spain. Such a scenario would have had negative consequences for both individual patients and the SSN. Patients would have had to wait for the request of the SSN to import the drugs from abroad and the SSN would have had to bear significantly higher costs.

Finally, the ICA held that the scarcity of oncological drugs in the Italian market influenced the negotiations with the AIFA. Aspen abused its "stock allocation mechanism" as leverage in the negotiation with the AIFA. Through its centralized distribution system,

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[50] *United Brands Company and United Brands Continentaal BV v. Commission of the European Communities* (Case C-27/76) EU:C:1978:22, *OSA - Ochranný svaz autorský pro práva k dílůmhudebním o.s. v. Léčebné lázně Mariánské Lázně a.s.* (Case C-351/12) EU:C:2014:110, *Kanal 5 Ltd and TV 4 AB v. Föreningen Svenska Tonsättares Internationella Musikbyrå (STIM) upa* (Case C-52/07) EU:C:2008:703, *British Leyland Public Limited Company v. Commission of the European Communities* (Case C-226/84) EU:C:1986:421, *General Motors Continental NV v. Commission of the European Communities* (Case C-26/75) EU:C:1975:150, *Corinne Bodson v. SA Pompes funèbres des régions libérées* (Case C-30/87) EU:C:1988:225, *Société civile agricole du Centre d'insémination de la Crespelle v. Coopérative d'élevage et d'insémination artificielle du département de la Mayenne* (Case C-323/93) EU:C:1994:368, *Deutsche Post AG - Interception of cross-border mail* (Case COMP/C-1/36.915), Commission decision of July 25, 2001, *Scadlines Sverige AB v. Port of Helsinborg* (Case COMP/A.36.568/D3), Commission decision of July 23, 2004.

[51] The criteria and procedure for the negotiation of drugs prices is set out in Decision No. 3/2001 of the Interministerial Committee for Economic Planning, which states that prices are determined through a negotiation between the AIFA and the drugs companies. Pursuant to the AIFA's indications contained in the "Request to revise the price of the drugs - Annex I", the AIFA, when agreeing to a proposed price increase, takes into consideration the following conditions: (i) an absence of substitutes in the same class of drugs; (ii) an increase in the production costs for the drugs, in particular due to the increase in the price of raw materials; and (iii) an increase in the production costs, in particular due to regulatory provisions concerning the quality and the security of the specific drug.

Aspen was able to adjust the quantity of drugs supplied in a country depending on its prices. The ICA noted that this system was used in a distorted manner in Italy. Before Aspen's request to increase the prices was accepted by the AIFA, the supply of oncological drugs was systematically lower than the demand, resulting in product shortages.

According to the ICA, the described anticompetitive conduct resulted in a renegotiation that ended with the approval of the excessive prices proposed by Aspen.

Policy and Procedure

The Council of State Confirms the Autonomy of Leniency Applications Before Different Competition Authorities

On October 20, 2016,[52] the Council of State confirmed the judgment of the TAR Lazio[53] that upheld the fine imposed on DHL Express Italy S.r.l. and DHL Global Forwarding S.p.A. (together "DHL") for participating in an international freight forwarding cartel in the road transport sector.

In 2007, DHL submitted an immunity application to the European Commission for its participation in an international freight forwarding cartel in the sea, air, and road transport sectors. The European Commission recognized DHL as the first leniency applicant and granted it immunity for all three freight forwarding sectors. However, the European Commission only launched proceedings in the air transport sector, therefore leaving it open to the National Competition Authorities (the "NCAs") to open proceedings in the other sectors.

Also in 2007, DHL submitted a summary leniency application to the ICA. In this summary application, DHL did not include information concerning freight forwarding on the roads to and from Italy. Right after DHL's application, Shenker Italiana S.p.A. ("Shenker") submitted its own leniency application to the ICA, providing information concerning freight forwarding on the roads to and from Italy. Therefore, in 2011, when the ICA established that there was a cartel in the road transport sector, it granted immunity to Shenker.

DHL challenged the ICA's decision before the Italian Administrative Courts, arguing that it had been the first to submit a leniency application to the European Commission in all of the freight forwarding sectors.

To resolve the dispute, the Council of State made a reference to the European Court of Justice for a preliminary ruling.

The Council of State recalled the principles stated by the European Court of Justice in its ruling and confirmed that, given the absence of a fully harmonized leniency scheme at the EU level, a leniency application submitted to the European Commission is not considered to have been submitted to an NCA. Therefore, an undertaking that has participated in a cartel concerning different Member States should submit a leniency application not only to the European Commission, but also to the NCAs.

The Council of State also recalled that no EU competition law states that a preliminary leniency application to an NCA must be interpreted according to a parallel leniency application submitted to the European Commission. By contrast, a hierarchy among different leniency applications would result in an infringement of the decentralized system provided for in Regulation (EC) No. 1/2003.

The Council of State noted that for the leniency regime to prove useful in detecting cartels, national laws must encourage and not block the submission of new leniency applications.

The Council of State therefore rejected the appeal and confirmed the fine imposed on DHL.

The TAR Lazio Decides on the Procedure to Verify Non-Compliance with an ICA Decision

On November 11, 2016,[54] the TAR Lazio upheld the appeal brought by the Italian National Lawyers'

[52] Council of State decision of October 20, 2016, *DHL and ICA* (Judgment No. 4374).

[53] TAR Lazio decision of March 29, 2012, *DHL and ICA* (Judgment No. 3034).

[54] TAR Lazio judgment of December 23, 2016, No. 11169.

Council (Consiglio Nazionale Forense, the "CNF") against the decision of the ICA in Case No. I748B.[55]

The judgment sheds light on the procedural rules that the ICA should follow in non-compliance proceedings.

The ICA fined the CNF almost one million euros for failure to comply with the ICA's previous decision.[56] In its first decision, the ICA had found that a restriction set by the CNF on the possibility for lawyers to advertise their services on third-party websites breached Article 101 TFEU. According to the ICA, the CNF did not comply with its initial decision because the CNF: (i) did not delete the resolution containing the restriction from its servers and databases; and (ii) issued an opinion on how its resolution should be interpreted, substantially maintaining the restriction.

On appeal, the CNF challenged the procedural framework leading to the ICA's non-compliance decision, essentially claiming that its rights of defense had been breached. Moreover, the CNF contested whether not deleting the resolution and issuing the opinion could be deemed in breach of the ICA's first decision. In the CNF's view, the opinion, despite its interpretative nature, was specifically aimed at remedying the restriction. Moreover, keeping the resolution does not qualify as non-compliance, as defined by case law (i.e. "univocal and slavish reiteration of an already-punished behavior").

