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BELGIUM

This section reviews competition law developments under the Act on the Protection of Economic Competition of September 15, 2006 ("APEC"), which is principally enforced by the Belgian Competition Authority ("BCA"), which comprises the Directorate General for Competition and the Competition Council. The Competition Council is itself divided into the College of Competition Prosecutors ("CCP") and the Council strictu sensu ("Council").

Unilateral Conduct

The Competition Council Decides That Bpost Abused Its Dominant Position By Way Of Discriminatory Rebates

On December 10, 2012, the Council imposed a fine on bpost NV/SA ("bpost"), the Belgian incumbent postal operator, for abusing its dominance through operating a "model per sender" rebate scheme from January 2010 until July 2011.[1]

Through the "model per sender" system, bpost granted rebates to its largest direct clients and intermediaries (i.e., companies that offer certain services to senders of mail, such as mail preparation, collection, and sorting). These rebates were either based on the volume of mail (i.e., quantitative rebates) or on the degree to which the mail was prepared for further treatment by bpost. However, intermediaries did not receive rebates as favorable as those awarded to direct clients. This was because the model per sender did not allow the intermediaries to consolidate the mail they handled for their clients, meaning they could not benefit from the quantitative rebates to the same extent as direct clients. Consolidation was only allowed for the intermediaries if they communicated their clients' identities to bpost. Only then would they retroactively obtain the same rebates as bpost's direct clients. As a result, a number of intermediaries decided to lodge complaints with the Council.

First, the Council found that bpost was dominant in the market for national industrial mail and considered direct clients and intermediaries both to be commercial partners of bpost. The Council further concluded that the model per sender scheme favored bpost's direct clients. The Council also noted that, since the relevant market was recently liberalized, intermediaries represented one of bpost's few remaining sources of competitive pressure. Finally, the Council found the different treatment of direct clients and intermediaries to be exclusionary; large clients were less willing to contract with the intermediaries because they could not offer large clients the same conditions as bpost. The Council therefore concluded that bpost abused its dominant position in the national industrial mail market.

The model per sender system had previously been subject to regulatory scrutiny. In July 2011, the Belgian Postal and Telecom Regulator (the "IBPT/BIPT") found the model per sender scheme incompatible with postal regulations and imposed on bpost a fine of €2,300,000. Following this decision, bpost terminated the rebate system.

The Council imposed a fine of €37,399,786 on bpost for abuse of a dominant position. In calculating the fine, the Council took account of the fact that a comparable rebate system existed in France. The Council also deducted from its fine the fine imposed by the IBPT/BIPT in July 2011, even though the latter was based on postal regulations.

The Competition Council Imposes Fines On Flour Mills For Engaging In Cartel Behavior

On February 28, 2013, the Council decided that five flour mills (Werhahn, Meneba, Ceres, Dossche, and Brabomills) infringed Belgian and European competition law by

[1] Conseil de la Concurrence, décision n° 2012-P/K-32 du 10 décembre 2012, Affaires CONC-P/K-05/0067, CONC-P/K-09/0017 and CONC-P/K-10/0016: Publimail, Link2Biz International and G3 Worldwide Belgium / bpost.

engaging in a cartel in the market for the production and sale of flour in Belgium.[2]

The Council's investigation was prompted by leniency applications from Werhahn and Meneba, which in turn were triggered by inspections and simultaneous investigations by competition authorities in other EU Member States, such as Germany and the Netherlands. The Council concluded that from August 2000 until December 2006, the flour mills exchanged commercially sensitive information and coordinated price increases in order to stabilize the position of each participating flour mill on the market.

Interestingly, the Council did not employ its traditional fine calculation process and instead imposed a lump sum fine. The Council deducted from this lump sum fines that had already been imposed on the participating flour mills by the Dutch Competition Authority. As a result, Ceres, Dossche and Brabomills were each given a fine of €100,000. Werhahn received full immunity from fines, while Meneba received a 30% leniency reduction and so received a fine of €70,000.

President Of The Competition Council Once More Extends Order To De Beers To Continue To Supply Rough Diamonds To Antwerp Trader Spira

In 2009, Diamanthandel A. Spira ("Spira") filed a complaint with the Council together with a request for interim measures pending the outcome of its complaint on the merits addressed to the President of the Council. In its complaint, Spira alleged that the "Supplier of Choice" distribution system, as introduced by De Beers UK Limited and Diamdel NV as liquidator of Diamond Trading Company (PTY) Limited NV ("De Beers") in 2003, constituted an abuse of dominant position; Spira claimed that, through employing the system, De Beers was able to foreclose access to the diamond distribution market. The introduction of the Supplier of Choice distribution system resulted in Spira ceasing to be selected as a distributor for De Beers rough diamonds. (Spira had acted as a distributor of De Beers for over 75 years before the introduction of the supplier of choice system.)

On November 25, 2010, as an interim measure, the President of the Competition Council ordered De Beers to continue to supply rough diamonds to Spira. This interim order was initially valid until April 30, 2012. On April 27, 2012, the President of the Competition Council prolonged the term of interim measure until July 13, 2012. On July 13, 2012, the President again extended the order to continue deliveries, this time until the end of 2012. Then, on December 31, 2012, the President once more extended the order to continue deliveries to Spira.[3] This new order will be valid until October 7, 2013. On February 18, 2013, the President of the Council clarified that, should Spira request a type of diamond that become scarce, De Beers would be entitled to reduce its deliveries to Spira in line with the reductions it applies to its other distributors under the Supplier of Choice system.[4]

Policy and Procedure

The Brussels Court Of Appeal Recognizes In-House Counsel Legal Privilege

On March 5, 2013, the Brussels Court of Appeal issued a judgment recognizing that, under Belgian law, legal advice rendered by in-house counsel (and related correspondence) benefits from a protection equivalent to legal privilege.[5]

In 2000, Belgium passed a statute establishing the Institute for Company Lawyers ("IJE/IBJ") stipulating that "advice rendered by company lawyers [members of the IJE/IBJ] to the benefit of their employer and within the framework of their activity as legal counsel, is confidential."[6] The scope

2 Raad voor de Mededinging, beslissing nr. 2013-I/O-06 van 28 februari 2013, zaak MEDE-I/O-08/0009: *Mededingingsbeperkende praktijken op de markt voor levering en verkoop van meel in België*.

3 Raad voor de Mededinging, beslissing nr. 2012-V/M-34 van 31 december 2012, zaak MEDE-V/M-12/0021: *Diamanthandel A. Spira BVBA / De Beers UK Limited en Diamdel NV als vereffenaar van Diamond Trading Company (PTY) Limitied NV*.

4 Raad voor de Mededinging, beslissing nr. 2013-V/M-04 van 18 februari 2013, zaak MEDE-V/M-12/0021: *Diamanthandel A. Spira BVBA / De Beers UK Limited en Diamdel NV als vereffenaar van Diamond Trading Company (PTY) Limitied NV*.

5 Brussels Court of Appeal, March 5, 2013, 2011/MR/3.

6 Article 5 of the Act of March 1, 2000 establishing the IJE/IBJ, *M.B./B.S.*, July 4, 2000, p. 23252.

and effect of that provision was debated until Belgacom brought suit in 2010 against a decision whereby the Council refused to set aside in-house counsel legal advice in the aftermath of an inspection carried out at its premises in October of that year.

The Council argued that it was legitimate to follow the approach followed at the EU level with respect to antitrust investigations whereby in-house counsel advice is not privileged, as set out in the *Akzo* ruling.[7] Belgacom and the IJE/IBJ, in contrast, argued that the *Akzo* ruling was not applicable to investigations carried out by national competition authorities ("NCAs"), and that in-house counsel legal advice was protected from seizure by Belgian statutory law and/or Articles 6 and 8 of the European Convention on Human Rights ("ECHR") (protecting the right to a fair trial and the right to privacy, respectively), even when national authorities are applying EU law.

First, the Brussels Court of Appeal held that the legal privilege benefiting members of the Bar (i.e., outside counsel) was a fundamental right originating primarily in Art. 8 ECHR (which protects the right to privacy). The Court also noted the corresponding provision of the EU Charter of Fundamental Rights (Art. 7).

Second, the Court rejected Belgacom and the IJE/IBJ's claim that in-house counsel legal advice falls within the ambit of Art. 458 of the Criminal Code, which is the historical legal basis of legal privilege in Belgium.

Third, the Court emphasized that, according to the IJE/IBJ statute, in-house counsel served the public interest by "ensur[ing] the correct application of the law by companies." The Court found that in-house counsel fulfill this function by providing legal advice to the their employer companies (including by preparing memoranda, correspondence, etc.) The court found that, in light of in-house counsels' public interest function, denying them a protection equivalent to legal privilege on their legal advice would amount to a disproportionate interference with the right to privacy benefiting companies pursuant to Art. 8 ECHR.

Finally, the judgment rejected the application of the *Akzo* ruling to national competition proceedings, including where the BCA enforces EU competition law provisions. In reaching this conclusion, the Court stressed that Belgian law and EU law are distinct legal orders. The Court illustrated this by pointing to the fact that, according to EU law, when national competition authorities carry out inspections "at the request of the Commission" they have to do so "in accordance with their national law."[8]

The Judgment of the Brussels Court of Appeal confirms – after years of legal uncertainty – that the confidentiality of in-house counsel legal advice (including requests for advice, related correspondence and preparatory materials) involves a prohibition from seizure during investigations carried out by the BCA. By analogy, the protection of in-house counsel legal advice can also apply to enforcement measures other than competition investigations because Article 8 ECHR is applicable irrespective of the nature of the public action.

The judgment expressly rejects the applicability of the *Akzo* ruling to national competition proceedings, even when these proceedings seek to enforce EU competition law. Likewise, it confirms that national law applies (and therefore legal privilege should be granted) when a national authority carries out an inspection at the request of the European Commission (but not when it merely assists EU officials during an inspection carried out by the Commission). More fundamentally, given that the Court based its recognition of the legal privilege of in-house counsel on Art. 8 ECHR (while referring to its equivalent in the EU Charter of Fundamental Rights), the judgment may aid any future challenge to the EU institution's rejection of in-house privilege, particularly as defend the recognition of

[7] *Akzo Nobel Chemicals and Others v. Commission* (Joined Cases T-125/03 and T-253/03) 2007 ECR II-3523; *Akzo Nobel Chemicals and Others v. Commission* (Case C-550/07) 2010 ECR I-8301.

[8] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1/1, art. 22.

privilege at the EU level, particularly as the EU is set to become a party to the ECHR Treaty in the near future.

DENMARK

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

Horizontal Agreements

Anticompetitive Decisions In The Collegiate Rules Of Foreningen Danske Revisorer

On February 20, 2013, the DCC ordered the trade association Foreningen Danske Revisorer (association of small Danish accountants) to refrain from reintroducing or enforcing collegiate rules aimed at hindering members of the association from (1) gaining other members' customers by offering their services at fees which are lower than their normal fees, and (2) taking over customers from ill or deceased members without special permission from the association or the estate of the deceased person.[9]

The DCCA discovered the contested provisions during a routine check of a number of trade associations' code of practices. The DCCA found several provisions in the association's code of practice that were possible infringements of Danish competition law; however, several of these were covered by the *de minimis* provision in the Danish Competition Act. Due to the nature of the case, the DCCA wished to resolve matter without bringing it to the DCC. Ultimately the DCCA did bring the case to the DCC due to the association not responding to the DCCA's request. Despite not reacting to the DCCA's requests, the association had in fact altered the contested provision prior to the DCC's decision.

The DCC found the contested provisions violated the prohibition against anticompetitive agreements in Section 6 of the DCA and ordered the association to refrain from reintroducing or enforcing rules with the same or similar purpose or effect as the two rules in question.

Vertical Agreements

Georg Jensen Pays Fine In Settlement For Resale Price Maintenance

On January 16, 2013, the jewelry company Georg Jensen agreed to pay a fine of DKK 1 million (approx. €134,000) for infringing Section 6 of the Danish Competition Act by engaging in resale price maintenance with respect to its distributors.[10]

The DCCA determined that Georg Jensen had infringed Section 6 of the Danish Competition Act by demanding that certain of its distributors use the company's indicative prices as a minimum resale price to consumers. This practice had been maintained for approximately two years.

When setting the fine, the DCCA took into account the duration of the infringement, the size of Georg Jensen's turnover, and the fact that the agreements on resale price maintenance were concluded with respect to multiple dealers.

The DCCA identified as mitigating factors: (1) the fact that the management of Georg Jensen had contacted the DCCA immediately after realizing that it had engaged in resale price maintenance; (2) the fact that Georg Jensen had cooperated with competition authorities throughout the investigation.

Unilateral Conduct

Danish Supreme Court Overturns The Danish Competition Council

On February 15, 2013, the Danish Supreme Court overturned the DCC's ruling in the Post Danmark saga.[11]

The case arose in 2003-2004 when Forbruger-Kontakt A/S ("Forbruger-Kontakt") submitted a complaint to the DCCA in which it claimed that Post Danmark abused its dominant position in the market for unaddressed mail (advertising,

9 Danish Competition Council case 12/05672/KB of 20 February 2013

10 Danish Competition and Consumer Authority case, see http://www.kfst.dk/en/service-menu/press/presse-2013/georg-jensen-pays-fine-in-settlement-for-resale-price-maintenance/

11 Supreme Court case Sag 2/2008, Post Danmark vs. Konkurrencerådet

newspapers, etc.) by practicing a policy of price and rebate discrimination. Forbruger-Kontakt submitted the complaint after losing three major clients to Post Danmark (the supermarket chains Coop, Super Best and Spar). Post Danmark had gained these clients by offering prices that were marginally lower than the those of Forbruger-Kontakt. The price that Post Danmark offered Coop did not allow Post Danmark to cover its average total costs; accordingly, Forbruger-Kontakt also alleged that that Post Denmark had engaged in predatory pricing.

On September 29, 2004, the DCC held that Post Danmark had abused its dominant position in the Danish market for the distribution of unaddressed mail by practicing a targeted policy of reductions designed to ensure its customers loyalty. Under this policy: (1) certain customers of Post Denmark would receive preferential treatment with respect to the terms of rates and rebates ('secondary-line price discrimination'); and (2) Forbruger-Kontakt's former customers would be charged, without objective justification, rates different from those charged to Post Denmark's own pre-existing customers ('primary-line price discrimination'). By a decision of November 24, 2004, the DCC found that Post Danmark did not offer unreasonably low prices and therefore dismissed this aspect of the complaint. The DCAT upheld both of the DCC's decisions on July 1, 2005. Subsequently, Post Danmark took –appealed the DCAT's decision to the Eastern High Court. After being unsuccessful at the Eastern High Court, Post Denmark took the case to the Supreme Court.

During the proceedings before the Supreme Court, Post Danmark requested that the European Court of Justice ("ECJ") provide a preliminary ruling on the case.

The ECJ issued its decision on March 27, 2012[12]. First, the ECJ stated that for a dominant to charge customers different prices for goods or services whose costs are the same or is not, in itself, abusive. The ECJ noted that to the extent that a dominant undertaking sets its prices at a level covering the majority of the costs attributable to the supply of the goods or services in question, it will, as a general rule, be possible for a competitor as efficient as the undertaking in question to compete with that dominant undertaking without suffering losses that are unsustainable in the long term.

The ECJ held that it is for the referring court (in this case, the Supreme Court) to assess whether the dominant undertaking in question is setting its prices in this unobjectionable fashion. In any event, the ECJ noted that it appeared from the documents before it that Forbruger-Kontakt managed: (1) to maintain its distribution network despite losing the volume of mail related to the three 'major' customers involved; and (2)to win back the Coop group and the Spar group.

The ECJ ultimately found that a policy by which a dominant undertaking charges low prices to certain major customers of a competitor may not be considered to amount to an exclusionary abuse merely because the price that the undertaking charges one of the customers is lower than the average total costs attributed to the activity concerned, but higher than the average incremental costs pertaining to that activity. In order to assess the existence of anticompetitive effects in circumstances in such a scenario, it is necessary to consider whether that pricing policy, without objective justification, produces an actual or likely exclusionary effect.

On February 15, 2013, the Supreme Court issued its judgment in the case, overturning the decision by the Danish Competition Council.

The Supreme Court upheld DCC's finding that Post Danmark maintained a dominant position in the relevant market. However, the Supreme Court rejected the DCC's finding that Post Danmark's pricing policy constituted an exclusionary abuse of a dominant position. In this regard, the Supreme Court referred to the ECJ's ruling in which it was noted that if a dominant company sets its prices at a level that covers most of its costs, it must be assumed that an equally efficient competitor could compete with those prices without suffering losses that are unsustainable in the

12 See case C-209/10, Post Danmark A/S v Konkurrencerådet

long term, and therefore such pricing is not inherently abusive.

Furthermore, the Supreme Court held that the DCC had not shown that the prices offered to Coop would be likely to have eliminated Forbruger-Kontakt from the market to the detriment of competition. The Supreme Court, based its assessment on, *inter alia*, the fact that (1) Post Danmark's average prices to all its customers exceeded its average total costs and (2) Post Danmark's customers could terminate their contracts with Post Danmark with one or three months' notice, which would make it possible for Forbruger-Kontakt to compete with Post Danmark's prices if it were as efficient as Post Danmark.

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. The FCCA began operations on January 1, 2013, and as such the reports below refer to the former Finnish Competition Authority ("FCA").

Horizontal Agreements

Members Of Industry Association Held Responsible For The Industry Association's Competition Infringement

In January 2013 the Supreme Administrative Court ("SAC") confirmed that member companies of an industry association can be held responsible for a competition infringement committed by the industry association.[13] The SAC confirmed that where a company's representatives takes part in a meeting of a trade association where a decision was made which represented or led to anticompetitive behavior, and where such representatives are on the board of the association or hold a position of similar responsibility, that company may be held responsible for the anticompetitive behavior of the association.

The FCCA had found that the Association of Household Appliance Repair Shops (the "Association") had committed a competition infringement by agreeing in board and other meetings on the prices for certain warranty repair works during 1997–2003. The FCCA's main evidence consisted of the minutes of the meetings which established both the infringement and the persons present in the meetings.