The TAR Lazio dismissed the ICA's arguments that the procedure to establish non-compliance is a simplified procedure, lacking any specific discipline.

Article 15(2) of the Italian antitrust law does not set out the procedure to follow in these cases. However, the TAR Lazio held that this does not result in a legal vacuum. Indeed, the procedure to establish non-compliance "shares, with the ordinary procedure, the same need for enhanced protection of the adversary principle, stemming from the peculiar punitive nature of the sanction".[57]

In light of the above, the ICA is subject to the same due process procedural rules both in non-compliance proceedings and in ordinary proceedings. In particular, the ICA cannot, as it did, waive the obligation to send the parties a statement of objections. Nor can the parties be heard only by the officials entrusted with the investigation of a case rather than by the ICA Council, the body with decision-making capacity. The ICA was not entitled to rely on Article 15(2) to sanction the CNF. Indeed, under Article 15(2), the automatic application of new penalties to an undertaking in a non-compliance case can only follow a similarly automatic assessment mechanism. The TAR Lazio concluded that whenever the assessment of an undertaking's behavior requires substantial interpretative effort, aimed at verifying if, and to what extent, there has been an infringement, the ICA cannot rely on Article 15(2) but must open a new and autonomous proceeding

The TAR Lazio also found that not deleting the resolution and issuing the opinion did not constitute non-compliance with the ICA's initial decision.

According to the judgment, not deleting an act, such as the resolution, is different from its adoption. Not deleting an act is the mere continuation of an act, and can only be autonomously relevant from an antitrust perspective if the CNF had threatened the lawyers that it would enforce the act, which it did not do. Secondly, the content of the opinion was radically different from that of the resolution. Indeed, pursuant to the opinion, the restriction on online advertising was only operational when the advertising aimed at unlawfully acquiring new clients, in breach of specific ethics rules.

As a result, the TAR Lazio quashed the ICA's non-compliance decision and ordered the ICA to pay all legal expenses. To date, there is no evidence that the ICA has appealed the TAR Lazio's judgment.

[55] ICA decision of February 10, 2016, *Condotte restrittive del CNF – Inottemperanza* (Case No. I748B).

[56] ICA decision of October 22, 2014, *Condotte restrittive del CNF* (Case No. I748).

[57] The ICA's power to sanction non-compliance with a previous decision is set out in Article 15(2) of Law No. 287 of October 10, 1990.

NETHERLANDS

This section reviews developments under the Competition Act of January 1, 1998 (the "Competition Act"),[58] *which is enforced by the Netherlands Authority for Consumers and Market (Autoriteit Consument & Markt, "ACM").*[59]

Horizontal Agreements

District Court Annuls ACM Decisions in the Taxi Operators Cartel Case

On October 13, 2016, the Rotterdam District Court annulled the ACM's November 2012 decisions to fine two Rotterdam taxi operators[60] and four of their executives[61] for entering into bid-rigging arrangements for contractual taxi transport services in the Rotterdam region.[62]

The cartel participants' joint market share exceeded 10% in the relevant geographic market (the Rotterdam region), which meant that they could not benefit from the de minimis exception to cartel violations as laid down in Article 7 of the Competition Act. The participants appealed the decision, arguing that the ACM had insufficiently motivated its definition of the relevant geographic market.

In its judgment, the Rotterdam District Court confirmed the ACM's qualification of the bid-rigging arrangements as restrictions of competition by object. However, it also noted that no evidence was brought before it supporting the fact that the ACM had conducted an in-depth examination of the relevant geographic market. The Rotterdam District Court considered that in the case at hand the ACM insufficiently motivated its decision to define the relevant geographic market for taxi transport services at the regional level, while in a previous case it had been defined at national level.[63] The Rotterdam District Court concluded that without a solid market definition, it could not be determined whether the cartel participants' agreement appreciably restricted competition and, therefore, annulled the ACM's decisions.

District Court Rejects Deutsche Bahn's Damages Claims in Pre-Stressing Steel Cartel Case

On November 16, 2016, the Limburg District Court rejected Deutsche Bahn's damages claims in the pre-stressing steel cartel case.[64] In 2010, the European Commission fined 17 producers of pre-stressing steel €269 million (reduced from €518 million) for participating in a cartel for 18 years. Pre-stressing steel is usually used in the construction industry to make foundations, balconies, or bridges. It is also used by makers of railroad ties or sleepers who may have sold their products to German railroad operator Deutsche Bahn ("DB").

On December 31, 2013, DB bought its damages claims for joint and several liability before the Limburg District Court due to the fact that one of the cartel participants is based in the Netherlands. The cartel participants present at the proceedings contested these damages claims, arguing that the statutory limitation period to bring proceedings had expired.

The Limburg District Court agreed with the defendants that according to the applicable law, i.e., German competition law, DB's damages claims were time-barred because they were brought after the 10-year

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

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

[60] Rotterdam District Court, Judgment of October 13, 2016, ECLI:NL:RBROT:2016:7663; Rotterdam District Court, Judgment of October 13, 2016, ECLI:NL:RBROT:2016:7664.

[61] Rotterdam District Court, Judgment of October 13, 2016, ECLI:NL:RBROT:2016:7659; Rotterdam District Court, Judgment of October 13, 2016, ECLI:NL:RBROT:2016:7660; Rotterdam District Court, Judgment of October 13, 2016, ECLI:NL:RBROT:2016:7661; Rotterdam District Court, Judgment of October 13, 2016, ECLI:NL:RBROT:2016:7662;

[62] Case 7130-7131 (*Taxivervoer Rijnmond*), ACM decisions of November 20, 2012.

[63] Case 6957 (*Veolia-CDC-Transdev*), ACM decision of December 9, 2010.

[64] Limburg District Court, Judgment of November 16, 2016, ECLI:NL:RBLIM:2016:9897.

limitation period, which had started running no later than September 2002 when the cartel stopped. DB maintained that the limitation period had been suspended for the duration of the European Commission's investigation, as laid down in Article 33(5) of the German Competition Act. However, the Limburg District Court rejected this argument on the basis that this provision only came into force in 2005, *i.e.*, after the cartel had already ended. In doing so, the Limburg District Court explicitly deviated from a previous, controversial judgment of the Higher Regional Court of Düsseldorf that did apply Article 33(5) retroactively.

However, the Limburg District Court did grant DB's damages claims against two Spanish defendants who did not appear before it in the proceedings.

Mergers and Acquisitions

ACM Approves T-Mobile's Acquisition of Vodafone Thuis; Liberty Global and Vodafone Complete Their Joint Venture

On December 13, 2016, the ACM approved T-Mobile's proposed acquisition of Vodafone Thuis, opening the way for Liberty Global and Vodafone to complete their telecoms joint venture in the Netherlands.[65]

In its August 3, 2016 decision, the European Commission cleared Liberty Global and Vodafone's proposed joint venture, subject to the condition that Vodafone divest its retail consumer fixed line business in the Netherlands.[66] The European Commission considered that the merger, as initially notified, "would have reduced competition in the markets for fixed multiple play services and for fixed-mobile multiple play services in the Netherlands".[67] It is against this background that T-Mobile proposed to acquire Vodafone Thuis, i.e., Vodafone's fixed telephone, TV, and internet businesses. The parties requested clearance of the transaction from the ACM on November 12, 2016.

The ACM approved T-Mobile's proposed acquisition of Vodafone Thuis, noting that it had no reason to consider that the merger would significantly reduce competition in the Netherlands or in any part of the Dutch territory. Furthermore, the ACM noted that its close collaboration with the European Commission during the Liberty Global/Vodafone merger investigation meant that it had been able to quickly decide on the T-Mobile/Vodafone Thuis joint venture. On December 31, 2016, Liberty Global and Vodafone announced the completion of their joint venture.[68]

[65] Case 16.1171.22 (*T-Mobile-Vodafone Thuis*), ACM decision of December 12, 2016.

[66] *Vodafone/Liberty Global/Dutch JV* (Case COMP/M/7978), Commission Decision of August 3, 2016.

[67] Commission press release IP/16/2711, "Mergers: Commission clears Vodafone/Liberty Global telecoms joint venture, subject to conditions; rejects referral request by Dutch competition authority," August 3, 2016.

[68] Vodafone/Liberty Global joint press release of December 31, 2016, available at: https://www.ziggo.com/resources/documents-new/16%2012%2031%20-%20Closing%20NL%20JV%20transaction%20-%20FINAL%200900GMT.pdf.

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").

Horizontal Agreements

The CNMC Fined Two Travel Agencies for Breaking a 16-Year Old Infringement Decision, with a Joint Venture Replacing Former Collusive Agreements

On September 29, 2016, the CNMC fined the travel agencies Viajes Barceló, S.A. ("Viajes Barceló") and Viajes Halcón, S.A. ("Viajes Halcón") €619,500 and €1,218,924 respectively for breaking an infringement decision from October 2000.[69]

The CNMC found that Viajes Barceló and Viajes Halcón had continued to coordinate their conduct in public tenders for the provision of travel assistance to IMSERSO, a Spanish government entity providing subsidized holidays to the elderly, from 1998 through 2011.

The coordination was implemented through a Unión *Temporal de Empresas* ("temporary joint venture") set up by the travel agencies,[70] which the CNMC found had replaced the former collusive agreements that had already previously been sanctioned in 2000.

In 2000, the Tribunal de Defensa de la Competencia ("TDC"), one of Spain's competition authorities at the time, fined a number of travel agencies for: (i) submitting identical bids to the 1995–1996 IMSERSO public tenders, and agreeing to jointly perform the contract, irrespective of the tender results;[71] and (ii) signing contracts with other travel agencies to ensure that those agencies would not take part in the tender.

As a result, the TDC fined the four infringing companies approximately €3.7 million. The decision was subsequently upheld by the Spanish High Court and the Spanish Supreme Court.[72]

Between 1998 and 2011, the travel agencies jointly bid in IMSERSO's tenders through the newly created temporary joint venture. The declared purpose of the temporary joint venture was to jointly bid for each yearly IMSERSO contract.[73] The temporary joint venture was the only bidder in the IMSERSO annual tenders between 1998 and 2015.

In its 2016 decision, the CNMC found that the creation of the temporary joint venture and its use by the travel agencies was a continuation of the coordinated behavior that had been prohibited in 2000. The CNMC therefore concluded that the new conduct breached the 2000 infringement decision.

The CNMC concluded that any agreement to jointly bid constituted a restriction of competition, regardless of its specific form. The fact that all travel agencies had the necessary resources to bid for contracts

[69] Case SNC/DC/007/16, *Agencias de viajes*, CNMC decision of September 29, 2016.

[70] Viajes Barceló and Viajes Halcón were the only travel agencies participating in the temporary joint venture by 2011. The two other members of the temporary joint venture (and the coordinated behavior to which the 2000 decision relates), namely Viajes Iberia and Viajes Marsans, had by then left the temporary joint venture after becoming bankrupt.

[71] The joint execution was carried out by an economic interest grouping named "AIE Mundosocial," set up by the travel agencies participating in the coordination of bids.

[72] Case 1001/2000, Spanish High Court judgment of February 12, 2003; Case 991/2000, Spanish High Court judgment of February 12, 2003; Case 1002/2000, Spanish High Court judgment of December 19, 2003; Case 1010/2000, Spanish High Court judgment of February 25, 2004; Case 1000/2000, Spanish High Court judgment of January 19, 2005; Case 4628/2003, Supreme Court judgment of February 14, 2006; Case 818/2004, Supreme Court judgment of October 24, 2006; Case 3658/2004, Supreme Court judgment of December 20, 2006; and Case 1634/2005, Supreme Court judgment of December 18, 2007. (Different judgments were issued for different parties).

[73] AIE Mundosocial continued to exist and retained several resources, including IT systems, offices, and workforce, which it would routinely lend to the new temporary joint venture for the execution of the contract won with IMSERSO.

independently from each other was an important factor in this conclusion.[74]

The decision closely follows recent cases[75] where the CNMC has also sanctioned the use of temporary joint ventures as a means to continue, in a more covert manner, cartels previously sanctioned by the competition authority.

This is also yet another decision focusing on public procurement markets. The CNMC currently considers public procurement an important area of work, where significant benefits for consumers can be achieved through enforcement.

The fines imposed in this case where nearly as high as (or even higher than, in the case of Halcón Viajes) the fines in the original infringement decision (in absolute, nominal terms).

The Supreme Court Clarified the Rules Governing the Prescription of Competition Law Infringements

On October 24, 2016, the Spanish Supreme Court delivered a judgment clarifying the grounds on which the deadlines for prescription of competition law infringements may be interrupted.[76]

On July 28, 2010, the then Spanish Competition Authority ("CNC") found that several wine producers had participated in a cartel in the Sherry sector.[77] The CNC found that several Sherry producers had engaged in market sharing, minimum price fixing, output limitation, exchange of commercially sensitive information, and implementation of monitoring mechanisms. As a result, the CNC fined nine wine producers, and the relevant industry association and Regulatory Board, a total of seven million euros.