The FCCA proposed that the Market Court impose a fine both on the Association and those member companies who had representatives in the board of the Association. The Market Court imposed fines on the Association but not on the member companies. The FCCA appealed to the SAC, which found that liability could also be attributed to member companies whose representatives were present in the Association's meetings.

The liability of each member company was limited to the period when its representatives were members in the Association's board or other bodies and had actually participated in the meetings. The SAC confirmed that with respect to a continuous infringement, companies can, in certain circumstances, be held liable for actions of other companies participating in the same infringement. However, if it is shown that an individual company has participated in the infringement at some point, it is not necessarily responsible for the whole duration of the infringement. According to the SAC, the FCCA had not provided evidence that the individual companies had been involved in the infringement longer than the last meeting in which their representatives had participated.

The SAC gave its judgment approximately seven years after the FCCA had provided the draft proposal for infringement fine to the investigated companies for comments. The SAC considered that approximately half of that time was a delay caused by reasons for which the State was responsible. Thus, the SAC lowered the fines in light of the case law of the European Court of Human Rights regarding undue delay in judicial proceedings. Consequently, four of the six companies under scrutiny had their fines lowered to zero.

In contrast with the EU rules, the Finnish Competition Act does not permit the relevant authorities to take into account the turnovers of the members of the industry association in setting a fine for that association. As industry associations typically have limited turnover, their fines tend to be low. This decision makes it clear that companies cannot circumvent their liability for cartel infringements by founding an industry association to commit the infringement in their stead.

[13] Case KHO:2013:8, judgment of January 22, 2013, available at http://www.kho.fi/paatokset/60863.htm.

FRANCE

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

Vertical Agreements

The Paris Court Of Appeals Upheld The FCA's Decision Against Pierre Fabre Dermo-Cosmétique

Following a preliminary ruling from the ECJ, the Paris Court of Appeals upheld a decision of the FCA that enjoined Pierre Fabre Dermo-cosmétique ("PFDC") to remove any provisions prohibiting its approved distributors from selling online.[14]

PFDC manufactures cosmetics and personal hygiene products. The FCA conducted an investigation into the distribution practices of PFDC and certain of its competitors, in particular its requirement that distributors guarantee at least one pharmacist would be on site at each retail location to advise customers. The FCA concluded that such provisions together acted as an online sales ban.

Following the FCA's investigation, PFDC's competitors committed not to include on-site pharmacist requirements in their distribution contracts. As PFDC had offered no such commitments, the FCA imposed on PFDC a €17,000 fine and an injunction against including on-site pharmacist requirements in its distribution contracts.[15] PFDC appealed the decision to the Paris Court of Appeals, which in turn requested clarification on certain issues from the ECJ.

In its judgment of October 13, 2011, the ECJ concluded that the imposition of an online sales ban constituted a restriction of competition by object, unless the practice could be justified by reference to the characteristics of the products in question and the surrounding economic and judicial context.[16]

The Paris Court of Appeals concluded that the relevant provisions represented a serious restriction of the free movement of goods and were unnecessary for the achievement of any legitimate objective. The Court of Appeals accepted that PFDC had limited market power and faced strong competition, but the Court held that these factors did not render the provisions in question benign. PFDC contended, attempting to take advantage of the individual exemption mechanism of Article 101(3) TFEU, that the on-site pharmacist requirements generated efficiencies which offset the restrictive effects identified by the Court. Specifically, PDFC argued that such requirements: (1) provide consumers with high quality advice; (2) protect consumers from counterfeit products; and (3) limit harmful free-riding by other distributors.

Regarding the first argument, the Court considered that some advice could also be given on the Internet, and as such an absolute ban could not be justified on this ground. Regarding the second and third arguments, the Court considered that the PFDC failed to show a direct link between the online sales and the proliferation of counterfeiting or free-riding.

Accordingly, the Paris Court of Appeals rejected the appeal of PFDC.

Mergers and Acquisitions

The FCA Clears The Acquisition By Eurotunnel Of Assets Of Seafrance

In a decision dated November 7, 2012, the FCA cleared, subject to commitments, the acquisition by Eurotunnel of the majority of the assets of SeaFrance SA, which had been placed under judicial liquidation on November 16, 2011.[17] *The decision was published on January 17, 2013.*

[14] Court of Appeals of Paris, Case n°2008/23812, January 31, 2013, Pierre Fabre Dermo-cosmétique, http://www.autoritedelaconcurrence.fr/doc/ca_pierrefabre_jan13.pdf

[15] French Competition Authority, Decision n°08-D-25 of October 29, 2008, relating to practices in the distribution of cosmetics and personal hygiene products sold with the assistance of pharmacists.

[16] *Pierre Fabre Dermo-Cosmétique SAS v. Président de l'Autorité de la Concurrence, Ministre de l'Economie, de l'Industrie et de l'Emploi* (Case C-439/09) judgment of October 13, 2011, not yet published.

[17] French Competition Authority, Decision n°12-DCC-154, November 7, 2012, relating to the acquisition of assets of SeaFrance by Eurotunnel,

The transaction concerned the liquidation of SeaFrance. On June 11, 2012, the Commercial Court of Paris accepted Eurotunnel as the purchaser of the majority of SeaFrance's assets. Prior to its liquidation, SeaFrance operated a fleet of four ships and offered passenger and cargo transport services between France and England. Eurotunnel operates a rail shuttle service between France and England, conveying passenger and freight vehicles on trains through the Channel Tunnel. The company also controls Europorte, which provides management services for port infrastructures.

The transaction involved the purchase of three of SeaFrance's ships, as well as the assets required for the operation of such ships. Eurotunnel was granted an exemption from the obligation not to close the transaction before clearance, and used the purchased assets to launch a trans-channel ferry transport business (MyFerryLink).

The FCA determined that the transaction was unlikely to give rise to any harmful unilateral effects, finding that any attempt by Eurotunnel to increase prices or degrade the quality of its shuttle services would be punished by rival channel ferry operators. The FCA also found that coordinated effects were unlikely to emerge from the transaction in light of asymmetrical distribution of market shares in the UK-continental Europe passenger and cargo freight markets and the fact that each of the main players in these markets had excess capacity.

With respect to conglomerate effects, the FCA determined that Eurotunnel would be in a position post-transaction to bundle its ferry and shuttle services with respect to freight transport. The FCA's market test indicated that there is a demand among freight customers of bundles of railway and maritime trips (for example, transporters may favor channel tunnel rail shuttle services for delivery (which is often time-sensitive) but would be happy to use ferry services for the return journey)).

Finally, the FCA examined the potential vertical effects of the transaction. It noted that Eurotunnel, which is active in the management of port infrastructures through its subsidiary Europorte, increased its level of vertical integration by acquiring the assets of SeaFrance. The FCA stressed that, Eurotunnel, through Europorte, had recently submitted an application to manage the ports of Boulogne sur Mer and Calais, the latter being considered vital for freight transporters. The FCA concluded that as there was a possibility Eurotunnel would gain control of a port essential to cargo transport, there was an appreciable risk that Eurotunnel would engage in foreclosure strategies through Europorte to benefit MyFerryLink.

To address the FCA's concerns, Eurotunnel committed (1) not to grant, for a period of five years, discounts on trans-channel railway freight transportation to clients also using the maritime transportation offering, (2) not to discriminate in any way against its clients who do not use MyFerryLink for maritime trans-channel freight transportation; and (3) in the event that Europorte's bid for the management of the Calais port is successful, to offer transparent and non-discriminatory access conditions to the users of the port infrastructures. Eurotunnel also committed that its rail transport price negotiation and ferry transport price negotiation would be conducted by different sales teams. The FCA accepted Eurotunnel's commitments and cleared the transaction.

The analysis of the FCA appears to be much more favorable than that of the UK competition authorities. On December 12, 2012, the Competition Commission (the "CC") held that this transaction raised several competition concerns, including: (1) a risk that Eurotunnel would increase prices for rail services; and (2) a risk that, in light of the excess capacity in maritime transport, one of the competitor ferry operators would be forced to exit the market and that only two operators would be left on the market for transport between the UK and continental Europe. On February 19, 2013, the CC published a notice on the remedies Eurotunnel could offer to remove these competition concerns, which provided that Eurotunnel

http://www.autoritedelaconcurrence.fr/user/avisdec.php?numero=12-DCC-154 should resell the Seafrance ferries covered by the transaction. Eurotunnel announced on the same day its intent to challenge the necessity of the resell. The final decision of the Competition Commission is expected on June 9, 2013.

New Fine Ordered By The FCA For Failure To Notify

The Réunica group was fined €400,000 for failing to notify a merger prior to its implementation.[18]

On September 8, 2006, insurance companies Réunica and Arpège signed a partnership agreement with the objective of creating one group named Groupe Réunica. On July 8, 2008, a memorandum of understanding was signed specifying the details of this merger. On January 1, 2010, Réunica and Arpège merged their human and material resources departments, as well as their governance bodies.

However, the transaction was not notified to the FCA until October 13, 2011, more than a year and a half after the last phase the transaction was completed, and more than five years after the start of the merger process. The FCA cleared the transaction in a decision of March 19, 2012.[19]

In its decision of January 31, 2013, the FCA concluded that the Réunica and Arpège groups infringed the provisions of Article L. 430-3 of the French Commercial Code. This article requires that the parties to a merger (that meet the turnover thresholds set forth in Article L. 430-2 of the French Commercial Code) notify the transaction before its implementation.

The FCA imposed a €400,000 fine on the Réunica Group for failure to notify. Pursuant to Article L. 430-8-1 of the French Commercial Code, the FCA may "*order a fine against the persons who were responsible for the notification of a pecuniary sanction for a maximum amount, for legal entities, of 5% of their revenues excluding tax generated in France during the prior fiscal year, increased, if applicable, by the revenues generated in France during the same period by the acquired party and, for individuals, €1.5 million*."

In the case at hand, the first issue was to determine the basis for the fine. Article L. 430-8-1 applies only to the legal entities who are responsible for the notification, which in this case were holding companies without turnover.

In order to preserve the effectiveness of the notification obligation provided for in Articles L.430-3 and L. 430-8-1 of the French Commercial Code, the FCA took into account the economic reality of the case at hand and therefore looked to the turnover generated by all of the entities controlled by the holding association Réunica in order to determine the maximum amount of the fine (€29 million).

The fine that was ultimately imposed, €400,000, was significantly lower than this cap. In reaching this amount, the FCA acknowledged the seriousness of failing to notify as well as several aggravating circumstances (including the fact that the transaction would obviously and foreseeably be reportable and the fact that the Réunica group offered limited cooperation throughout the transaction review procedure) but took into account, for the benefit of Réunica, the short period between the effective implementation of the transaction and the date on which the Réunica group contacted the merger division of the FCA (three months).

This is the second time that the FCA has sanctioned a company for failure to notify.

Policy and Procedure

The French Competition Authority Releases A Draft Of Revised Merger Control Guidelines For Public Consultation

On February 22, 2013, the French Competition Authority ("FCA") published a draft of revised Merger Control Guidelines.[20] *The main purpose of the draft is to*

[18] French Competition Authority, Decision n°13-D-01, January 31, 2013, relating to the situation of the Réunica and Arpège groups in light of article L. 430-8 of the French Commercial Code.

[19] French Competition Authority, Decision 12-DCC-36, March 19, 2012, relating to the merger of the Réunica and Arpège groups.

[20] Draft of the French Competition Authority's Merger Control Guidelines, February 22, 2013, http://www.autoritedelaconcurrence.fr/doc/projet_ld_concen_22fev13.pdf

consolidate prior guidelines, while integrating the decision making practice of the past four years.

On February 22, 2013, the FCA published its draft of new Merger Control Guidelines (the "Draft Guidelines"). The draft was released for a two-month public consultation, until April 22, 2013. It is expected that the Draft Guidelines will be adopted at the end of the second quarter of 2013.

The Draft Guidelines incorporate the principles developed by the FCA over the first four years of its operation, as well those developed by the European Commission and EU Courts. With regard to procedure, the Draft Guidelines emphasize the importance of the informal pre-notification phase, which allows companies and the FCA to discuss matters such as whether or not the transaction is reportable. In order to encourage the use of this informal pre-notification procedure, the Draft Guidelines specify that companies may begin communicating with the FCA at any stage of the proposed merger and that such communications would not be subject to any formal requirements.

Furthermore, the Draft Guidelines detail the eligibility conditions for the simplified examination procedure. This procedure allows companies to receive a clearance decision within 15 days, where it can be shown that the transaction in question is not likely to raise any competition concerns. In 2011, decisions resulting from the simplified procedure represented 40% of all merger decisions rendered by the FCA. The Draft Guidelines provide that transactions eligible for the simplified procedure are those (1) where the purchasers are not active in any of the same markets in which the target is active, and not active in any market that is upstream or downstream of the target's operations; or (2) relating to retail trade that would not cause a change of the brand of the retail stores in question.[21]

With respect to substantive appraisal, the Draft Guidelines present different quantitative tests for determining whether a merger is likely to give rise to harmful unilateral effects, including the upward price pressure and gross upward price pressure index tests which entail the examination of diversion ratios to measure the incentive a merged entity would have increase prices on certain products. The indicative price rise test provides an estimate of the anticipated price increase after a merger.

The Draft Guidelines reflect the preference of the French and EU competition authorities for structural remedies, while reaffirming that behavioral remedies may be acceptable when the merger in question is considered to give rise vertical or conglomerate concerns. The Draft Guidelines also provide a divestiture commitments template and a monitoring trustee mandate template.

Finally, the Draft Guidelines outline the FCA's position on "portage" transactions, where the target company is parked with an interim buyer (most often a bank) who will sell on the relevant business to the ultimate acquirer when the transaction is cleared by the relevant competition authorities. Relying on an a the decision of the General Court,[22] the FCA holds that such portage transactions should not be considered mergers and that only sales to the ultimate purchasers are notifiable. This position is at variance with the decisional practice of the European Commission, which considers that a "portage" transaction is the first step of a single merger comprising the lasting acquisition of control by the ultimate purchaser,[23] and which therefore cannot be implemented without clearance.

Bill Introducing A Class Action Procedure In French Consumer Law To Be Examined By The French National Assembly

On March 25, 2013, the Minister for Consumer Policy presented a preliminary bill whose key measure is the

[21] Specifically, this refers to transactions that may be notified pursuant to Section II of Article L.430 2 of the French Commercial Code, but not Section I of the same Article.

[22] *Éditions Odile Jacob SAS v European Commission* (Case T-279/04) 2010 ECR II-185.

[23] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ 2008 C 95/1, p. 35.

introduction in the French Consumer Code of a class action procedure.[24] *The text should be examined by the French National Assembly on first reading from June 5- 7, 2013, after a presentation of the text before the Council of Ministers.*

The contemplated class action mechanism would cover: (1) material damage suffered individually by a group of consumers as a result of (a) manufacturer(s) or service provider(s) failing to perform their legal obligations, or performing them negligently; and (2) economic damages resulting from anticompetitive practices within the meaning of Articles 101 and 102 of the Treaty on the Functioning of the European Union and its French equivalents (Articles L. 420-1 and L. 420-2 of the French Commercial Code).

The class action mechanism for damages resulting from anticompetitive conduct would require a prior, non-appealable ruling from a competition authority or national court to the effect that the company(ies) in question did in fact engage in anticompetitive conduct. Any follow-on class action suit would have to be initiated within five years of the relevant decision. The procedure would comprise two steps.

First, the court receiving the application from an approved claimant association would issue a decision outlining the liability of the relevant company(ies)/individual(s) and the criteria for individuals to join the claimant group. After the exhaustion of all appeal routes, the court would publicize its decision to enable consumers to join the claimant group and obtain compensation. The procedure is therefore 'opt-in' in nature.

Second, the indemnification procedure would be implemented. Where the amount of the individual damages suffered by each consumer is identical and the number of such consumers is known, the court would be able to, depending on the case: (1) sentence the company to pay to the approved association an amount corresponding to the total amount of the individual damages, it being left to the association to distribute this amount between the consumers or; (2) provide that the company will indemnify directly and individually, within a determined time period, the consumers wronged, according to the terms it sets.

The bill also provides an optional procedure of preliminary mediation. In case of agreement with the company/individual(s) at fault, such agreement would be subject to the court's approval.

[24] Preliminary bill on consumer law, March 25, 2013, http://sosconso.blog.lemonde.fr/2013/03/26/action-de-groupe-le-texte-de-lavant-projet-de-loi/

GERMANY

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

Horizontal Agreements

FCO Fines Confectionery Manufacturers Totaling More Than €60 Million

On January 31, 2013, the FCO imposed fines totaling more than €60 million on 11 confectionery manufacturers as well as their sales representatives for three separate cartel infringements.[25]

The first infringement concerned price-fixing and the exchange of competitively sensitive information between 2006 and early 2008 in the so-called "Big Four" circle (comprising Ritter, Mars, Nestlé and Haribo). Interestingly, not all participants are direct competitors. While Mars, Ritter and Nestlé are (primarily) active in chocolate products, Haribo is a supplier of other types of sugar confectionary. The participants exchanged information concerning the status of their annual negotiations with retailers. In addition, Ritter, Mars and Nestlé agreed on price increases for chocolate products. The FCO fined Ritter and Nestlé a total amount of €19.5 million, while Haribo had already been fined in August 2012, after reaching a settlement with the FCO.[26] The whistleblower, Mars, was granted full immunity from fines.

The second infringement concerned anticompetitive information exchanges among members of a working group of the Association of the German Confectionary Industry between 2004 and 2008. The participants exchanged information about their negotiations with food retailers and about planned price increases. In addition to Mars and Ritter, eight smaller confectionery manufacturers participated. The participants were fined a total amount of €19.6 million. Again, Mars, being the immunity applicant, escaped a fine.

The third infringement concerned price-fixing agreements between Kraft Foods Deutschland and Ritter regarding chocolate bars in 2007. The FCO imposed fines of €21.7 million for this conduct on Kraft. Ritter escaped fines for this infringement due to its application for immunity, which was essential in detecting this infringement.