One wine producer, Bodegas José Estévez, S.A. ("Bodegas Estévez"), challenged the CNC decision before the Spanish High Court, arguing, amongst other points, that the infringement proceedings had lapsed.[78]

Under Spanish Law, the time limit for issuing and notifying an infringement decision is 18 months from the date of formal initiation of the infringement proceedings. If this period ends without the adoption and notification of a final decision, the infringement proceedings expire.

In addition, competition law infringements are subject to a statute of limitations running from when the infringement was committed (or, in the case of a continuous infringement, from the date it ceased). For serious infringements (such as a cartel), the period expires four years after the infringement was committed (or ceased to be committed). This period may be interrupted by: (i) any enforcement activity of the administration that has been formally notified to the investigated party (such as infringement proceedings); and (ii) any acts performed by the parties under investigation to comply with infringement decisions.

The first infringement proceedings against the Sherry cartel were initiated by the CNC on July 15, 2008.[79] The infringement decision was adopted on July 28, 2010 and notified to Bodegas Estévez on August 2, 2010.

In its judgment, the Spanish High Court held that the deadline to adopt a final decision (July 29, 2010) preceded the date of notification. It was not sufficient for the CNC to adopt the decision by the deadline. The decision was therefore annulled.

However, the High Court found that that the statute of limitations of the infringement had not yet run, since the prescription period had been interrupted by: (i) the

74 In this respect, the CNMC pointed to the fact that the temporary joint venture was able to continue to perform the contracts despite two of the four initial members leaving the temporary joint venture upon becoming bankrupt during different contract periods.

75 See Case 205/2016, Spanish High Court judgment of May 23, 2016 and Case 206/2016, Spanish High Court judgment of May 26, 2016, confirming Case S/0383/11, Transporte Sanitario Conquense , CNMC decision of July 23, 2013.

76 Case 98/2014, Spanish Supreme Court judgment of October 24, 2016.

77 Case S/0091/08, *Vinos Finos de Jerez*, CNC decision of July 28, 2010.

78 Case 626/10, Spanish High Court judgment of November 26, 2013.

79 Incidentally, this was also considered to be the moment when the infringement ceased

infringement proceedings; (ii) the instructions sent by the CNC to proceed with the fine payment; and (iii) the application for the CNC to stay the execution of the fine.

In June 2014, the CNMC therefore initiated new infringement proceedings against Bodegas Estévez, and on December 17, 2015 imposed a new fine of €1.71 million for the same anticompetitive conduct as had been originally investigated by the CNC.[80]

However, on October 24, 2016, the Spanish Supreme Court reversed the previous judgment of the High Court. The Supreme Court found that certain acts taken into account by the High Court to establish the infringement had not interrupted the statute of limitations. Specifically, the Supreme Court held that: (i) the CNC's instructions to Bodegas Estévez for the fine payment were a supplement to the (lapsed and invalid) infringement decision.[81] The instructions therefore could not interrupt the limitations period; and (ii) Bodegas Estévez's application for the CNC to stay the execution of the fine was not an act to comply with the infringement decision, but rather a step to provisionally impede the execution of the decision.

On this basis, the Supreme Court held that the 2015 decision was adopted after the statutory period had run.

This judgment will provide helpful clarity to any party under investigation by the CNMC, and to the CNMC itself, on the statute of limitations of competition law infringements.

80 Case S/DC/0517/14, *Bodegas José Estévez*, CNMC decision of December 17, 2015. The CNMC used the same evidence and analysis as the CNC, but relied on a different methodology to calculate the fine, taking into account recent legal precedent annulling the penalty setting policy of the CNC and CNMC.

81 Those instructions merely indicated the place and term of the payment.

Mergers and Acquisitions

The Spanish Supreme Court Annulled a Fine Imposed by the Spanish Competition Authority for Gun-Jumping in a Two-Stage Transaction

On October 10, 2016, the Spanish Supreme Court upheld[82] a judgment of the Spanish High Court[83] that annulled a €124,400 fine[84] on manufacturers of metal automotive components (Gestamp Manufacturing Autochasis, S.L. ("Gestamp") and Grupo Estampaciones Sabadell, S.L.U. ("Bonmor"), and their respective parent companies) for failing to suspend a concentration pending approval by the competition authority.

The case relates to Gestamp's 2011 acquisition of a 40% participation in Bonmor's subsidiary ESSA Palau, S.A., ("ESSA Palau"). The participation was achieved in two "tranches" in the form of two simultaneous agreements signed on July 22, 2011.

In the first agreement, Bonmor undertook to sell 10% of shares in ESSA Palau to Gestamp and Gestamp agreed to open a credit line in favor of ESSA Palau for a maximum of €2.5 million since the target was in a critical financial situation at the time, which needed to be addressed as a matter of urgency and without waiting for the mandatory approval of the transaction. This agreement was effective immediately.[85]

In the second agreement, Gestamp acquired 30% of ESSA Palau, subject to the approval of the transaction by the CNC. This agreement was notified to the CNC on August 12, 2011.

82 Case 2681/2015, Spanish Supreme Court judgment of October 10, 2016.

83 Case 136/2012, Spanish High Court judgment of April 24, 2015.

84 Case SNC/0015/11, *Gestamp/Essa Bonmor*, CNC decision of January 30, 2012.

85 The agreement envisaged a transfer of the ownership of the 10% shareholding to Gestamp and the payment of the agreed price on the same day as the signing of the agreement. The agreement did not include any suspension clause regarding the mandatory authorization by the CNC.

The second transaction was approved by the CNC, without remedies, on September 7, 2011. The CNC looked at Gestamp's acquisition of 40% shareholding in ESSA Palau, but did not conclude on whether the first transaction alone amounted to an economic concentration.

On September 14, 2011, the CNC initiated infringement proceedings against the parties for failure to suspend the first agreement pending approval of the transaction by the CNC. The CNC imposed a fine on January 30, 2012.

The Supreme Court's assessment focused on whether the first agreement constituted an economic concentration under Article 7 of the LDC, and therefore whether it was subject to the obligation of *ex ante* notification (and the prohibition to complete such concentration until approval has been obtained from the competition authority) under Article 9 LDC.

If the first agreement constituted such a concentration, then the parties would have infringed Article 9 LDC, since the agreement was completed on July 22, 2011, whereas the transaction was only notified to the CNC on August 12, 2011.

Article 7 LDC defines an economic concentration as a stable change of control over all or part of one or more undertakings. Therefore, to address the above question, the Supreme Court assessed two issues.