Most of the companies settled with the FCO.

FCO Fines Nestlé For Illicit Information Exchange

On March 27, 2013, the FCO fined Nestlé Deutschland AG ("Nestlé") approximately €20 million and thereby concluded a series of cartel proceedings relating to anticompetitive information exchange against manufacturers of consumer goods.[27] In 2011, the FCO imposed fines totaling €38 million in the same matter on Kraft Foods Deutschland GmbH, Unilever Deutschland Holding AG and Dr. August Oetker Nahrungsmittel KG, all of which had agreed to settle the case with the FCO.[28] As Nestlé had refused to settle, proceedings against the company continued and were only concluded two years later.

The FCO's proceedings were initiated in 2008 following a leniency application by Mars GmbH, to which the FCO granted full immunity. The FCO found that Nestlé and

25 *See* FCO press release, available in English at: http://www.bundeskartellamt.de/wEnglisch/News/press/2013_01_31-II.php.

26 See National Competition Report July – September 2012, p. 8; see also FCO press release, available in English at: http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2012/2012_08_01.php.

27 *See* above and FCO press release, available in English at: http://www.bundeskartellamt.de/wEnglisch/News/press/2013_03_27.php. The proceedings also comprised the so-called "chocolate cartel", on which the FCO imposed fines totaling more than €60 million on January 31, 2013, see "*FCO Fines Confectionery Manufacturers Totaling More Than €60 Million"* in this issue, p. 14; see also FCO press release, available in English at: http://www.bundeskartellamt.de/wEnglisch/News/press/2013_01_31-II.php.

28 *See* National Competition Report January – March 2011; p. 12 *et seq*; *see* also FCO press release, available in English at: http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2011/2011_03_17.php.

competing manufacturers of certain consumer goods, such as confectionary, hot beverages, frozen pizza, and pet food, exchanged information on retailers' financial requests during annual negotiations and informed each other about how they intended to react to these requests. Some manufacturers also exchanged information on their intended price increases. In addition, in one instance Nestlé even agreed with Kraft on price increases for instant cappuccino.

This decision, as other decisions summarized in this report, shows once again that the FCO actively pursues and punishes exchanges of sensitive business information.

FCO Fines Milling Companies Totaling More Than €41 million

On February 19, 2013, the FCO completed its proceedings against 22 milling companies, the association of German mills and the responsible individuals.[29] It imposed fines totaling €41 million for price fixing, market and customer allocation, as well as limiting capacities in the flour distribution sector. Proceedings against 17 companies and individuals were concluded by settlements. After the investigations were launched in 2008, several companies applied for leniency and obtained fine reductions. The first fine was imposed in October 2011.[30] The FCO closely cooperated with the French Competition Authority and the Dutch Competition Authority that had also fined German, French, Dutch and Belgian flour producers for anticompetitive behavior.[31]

FCO Imposes Fines Totaling More Than €63 million For Illegal Information Exchange On Branded Personal Care Product Manufacturers

On March 18, 2013, the FCO fined six manufacturers of branded personal care products and the German brands association including the responsible individuals. The fines totaled €39 million.[32] The FCO found that the parties exchanged competitively sensitive information concerning price increases, rebates demanded by retailers, and negotiations with retailers for several years. The investigation was triggered by a leniency application of Colgate Palmolive GmbH, which was granted immunity. In 2008 and 2011, the FCO fined Henkel Wasch- und Reinigungsmittel GmbH, Schwarzkopf & Henkel GmbH, Sara Lee Deutschland GmbH, Unilever Deutschland GmbH, Reckitt Benckiser Deutschland GmbH and four other companies for exchanging information illegally. The total fines in the matter amount to €100 million.

FCJ Rules That 10% Limit For Fines Is Not A Capping Threshold Under German Law

On February 26, 2013, the FCJ[33] confirmed a decision of the DCA[34] concerning the method of setting fines under German law. For an infringement of Section 1 of the GWB, the FCO can impose a fine of up to 10% of an undertaking's total worldwide group turnover in the preceding business year.[35] The FCJ held that the 10% limit should not be considered a cap (as is the case under EU law), but rather as the upper limit of the fine. The FCJ has thus given the 10% limit a different interpretation than it has under EU law. The FCJ held that under constitutional law, the legislator is required to provide for an upper limit of fines. Accordingly, it was necessary to interpret the 10% limit as an upper limit as it would otherwise violate constitutional law and would therefore be invalid.

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29 *See* FCO Press release, available in German at: http://www.bundeskartellamt.de/wDeutsch/aktuelles/presse/2013_02_19.php.

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

31 *See* National Competition Report January – March 2012, p. 5, National Competition Report July - September 2012, p. 17 and National Competition Report October – December 2010, p. 16.

32 *See* FCO press release, available in German at: http://www.bundeskartellamt.de/wDeutsch/aktuelles/presse/2013_03_18.php.

33 *See* FCJ, Judgment of February 26, 2013, Case KRB 20/12, only available in German at: http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2013&Sort=3&nr=63748&linked=bes&Blank=1&file=dokument.pdf

34 *See* DCA, Decision of June 26, 2009, Case VI-2a Kart 2-6/08, only available in German at: http://www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2009/VI_2a_Kart_2___6_08_OWiurteil20090626.html

35 Section 81 (4) Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*).

The result of the FCJ's judgment is that the FCO can now only impose the maximum fine for extreme hard-core infringements. In contrast, under its previous approach, the FCO calculated the applicable fine primarily based on the turnover generated during the infringement period with the products affected by the infringement and then capped – if necessary – the fine at 10%, thus making it in theory possible to impose a fine of up to 10% even for less serious infringements.

The FCJ's judgment therefore requires the FCO to revise its entire fine setting methodology. In reaction to the FCJ's decision, the FCO announced that it will revise its fining guidelines and will discontinue applying the current guidelines for the time being. In a press release, the FCO commented that the FCJ's decision should not significantly change overall fine levels, although it could make a difference in individual cases.

The FCO also stated that the FCJ's judgment will probably lead to large companies facing higher fines than before.[36]

Vertical Agreements

FCO Accepts Lufthansa's Commitment Not To Require Disclosure Of Competitor Data From Its Customers

Between July 2008 and November 2012, the FCO challenged certain data disclosure clauses contained in Deutsche Lufthansa AG ("Lufthansa")'s corporate client contracts, and terminated proceedings after Lufthansa committed to removing the clauses from its existing and future contracts.[37] The investigation followed complaints of various corporate clients of Lufthansa, including companies from all economic sectors as well as the German government's travel office. According to the contractual clauses at issue, Lufthansa's corporate clients could only obtain special discounts and sales refunds ('incentive services') and participate in the corporate clients program under the condition that they disclose all sales data of flights booked via a specific customer credit card within a specific reference period. The information to be disclosed also included data regarding flights operated by Lufthansa's competitors ('data tracking').

In December 2012, the FCO concluded on a preliminary basis that requesting customers to provide data of Lufthansa's competitors (e.g., sales volumes and rebates that particular Lufthansa clients were granted by specific Lufthansa competitors) creates a degree of market transparency for Lufthansa which could enable Lufthansa to distort competition on specific routes by applying short-term and targeted reactions to its rivals' offers. In the FCO's view, the corresponding clauses in the agreements with Lufthansa's customers would infringe Article 101 TFEU/Section 1 GWB since they create this transparency to the detriment of competitors. Further, the FCO could not exclude that Lufthansa's conduct might also constitute an abuse of a dominant position pursuant to Article 102 TFEU/Section 19 GWB since Lufthansa could impose unfair trading conditions in its clients. Lufthansa committed to remove the clauses from existing and future contracts by April 1, 2013. These commitments resolved the FCO's preliminary concerns. The FCO therefore declared them as binding (pursuant to Section GWB32b GWB) and terminated the proceedings.

Federal Court Of Justice On Illicit Pressure To Enforce Resale Price Maintenance

On November 6, 2012, the FCJ confirmed a judgment of the Berlin Court of Appeal concerning allegedly unlawful resale price maintenance conduct pursuant to Section 21(2) GWB.[38] Section 21(2) GWB, *inter alia*, declares it

[36] *See* FCO press release, available in English at: http://www.bundeskartellamt.de/wEnglisch/News/press/2013_04_10.php

[37] *See* FCO, Decision of December 17, 2012, Case B 9 – 96/09, available in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell12/B9-96-09.pdf; a case summary is available in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell12/Kartell_Fallberichte_12/B09-096-09-final.pdf; a press release is available in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Presse/2012/2012-12-20_PM_Lufthansa.pdf, and in English at: http://www.bundeskartellamt.de/wEnglisch/News/press/2012_12_20.php.

[38] *See* FCJ, decision of November 6, 2012, Case KZR 13/12, available in German at: http://juris.bundesgerichtshof.de/cgi-

unlawful to threaten another undertaking in order to induce it to engage in conduct, which would be unlawful pursuant to the GWB or a decision by the FCO , if it formed part of an agreement between the parties. An example of such conduct would be minimum resale price maintenance.

In February 2012, the Berlin Court of Appeal had ruled that a producer of backpacks violated Section 21(2) GWB by calling an online backpack retailer and stating that it could not comprehend the economic reasoning behind the retailer's resale prices for certain backpacks, which were well below the producer's recommended retail prices. The retailer – which essentially sold the producer's backpacks via the Internet and thereby significantly undercut the producer's recommended retail prices – filed for injunctive relief because of this telephone call as it considered itself pressured to apply the producer's recommended resale prices. The Berlin Court of Appeal found that the retailer could only have interpreted the call as an attempt by the producer to enforce its recommended resale prices and as a threat that the producer would stop supplying the retailer if the retailer did not increase prices. The court's view was, *inter alia*, based on the fact that, when asked by the retailer if the comment on its pricing would mean that it would not be supplied with backpacks in the future if it did not obey the recommended resale prices, the producer's sales representative merely responded by saying that he "did not say this," but also did not provided a clear commitment to continue supplying the retailer with backpacks in the future regardless of the retailer's resale prices.

On this basis, the FCJ found that the Berlin Court of Appeal was correct in holding that the conduct in question constituted illicit pressure to enforce the producer's recommended resale prices. However, the FCJ explicitly left open the question of whether any repeated discussions between a supplier and retailers in which the supplier refers to previously communicated recommended retail prices violates Section 21(2) GWB. The German FCO had earlier held that such conduct in itself infringes Section 1 GWB, the German equivalent of Article 101(1) TFEU, if the retailer then applies the recommended resale prices.[39]

Unilateral Conduct

Cologne Regional Court Decides In Favor Of The Plaintiff Of a Follow-On Damage Claim Against Deutsche Telekom For Margin Squeeze

On January 17, 2013[40] the Cologne Regional Court held that a competitor of Deutsche Telekom ("DT") can in principle claim damages from DT for charging higher prices to the plaintiff for access services to the fixed telephony network (so-called local loop access services) than to DT's own end-users ("margin squeeze"). The judgment only finds that the plaintiff is in principle entitled to damages, but does not deal with the amount of damages, which will be subject to a separate decision. The damage claim followed a European Commission decision imposing a €12.6 million fine on DT for margin squeezing, which was ultimately confirmed by the ECJ.

The Cologne Regional Court held that several claims were time-barred as the applicable limitation period began to run with the plaintiff's complaint about DT's conduct to the European Commission, which led to the Commission's investigations, or, with regard to two companies that the plaintiff had acquired after the fining decision was issued, at the latest with the publication of the European Commission's decision in 2003. Under German law, the three-year limitation period[41] is triggered by the plaintiff's knowledge or grossly negligent lack of knowledge of the facts that entitle the plaintiff to damages, i.e., the infringement at issue.

bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2012&Seite=18&nr=62438&pos=565&anz=3351.

[39] *See* FCO, decision of September 25, 2009, Case B 3 123/08, available in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell09/B3-123-08.pdf?navid=46; see also National Competition Report July – September 2009, p. 6. *et seq.*

[40] *See* Cologne Regional Court, Interlocutory and partial judgment of January 17, 2013, Case 88 O 1/11, available in German at: http://www.justiz.nrw.de/nrwe/lgs/koeln/lg_koeln/j2013/88_O_1_11_Grund_und_Teilurteil_20130117.html

[41] A ten-year limitation period applies regardless of "knowledge" after the date upon which the claims arise.

The court held that the remaining claims are, however, in principle well-founded. With regard to the finding of the infringement itself and the finding that DT was aware of its own abusive conduct, the court referred to the corresponding findings in the European Commission decision which it deemed itself to be bound by according to EU and national law. Since the exact amount of damages was not at issue in the current proceedings, the court only had to assess whether it can be excluded at the outset that plaintiff incurred damages, namely, lost profits. (According to German procedural law, it is possible to first obtain a declaratory judgment that a defendant must in principle pay damages, while the plaintiff can subsequently sue the defendant to compel the actual payment of said damages. Such a staggered approach is feasible if the damage claim involves complex issues that are better be dealt with separately or if the plaintiff aims to reduce its risk of bearing the costs of the entire litigation.) For this purpose, the plaintiff demonstrated two alternatives in this regard – lower network access prices would have enabled the plaintiff either to increase its profits, while maintaining its prices, or to win more end-users by offering lower prices to them – which the court accepted.

Düsseldorf District Court Seeks Clarification Regarding Compulsory License Objection

On March 21, 2013, the Düsseldorf District Court stayed injunction proceedings brought under Article 64 of the European Patent Convention and Sections 139 et seq. of the German Patent Act against a large telecommunications company and referred several questions to the ECJ.

In the European Telecommunications Standards Institute's ("ETSI") standard setting proceeding for the 4G/LTE cellular telecommunications standard, the plaintiff had declared the patent in question to be standard-essential (an "SEP"), and committed to grant licenses on fair, reasonable and non-discriminatory ("FRAND") terms. Subsequently, the plaintiff sued the defendant for infringement of the SEP. The defendant raised a compulsory license objection under Article 102 TFEU, arguing that the plaintiff's refusal to grant a license on FRAND terms constituted an abuse of the plaintiff's dominant position.[42] Under the strict "Orange Book Standard" established by the FCJ in 2009,[43] the abuse of a dominant position requires that (i) the patent holder has rejected a concrete and unconditional offer and that (ii) the licensee-to-be has acted as if it had already been granted a license, in particular by paying royalties (either directly or via deposit). Since the defendant had previously only engaged in non-binding negotiations, its objection did not meet the FCJ's Orange Book Standard.

However, in December 2012, the European Commission had issued a Statement of Objections ("SO") to Samsung concerning injunctions that Samsung had sought against Apple.[44] In the SO, the Commission set out its preliminary view that a holder of an SEP which has given a FRAND promise abuses its dominant position when a potential licensee has shown "a willingness to negotiate" and yet the patent holder seeks an injunction.[45] Pursuant to this broader view, the compulsory license objection in the present case might stand.

The Düsseldorf District Court is now seeking clarification from the ECJ on which view should be adopted and, depending on the answer, which conditions, especially regarding the defendant being a "willing licensee" or pre-license compliance with FRAND license terms, must be met to establish an abuse of a dominant position pursuant to Article 102 TFEU. The ECJ's decision will therefore be

[42] *See* DCA, Judgement of January 20, 2011, National Competition Report, January – March 2011, p. 15-16.

[43] See FCJ, Judgement of available in German at http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2009&Sort=3&Seite=1&nr=48134&pos=33&anz=1123. An English translation can be found here: http://www.ipeg.eu/ blog/wp-content/uploads/EN-Translation-BGH-Orange-Book-Standard-eng.pdf.

[44] *See* EU Commission press release, available at http://europa.eu/rapid/press-release_IP-12-1448_en.htm.

[45] The European Commission had opened a similar investigation against Qualcomm in 2007, but closed it in 2009 without reaching a decision. Press releases are available at http://europa.eu/rapid/press-release_MEMO-07-389_en.htm (opening) and at http://europa.eu/rapid/press-release_MEMO-09-516_en.htm?locale=en (closing).

highly relevant in SEP infringement claims throughout the EU.

FCJ Clarifies When Legal Reasons Justify Refusal To Grant Access To Essential Facilities

On December 11, 2012, the FCJ continued the antitrust saga [46] related to the Puttgarden (Germany) - Rødby (Denmark) ferry route by quashing[47] a DCA decision[48] that had annulled an order of the FCO,[49] which in turn had obliged Scandlines, the sole operator on the route and owner of the Puttgarden port, to negotiate access modalities to the port infrastructure with two Norwegian shipping companies.

The DCA had reasoned that a legal obstacle precluded any joint use of the port because the only port landside areas available to an additional operator for setting up the necessary infrastructure are officially designated for railway purposes. Since there was no sufficient degree of probability that the competitors seeking access could get an official rezoning permit for these areas and the competitors had not substantiated that the legal obstacle could be removed, Scandlines was not required to grant access to the terminal.

The FCJ affirmed that the Puttgarden ferry terminal constitutes an essential facility and that legal obstacles can in principle justify a refusal to grant access. The FCJ held, however, that only permanent and insurmountable legal obstacles can objectively justify an access refusal. Further, since it was unclear whether an official rezoning authorization could be obtained, the FCJ concluded that the port owner relying on the exemption from the access obligation bears the burden of proof that access cannot be granted. The FCJ remanded the case to the DCA, which will have to clarify whether joint use is possible.

Mergers and Acquisitions

FCO Clears Strategic Alliance Between General Motors And Peugeot S.A.

On October 26, 2012, the FCO cleared[50] the formation of a strategic alliance between General Motors Holding LLC ("GM") and Peugeot S.A. ("PSA") comprising (i) the creation of a 50/50 joint venture that would carry out the procurement of certain automotive modules for car manufacturing and distribution, (ii) agreements on the development of vehicle platforms, modules for car manufacturing, and logistics, and (iii) GM's acquisition of a 7% equity stake and 5.78% of the voting rights in PSA, which would make GM the second-largest shareholder in PSA.

The transaction was not caught by the EU Merger Regulation ("EUMR"), but by the GWB. First, the joint venture would not constitute a concentration under the EUMR as it would not be fully functional within the meaning of Article 3(4) EUMR, given that it would only offer its services to the two parent companies and would fully depend on them as regards personnel, financial and organizational resources. In contrast to the EUMR, the German merger control regime also covers non-full function joint ventures. Second, in addition to the joint venture constituting a concentration under German law, the FCO also found that GM gained "competitively significant

[46] The FCJ judgment discussed here is part of the second proceedings against Scandlines. The first proceedings originated from complaints filed by partly the same as now competitors of Scandlines, upon which the FCO issued on December 21, 1999 (Case B9-199/97 and 16/98) an order obliging Scandlines not to refuse access to the Puttgarden ferry terminal. On August 2, 2000, the DCA quashed (Case Kart 3/00 (V)) the FCO order holding that its operative provisions were not sufficiently definite. By judgment of September 24, 2002 (Case KVR 15/01), the FCJ annulled the DCA decision and remanded the case to the latter. However, proceedings ended without a new decision as the undertakings seeking access ceased to exist in 2003.

[47] *See* FCJ, judgment of December 11, 2012, Case KVR 7/12, available in German at http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=cd9970f16c13ffae608bef9a139f6b91&nr=63091&pos=0&anz=1

[48] *See* DCA, judgment of 7.12.2011, Case VI Kart 1/10 (V), WuW/E DE-R 3467. The DCA had already ruled in favor of Scandlines in interim proceedings against the FCO decision. See National Competition report, April – June 2010, p. 9.

[49] *See* WuW/DE-R 2941; see also a brief summary of the FCO decision in: National Competition Report, January - March 2010, p. 9.

[50] *See* FCO, case report available in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion12/Fallberichte_2012/B09-032-12_GM-PSA_Fallbericht-endg.pdf.

influence”[51] over PSA by way of its acquisition of the minority stake in PSA, since the strategic alliance would leave little room for PSA’s competitive interests deviating from GM’s. In its review of the strategic alliance, the FCO assessed whether the joint venture would create or strengthen a dominant position under German merger control rules, but the decision does not reveal that the FCO would have assessed the strategic alliance also under Article 101 TFEU and its German equivalent Section 1 GWB, although it would have been entitled to do so.

More precisely, the FCO concluded that the transaction would neither create nor strengthen a dominant position in (i) the overall or (ii) the individual markets for purchasing automotive modules, nor (iii) any car sales markets. With respect to the purchasing markets, the FCO assumed an EEA-wide market but also assessed the market shares at the German and the worldwide level. It found that Volkswagen is the clear market leader in most segments, and that the transaction is unlikely to cause any unilateral effects due to the parties’ low market shares and because other automotive suppliers typically have a diversified customer portfolio and do not depend on GM or PSA. With respect to the car sales markets, the FCO excluded that any spillover effects generated or efficiencies obtained through the procurement cooperation would allow for the creation or strengthening of a dominant position in the relevant car sales markets.

Further, any closer cooperation between GM and Faurecia, of which PSA is the majority shareholder, did not raise vertical concerns due to (i) GM’s low share of Faurecia’s supplies, (ii) Faurecia’s incentive to keep generating major turnover by supplying third parties, and (iii) the presence of strong alternative automotive suppliers. While GM’s access to Faurecia’s supplies at favorable pricing conditions may allow GM to lower its care sales prices, GM would not stand out relative to its competitors since rebates are common practice on the care sales markets.

FCO Blocks Merger Between Two Agricultural Weekly Papers

On November 28, 2012, the parties withdrew their merger notification relating to Landwirtschaftsverlag GmbH Münster’s acquisition of Landwirtschaftsverlag Hessen GmbH and Fachverlag Dr. Fraund after the FCO indicated that it would likely block the transaction.[52]

Each of the parties publishes a weekly agricultural paper, albeit in different regions. Landwirtschaftsverlag Münster is one of the two most important publishing companies in Germany which, together, reach more than half of all readers of agricultural weekly papers in the country. Besides, Landwirtschaftsverlag Münster is dominant in the segment of national professional agricultural magazines.

The FCO determined that acquisition would not only increase Landwirtschaftsverlags Münster’s shares in the overall national agricultural advertisement market and the regional readers’ markets for agricultural weekly papers, but would also stabilize the duopolistic and collusive market structure in both markets. The two main publishing companies’ scope for driving competitors out of the market by offering a national advertisement product would become larger once Landwirtschaftsverlag Münster integrated further regional distribution areas of agricultural weekly papers into its portfolio. Moreover, the actual and potential competition between the parties’ weekly papers in their neighboring distribution areas would be eliminated.

FCO Fines Individual For Incomplete Merger Notification

On January 15, 2013, the FCO fined Mr. Clemens Tönnies, the individual controlling Tönnies Holding, €90,000 for an incomplete merger notification.[53]

[51] According to Section 37 (1) No. 4 GWB, a concentration can be any combination of companies enabling one or several companies to directly or indirectly exercise a competitively significant influence over another company. The requirements for such influence are lower than for the assumption of control under the EUMR.

[52] *See* FCO, press release, available in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion13/Fallberichte_2013/B06-063-12_ENDFASSUNG.pdf.

[53] *See* FCO press release, available in English at: http://www.bundeskartellamt.de/wEnglisch/News/press/2013_01_15.php.

The notification concerned the acquisition of a slaughterhouse operator by Tönnies Holding. On November, 17, 2011, the FCO prohibited this acquisition, because it would have strengthened Tönnies's dominant position in two markets.[54]

While the notification included information on the group structure of Tönnies Holding, Mr. Tönnies failed to disclose his majority shareholdings in several companies belonging to the zur Mühlen group, Germany's number one supplier in a vertically related market. These shareholdings of which the FCO only became aware in the course of its investigation of the transaction were one of the main reasons for the FCO to block the deal, because it increased Tönnies Holding's vertical integration significantly and thereby led to the creation of a dominant position of Tönnies Holding in the market for the distribution of sow meat.

While this is not the first time that the FCO fined an individual for providing incomplete or incorrect information in a merger notification, the fine is relatively high given that the maximum fine that can be imposed on an individual in such a case is €100,000. The FCO only refrained from imposing the maximum fine as Mr. Tönnies had agreed to end the proceeding through a settlement.

FCO Clears Acquisition Of Arena Management GmbH By CTS Eventim AG

On December 6, 2012, the FCO unconditionally approved the acquisition of Arena Management GmbH ("Arena Management"), the operator of the Lanxess Arena, a multifunctional arena in Cologne, by CTS Eventim AG ("CTS"). The FCO concluded that the vertical integration caused by this transaction will not strengthen the dominant position that CTS is likely to hold in certain markets.[55]

The transaction affects the live entertainment sector with its typical value chain, reaching from artists' managers and agents to tour organizers and local tour operators which contract both with venue operators and ticketing service providers. CTS is active on several levels in this value chain, being likely dominant in the markets for tour organizers, local tour operators and ticket service providers. Arena Management is a venue operator which is, however, unlikely to hold a dominant position.

The FCO investigated in particular whether CTS had the possibility and incentive to foreclose markets post-transaction, but concluded that no such effects are to be expected: CTS will have no possibility to foreclose other tour organizers or operators, as there are alternative venues available both in Germany as a whole and the Rhine/Ruhr region specifically. Further, even if CTS required all events taking place in the Lanxess Arena to make use of its own ticketing systems, these distortions would only relate to a small part of the ticketing market. Also, the FCO's market testing revealed that CTS/Arena Management will not be able to require local tour operators to use CTS's ticketing system.

FCO Clears Acquisition Of Pernod Ricard And V&S Deutschland By Ratos AB

On December 19, 2012, the FCO cleared the acquisition of Pernod Ricard Denmark A/S and V&S Deutschland, which produce and commercialize the spirits Aquavit and Bitter, by Ratos AB, a private equity company.[56]

The FCO applied its traditional approach to product market definition that focuses primarily on the analysis of consumer purchasing behavior. Thereby, it found that only *Kümmel* (caraway) liquors belong to the same product market as Aquavit. Various market studies and surveys indicated that there are many different spirits that may be considered substitutable, at least to some extent. Although approximately half of the respondents found Aquavit to be part of a broader market for digestifs, the FCO found that, taken by itself, none of the other digestifs was substitutable

[54] *See* National Competition Report October – December 2011.

[55] *See* FCO case summary available in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion13/Fallberichte_2013/B06-093-12-endg.pdf.

[56] *See* FCO, Decision of December 19, 2012, Case B2-64/12, available in German at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion12/B2-64-12.pdf.

to such a degree that they should be included in the same product market.

Interestingly, despite the combined entity's market shares of 55-65% in revenue and 35-45% in volume in the Aquavit and *Kümmel* market and the next-largest competitors holding market shares of only 5-10%, the FCO did not find that the transaction would create or strengthen a dominant position in this market. In particular, it found the following factors to indicate otherwise: (i) the separation of the target from the former parent company would break the pre-existing vertical integration, (ii) the overlap market was a niche market, (iii) the small size of the market, the presence of many established producers, low barriers to entry, the consumers' possibility to switch to spirits in neighboring markets (on a broader, hypothetical market for all digestif spirits, the combined entity's market share (0-10%) would be clearly below the dominance presumption threshold), and strong countervailing buyer power constrained the merged entity sufficiently.

On a different note, the parties – citing the European Commission [57] – had argued that sales made by a distributor should primarily be attributed to that distributor rather than the producer, because the distributor is the market actor that in effect competes with the other market players. The FCO found the cases decided by the Commission not to be comparable with the case at hand and the Commission's reasoning to be inadequate under German law in general, because it would incentivize brand owners to employ distributors for strategic reasons in order to avoid the attribution of market shares in merger control proceedings.

FCO Blocks Acquisition Of Tele Columbus Despite Commitments Of Kabel Deutschland

On February 22, 2013, the FCO prohibited the acquisition of cable network operator Tele Columbus ("TC") by Kabel Deutschland Holding AG ("KDG"). [58] KDG is the largest cable network operator with 8.5 million customers and together with Unitymedia ("UM") one of the two leading operators in Germany. TC is the third-largest operator with 1.2 million customers in Germany.

The FCO found that the acquisition would strengthen KDG's and UM's collective dominant position on several markets. The FCO also explicitly found that the transaction restrains competition by, interestingly, applying the SIEC test[59] in parallel with the dominance test, the use of which is still prevalent under German law. (The SIEC test is only scheduled to enter into force later in 2013[60] and will replace the current dominance test.) Even though the transaction would have also led to improvements on the telephone and broadband internet access market, the FCO found that these improvements were insignificant and could not counterbalance the transaction's anticompetitive effects on the relevant affected markets.

The FCO first looked at the national end-customer ("retail TV services") market where cable network operators offer cable TV service contracts to housing associations which administer large apartment complexes. It held that KDG and UM were collectively dominant in this market with a combined market share of 65-75% (KDG 35–45%).[61] KDG

57 *See* Case COMP/M.5114 - PERNOD RICARD / V & S, Commission decision of July 17, 2008, available in English at http://ec.europa.eu/competition/mergers/cases/decisions/m5114_20080717_20212_en.pdf, para. 56.

58 *See* FCO, Decision of February, 2013, Case B 7 – 70/12, available in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion13/B7-70-12.pdf; a case summary is available in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion13/Fallberichte_2013/B07-070-12_KDG-TC_final.pdf; a press release is available in German at: http://www.bundeskartellamt.de/wDeutsch/aktuelles/presse/2013_02_22.php; and in English at: http://www.bundeskartellamt.de/wEnglisch/News/press/2013_02_22.php.

59 "SIEC" stands for "significant impediment of effective competition". The SIEC-test known from and used in EU merger control law enforcement.

60 Following the 8th amendment of the ARC; the government draft (Parliamentary Paper 17/9852) is available at: http://dipbt.bundestag.de/dip21/btd/17/098/1709852.pdf. Although the Amendment is widely agreed upon, there are still disputes between the two legislative chambers (the *Bundestag* and the *Bundesrat* representing the individual federal states) with regard to the treatment of potential antitrust issues in the water and health insurance sectors, which are delaying the Amendment's entry into force.

61 The decision confirms the finding in the FCO's clearance decision (subject to conditions) concerning the acquisition of Kabel Baden-Württemberg by Liberty Europe Holding (parent company of UM) that, in

would have taken over the duopoly's most important competitor, TC, with a market share of 5-15%, which would further reduce competition. The FCO rejected KDG's claim that the acquisition would be procompetitive as it would allow KDG to become a more significant competitor of UM in the North Rhine-Westphalia and Hesse regions. In the FCO's view, the KDG could (i) not be expected to benefit from the transaction other than through acquiring TC's few customers in these states, because the long duration of existing contracts does not currently allow KDG to compete for any additional new customers there, and (ii) easily build up its own infrastructure in these regions, so in order to compete more vigorously with UM, it did not need to acquire TC's minor activities in these states. The FCO also found that KDG's (and TC's) current lack of competition with UM would not change post-transaction, since, in particular, the investment in acquiring TC does not economically compel KDG to then compete with UM and expand the business in North Rhine-Westphalia and Hesse.[62]

Furthermore, the FCO assessed the transaction's effects on the feed-in market where cable network operators offer broadcasters to feed programs into their networks, and the TV-Signal delivery market where operators supply TV-signals from one network level to the destination network (the actual building). On these markets, network operators like KDG are presumed to be dominant in each of their practically exclusive network areas. The FCO confirmed that on highly concentrated or monopolistic markets, even a minor improvement of the dominant company's competitive position, in this case KDG's increased bargaining power due to the larger network area post-transaction on the feed-in market and the small market share increment of less than 5% on the TV-Signal delivery market, strengthens a dominant position.

KDG offered to divest TC's networks in Berlin, Dresden and Cottbus (approximately 30% of TC's networks in Eastern Germany) where TC is KDG's largest competitor. However, the FCO considered this insufficient and found KDG would need to dispose of 60% of the networks in Eastern Germany in order to alleviate the FCO's concerns, which KDG was not prepared to do.[63] In these additional network areas, KDG and TC also have parallel networks and compete intensely. The FCO considered this intense competition to be at risk without KDG's broader commitment.

KDG has appealed the FCO's decision with the DCA.

Cologne Regional Court Rejects Damage Claim By GN Resound Against FCO For Blocking The Transaction With Phonak

On February 26, 2013, the Cologne Regional Court dismissed the claim brought by GN Resound ("GN") for damages caused by the FCO wrongly blocking the sale of its hearing aid manufacturing division to Phonak (now Sonova).[64]

In April 2007, the FCO blocked the transaction arguing that it would strengthen the collective dominant position of the top three hearing aid suppliers (Siemens, Oticon, and Phonak).[65] After the DCA affirmed the FCO's prohibition decision, the FCJ overruled both decisions finding that the prohibition of the transaction was unlawful. According to the FCJ, the parties had rebutted the presumption of

contrast to prior merger decisions, there was not sufficient bidding competition for contracts with housing associations, see National Competition Report, October – December 2011, p. 11.

62 The FCO based its finding that there was actually no effective competition between the three competitors on the fact that KDG and TC could not name one bidding process in which one of them and UM concurrently participated as bidders.

63 *See* Kabel Deutschland press release February 18, 2013, available in English at: http://www.kabeldeutschland.com/static-com/tx_kdgnews/130218_KD_IR_Release_TC_Acquisition_update.pdf %20and%20in%20German%20at:%20http:/www.kabeldeutschland.com /static-com/tx_kdgnews/130218_KD_TC_BKartA_Einschaetzung_final.pdf.

64 The decision is available in German at: http://www.justiz.nrw.de/nrwe/lgs/koeln/lg_koeln/j2013/5_O_86_12_Urteil_20130226.html.

65 *See* National Competition Report April – June 2007, p. 15.

collective dominance under Section 19 (3) GWB, so that no such position had been proven to exist in the first place.[66]

GN is now seeking compensation in the amount of the lost sale price (around €2 billion) minus the estimated current value of the hearing aid division (around €982 million), i.e., around €1 billion in damages. The Cologne Regional Court held that the FCO infringed an administrative duty to the detriment of the plaintiff since the prohibition decision was unlawful, but found that the FCO did not act negligently which, however, is a condition for claiming damages. It found that the FCO conducted a diligent assessment of the facts and the law regarding collective dominance. Furthermore, according to German case law, administrative authorities cannot be seen as having acted negligently if their decision is confirmed by a proper German court consisting of more than a single judge. The plaintiff disputed that this legal rule applies to the FCO as a highly specialized Federal Authority, but the Cologne Regional Court considered the rule applicable and accordingly excluded negligence based on the DCA's decision.

As an *obiter dictum*, the Cologne Regional Court expressed doubts about whether GN sustained damages by the unlawful prohibition decision. For procedural reasons, in order to have standing in the FCJ appeal proceedings, GN had to demonstrate that it could still possibly sell its branch to Phonak or one of the two other allegedly collectively dominant hearing-aid manufacturers (Siemens and Oticon). The Cologne court considered that GN might have negligently omitted to actually sell the branch after the FCJ declared the prohibition decision unlawful. Given that GN has a legal obligation to at least minimize any damage it would incur, this may lead to the conclusion that, rather than the current value of the branch, the feasible resale price (which may be lower than the branch's current value) may be deducted from the lost sale price to calculate the actual damage.

66 *See* National Competition Report April – June 2010, p. 11.

Policy and Procedure

Transparency Unit For Fuels Publishes First Documents And Starts Registering Companies

The FCO's new transparency unit for fuels, charged with the implementation of the new fuel price reporting requirement, is currently being set up. After the unit's technical setup, oil companies and petrol station operators will be obliged to report all fuel price changes to the unit almost in real time. The unit will then provide consumer information services with such information so as to ultimately enable consumers to gain information on current fuel prices at petrol stations. As part of the unit's setup, the FCO published in February and March of 2013 preliminary documents on the unit's overall concept, information flows and technical concepts.[67] Furthermore, on April 22, 2013, the FCO started to register the companies that are required to report their prices.[68]

Federal Constitutional Court Rules On Constitutionality Of Interest On Cartel Fines

On December 19, 2012, the Federal Constitutional Court ("FCC") confirmed that Section 81(6) GWB, which requires legal entities to pay default interest on cartel fines, complies with constitutional law and is therefore valid.[69]

The FCO had imposed a fine of €6.4 million on an insurance company in 2005 for violating Section 1 GWB. The company appealed the fine, but withdrew the appeal in 2011. The FCO demanded an additional €1.77 million as default interest on the fine. The company appealed the

67 The documents are available in German via the FCO's website at: http://www.bundeskartellamt.de/wDeutsch/MTS-K/MTS-KW3DnavidW26133.php.