First, it assessed whether the first agreement conferred the acquirer (Gestamp) decisive influence over the target (ESSA Palau). In this regard, the Supreme Court noted that, as a consequence of the first agreement (which transferred to Gestamp a limited shareholding (10%) of the target and the right to appoint two out of five directors, while establishing new qualified majorities for the approval of certain corporate decisions), Gestamp merely acquired the ability to veto the approval of the target's annual accounts (but not its budget) and the entering into new financial debt by the target. This, in the view of the Supreme Court, did not lead to a finding of decisive influence.

Second, the Supreme court assessed whether the first agreement represented a stable (*i.e.*, durable) change of control. The Supreme Court referred in this point to paragraphs 28 ff of the EC's Jurisdictional Notice,[86] since Spanish law does not explicitly clarify this aspect. The Supreme Court noted that the first agreement was the only agreement in place for merely 48 days. Further, the first agreement was subject to the condition that the second agreement would be approved by the competition authority. While the EC's Jurisdictional Notice does not refer to an equivalent scenario, it sets out a number of other scenarios where the acquisition of control on a temporary basis (typically less than a year) may exceptionally not be considered an economic concentration. The application of the (implied) one year criterion contained in the EC's Jurisdictional Notice supported the Supreme Court's view that there was no notifiable transaction in the present case.

The Supreme Court concluded that the merger parties were not obliged to notify the first agreement to the CNC, and annulled the fine imposed by the CNC. The Supreme Court did suggest that there is no set rule to determine the circumstances in which temporary transactions may be regarded as a stable change in control. A case-by-case assessment will continue to be necessary in the future.

This judgment provides clarity on the issue of temporary transactions in Spanish law and helps ensure consistency with EU law precedent. The judgment also provides helpful guidance on the issue of minority shareholdings in merger control.

[86] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ 2008 C 095/01

SWEDEN

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

Horizontal Agreements

The SCA Fines Two Undertakings for Collusion on the Market for Waste Collection

On November 25, 2016, the SCA issued a decision finding that Ragn-Sells AB ("Ragn-Sells") and Bilfrakt Bothnia AB ("Bilfrakt") had entered into an agreement not to compete against one another in waste collection procurements.[87]

The SCA found that Ragn-Sells and Bilfrakt had agreed for five years not to bid against each other for household waste collection procurements in the region of Västerbotten. The SCA held that the agreement was anticompetitive as it reduced uncertainty in the tendering process. The arrangement was discovered in February 2014, after Postnord AB ("Postnord") took over the waste collection services from Bilfrakt's subsidiary, Transbothnia AB ("Transbothnia"), after acquiring it.

Postnord and Transbothnia were granted full leniency because they had informed the SCA of the arrangement. Ragn-Sells and Bilfrakt were fined kr2.45 million and kr2.06 million, respectively.

The Patent and Market Court Upholds SCA Claim Against Data Communications Operators

On December 21, 2016, the Patent and Market Court issued its judgment in the claim brought by the SCA against Göteborg Energi GothNet AB ("GothNet") and TeliaSonera Sverige AB ("TeliaSonera").[88] The SCA claimed that GothNet and TeliaSonera had entered into an anticompetitive agreement or concerted practice in breach of the Swedish Competition Act 2008.

Both parties were active on the market for data communications services and offered their products and services to customers in the Gothenburg region. In 2009, the city of Gothenburg held a tender for the provision of fixed data communications services for the city's network. GothNet won the tender and appointed TeliaSonera, which had not bid, as its exclusive sub-contractor. The SCA claimed that GothNet and TeliaSonera had entered into an arrangement whereby TeliaSonera agreed not to participate in the bid on the understanding that GothNet would assign it as sole sub-contractor.

The Court found that TeliaSonera had provided information to GothNet on its intent not to bid. When GothNet subsequently sought confirmation from TeliaSonera, TeliaSonera submitted a document that could be perceived as either a letter of intent or cooperation agreement. The Court found that this was insufficient to constitute an agreement, but rather constituted a concerted practice with the object of restricting competition.

The Court held that the information exchanged by TeliaSonera was current, only made available to GothNet, and specific to the tender. By informing GothNet of its intent, TeliaSonera reduced the uncertainty of the bid and limited GothNet's need to submit a competitive offer. GothNet had an advantage over the other undertakings involved because it was the only undertaking aware of TeliaSonera's intent. TeliaSonera provided this information to GothNet with the aim of gaining its trust and to benefit from a stronger position when negotiating a sub-contractor agreement. The Court found that this practice had the object of reducing the uncertainty of the tender process for GothNet and would be presumptively anticompetitive.

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[87] SCA decision of November 9, 2016 (DNR 184/2014), available at: http://www.konkurrensverket.se/globalassets/konkurrens/avgiftsforelaggande/14-0184-beslut-avgiftsforelaggande-ragn-sells-2016-11-09.pdf and http://www.konkurrensverket.se/globalassets/konkurrens/avgiftsforelaggande/14-0184-beslut-avgiftsforelaggande-bilfrakt--2016-11-09.pdf.

[88] The Patent and Market Court's judgment of December 21, 2016 (PMT 17299-14).

The Court then assessed the legal and economic circumstances under which the practice occurred. It found that both GothNet and TeliaSonera had the ability and capacity to independently bid in the tender procedure and were therefore competitors. GothNet had a distinct advantage over other bidders due to having an existing network in place, which substantially reduced its own costs. Importantly, it noted that GothNet had previously won Gothenburg's tender in 2004 for the same services and similarly employed TeliaSonera as its sub-contractor. Consequently, the Court concluded that the arrangement was an effort to cement this relationship on a permanent basis.

The Court proceeded to review any potential efficiencies of the arrangement under Chapter 2 Article of the Swedish Competition Act, the Swedish analogue of Article 101(3). However, it held that the information sharing did not contribute to a more efficient production or distribution process nor did it contribute to technical or economic progress. In particular, the Court found that GothNet and TeliaSonera could have entered into a sub-contractor agreement without any prior information exchange regarding TeliaSonera's participation in the tender.

The Court fined GothNet and TeliaSonera eight million krona each for entering into a concerted practice with the object of restricting competition in violation of the Swedish Competition Act.