68 *See* FCO press release, available in English at: http://www.bundeskartellamt.de/wEnglisch/News/press/2013_04_23.php.

69 *See* Press releases of the FCC and the FCO, available in German at: http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg13-005.html; http://www.bundeskartellamt.de/wDeutsch/aktuelles/presse/2013_01_22.php; FCC, Decision of December 19, 2012, Case 1 BvL 18/11, available in German at: http://www.bundesverfassungsgericht.de/entscheidungen/ls20121219_1bvl001811.html.

interest claim, alleging that Section 81(6) GWB was unconstitutional. The DCA referred this question to the FCC, arguing that in its view the provision infringed the constitutional principle of equal treatment as (1) only legal entities, but not individuals, have to pay interest, and as (2) interest only has to be paid on fines imposed by the FCO, not on fines imposed by the DCA.

Section 81(6) GWB had been introduced to the GWB in 2005 in order to prevent companies from appealing fining decisions simply for financial reasons and withdrawing the appeal just before a court decision is rendered if it is clear that the company will lose. If they appeal an FCO fining decision, companies do not have to pay the fine before a final decision is rendered. Thus, in the absence of an obligation to pay interest, companies would have an incentive to appeal a fining decision at least in order to delay payment of the fine. However, since its introduction, many legal scholars have argued that Section 81(6) GWB is unconstitutional.

The FCC's decision now finally provides clarity in this respect and establishes that Section 81(6) GWB does not violate the principle of equal treatment. According to the FCC, the fact that only legal entities, but not individuals, have to pay interest does not infringe this principle as legal entities are more likely than individuals to abuse the right of appeal for purely financial reasons if there is no obligation to pay interest. After all, cartel fines for antitrust infringements are more rarely imposed on individuals, and fines imposed on legal entities are typically much higher than fines imposed on individuals, so that in the FCC's view, individuals do not have a significant incentive to appeal the FCO's decision in order to delay paying the fine. The FCC further deemed it reasonable that interest has to be paid only when the fine is imposed by the FCO and not by the DCA, as the DCA is entitled to include the time elapsed during the judicial proceedings in its own calculation of the amount of the fine. In addition, the FCC held that Section 81(6) GWB does not violate due process rights as this provision does not aim at preventing companies from making use of their legal right to judicial review. Finally, the FCC considered the amount of interest to be paid not to be so high that a company would be deterred from appealing a decision.

The FCC's decision, and hence the German law's position on interest on cartel fines, is consistent with the general practice of the European Commission, which regularly demands interest on fines imposed under Article 23 of Regulation 1/2003. The ECJ has confirmed this practice despite the Commission's lack of an explicit legal basis to impose interest payments.[70]

[70] *AEG v. Commission* (Case C-107/82) 1983 ECR 3151.

GREECE

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

Horizontal Agreements

Decision No 547/VII/2012: The Hellenic Competition Commission Imposes Fines On Undertakings Producing Ready –Mixed Concrete.

Following a complaint for high concrete prices, the HCC launched an investigation into the markets of production and sale of ready-mixed concrete on the island of Crete. During its search of the offices of the investigated companies, it discovered two agreements signed in 2001 and 2005 between five local companies which provided for price fixing, restriction of production, and exchange of information.

Given the short life of ready-mixed concrete after its production (1 to 2 hours maximum) and the resulting limited range of its transportation (40-50 km from production site), the HCC found that the relevant geographical market could not cover the entire island. The HCC determined that the relevant geographic markets were prefecture-wide in scope (four geographic markets were identified).

The relevant agreements included provisions relating to:

- the determination of the quantities of cement to be purchased by each company;
- the imposition of a penalty in case the cement purchased exceeded the agreed quantities;
- a minimum sale price for ready mixed concrete;
- the payment terms to be agreed with customers;
- an increase of prices of all categories of concrete by 3 euro/m^3;and
- the determination of surcharges on the price based on distance.

It was also agreed that all written agreements between each undertaking and its customers would be accessible by the other companies and that each company would put €5,000 in escrow, which would be forfeited to all of the other undertakings in case of breach. The parties arranged to meet regularly to examine the market developments and decide jointly on future actions. The parties also agreed to appoint a trustee who would receive information on quantities of purchased cement from the parties so as to be able to monitor the parties' compliance with the agreements. This trustee would be an officer of the Association of Industries of Ready-Mixed Concrete in Crete, which was one of the reasons the HCC concluded that the association had played an important role in coordinating these agreements.

The HCC had no difficulty in establishing that the agreements described above were prohibited. It dismissed the arguments of the parties that the agreements were not implemented on the grounds that they had the objective of restricting competition. The HCC concluded that the parties had replaced the normal risks of competition with practical collaboration aimed at the coordination of their production and pricing policies.

The HCC also rejected the argument that the undertakings' motives were to protect their activities from sales below cost; even if such unfair practices were foreseen, the HCC held that restriction of competition was not the appropriate means by which to prevent them.

The Commission imposed fines ranging from €9,000 to €32,000 euro.

Policy and Procedure

New Regulation On The Operation Of The Commission

The HCC has adopted a new Regulation governing its functioning effective as of January 16, 2013. The new Regulation introduces several changes to the previous Regulation from 2006:

- **Summons of the parties before the HCC and submission of written briefs and counter briefs.** The previously existing term for a summons at a hearing of at least 60 days before the hearing, has been reduced to 45 days. The term for briefs has been reduced from 30 and 15 days before the hearing, while the terms for rebuttals has been reduced from 20 and 10 days before the hearing.
- **Confidential documentation and access to files.** The case reporter may use information identified as confidential during the drafting of the statement of objections if he considers that such information is necessary to establish the violation. Also, the party against which a complaint has been filed may obtain a copy of the non-confidential version thereof at any time, provided the investigation of the case by the Competition Division is not thereby prejudiced.
- **Witnesses and experts.** Cross examination of witnesses or litigants is allowed. Also, the HCC may appoint expert witnesses to investigate matters for which special knowledge is required.
- **Rights of third parties.** The HCC may call an intervening third party as a witness if it concludes that the third party's participation may contribute to the examination of the case. Also, the intervening third party may request to be present at the Commission's hearing.
- **Deliberations and decision making of the HCC.** *Important:* As the HCC currently consists of eight members, it is provided that in case of equality of votes, the chairman has a casting vote.

IRELAND

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

Policy and Procedure

New Section 14B Allows Commitments Accepted By The ICA To Be Made An Order Of Court

On December 18, 2012, the High Court of Ireland (the "Court") issued an order [71] allowing for an agreement between the ICA and Double Bay Enterprises Ltd., trading as Brazil Body Sports ("BBS"), to be made an order of the court. BBS is the exclusive distributor of footwear sold under the "FitFlop" brand in Ireland.[72] This is the first order made by the Court under section 14B of the Act, which was inserted by section 5 of the Competition (Amendment) Act 2012.[73]

Section 14B allows the ICA to apply to have any agreement involving commitments between it and an undertaking that it has been investigating made an order of the court. There is a waiting period of 45 days before the order comes into effect to allow third parties to apply for variation or annulment of the order. Any breach of the order is treated as contempt of court, which reinforces the value of any commitments offered.

In 2012, on the basis of complaints, the ICA launched an investigation into alleged retail price maintenance practices and passive sales bans by BBS.[74] Such activities are considered 'hardcore' infringements of Irish and EU competition law.[75] In coming to an agreement with the ICA, BBS agreed not to restrict retailers from deciding their own pricing policy in respect of the sale of FitFlop products. The commitments make clear that retailers are free to decide: the retail price of FitFlop products; the time of year when FitFlop products can be discounted; and the level of any discount applied. In return, the ICA agreed not to pursue legal action against BBS in relation to the matters under investigation. On December 18, 2012, Mr. Justice John Cooke granted an order under section 14B of the Act making the commitments a Rule of Court. No third party application was made to the Court and the order came into effect on February 2, 2013.

A number of conditions must be fulfilled before the Court can grant a section 14B order.[76] The undertaking party must consent to the application for an order, must have obtained legal advice prior to consenting, and must understand that failure to comply with the court order would constitute contempt of court. The agreement between the ICA and the undertaking must be clear, unambiguous and capable of being complied with. Additionally, the ICA must publish the terms of the agreement on its website no later than 14 days before making an application to the High Court and must publish notice of the application in at least two daily newspapers distributed nationwide.

The section 14B order is a powerful enforcement tool. Previously, the ICA could choose to settle a case either prior to court proceedings or indeed without having to issue court proceedings at all. In that situation, the ICA issued a reasoned decision ('enforcement decision'), which it would sometimes choose to publish on its website. However, obtaining court endorsement for settlements involving commitments is more effective, as it renders the consequences of their breach more serious, thus positioning the Authority as a more powerful enforcement agency.

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71 *The Competition Authority v. Double Bay Enterprises Limited, trading as Brazil Body Sportswear*, 2012 434 MCA (2012 No 4 CMP).

72 ICA press release of February 4, 2013, available at www.tca.ie/EN/News--Publications/News-Releases.

73 This was also the first time the Authority applied for an order under the new provision.

74 The investigation was carried out pursuant to section 30(1)(b) of the Competition Act 2002.

75 Section 4 of the Competition Act 2002 and Article 101 of the Treaty on the Functioning of the European Union.

76 Section 14B(2) of the Competition Act 2002.

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").

Unilateral Conduct

Council Of State Overrules TAR Lazio Judgment And Confirms The ICA's Decision Fining Bayer Cropscience For Exclusionary Behavior In Fosetyl-Based Fungicides Market.

On June 28, 2011, the ICA fined Bayer CropScience SRL ("BCS"), the Italian branch of Bayer's crop protection division, €5,124,000 for abusing its dominant position in the Italian market for fosetyl-based fungicides, which protect grapevines from peronospora.[77] The case originated from a complaint by Sapec Agro SA, a competitor of BCS. Sapec Argo, along with other companies forming the EU fosetyl task force (the "Task Force"), wished to gain approval to sell fosetyl-based products, but in order to do so these companies were required to present studies on the impact of fosetyl on the environment. The relevant regulations provided that the experiments on which these studies would have to based could not be replicated once successfully performed, and that accordingly companies seeking authorization to market fosetyl products would need access to the original studies. The relevant regulation prescribed a specific procedure for companies wishing to access to such studies. The first step consisted of negotiation between the study owner and the companies seeking access to it. If negotiations were not fruitful, the regulation prescribed a second step, an arbitration/conciliation procedure designed to lead to access to the scientific information under the supervision of the competent national authorities.. The ICA held that BCS' repeated refusal to grant the companies of the Task Force access to two scientific studies on the impact of fosetyl on human health and the environment (the "Studies"), constituted abusive refusal to supply an essential facility. BCS appealed this decision to TAR Lazio.

On May 15, 2012, TAR Lazio upheld BSC's appeal and annulled the ICA's decision.[78] The judges held that the ICA erred in law by misinterpreting the essential facility doctrine. In the view of TAR Lazio, the Studies were not "essential" for the Task Force companies. TAR Lazio held that once access to a facility is made available through a given procedure (the conciliation/arbitration procedures in this case), the owner of the facility is not obliged to grant access to it outside such procedures. TAR Lazio also pointed out that there was nothing in the relevant regulation that could have been interpreted as a ban on carrying out alternative studies. Thus, the Studies could not have been considered as not replicable by the Task Force. TAR Lazio noted that the Task Force companies managed to carry out their own environmental impact studies in order to obtain authorization to sell fosetyl products in Portugal. Finally, Tar Lazio annulled the ICA's decision in relation to the market definition. According to the judges, the definition of the relevant market as the Italian market for the manufacture and sale of fosetyl-based fungicides against peronospora was not supportable because the ICA did not thoroughly examine whether other fungicides were substitutable for fosetyl-based fungicides.

On January 29, 2013, the Council of State annulled TAR Lazio's decision, endorsing the original fining decision of the ICA.[79] First, the Council of State held that TAR Lazio went beyond the limits of its jurisdiction with respect to the ICA's relevant market definition, by substituting its own assessment for that of the ICA. The Council of State confirmed the ICA's market definition, finding that the evidence on which the ICA relied was accurate, reliable, and consistent and found that the ICA's appraisal of this evidence did not contain any manifest error.

[77] Case A415 – *Sapec Agro/Bayer-Helm* (see National Competition Report (Italy) 2011 – 3rd Quarter).

[78] Tar Lazio decision of May 16, 2012, n. 4403 (see National Competition Report (Italy) 2012 – 2nd Quarter).

[79] Council of State decision of January 29, 2013, n. 548.

Second, the Council of State held that, contrary to TAR Lazio's interpretation, the European legislation, applicable to the facts of the case, already prescribed a ban on duplication of experiments on animals with the purpose of carrying out studies on the impact of fosetyl on human health. Accordingly, it was easy for the Council of State to uphold the ICA's decision on the essential facilities doctrine, by considering the Studies as not replicable. In other words, the Council of State agreed with the ICA that BCS was obliged to grant access to its Studies and that, in failing to do so with respect to the requests of the Task Force companies, BCS abused its dominant position in the Italian market for the manufacture and sale of fosetyl-based fungicides. The Council of State also found that, as long as BCS was obliged to grant access to the Studies, the failure of the Task Force companies to promptly initiate the prescribed conciliation procedures for accessing the Studies was not relevant.

The Council of State decision is important for several reasons. First of all, the decision confirms the unwillingness of the Council of State to endorse a full judicial review on an ICA decision involving complex economic assessments. According to the Council of State, the standard of judicial review on complex economic matters, such as the definition of the relevant market in abuse of dominance cases, should be limited to the "manifest error" test. Second, it appears from the decision that it was not clear whether the relevant European regulation required Member States to ban duplication of experiments on animals. Thus, it would have been more appropriate for the Council of State to uphold BCS' preliminary request and ask the ECJ to give a ruling on the interpretation of the relevant European regulation.

Policy and Procedure

TAR Lazio's Recent Rulings On The Interest For Late Payments Of Antitrust Fines

Pursuant to Law n. 689/1981 (the "Law"), fines imposed by the ICA for antitrust infringements should be paid within 90 days of the infringement decision having been served upon the party. After the expiration of the 90-day term, legal interest will accrue for a period of six months. Should the fined company fail to pay the sums due within the six months after the expiration of the 90-day term, the amount of the original fine will be increased by 10% and continue to be increased by 10% every six months (or proportional fraction thereof).

The application of the Law is quite clear when the ICA's decision is confirmed in both instances of appeal, as well as in cases when the ICA's fining decision is definitively annulled by the Italian administrative courts. In the first case, the company that has chosen not to pay the fine until the last instance judgment is rendered would be under obligation to pay not only the amount of the original fine, but also the accruals prescribed by the Law. In the second case, no payment is due.

However, the application of the Law is not clear in cases where (1) the decision of the ICA is annulled by TAR Lazio but upheld by the Council of State and (2) TAR Lazio partially annuls the ICA's fining decision. There have been decisions by the Italian administrative courts ruling that the abovementioned statutory terms should run from the day on which the (initial) ICA infringement decision is served upon the party. According to such case law, the risk of failure to pay the antitrust fines within the statutory terms is, in any case, borne by the sanctioned company.

TAR Lazio has recently analyzed the above issues in two rulings, which may lead to the general adoption of a fining practice that is respectful of the legitimate expectations of companies sanctioned by the ICA.

With its preliminary interim ruling of March 7, 2013, TAR Lazio suspended the ICA's decision by means of which, and in light of the Council of State decision in *BCS case* (see above, Unilateral Conduct), the ICA ordered BCS to pay the amount of the fine imposed by the ICA's decision.[80] as well as the interest and increments accrued from the date the ICA's infringement decision was served upon the party.[81] In its ruling, TAR Lazio held that, from a plain

[80] *Supra* note 24.

[81] TAR Lazio interim order of March 7, 2013, n. 1056.

reading of the Law, the relevant statutory terms should not run from the date BCS was notified of the initial ICA decision, but from the date on which the ICA notifies BCS with a new fining decision that confirms the initial fine.

In its *Albini § Pittigliani* ruling of January 24, 2013, TAR Lazio distinguished among cases where the administrative judge merely re-determines the amount of the fine imposed by the ICA, without partially annulling the ICA's decision, from those where the administrative judge partially annuls the ICA's decision and orders the latter to re-determine the amount of the fine.[82] According to TAR Lazio, in the first set of cases, the ICA's decision remains valid and thus, the statutory terms prescribed by the Law would run from the day the infringement decision was notified to the party. Conversely, in the second set of cases, the (partial) annulment of the ICA's initial decision implies that such decision would not produce any effect on the party, because, once annulled by the first instance judges, the decision is formally "expelled from the legal order." Accordingly, the statutory terms would begin to run only from the day on which the ICA's new decision, re-determining the fine, is notified to the party.

[82] TAR Lazio decision of January 24, 2013, n. 867.

THE NETHERLANDS

This section reviews developments under the Competition Act of January 1, 1998 (the "Competition Act"),[83] *which is enforced by the Netherlands' Competition Authority (Nederlandse Mededingingsautoriteit, "NMa").*[84]

Horizontal Agreements

NMa Imposes Fines On Onion Producers For Destroying Onion Fields

In its decision of December 18, 2012, the NMa imposed fines totaling over €4 million on seven producers of a particular kind of onion (the "Onion Producers") for (1) destroying parts of their onion fields; and (2) exchanging information about individual production volumes in order to reduce supply and obtain higher prices.[85]

The NMa found that the Onion Producers had meetings, in varying formations, in the period from May 18 to September 25, 2009, in order to agree on the reduction of their joint supply (the "Agreement"). The Onion Producers argued that the reason for the Agreement was mainly to prevent a surplus on the market that in previous years had led to very low prices and a build-up of unsellable stock (stock that had to be thrown away). The NMa, however, held that the Onion Producers could individually have decided to reduce their output, but by coordinating their efforts, they restricted competition by object and infringed Articles 6(1) Competition Act and 101(1) TFEU.