Mergers and Acquisitions

The Patent and Market Court of Appeal Dismisses SCA Appeal Against Heating Pipes Merger

On November 24, 2016, the Patent and Market Court of Appeal issued its judgment in the appeal brought by the SCA against the proposed merger between Logstor A/S's subsidiary Logstor Sverige Holding AB ("Logstor") and Powerpipe Systems AB ("Powerpipe").[89] The Patent and Market Court of Appeal upheld the first instance judgment of the Stockholm City Court which had found on August 4, 2016 that the merger did not contravene Chapter 4 of the Swedish Competition Act 2008, which prohibits concentrations that impede the development of effective competition within the country or a substantial part thereof, in particular when creating or strengthening a dominant position.

Logstor and Powerpipe are both manufacturers of district heating pipes, which provide the network systems of pipes that conduct warm water to radiators and taps in households. Logstor sought to purchase Powerpipe. However, the SCA argued that such a merger would reduce the number of competitors on the Swedish market, create a dominant position, and potentially cause price increases or worse offers for customers.

The Court of Appeal undertook a review of the relevant market for the proposed merger, focusing on the geographic market as the relevant product market of district heating pipes, potentially also including district cooling pipes, was not disputed.

The Court initially noted that the SCA had insufficiently analyzed the market shares of the parties and their competitors, both in Sweden and abroad. This limited the Court's ability to conclude whether the geographic market was national in scope based on cross-border presence. In any event, the Court found that manufacturers and customers of district heating pipes did conduct sales and purchases across Member State borders. Customers did not show a preference for locally manufactured district heating pipes and the products themselves varied very little regardless of where they were produced, with the most important factor being the final price paid. The pipe specifications requested by customers, which could differ by country, were such that all manufacturers would be able to meet them. Importantly, manufacturers outside of Sweden have won tenders to supply Swedish customers and several foreign undertakings have expressed a desire to enter the Swedish market.

Regarding costs, the Court held that price differences across Member States were not systematic nor were transport costs a decisive factor, as these were

[89] The Patent and Market Court of Appeal's judgment of November 24, 2016 (PMT 7499-16).

relatively small and manufacturers often offset these with various other costs, such as that of raw materials. The Court noted that the SSNIP-test was not relevant in the context of this market as it operated through tenders. The tender bids varied depending on the individual needs and specifications of the purchaser's order and, therefore, there was no standard competitive price to use for the SSNIP-test. Moreover, there were no regulatory barriers or costs to limit the geographic market on a national basis. As a result, the Court concluded that the relevant geographic market was not national in scope, as the SCA argued, but instead was EEA (plus Switzerland)-wide.

The Patent and Market Court of Appeal concluded that the proposed merger could proceed as it did not create or strengthen a dominant position, nor would the merger impede effective competition on the whole, or parts of, the Swedish market.

SWITZERLAND

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

Horizontal Agreements

The FCC Maintains Swatch's Supply Agreement Based on Survey Evidence

On October 24, 2016, the FCC decided to maintain its 2013 agreement with Swatch Group AG ("Swatch").[90] This agreement requires Swatch's subsidiary ETA SA Manufacture Horlogère Suisse ("ETA") to supply mechanical watch movements to third-parties, albeit in gradually reducing volumes.[91]

Following Swatch's request to amend the agreement, the FCC conducted a review of current market conditions and found that ETA was still dominant in the market. The FCC concluded that current market conditions meet their 2013 predictions and did not justify amending the agreement.

The FCC's analysis relied on survey responses from market players, who strongly expressed that the maintenance of the previous agreement was crucial for the development of the market. These players stated, and the FCC agreed, that modifying the supply agreement would jeopardize ETA's competitors' plans for market entry or expansion. The FCC concluded that the current economic difficulties in the watch industry are not a sufficient justification for modifying the 2013 agreement.

The FCC Fines Swiss and Austrian Companies for Territorial Distribution Involving a Government Contract

On December 20, 2016, the FCC fined Austrian warning light producer Eflare Corporation Pty Ltd ("Eflare") and its Swiss distributor Waseg-Handel GmbH ("Waseg") for impeding parallel imports.[92]

Eflare warning lights are used by the Swiss military police for temporary signaling on roads. They are distributed in Switzerland by Waseg. A competitor of Waseg's tried to import these warning lights through Eflare's Polish distributor, in order to fulfill part of a large procurement order from the Swiss Army. But Eflare refused to supply its Polish distributor with the lights destined for sale in Switzerland following a request made by Waseg. The FCC, upon finding that the agreement to block the sale through the Polish distributor amounted to territorial distribution, fined both Eflare and Waseg. Eflare and Waseg also agreed not to conclude an illegal territorial distribution agreement in the future.

The FCC Issues Fines in Several Infringements Relating to Interest Rate Derivatives

On December 21, 2016, the FCC issued decisions in four interest rate derivatives ("IRD") and benchmark investigations.[93] The FCC fined various banks over CHF 98 million for collusion related to the Swiss franc, euro, and yen IRDs and the Swiss franc LIBOR benchmark.

IRDs are financial products that are used by banks or companies for managing the risk of interest rate fluctuations. They derive their value from the level of a benchmark interest rate, such as the London interbank offered rate (LIBOR) or the Euro Interbank Offered Rate (EURIBOR).

[90] *See* FCC press release, October 24, 2016, available at: https://www.weko.admin.ch/weko/fr/home/actualites/communiques-de-presse/nsb-news.msg-id-64271.html.

[91] *See* FCC press release, October 25, 2013, available at: https://www.weko.admin.ch/weko/fr/home/aktuell/medieninformationen/nsb-news.msg-id-50702.html.

[92] *See* FCC press release, December 20, 2016, available at: https://www.weko.admin.ch/weko/fr/home/actualites/communiques-de-presse/nsb-news.msg-id-65020.html.

[93] *See* FCC press releases, December 21, 2016, available at: https://www.weko.admin.ch/weko/fr/home/actualites/communiques-de-presse/Medienmitteilungen-2016.html.

Swiss franc. The FCC concluded that four international banks—Credit Suisse, JPMorgan, Royal Bank of Scotland ("RBS"), and UBS—operated a cartel in Swiss franc IRDs between May and September 2007.

The FCC found that the cartel agreed to quote wider fixed bid-ask spreads on certain categories of short term over-the-counter Swiss franc IRDs to third parties, while maintaining narrower spreads for trades amongst participating traders.

As part of a December 5, 2016, settlement with the FCC, Credit Suisse was fined CHF 2 million, JPMorgan CHF 2.5 million, and RBS CHF 0.86 million. UBS received full immunity for revealing the cartel to the FCC, and RBS and JPMorgan received fine reductions for cooperating with the investigation under the leniency program.

Euro. The FCC concluded that between September 2005 and May 2008 several banks participated, for different durations, in a cartel in euro IRDs.