The NMa based its findings on several pieces of evidence, including a document which provided that the Onion Producers were to aim at a collective reduction of 20% of their onion fields; the document ended with the statement "*Less work, more money!*," and an overview of the number of onion fields that each producer would destroy.

The NMa also detailed how the Agreement was monitored and enforced. Onion producers in the Netherlands have to register their onion fields with the *Naktuinbouw*, an independent government body that is responsible for examination of the quality of Dutch onions. The *Naktuinbouw* publishes statistics each year, which include the number of onion fields that are sown in that year. The Onion Producers withdrew their registration of the fields they planned to destroy with the *Naktuinbouw* before the annual publication of these statistics. That way, the statistics published by the *Naktuinbouw* would provide an accurate way of monitoring whether all Onion Producers had complied with the Agreement.

Upon publication in 2009, it turned out that the decrease in onion fields was smaller than the Onion Producers had expected and aimed for. In order to understand the discrepancy, the Onion Producers, as well as non-participating onion producers, exchanged their individual cultivation figures. Afterwards, the Onion Producers held one final meeting, after which the Agreement was discontinued.

As to the fine, the NMa included sales to customers within the whole of the EU to determine the relevant turnover of the Onion Producers. The NMa held that it is bound not only to apply national fining rules and guidelines, but also EU case law which provides that fines should be effective, proportionate, and serve as a deterrent. The NMa stated that, in applying EU competition law at a decentralized level, it would discount the *effect utile* and the uniform application of EU law if such an approach failed to take into account the relevant turnover throughout the EU.

In setting the fine, the NMa concluded that the infringement was "very serious," due to: (1) the fact that the Onion Producers together accounted for 80% of the relevant market in the Netherlands; and (2) the fact that the Onion Producers were the most important providers of these specific onions in EU. Accordingly, the NMa multiplied the base fine by two.

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[83] Decisions of the NMa can be found at www.acm.nl, case-law can be found at www.rechtspraak.nl.

[84] The Netherlands Authority for Consumers and Market (*Autoriteit Consument & Markt*, "ACM") is the successor of the NMa as of April 1, 2013.

[85] Case 6987_1/261 (Eerstejaars plantuien), NMa decision of December 18, 2012.

In response, the Onion Producers argued that: (1) the NMa could not impose a fine on them as they were not – at the time – aware of the fact that collectively reducing volumes was anticompetitive; and that (2) the Agreement did not, in fact, lead to higher prices for the onions concerned. The NMa, however, held that a lack of knowledge of competition rules does not prevent authorities from imposing fines for restrictive behavior. In addition, even if the Agreement did not result in the intended price increase, that does not affect the ability of the Agreement seriously to restrict competition. Therefore, the NMa saw no reason to reduce or rescind the fine.

NMa Fines Three Taxi Firms And Six Executives For Bid Rigging In Procurement Procedures

In a range of decisions published on April 3, 2012, the NMa fined three taxi firms active in the market for contractual taxi transportation and six of their executives for participating in a cartel, which consisted of bid rigging during multiple procurement procedures in the Rotterdam area from 2009 to 2011 for taxi firms RCM and the BIOS-group[86] (the "Rijnmond Infringement") and from 2007 to 2010 for taxi firms RCM and IJsselsteden[87] (the "IJsselsteden Infringement").

The Rijnmond Infringement. Since 2006, the companies had sought to coordinate their behavior during procurement procedures by means of cooperating through a joint undertaking. After a failed attempt in 2006, the companies agreed to cooperate through a new joint undertaking and signed a cooperation agreement of July 14, 2009, agreeing to cooperate prior to public procurement procedures for contractual taxi transportation. The arrangements included: (1) respecting each other's current contracts; (2) when current contracts became subject to new procurement procedures, only the company to whose "portfolio" that contract belonged would bid, while the other party would refrain from bidding; and (3) with regard to new contracts not belonging to either company, the companies would coordinate bids and agree on which company would be most successful in submitting a bid.

The IJsselsteden Infringement. Following a conflict about a contract in which IJsselsteden was the subcontractor for RCM, RCM initiated discussions to formalize the companies' cooperation in 2007. The companies signed a cooperation agreement on December 18, 2007, consisting of similar arrangements as the Rijnmond Infringement. Additionally, the companies agreed: (1) to refrain from actively pursuing each other's contractors or clients; (2) if a third company won the procurement, they would only offer their respective services after consulting each other; and (3) they would use each other as *most preferred partner* for subcontracting in the event that one of them won a procurement contract.

In two separate fining decisions, the NMa qualified the behavior as bid rigging, because the parties' arrangements had impeded competition between the parties for current and future contracts. Additionally, by agreeing to consult each other before offering their services to a third party (as subcontractor), the parties also impeded effective competition from third parties. In defining the relevant market, the NMa referred to a decision by the Trade and Industry Appeals Tribunal (*College van Beroep voor het Bedrijfsleven,* "CBB") which held that the relevant market for anticompetitive behavior prior to a procurement was limited to the companies bidding in that procurement.[88]

Deciding on a a gravity factor of 2.5 for the Rijnmond Infringement, the NMa set fines of €3,741,000 for RCM and €643,000 for the BIOS-Group. Given the more serious character of the IJsselsteden infringement, the ACM determined a gravity factor of 3 was appropriate. Taking into account that IJsselsteden had been declared bankrupt in 2010, the NMa imposed a symbolic fine of €1,000 while RCM was fined €4,564,000.

[86] Case 7131/222 (Taxivervoer Rijnmond), NMa decision of November 20, 2012 (published April 3, 2013).

[87] Case 7130/216 (Taxivervoer IJsselsteden), NMa decision of November 20, 2012 (published April 3, 2013)

[88] CBB, Judgment of April 8, 2010, LJN:BM1588.

In six separate decisions, the NMa fined six executives (*leidinggevenden*). In its decisions, the NMa took into account that (1) the individuals were in control of management; (2) they had been involved in the set-up and execution of the agreements; and (3) had undertaken no action to prevent or end the infringing behavior while being in a position to do so. The fines ranged from €120,000 and €80,000 for executives of RCM; €80,000 and €50,000 for executives of the BIOS-Group; and a symbolic €1,000 for the executives of IJsselsteden as the company had previously gone bankrupt.

NMa Lowered Several Fines Or Revoked Infringement Decision

The NMa lowered the fines imposed in two cases following the appeal of the parties to the Advisory Committee on Administrative Appeals under the Competition Act (*Adviescommissie Bezwaarschriften Mededingingswet*) (the "Committee").

In the *Insulating Glass* decision on appeal, the NMa decreased the fines of two companies to take into account a shorter duration of the infringement.[89] The fines were decreased from €2,252,000 and €7,460,000 to €1,626,000 and €4,097,000, respectively.

In the *Flour Producers* decision, the NMa lowered the fine on Grain Millers and its subsidiary Rank because of inability to pay.[90] In its analysis, the NMa took into account that the companies had also received fines for the same infringement from the German and French competition authorities. The total of these fines would surpass the level which the companies could pay without going bankrupt. After consultation, the NMa and the German competition authority decreased the respective fines to a level payable by the companies. The NMa fines were decreased from €2,868,000 and €3,911,000 to a total fine of €3,099,500.

In the *Home Care* decision, the NMa decided on appeal to revoke its earlier fining decision after a negative recommendation from the Committee.[91] In formulating its recommendation, the Committee took into account that (1) the NMa had not responded to the parties' arguments; (2) in reviewing the allegedly anticompetitive agreement, the NMa had failed to take into account the explanation of the drafter of the agreements; and (3) in reviewing the economic reality of the alleged infringement, the NMa had used a report which was not representative. The NMa agreed with the Committee's recommendation and subsequently decided to revoke its decision.

Arnhem District Court Rejects The "Passing-On" Defence In Private Damages Claims

On January 16, 2013, the Arnhem District Court (the "District Court") rejected the "*passing-on*" defense in a landmark ruling that, despite being very fact-specific, will have a considerable impact on the possibility of successfully claiming private damages following cartel behavior in the Netherlands.[92]

The case concerned an action for damages by Tennet TSO B.V. ("Tennet") against different entities of the ABB Group, most notably ABB B.V. and ABB Ltd (together "ABB")[93] for damages resulting from ABB Ltd's participation in the EEA-wide Gas Insulated Switchgear ("GIS") cartel.[94] In 1992, ABB B.V.[95] won a public procurement contract with

89 Case 5965_1/500 (Producenten isolerend dubbelglas), NMa decision of December 21, 2012 (published March 14, 2013)

90 Case 6306_1/1501 (Meel – wijzingingsbesluit), NMa decision of February 12, 2013.

91 Case 6109/867 (Caraat), NMa decision of June 28, 2012, published on February 20, 2013.

92 Arnhem District Court, Judgment of January 16, 2013, LJN:BZ0403.

93 The case also concerned ABB Holdings B.V. The corporate structure of the ABB Group is as follows. ABB B.V.'s shares are held by ABB Holding B.V., whose shares are held by ABB Ltd. ABB Ltd is thus the ultimate parent company of ABB B.V.

94 *Gas Insulated Switchgear* (Case COMP/38.899), Commission decision of January 24, 2007. The decision was appealed by Toshiba and Mitsubishi Electric. In two separate judgments (Toshiba v. Commission, Case T-113/07, 2011 E.C.R and Mitsubishi Electric v. Commission, Case T-133/07), the General Court annulled the fining decision for a breach of equal treatment in setting of the two companies' fines. The Commission readopted the respective fining decisions. The judgments are currently under appeal before the Court of Justice (Case C-498/11P and Case C-489/11P).

95 The contract was won by ABB T&D, ABB B.V.'s legal predecessor.

Tennet[96] for two GIS installations. In 2007, ABB Ltd was held liable for its participation in the GIS cartel from April 15, 1988, to March 2, 2000, but it received immunity from fines as a leniency applicant. In 2010, Tennet submitted an action for damages, arguing that it had overpaid 54% (approximately €25 million) for its 1992 contract with ABB B.V. due to the GIS cartel.

Despite the fact that the relevant procurement procedure in the Netherlands was not subject to the Commission's cartel investigation, the District Court ruled that this procedure had most likely been affected by the cartel, too, since all the bidding parties were cartel participants and the cartel's EEA-wide nature implied that it must have had an effect on the Netherlands. Additionally, although ABB B.V. was not an addressee of the Commission's fining decision, the District Court held that its prices had likely been affected since it adhered to the pre-determined prices set by ABB Ltd. Lastly, the Court held that in these circumstances, ABB carried the burden of proof that the procurement procedure was not affected by the cartel. In the District Court's opinion, ABB had not succeeded in proving such.

On the topic of ABB B.V.'s liability, the District Court ruled that the concept of an "economic entity" was irrelevant for determining liability under Dutch civil law. For liability, it is necessary that ABB B.V. was aware or should have been aware of the illegality of the joint behavior. It is sufficient that this awareness was present at higher corporate entities or directors whose knowledge could be attributed to ABB B.V. The District Court held that ABB Ltd's knowledge was sufficient for this purpose and that ABB B.V. had failed to rebut that its own directors were not aware of the behavior's illegality.[97]

ABB subsequently used the "passing-on" defense and argued that Tennet had not incurred any damages as it had "passed-on" the GIS costs in its customer's electricity prices. The District Court dismissed the argument and held that the relevant factor for calculation of damages is the amount by which Tennet had overpaid during the procurement contract. The fact that such a certain amount had since been passed-on did not change that Tennet has incurred damages by overpaying at the time. Lastly, ABB argued that, according to the Commission White Paper on Damages,[98] Tennet's customers should be able to obtain damages from ABB. Therefore, if Tennet's awarded damages would be diminished by the amount of the final customers' damages, the consumers could sue ABB for unjust enrichment. The District Court held that such developments were unlikely if Tennet received the full damages and passed an appropriate amount of these damages on to its customers.

In its verdict, the District Court held ABB B.V. and ABB Ltd liable for Tennet's damages and ruled the exact amount of damages to be assessed in further proceedings.

Although this controversial judgment is clear in its rejection of the "passing-on" defense, its effect on the private damages practice in the Netherlands is unclear as the judgment is arguably very fact specific and is likely to be appealed. The foremost criticism is that the judgment does not prevent double recovery if a former cartelist is fined by its direct contracting party and the final consumers. It has been suggested that ABB has appealed the ruling, however, no formal confirmation has been received.

Policy and Procedure

ACM Aims At Promoting Chances And Choices For Companies And Consumers (II)

On April 2, 2013, the Netherlands Authority for Consumers and Markets (*Autoriteit Consument & Markt*, "ACM"), the authority formed through the merger of the Netherlands Independent Post and Telecommunications Authority

[96] The contracting party was Sep, a legal predecessor of Saranne B.V., which is a 100% subsidiary of Tennet. Sep's corporate structure was changed in order to comply with the 1998 Energy Act in the Netherlands (requiring owners of electricity networks to appoint network administrators).

[97] ABB Holdings B.V. was not held liable as it was not an addressee of the fining decision and did not exist during the infringement against Tennet.

[98] Commission White Paper on Damages Actions for Breach of the EC Antitrust Rules, COM/2008/0165 final.

(*Onafhankelijke Post en Telecommunicatie Autoriteit*, “OPTA”), the Netherlands Consumer Authority (*Consumentenautoriteit*, “CA”), and the NMa, presented its mission statement.[99] The ACM stated that increasing consumer welfare is its most important goal, and that it in achieving this goal it would seek to take advantage of the synergies that would result from the merging of the three authorities.

As to its own organization, the ACM set out that it will operate on the basis of three core values: independence, openness, and professionalism. In connection with ‘professionalism’, the ACM stated that it will carry out more thematic market investigations and it will continue to enhance its detection methods.

As to its investigations, the ACM announced that it will take an effect-based approach, in that it will also look at the larger (societal) problems behind potential antitrust infringements, and that it will take into account negative and positive external effects. Even though it will use a range of enforcement instruments, including “consumer empowerment,” it will not hesitate to impose fines on companies and individuals that infringe competition law. It will strengthen its cooperation with other national and international authorities and will engage in public debate on relevant issues.

Areas of focus will include: affordability of health care products, the relationship between sustainability and competition, preventing unfair competition by government bodies, the financial sector (as the economic characteristics of several financial markets bear an increased risk of leading to cartels), real-estate products and services and the agriculture and food sector (in particular due to EU-wide concerns about the incomes of primary producers of these products).

Finally, the ACM stated that the current financial crisis should not affect antitrust enforcement. The ACM did accept, however, that where there was systematic surplus in a particular market, wide-scale reduction of capacity could be negotiated with the relevant actors.

[99] Available at https://www.acm.nl/nl/organisatie/missie-visie-strategie/onze-missie/.

PORTUGAL

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

Horizontal Agreements

Banks Raided Over Alleged Collusion

On March 6, 2013, following a request by the PCA, public attorneys conducted surprise inspections on at least ten banks operating in Portugal. The PCA confirmed that the financial institutions were searched in an effort to uncover alleged exchange of market-sensitive information in the national market.[100] News reports have stated that the banks had allegedly discussed spreads and commissions and that the raids followed a leniency application submitted by Barclays to the PCA.

Policy and Procedure

PCA Releases Guidance On Method Of Setting Fines

On December 20, 2012, the PCA published guidelines on the setting of fines for breaches of competition law (the "Fining Guidelines").[101] The methodology outlined in the Guidelines only applies to proceedings opened after the new Competition Act entered into force on July 7, 2012.

Fines cannot exceed 10% of the undertaking's turnover in the year preceding the conviction, or 10% of the annual remuneration of an individual in the infringing undertaking. The Fining Guidelines further clarify that, if the economic benefits gained from the infringement can be calculated and if they exceed the 10% turnover cap, the fine can be increased up to 13.3% of the turnover.

Article 69 of the Competition Act contains a list of factors to be considered when imposing fines, such as seriousness and duration of the infringement, recidivism, and collaboration. The Fining Guidelines establish a methodology for the setting of fines that elaborates on these factors and is based on the framework of the European Commission's 2006 guidelines.[102] The methodology involves the four steps:

(1) the setting of a basic amount;

(2) the computing of aggravating and mitigating factors to adjust the basic amount;

(3) concrete determination of the fine (including deterrence multipliers); and

(4) the application of pertinent leniency or settlement discounts.

The basic amount is calculated on the basis of: the turnover in relation to the affected products or services (or total turnover exceptionally); the gravity of the relevant infringement; the duration of the relevant infringement; and an entry fee. A percentage between 0 and 30% of the turnover is determined on the basis of gravity, which is then multiplied by the number of the years of the infringement. The PCA then adds a sum between 15% and 25% of the turnover as an entry fee for particularly serious infringements (cartels and abuses of dominant position involving exclusion or creation of entry barriers).

The second step involves the adjustment of the basic amount, based on aggravating and mitigating circumstances. Aggravating factors include, for example, recidivism, the holding of a leadership role in the relevant infringement, and the imposition of measures designed to conceal the infringement. Mitigating factors include, for instance, government measures having instigated the infringement in question, attempts to put an end to the practice and to repair the damage caused, and reduced participation in the infringement.

[100] Autoridade da Concorrência, "A AdC promove diligências de busca a diversas instituições bancárias", March 6, 2013, available at: http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_201309.aspx?lst=1&Cat=2013

[101] Linhas de Orientação sobre a Metodologia a Utilizar na Aplicação de Coimas, no âmbito do artigo 69.º, n.º 8, da Lei n.º 19/2012, December 20, 2012, Available at: http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Documents/Linhas_de_Orientação_Coimas_DEZ2012.pdf.

[102] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ 2006 C 210/2.

In the third step, the PCA either increases the actual amount of the fine or reduces it. The increase is up to 100% and takes place if the PCA finds, based on criteria such as size of the defendant, that an additional deterrence multiplier is justified. The fine can also be increased so that it exceeds the net profits obtained by the defendant, up to the maximum amount allowed. With a view of ensuring proportionality, the fine can be reduced if the defendant's business is mainly conducted in the market affected by the infringement or due to inability to pay considerations.

The final step concerns the application of fine reductions stemming from leniency discounts or settlement discounts. There is not a fixed percentage for settling parties, as the discount will reflect the gains in procedural economy obtained by the PCA. Leniency can either involve full immunity or discounts (fine reductions brackets of 30 to 50%, 20 to 30% or up to 20%) for applicants providing significant value added to the PCA's investigation.

PCA Releases Guidance On Prosecutorial Discretion

On January 17, 2013, the PCA published guidelines on the use of its prosecutorial discretion in pursuing investigations into anti-competitive behavior (the "Priority Guidelines").[103] The current Competition Act allows the PCA to assign priority levels to the different matters it is asked to address and to choose which cases to open. The Priority Guidelines constitute an effort by the PCA to provide transparency and legal certainty with regard to this newly-acquired power.

The Priority Guidelines explain how the PCA will assess each of the topics listed by the Competition Act as parameters for deciding whether to initiate an investigation:

- the annual priorities published every last quarter of the year by the PCA;
- a case-by-case analysis of the factual and legal elements brought to the PCA's attention, in particular by means of the leniency program or the complaint form available on the PCA's website;
- the gravity of the suspected infringement;
- the practice's possible negative impact on the economy and consumer welfare;
- the economic importance of the practice, in terms of the size of the undertakings and the area of economic activity involved;
- the significance of the type of infringement in question, as determined by the Competition Act, the annual priority document, or the PCA's advocacy efforts;
- the likelihood of proving the existence of the infringement, in light of the evidence available and the standard of proof;
- the required investigative efforts, considering whether the limited resources available will permit timely action by the PCA.

The Priority Guidelines explain that the matters brought to the PCA's attention which are not considered a priority will be analyzed in chronological order according to the resources available. The priority level assigned to any given case might be increased in light of changed circumstances.

The Priority Guidelines only concern the PCA's prosecutorial discretion in the selection of which cases to pursue and do not consider the PCA's other supervisory and regulatory powers. Moreover, they do not supersede the document published every last quarter of the year setting the PCA's annual enforcement goals.

Regulation Setting Out Merger Control Notification Forms Is Enacted

On February 14, 2013, a regulation was published setting out the forms to be used in merger control notifications to the PCA.[104] The regulation replaces the previous ordinary

[103] Linhas de Orientação sobre as Prioridades no Exercício dos Poderes Sancionatórios, January 17, 2013, English version available at: http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Documents/Linhas_de_Orientacao_Act_Sacionatoria.pdf.

[104] REGULAMENTO n.º 60/2013 (Formulários de Notificação de Operações de Concentração de Empresas). "D.R. II Série", 32 (13-02-14) 6353-6360, available at:

form and also provides for the possibility of submitting a simplified form in less complex cases. The simplified form requires less information from the parties, and can be submitted if there are: (1) no horizontal overlaps between the parties (i.e., the parties to the concentration do not compete in the same relevant product and geographic market), (2) no vertical relationships between the parties (i.e., the parties are not active upstream or downstream in relation to each other); and (3) no conglomerate relationships between the parties (i.e., the parties are not active in neighboring markets). Transactions involving a transition from joint control to sole control or vice versa may benefit from the simplified procedure if they meet the criteria set out above. The short form is available for transactions involving a transition from joint control to sole control only if the acquiring party, prior to the transaction, was not active in the same markets as the joint venture, or in any vertically related or neighboring markets. In addition, parties may use the simplified form if the following conditions are met:

If the transaction gives rise to a horizontal overlap leading to combined market shares of either (1) less than 15% or (2) between 15% and 25% if the share increment is below 2%;

If there is a vertical relationship between the parties, but the parties' individual or combined market shares at either level of the supply chain is less than 25%; or

If the parties are active in neighboring markets, but the individual or combined market shares in any of these markets is below 25%.

Notwithstanding the criteria above, the PCA has reserved its right to request that parties to notify the transaction using the ordinary form in situations where it is difficult to define relevant markets or to determine market shares, and if the transaction concerns markets characterized by high entry barriers, high concentration levels, or by known competitive restrictions.

http://www.concorrencia.pt/vPT/A_AdC/legislacao/Documents/Nacional/Regulamento_2013_60_Formularios_de_Notificacao.pdf.

The regulation also emphasizes the importance of pre-notification contacts with the PCA to determine which form to use. Finally, the regulation addresses some procedural issues, such as electronic submission of the notification form, confidentiality requests, and payment of fees.

PCA Releases Guidance On The Conduct Of Cartel And Abuse Of Dominance Proceedings

On March 22, 2013, the PCA published guidelines on the conduct of proceedings relating to suspected collusive behavior and abuse of dominance.[105] The guidelines, which are generally modeled on the decisional practice of the European Commission and the EU courts, provide detailed guidance in six areas: the investigative phase, the phase leading to a prohibition decision (the prosecution stage), voluntary commitments, settlements, confidentiality/access-to-file issues, and publication of decisions.

In relation to the investigative phase, the guidelines detail: (1) how the PCA is informed of possible anticompetitive behavior; (2) the evaluation of complaints; and (3) the use of supervisory investigations (e.g., sector inquiries). The guidelines also detail the PCA's investigative powers including: requests for information, questioning of defendants and non-defendants, dawn raids, inspections and audits, and precautionary measures. Finally, the guidelines address the duration of the investigative phase and the various means by which the investigative phase is concluded (i.e., termination decisions and statements of objections).

The second section of the guidelines discusses the prosecution stage. The guidelines explain what information must be included in this statement of objections, and what information from the PCA's case file must be made available. The guidelines also address procedural questions relating to written replies, other investigative

105 Linhas de Orientação sobre a instrução de processos relativos à aplicação dos artigos 9.º, 11.º e 12.º da Lei n.º 19/2012, de 8 de maio e dos artigos 101.º e 102.º do TFUE, March 22, 2013, Available at: http://www.concorrencia.pt/vPT/Noticias_Eventos/Noticias/Documents/LO_Instrucao_Processos_2013.pdf.

measures, oral hearings, precautionary measures, and the assessment of evidence. Finally, the guidelines address how the prosecution stage ends –through a prohibition decision setting fines and/or behavioral or structural measures.

The guidelines then turn to voluntary commitments offered by defendants to put an end to the investigation without the imposition of a fine. Among other issues, the guidelines explain that commitments: (1) will not be adequate in certain cases (e.g., cartels); (2) can be offered at any stage of the proceedings; (3) can be either behavioral or structural in nature; (4) must be implemented within two years; (5) will be market tested before adoption; (6) do not establish an infringement; and (7) can lead to fines if not observed.

The guidelines also explain settlements, which are an instrument through which the PCA seeks to achieve procedural efficiencies by granting a fine reduction if the defendant admits guilt and does not appeal the admitted facts. According to the guidelines, the amount of the fine reduction will reflect the efficiency gains resulting from the settlement and the stage of the proceeding when they were reached. Procedural aspects of the settlement negotiations, which can take place either in the investigative or prosecution phase, are also addressed.

The last two procedural aspects discussed in the guidelines are publicity/access-to-file issues and the publication of decisions. The section on publicity/access-to-file contains explanations on confidentiality of proceedings, third party access, redaction of business secrets, access to confidential information for defense purposes, and legal professional privilege (which comprises in-house lawyers as long as they are registered in a bar association).

PCA Releases Draft Guidelines On The Economic Analysis Of Horizontal Mergers

On February 1, 2013, the PCA launched a public consultation on the draft guidelines addressing the economic analysis of horizontal mergers.[106] The draft currently spans more than 120 pages and contains a detailed explanation of the economic concepts and empirical methods the PCA proposes to use in the review of horizontal mergers.

The document is divided into two sections, which address the definition of relevant markets and the legal-economic assessment of mergers, comprising the following topics:

- Relevant market definition: product markets, geographic markets, the hypothetical monopolist test, other methodologies (including natural experiments and analysis of price series), and other specificities (including two-sided platforms, markets characterized by rapid technological innovation, price discrimination, substitution chains etc.)
- Assessment: market structure (including shares and concentration levels), unilateral effects (including discussion on markets with differentiated products, potential competition, buyer power, and methodologies such as upward price pressure and merger simulation), coordinated effects, acquisition of sole control and transactions involving transition from joint control to sole control, entry barriers, efficiencies and the failing firm argument.

The PCA will receive comments from interested parties until May 2, 2013.

[106] Projeto de Linhas de Orientação para a Análise Económica de Operações de Concentração Horizontais, February 1st, 2013, available at: http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Documents/Linhas_de_Orientacao_para_a_Analise_Economica_de_Operacoes_de_Concentracao_Horizontais.pdf.

SPAIN

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

Horizontal Agreements

The CNC Fined Prisa Televisión And Telefónica DE ESPAÑA €188,646.00 For Breaching The Commitments Subject To Which The Trio Plus Infringement Proceedings Were Brought To An End

On January 28, 2010, the Council of the CNC terminated the Trio Plus after adopting commitments from the parties involved. In that case, the CNC analyzed, *inter alia*, several joint marketing agreements for pay-TV services and certain electronic communications services entered into by Sogecable (now Prisa TV), DTS, and several telecommunications operators, including Telefónica.

The commitments accepted by the CNC provided for the cancellation of the agreement between Sogecable and Telefónica for the joint acquisition of content, as well as the amendment of the joint marketing agreements between Sogecable, Telefónica, Orange, and Vodafone. Furthermore, Sogecable committed to providing information to the DI and an obligation was imposed on DTS and Telefónica to ensure that the jointly marketed products could be acquired separately for the same price.

The CNC's monitoring of the commitments led to the opening of new infringement proceedings; the CNC found that the sale of the "Digital+ mini" package to new DTS clients exclusively through the Trío+ channel (which sells DTS and Telefónica products together) constituted an infringement of the CNC Council's Decision of January 28, 2010.

On July 16, 2012, the DI opened formal proceedings against DTS, Prisa and Telefónica. In its decision of January 23, 2013, the CNC Council held that these undertakings had committed a very serious infringement under article 62.4 (c) LDC as a result of having breached commitments adopted under the abovementioned decision. Consequently, a €88,387 fine was imposed on Prisa and DTS, for which they are jointly and severally liable, and a €100,259 fine was imposed on Telefónica.

The CNC Imposed Fines Of More Than €26 Million On Ten Companies And The Industry Association For Forming A Cartel Affecting The Market For The Manufacture Of Flexible Polyurethane Foam

On August 9, 2010, Recticel, S.A., submitted a leniency application to the CNC with a view to obtaining an exemption from the payment of the fines that could be imposed on Recticel and its subsidiares for having entered into price-fixing and market-sharing agreements in relation to the flexible polyurethane foam that serves as an input for products such as upholstery, mattresses, chairs, footwear).

On February 16, 2011, the CNC carried out inspections at the headquarters of the main participants in the flexible polyurethane cartel. On April 13, 2011, the DI opened formal proceedings.

In its decision of February 28, 2013, the CNC Council took the view that the companies subject to the proceedings had participated in a cartel which had been in operation since at least January 1992. The CNC Council found that the cartel had two phases. During the first phase, the companies involved agreed on prices and production ceilings. This agreement was designed and controlled by external auditors. The companies attempted to conceal the monitoring of the agreement as an auditing procedure aimed at reducing the emission of contaminants.

During the second phase of the cartel, from 2000 onwards, in view of the increased sales of the Portuguese companies on the Spanish market, which threatened to destabilize the agreement, the members of the cartel focused their collusion on reaching agreements regarding price increases.

In light of the above, the CNC Council ruled that there was proof of a breach of article 1 of the LDC and Article 101

TFEU. Accordingly, the CNC imposed fines on the cartel participants ranging from €250,000 to €9.5 million.

On the basis of its leniency application, Recticel. was exempted from fines. Another cartel participant, Flex 2000 received a 40% fine reduction as the information it offered provided significant added value to the CNC's investigation. Euroespuma also benefitted from a partial exemption on the same grounds. The CNC Council determined that the information provided by Flexipol in its leniency application did not provide significant added value. - The level of its fine was therefore not reduced.

The CNC Imposed Fines Of More Than €44 Million On Fifteen Companies For Forming And Maintaining A Cartel In The Paper Envelopes Sector For More Than Thirty Years

On March 15, 2011, the DI opened formal proceedings to investigate whether manufacturers of paper envelopes entered into price-fixing and market-sharing agreements (i.e., allocation of contracts and/or customers) and limited technical development in the market. In particular, the CNC analyzed alleged anticompetitive practices affecting pre-printed or special envelopes, envelopes which according to customer specifications are of a non-standard size, weight or structure, and normal blank catalog or stock envelopes.

In its decision of March 25, 2013, the CNC Council concluded that there was sufficient proof that the companies subject to the proceedings had participated in a cartel between 1977 and 2010.

The CNC found that the companies had entered into a number of anticompetitive agreements, including: (1) price-fixing and market-sharing agreements affecting tenders for envelopes used in elections; (2) agreements providing for the sharing of the market for pre-printed envelopes through the allocation of customers; (3) agreements for the fixing of prices and the sharing out customers for blank envelopes; and (4) an agreement to limit technical development.

The cartel entered into operation in 1977, coinciding with the calling of the first democratic elections in Spain, with an agreement to share the market for the manufacture and supply of the electoral envelopes. This agreement was then replicated in the context of practically all of the tenders for envelopes for elections held in Spain from 1997 to 2010 (including national, European, regional and local elections).

In addition, from 1990 until 2010, certain cartel members entered into agreements for the allocation of up to 223 large customers for pre-printed envelopes. These were both public (e.g., the State Tax Agency, the National Treasury, and the Police) as well as private (*e.g.*, financial institutions, electricity and telecommunications companies). From the mid-1990s onwards certain manufacturers in the cartel extended their agreements to the manufacture and marketing of blank or stock envelopes and engaged in strategies to limit technological development; the manufacturers created a technological consortium by means of which the licensing of technological innovations was limited to companies participating in the cartel.

Consequently, the CNC imposed fines on fifteen undertakings. Moreover, there was proof that sixteen other companies as well as the industry association had participated in the cartel. However, these undertakings were not subject to the proceedings, because the relevant time limits had expired. Two companies were fully exempted from fines and two benefited from fine reductions on the basis of leniency applications.

SWEDEN

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

Mergers and Acquisitions

The SCA Orders ASSA ABLOY AB To Notify Its Acquisition Of Prokey AB

On January 30, 2013, the SCA issued an order compelling ASSA ABLOY AB ("ASSA Sweden"), a Swedish lock manufacturer and wholesale distributor, to notify its acquisition of Prokey AB ("Prokey"), a Swedish lock wholesale distributor. The transaction does not meet the merger notification thresholds, but the SCA believes the transaction may impede effective competition.

On December 5, 2012, ASSA Sweden emailed its customers informing them ASSA Sweden was to acquire Prokey. The email was forwarded to the SCA by Prokey's customers and an industry association. They expressed the concern that ASSA Sweden is acquiring the only competing wholesale distributor which offers a full product range.

In Sweden, a merger is notifiable if, in the last fiscal year (1) the parties' combined annual turnover in Sweden exceeded SEK 1 billion (€114.9 million), and (2) each of at least two of the parties' annual turnover in Sweden exceeded SEK 200 million (€23 million).

ASSA Sweden is the parent company of the entire ASSA ABLOY group. Its 2011 annual turnover amounted to SEK 42 billion (€4.8 billion), of which SEK 2.6 billion (€300 million) was generated in Sweden. Prokey's 2011 turnover amounted to SEK 149 million (€17 million).

The transaction is therefore not notifiable. However, "*in particular circumstances*," the SCA may require notification even where the first threshold, but not the second, is met. Such a request must be made within 2 years of the completion of the transaction (a transaction is considered completed when it has reached a phase where it permanently affects the competitive structure of the market). As the combined annual turnover exceeded SEK 1 billion (€110 million) in 2011 in Sweden, the transaction falls in the category of voluntarily notifiable transactions.

The ASSA ABLOY group has more than 200 subsidiaries in over 40 countries. ASSA Sweden is active in the production and the wholesale distribution of locks and fittings, as well as the manufacturing and installation of door automatics. In 2011, ASSA ABLOY acquired Swesafe AB, active in the locksmith business in Sweden. ASSA Sweden is therefore vertically integrated and has acquired a very strong position not only in the production of locks and fittings, but also in the distribution thereof.

In 2008, ASSA Sweden acquired Copiax AB ("Copiax"), which is primarily active in the wholesale distribution of locks and fittings in Sweden. At the time of its acquisition, Copiax was ASSA Sweden's only competitor in the wholesale market. The SCA concluded in its 2008 decision that there was a distinct market for wholesale distribution of locks; as a result of the Copiax transaction, ASSA Sweden would have obtained a monopoly in the market for distribution of locks. The SCA initially intended to prohibit the merger (in order to prohibit a merger in Sweden, the SCA must apply to the Stockholm City Court to issue an order prohibiting the merger). The Stockholm City Court cleared the merger and the SCA decided not to appeal the judgment. During the investigation, Prokey declared it would enter the wholesale market for locks, provided it received support from its suppliers, including, among others, ASSA Sweden.

The SCA noted that Prokey has significantly expanded since 2008, even if it remains smaller than ASSA Sweden. ASSA Sweden's competitors in the manufacturing market, as well as Prokey's customers, have expressed the view that Prokey constitutes a real alternative to and thus exercises a competitive constraint on ASSA Sweden. In turn, ASSA Sweden claims that the transaction is likely to give rise to synergies since its business model will continue to be based on the wholesale distribution of a complete product range, with products from both ASSA Sweden and other manufacturers.

Because of ASSA Sweden's strong position in the manufacturing and the wholesale markets, the SCA decided that it could not exclude that the transaction may impede effective competition in 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").

Unilateral Conduct

The Swiss Supreme Court Dismisses The Appeal Lodged By Publigroupe SA Against The Decision Of The Swiss Administrative Federal Tribunal Of April 27, 2010

In a decision dated June 29, 2012, the Swiss Supreme Court confirmed the fine of CHF 2.5 million (€2.1 million) imposed on PubliGroupe SA by the Federal Competition Commission ("FCC") for abuse of a dominant position.