The cartel aimed to distort the normal pricing of euro IRDs. Traders from various banks occasionally discussed their submissions for the calculation of the EURIBOR as well as their trading and pricing strategies.

On December 5, 2016, four of these banks (Barclays, Deutsche Bank, RBS, and Société Générale) settled with the FCC. Barclays and Deutsche Bank participated in the cartel for 32 months, Société Générale for 26 months, and RBS for 8 months. Deutsche Bank received full immunity for revealing the cartel to the FCC. Barclays, RBS, and Société Générale received fine reductions for cooperating with the investigation under the leniency program. The FCC fined Barclays CHF 29.8 million, RBS CHF 12.3 million, and Société Générale CHF 3.3 million. Proceedings against BNP Paribas, Crédit Agricole, HSBC, JPMorgan, and Rabobank are ongoing.

Yen. The FCC found several distinct, bilateral infringements of competition law, lasting between 1 and 10 months from 2007 to 2010, in the yen IRDs sector.

The collusion included discussions between traders on yen LIBOR submissions. The traders also exchanged commercially sensitive information relating to trading positions and, in one infringement, to future submissions for the TIBOR (Tokyo interbank offered rate).

On December 5, 2016, four of the banks involved (Deutsche Bank, JPMorgan, Citigroup, and RBS) settled with the FCC. The FCC fined Deutsche Bank CHF 5 million, JPMorgan CHF 1.7 million, Citigroup CHF 3.8 million, and RBS CHF 3.9 million. Proceedings against HSBC, Lloyds, Rabobank, and UBS, and the Interdealer/Cash Brokers ICAP, RP Martin, and Tullett Prebon are ongoing. But the FCC discontinued proceedings against the Japanese banks Mizuho, Sumitomo Mitsui, and the Bank of Tokyo-Mitsubishi.

LIBOR. The FCC concluded that between March 2008 and July 2009 JPMorgan and RBS operated a bilateral cartel with the aim of influencing the Swiss franc LIBOR benchmark.

The FCC found that, between March 2008 and July 2009, RBS and JP Morgan tried to distort the normal pricing of Swiss franc IRDs. The banks discussed future Swiss franc LIBOR rate submissions and exchanged information concerning trading positions and intended prices.

On December 14, 2016, both banks settled with the FCC. RBS received full immunity for revealing the cartel to the FCC. The FCC fined JPMorgan CHF 33.9 million, after a reduction for cooperation under the leniency program. Simultaneously, the FCC discontinued the procedure against the two Swiss Interdealer/Cash Broker Cosmorex and Gottex Brokers.

Mergers and Acquisitions

FCC Announces In-Depth Investigation into Pharmaceutical Acquisition

On October 18, 2016, the FCC announced that it would carry out an in-depth investigation into the acquisition of Pharmapool Aktiengesellschaft ("Pharmapool") by Galexis AG ("Galexis"), a

subsidiary of Galenica AG and the largest pharmaceutical wholesaler in Switzerland.[94]

The transaction is liable to strengthen Galexis' market position, in particular in the field of wholesale pharmaceutical trade for dispensing physicians. Galexis, however, claims the acquisition would create synergies by making certain terms of purchase available to Pharmapool.

During its Phase I investigation, the FCC found indications that the proposed transaction could create or strengthen a dominant position in the markets for wholesale pharmaceutical trade for dispensing doctors, nationwide pharmacies, and local pharmacies in the Rheintal region (Saint-Gall). On this basis, the FCC will examine the effects on competition of the proposed concentration. The law provides for a maximum period of four months for Phase II.

[94] *See* FCC press release, October 18, 2016, available at: https://www.weko.admin.ch/weko/fr/home/actualites/communiques-de-presse/nsb-news.msg-id-64166.html.

UNITED KINGDOM

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

Horizontal Agreements

CMA Fines Poster Reseller and Disqualifies Director for Online Price Fixing

On September 30, 2016, the CMA published its August 12, 2016 infringement decision finding that Trod Ltd. ("Trod") had entered into an agreement not to undercut prices with its supplier and competitor GB Eye Ltd. ("GBE").[95] The CMA's formal investigation began in September 2015 following a leniency application by GBE. The CMA carried out unannounced inspections at Trod's business premises and the domestic premises of its senior management on December 1, 2015.

Trod was GBE's largest online customer, purchasing sport and entertainment posters and frames from GBE for resale on its own website and Amazon UK's online marketplace. GBE initially sold posters and frames to resellers, with a limited direct sales operation on its website. In March 2010, GBE expanded into Amazon UK's online marketplace, prompting complaints from its resellers that it was "undercutting" their business.

The CMA found that GBE and Trod entered into an arrangement under which both parties agreed not to undercut each other's selling price on Amazon UK. By March 2011, the parties had formalized the arrangement through the use of electronic re-pricing software, with both parties agreeing not to undercut each other unless a third party was offering cheaper prices on a given product. The arrangement continued until at least July 1, 2015.

The CMA determined that the parties had engaged in hardcore cartel activity by restricting price competition between competitors, resulting in a serious breach of the Chapter 1 Prohibition.[96] The CMA fined Trod £163,371, taking into account the severity of the offence (including the use of automated software to make non-compliance more difficult, the involvement of senior management, and the position of the parties as large players in the market for posters and frames within the United Kingdom) and mitigating factors (including Trod's agreement to settle with the CMA and the existence of some limited competition where third parties sold the affected products). GBE received full immunity as the leniency applicant.

Furthermore, on December 1, 2016, the CMA announced that it had accepted a competition disqualification undertaking from Daniel William Aston disqualifying him from acting as a UK company director for five years.[97] Aston was the managing director of Trod, and was found to have played a key role in the cartel agreement.

This is the first disqualification of a director secured by the CMA since UK competition authorities received the power to do so in June 2003.[98] The CMA has the power to disqualify a director for up to 15 years, but can choose to accept a discounted period (such as five years in the present case) when an individual offers to accept disqualification absent formal proceedings.

Mergers and Acquisitions

CMA Approves Future's Acquisition of Miura Holdings, Subject to Commitments

On November 14, 2016, the CMA published its decisions assessing and conditionally approving the acquisition of Miura Holdings Limited ("Mirua") by

[95] *Online sales of posters and frames*, Case 50223, CMA decision of August 12, 2016, available at: https://assets.publishing.service.gov.uk/media/57ee7c2740f0b606dc000018/case-50223-final-non-confidential-infringement-decision.pdf.

[96] The Chapter 1 prohibition of the Competition Act 1998 is the United Kingdom analogue of Article 101 TFEU.

[97] Undertaking from Daniel William Aston available at: https://assets.publishing.service.gov.uk/media/583ff903e5274a1303000040/daniel-aston-director-disqualification-undertaking.pdf.

[98] The power to disqualify directors for breaches of competition law is provided for in S9A-9E of the Company Directors Disqualification Act 1986, as amended by the Enterprise Act 2002.

Future plc ("Future").[99] The two parties overlapped in the supply of special interest magazines.

The CMA found that the magazine industry consisted of double-sided product markets of advertisers and readers. The CMA defined reader-markets based on magazine specialty,[100] noting that substitutability between interests was limited. With respect to advertisers, the CMA followed its reader-market segmentation, while acknowledging that certain advertisers may purchase broadly across multiple specialties. The CMA also noted that the magazine sector had generally been in decline as a result of customer migration to online services. However, the CMA only included online competitors as part of the overall product market for two specialties (Creative & Design and Gaming), noting that the competitive constraint on other interest categories was insufficiently strong to change its frame of reference. The CMA followed its previous decisional practice of defining a national market for the supply of magazines, due to the national character of magazine kiosk sales and distribution.

The CMA's competitive assessment made use of volume and value market shares provided by the parties, internal documents identifying closeness of competition, advertiser views, and responses to a CMA-commissioned reader survey on purchasing and diversion preferences. In six of the product markets under review, the CMA identified no likely anticompetitive effects as a result of the transaction, due to the parties' market shares, limited closeness of competition between the parties' product offerings, and the constraint exercised by online products.

On the market for Sci-fi publications, the CMA found that the parties would have combined shares of 75–85%. Additionally, the CMA found that diversion to online content was lower than for other specialties (between 15%–24%), and that the parties' two principal products, Future's SFX and Miura's Sci-Fi Now, showed strong diversion between each other (30% and 36% respectively). The CMA rejected the parties' contention that general-interest film magazines—a number of which had carried sci-fi content in recent months—would exercise a sufficient competitive constraint, finding that they would only constrain "impulse" purchases of magazines to a limited extent.

To address the CMA's concerns of a substantial lessening of competition ("SLC") in Sci-Fi magazines sold in the UK, Future agreed to divest the entirety of Miura's Sci-Fi Now business, removing the overlap in the affected market. Following a consultation that raised no material comments or concerns, the CMA accepted the undertakings.

Following a Phase II Investigation, CMA Approves Arriva's Acquisition of Northern Rail Franchise, Subject to Commitments

On December 22, 2016, the CMA accepted undertakings[101] from Arriva Plc. ("Arriva") that remedied the SLCs identified in its Phase II investigative report.[102] The CMA's investigation followed a European Commission decision to allow the transaction to be reviewed at the national level.[103]

[99] *Future/Miura*, ME/6624/16, October 7. 2016 decision on relevant merger situation and substantial lessening of competition available at: https://assets.publishing.service.gov.uk/media/5825ee5840f0b66201000029/future-miura-decision.pdf. November 14, 2016 decision accepting undertakings in lieu available at: https://assets.publishing.service.gov.uk/media/5825ede7ed915d7ad800001e/future-miura-uil-decision.pdf.

[100] In particular, the CMA identified overlaps for Creative & Design, Gadgets/Men's lifestyle, Gaming, Linux, Mac, Photography, and Sci-fi interests.

[101] *Completed acquisition by Arriva Rail North Limited of the Northern rail franchise*, ME/6591/16, CMA Notice of December 22, 2016, available at: https://assets.publishing.service.gov.uk/media/585bce92e5274a13070000fd/Acceptance_of_final_undertakings_from_Arriva_Rail.pdf

[102] *CMA Report, A report on the completed acquisition by Arriva Rail North Limited of the Northern rail franchise*, November 2, 2016, available at: https://assets.publishing.service.gov.uk/media/581b6b6ced915d7ad5000007/arriva-northern-final-report.pdf.

[103] *Arriva Rail North/Northern Franchise* (Case COMP/M.7897), Commission decision of January 27, 2016, available at:

On December 9, 2015, the Department of Transport awarded the Northern Rail Franchise (the "NRF") to Arriva Rail North (a subsidiary of Arriva). The NRF is the United Kingdom's largest train franchise, providing approximately 15,000 services a week to around 500 stations. The award of a rail franchise constituted an acquisition of control under the Enterprise Act.

The CMA's assessment reviewed whether the transaction would have anticompetitive effects on: (i) competition for the award of rail franchises (competition for the market); (ii) network pricing; (iii) pricing for rail-bus route flow overlaps; and (iv) pricing for rail-rail route flow overlaps.[104]

With respect to competition for the award of rail franchises, the CMA found that there would be no material incumbency benefit to Arriva, and that the transaction would not reduce the number of bidders for future rail franchises. With respect to network pricing (*i.e.*, customers who purchase tickets for a broader network rather than a particular route), the CMA found that a broad range of network tickets—in particular for bus networks—would constrain the entity post-transaction.

With respect to rail-bus competition, the CMA identified 1,068 flow overlaps between the NRF and Arriva bus services. The CMA investigated whether Arriva would have the ability or incentive to increase fare prices on the affected bus routes as a result of the transaction. The CMA initially identified 24 overlapping flows where Arriva could be expected to raise prices. However, after examining the parties ability to increase bus fares and likely diversion ratios to other forms of transport, the CMA ultimately concluded that Arriva would achieve little to no increase in profits from increasing prices, and therefore would have no incentive to do so.

With respect to rail-rail competition, the CMA identified 167 flow overlaps between Arriva's existing train services and the NRF. The CMA's assessment focused on Arriva's ability and incentive to increase unregulated fares (*i.e.*, fares without price caps) post-transaction. The CMA used MOIRA, an industry standard demand forecasting model, to determine the closeness of competition between Arriva's existing services and the NRF, resulting in an in-depth review of Arriva's ability to increase fares on 11 flow overlaps.

Of the 11 overlaps, the CMA found that a lack of third party alternatives, lack of new entry, and high degree of closeness of competition would lead to SLCs on the Leeds–Sheffield, Wakefield–Sheffield, and Chester–Manchester routes. Given the limited number of problematic overlaps, the CMA determined that a structural remedy would be disproportionate, and accepted a behavioral remedy. The final undertakings offered by Arriva imposes fare caps on the three affected routes, for both existing Arriva and NRF services.

CLEARY GOTTLIEB

http://ec.europa.eu/competition/mergers/cases/decisions/m7897_71_3.pdf.

[104] The CMA only assessed effects on pricing, in light of minimum service obligations on non-price related factors such as quality of service, timetables, *etc*.

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