On March 5, 2007, the FCC issued a decision finding that PubliGroupe had abused its dominant position in the market for advertisements in the print media. The FCC imposed a substantial fine on PubliGroupe.

PubliGroupe is the principal means through which advertisements are placed for publication in the Swiss print media. It established a set of conditions that intermediaries seeking to deal with PubliGroupe on behalf of advertisers had to meet in order to receive a commission. A group of independent intermediaries wished to sell advertising orders to PubliGroupe without meeting PubliGroupe's qualification criteria. PubliGroupe refused to pay commissions to these independent intermediaries.

The FCC fined PubliGroupe CHF 2.5 million (€2.1 million). It fixed this fine in reference to the type and gravity of the infraction. The fact that PubliGroupe had altered its behavior to discontinue the abuse during the course of the FCC's investigation was viewed as a mitigating factor. An agreement between the FCC and PubliGroupe bringing the alleged abuse to an end came into effect on January 1, 2006. In accordance with this agreement, PubliGroupe lowered the turnover required of intermediaries to benefit from commissions. Furthermore, intermediaries are no longer required to sell all types of adverts appearing in newspapers, but may specialize in one or more categories. On the other hand, the FCC found that PubliGroupe's failure to put an end to this abuse, at the end of the one year grace period allotted on April 1, 2004, with the wide-ranging amendment of the Competition Act, was an aggravating factor.

The following aspects of the decision of the Swiss Supreme Court are of note with respect to competition law:[107]

- The Swiss Supreme Court held that a sanction pursuant to Article 49a of the Competition Act is of criminal character. Consequently, the procedural guarantees of Articles 6 and 7 of the European Convention on Human Rights ("ECHR"), as well as of articles 30 and 32 of the Swiss Federal Constitution ("Constitution"), are applicable to proceedings in the field of competition law. As the FCC is not a judicial authority, proceedings before it do not meet the requirements of the ECHR and of the Constitution. However, according to the Swiss Supreme Court, the requirements of the ECHR and the Constitution are sufficiently fulfilled when the proceedings before the Swiss Administrative Federal Tribunal (i.e. the first appellate body) meet the required procedural conditions. In this respect, it is essential that the Swiss Administrative Federal Tribunal also review factual issues without limiting itself to legal issues. The Swiss Supreme Court nevertheless found that the Swiss Administrative Federal Tribunal is permitted to exercise restraint regarding technical factual questions.[108]
- The Swiss Supreme Court left open the question of whether Article 7, paragraph 1 of the Competition Act is by itself a sufficient legal basis to impose a fine, admitting only that the provision contains indeterminate concepts. The Swiss Supreme Court found, however, that Article 7, paragraphs 1 & 2 of the Competition Act,

107 Swiss Supreme Court, Decision 2C_484/2010 of June 29, 2012 (to be published in Federal Court Reports).

108 Message related to the revision of the Swiss Federal Act on Cartels and other Restraints of Competition of February 22, 2012, BBl 2012 3905.

taken together, are sufficiently detailed to serve as legal basis for a sanction.

- PubliGroupe SA owns 100% of its four subsidiaries: Publicitas SA, Publicitas Publimedia SA, Publicitas Publimag SA, and Publicitas Mosse SA. In turn, the four subsidiaries are integrated within an association, the *Verband Schweizerischer Werbegesellschaften* ("VSW"). The Swiss Supreme Court is of the view that PubliGroupe SA, its four subsidiaries, and the VSW form a homogeneous corporation. The Swiss Supreme Court argues that these entities are independent from a legal standpoint, but tied together economically. The strong degree of integration between them constitutes an additional indication of their economic interdependence. Consequently, the parent company was held responsible for the behavior of its subsidiaries. In other words, PubliGroupe SA was validly made to bear the full burden of the fine of CHF 2.5 million (€2.1 million).

- The VSW is the body in charge of the selection and authorization process of professional intermediaries. In this respect, the VSW issues recommendations ("VSW Recommendations"). After having concluded, following a detailed analysis, that PubliGroupe SA occupied a dominant position, the Swiss Supreme Court examined the VSW Recommendations and found that some of its clauses had the effect of discriminating against trading partners of PubliGroupe SA in favor of PubliGroupe SA (Article 7, paragraph 1 in relation to paragraph 2(b) of the Competition Act). For the purpose of the exercise, the Swiss Supreme Court disregarded the external legal structure of the VSW in favor of an examination of the internal quality of its members, all of which are PubliGroupe subsidiaries.

In substance, professional intermediaries were only granted an authorization by the VSW if they met all the requirements of the VSW Recommendations. PubliGroupe SA was of the view that this selection process was similar to a selective distribution system based on qualitative criteria. The Swiss Supreme Court, on the other hand, found PubliGroupe's line of reasoning irrelevant because the agreements between and among the subsidiaries were in any case not subject to the Competition Act ("*Konzernprivileg*"). Rather, the Swiss Supreme Court examined the question of whether the VSW Recommendations had the effect of hindering other undertakings from starting or continuing to compete in the market. The first clause to be held unlawful required the professional intermediaries to submit advertising orders from several sponsors (all independent from one another). The Swiss Supreme Court found that this clause had as its effect the foreclosure of intermediaries that conducted their own business (or, alternatively, which conducted business exclusively for one publisher). The second unlawful clause required the professional intermediaries to have that as their main activity. The Swiss Supreme Court considered that this clause had the effect of foreclosing the intermediaries whose role as an intermediary was only ancillary. The third clause to be held unlawful disqualified the professional intermediaries that did not reach an annual advertising sales volume of CHF 1 million (€830,000) or, alternatively, excluded the professional intermediaries that did not reach an annual turnover of CHF 100,000 (€80,000) as regards their business relationship with PubliGroupe SA. The Swiss Supreme Court found that all of the above clausesdiscriminated against the trading partners of PubliGroupe SA and that these requirements had no legitimate business purpose.

The Swiss Supreme Court disregarded the external legal structure of the VSW in favor of an examination of the internal quality of its members, all of which are PubliGroupe subsidiaries. Given the role played by associations, such as the VSW, in the setting-up of anticompetitive restraints(via recommendations), such an approach may be a more effective means for the competition authorities to address anticompetitive behavior.

Investigations

The Swiss Competition Commission Launches An Investigation Into The Pay TV Live Sports Broadcasting Sector

On April 4, 2013, the FCC launched an investigation into the Pay TV live sports broadcasting sector. The preliminary investigation found that there are indications that Swisscom and Cinetrade, together with their Pay TV provider, Teleclub, may have violated certain clauses of the Competition Act.

According to the FCC Secretariat's press release,[109] there are indications that Swisscom and Cinetrade may have a dominant position in the Pay TV live sports broadcasting market and, if so, may have abused that dominant position. In particular, the investigation shall determine whether Cinetrade has abused its dominant position by refusing to broadcast certain programs on television channels that are competitors of Swisscom TV.

The investigation shall also determine whether Cinetrade has discriminated against some of its television channel providers and final customers by proposing Teleclub programs at a more attractive price on Swisscom TV than on other television channels, despite the larger sports offer on Swisscom TV. In order to have access to Teleclub sports programs, consumers are forced to acquire a full range of services. The investigation will further determine whether Cinetrade's behavior is compatible with the Competition Act.

Cinetrade holds exclusive and extended rights in the Pay TV live sports broadcasting market. Holding such rights may position Cinetrade as a dominant undertaking in the market. The abuse of a dominant position may give a competitive advantage to Swisscom that may, in turn, constitute an unlawful hindrance of competition.

[109] French and German versions are available at: http://www.news.admin.ch/message/index.html?lang=fr&msg-id=48360 (15.04.2013).

The Swiss Competition Commission Launches An Investigation Into The Free Movement Of Public Notaries

On March, 26, 2013,[110] the FCC launched an investigation to question whether the Swiss Federal Act on the Internal Market ("AIM") represents a sufficient legal basis for notaries public to benefit from free circulation between the Swiss cantons. Pursuant to cantonal law, notaries public are ordinarily not provided with the opportunity to obtain recognition of their certificate of professional competence in a different canton. In other words, the activities of notaries public are restricted to one canton. In this respect, Swiss notaries public may be subject to discrimination in comparison with notaries public from the European Union, who may assert their right to access the market on the basis of the Agreement on the Free Movement of Persons. The investigation shall examine whether the AIM shall be deemed to prevent such discrimination, which it is designed, *inter alia*, to do.

The AIM is meant to create a Swiss single market in which the economic operators can develop their activity without being held back by additional barriers of cantonal or communal origin. According to the Swiss Supreme Court case law, notaries public currently cannot enjoy the full benefits of the Swiss single market.

The application of the AIM to notaries public would allow them to take part in the increasing mobility within Switzerland. Additionally, the application of the AIM to notaries public would give clients the opportunity to notarize legal documentation more easily in any canton, thereby enabling them to better address their business needs. From the FCC's perspective, the application of the AIM to notaries public would contribute towards increasing competition.

In the context of the investigation, the FCC is requesting the cantons to provide the competition authorities with their opinion on the free movement of notaries public throughout

[110] French and German versions are available at: http://www.news.admin.ch/message/index.html?lang=fr&msg-id=48265 (15.04.2013).

Switzerland. Once the investigation is completed, the FCC may submit a recommendation to the authorities or file an appeal with the Swiss Supreme Court against decisions taken at the cantonal level.

UNITED KINGDOM

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

Horizontal Agreements

Tesco's Appeal Against Oft Dairy Retail Price Initiatives Decision Closed By Consent Order

On February 26, 2013, the OFT announced that Tesco's appeal against the OFT's 2011 Dairy Retail Price Initiatives decision had been brought to an end by an Order of the CAT.

On August 10, 2011, the OFT imposed fines totaling £49.51 million (€61.1 million) against four supermarkets (Asda, Safeway, Sainsbury's, and Tesco) and five dairy processors (Arla, Dairy Crest, Lactalis McLelland, The Cheese Company, and Wiseman) which it found to have coordinated price increases for certain dairy products through the indirect exchange of retail pricing intentions in 2002-2003 and/or 2003 in breach of the Chapter I prohibition of the Competition Act 1998. Each of these infringements involved an indirect (A-B-C) information exchange, whereby the supermarkets indirectly exchanged retail pricing intentions with each other via the dairy processors, resulting in the co-ordination of retail price increases for the relevant dairy products.

Tesco (against which the OFT had imposed a total fine of £10.43 million (€12.9 million)) launched an appeal against the OFT's decision in the CAT on October 17, 2011, on the grounds that the OFT had erred in finding that it had participated in unlawful concerted practices in relation to cheese in either 2002 or 2003, and, in the alternative, that the penalty imposed on Tesco was excessive and disproportionate.

On December 20, 2012, the CAT handed down its judgment on liability, in which it found that the OFT had established to the required legal standard that Tesco had committed an infringement of the Chapter I prohibition of the Competition Act 1998 by participating in A-B-C information exchanges about the price of cheese on three occasions in 2002. However, the CAT annulled the OFT's findings in relation to five other information exchanges in 2002 and also annulled the OFT's finding that Tesco had been involved in an infringement in 2003. On January 28, 2013, the CAT made an Order that ended the liability phase of the appeal and fixed a timetable for hearing submissions on the consequential issues arising from the judgment on liability.

On February 19, 2013, the OFT and Tesco submitted a proposed agreed consent order to the CAT to settle the proceedings (as provided by Rule 57 of the CAT Rules) and on February 26, 2013, the CAT made a Consent Order to close Tesco's appeal against the OFT's dairy retail price initiatives decision. Tesco has agreed to pay a fine of £6.5 million (€8 million), as against the £10.43 million (€12.9 million) originally imposed by the OFT, of which £9.55 (€11.8 million) million related to the 2002 cheese infringement, and its appeal of the OFT's 2011 Dairy Retail Price Initiatives decision has been brought to an end.

Oft Agrees Settlement With Mercedes-Benz And Three Dealers

On February 21, 2013, the OFT announced that it had reached settlement agreements with Mercedes-Benz and three of its commercial vehicle dealers, Ciceley, Road Range, and Enza Motors, each of which admitted to breaching the Chapter I prohibition of the Competition Act 1998 in relation to the distribution by dealers of Mercedes-Benz commercial vehicles in the North of England and parts of Wales and Scotland. Northside, a further dealer, was the first company to come forward after the investigation commenced with evidence of collusion in return for immunity from penalties and will avoid paying a fine under the OFT's leniency policy.

In January 2010, the OFT launched an investigation into suspected breaches of the Chapter I prohibition of the Competition Act 1998 in the distribution of Mercedes-Benz commercial vehicles mainly in areas within the North of England and parts of Wales and Scotland and on June 28, 2012, it issued a statement of objections to Mercedes-Benz and five dealers, in which it set out five separate alleged infringements by dealers of the Chapter I prohibition between March 2007 and January 2010, each of which contains an element of market sharing, price coordination, or the exchange of commercially sensitive information. The OFT provisionally found that the infringing conduct had taken place with the involvement of Mercedes-Benz, which had allegedly helped to facilitate or consolidate the agreements amongst the dealers.

Under the terms of the settlement agreements Mercedes-Benz will pay £1,492,646 (€1.8 million), Road Range £115,774 (€140,000), Ciceley £659,675 (€810,000), and Enza Motors £347,198 (€430,000), which represents, in each case, a reduction of 15% from the penalties that would otherwise have been imposed to reflect the parties' admissions and agreement to a streamlined administrative process. The OFT notes in addition that, in setting the fines, it applied the penalties guidance in force at the time the statement of objections was issued and not the new guidance that has been in force since September 2012.

It would appear from the OFT's press releases that the infringements admitted under the settlement agreements do not reflect all the infringements alleged in the statement of objections and the OFT does not state whether its investigation is ongoing in relation to the fifth distributor to whom the statement of objections was reportedly sent, or whether the allegations against it have been dropped

This case continues the trend of settlement agreements being used to bring cases to a conclusion and we note that, when publishing its new Competition Act procedural guidance in October 2012, the OFT stated that it is still considering whether it would be appropriate to proceed with guidance on its settlements procedures.

Market Investigations

CC Takes Aim At "The Big Four" As It Provisionally Finds Aspects Of The UK Audit Industry To Have An Adverse Effect On Competition

On February 22, 2013, the CC published provisional findings[111] in relation to its investigation of the UK market for the supply of statutory audit services to FTSE 350 companies. It found that reputational barriers faced by smaller firms, along with the cost and difficulty of choosing, switching to, and "educating" a new auditor shielded incumbent auditors from competition. This adverse effect on competition ("AEC") was provisionally found to be exacerbated by firms competing not to satisfy shareholders, but rather company management, potentially at the cost of their impartiality. The CC has proposed a range of corporate governance remedies[112] designed to align shareholder and auditor incentives, and to encourage companies to change auditors more frequently and to draw from a wider pool of firms.

The CC noted in its findings that audit of the accounts of FTSE 350 companies is a statutory requirement, the purpose of which is to ensure shareholders are properly informed about their investment. However, the CC has provisionally found that, in practice, shareholder involvement in the appointment of auditors is minimal; "the overwhelming majority" of audits in the relevant market are conducted by "the Big Four" (Deloitte, Ernst & Young, KPMG, and Pricewaterhouse Coopers); and major companies rarely change their auditor. The CC considers that these features of the market are attributable to the following causes:

- ***Barriers to switching favor the incumbent auditor.*** FTSE 350 companies do not switch auditors frequently as organizing a tender process is costly and time-

[111] http://www.competition-commission.org.uk/assets/competitioncommission/docs/2011/statutory-audit-services/provisional_findings_report.pdf

[112] http://www.competition-commission.org.uk/assets/competitioncommission/docs/2011/statutory-audit-services/remediesnotice.pdf

consuming, auditors occupy a position of confidence in relation to the company, and companies cannot judge in advance the quality of rival auditors. In some cases, "Big Four only clauses" in loan documents preclude mid-tier auditors from competing. As a result, firms have little incentive or ability to change auditors.

- ***Auditors compete on the wrong parameters.*** As selection of auditors is largely controlled by management, auditors compete to please management rather than shareholders. As a result, despite internal quality controls, auditors are vulnerable to pressure from management to minimize disclosure and present accounts in an unduly favorable manner.

Such market conditions were found to give rise to an AEC, which manifests itself through higher audit prices, lower quality, less consumer choice and less innovation *vis-a-vis* shareholder demands. To remedy this AEC, the CC has put forward the following points for discussion:

- Requiring companies to tender for audit contracts after a certain period. The CC proposes a five- or seven-year period.
- Requiring companies to change their auditor after a certain period. The CC is considering seven-, ten- or fourteen-year periods.
- Putting in place provisions for more frequent reviews of audit quality by the Financial Reporting Council's Audit Quality Review Team.
- Prohibiting Big Four only clauses in loan documents.
- Reducing the role of the CFO in appointing auditors by transferring his auditor-selection role to the chair of the company's audit committee.
- Increasing shareholder influence over the selection of auditors by way of reinforced majority requirements for the reappointment of auditors; presentations by auditors, and internal audit committees to AGMs; and shareholder-initiated tenders for audit.
- Enhancing audit disclosure requirements to improve the transparency and comparability of audit services. The CC comments that the Financial Reporting Council is best placed to initiate such a reform.

The CC invited responses to its provisional findings by March 21, 2013, and to its notice of possible remedies by March 18, 2013. The CC will publish its final report by October 20, 2013, at the latest, although it is currently expected for August.

Oft Finds UK Road Fuels Sector To Be Functioning Competitively

On January 30, 2013, the OFT published a report on the functioning of the UK road fuels sector (the "Report")[113]. The Report sets out the results of the OFT's call for information ("CFI")[114], which was designed to identify competition issues in this sector. The CFI was launched amidst public concern about rising fuel prices in the UK. The Report has concluded that relatively effective competition subsist in the UK road fuels sector.

The Report found that in the UK, pre-tax petrol and diesel prices are among the cheapest in Europe, but among the most expensive after tax. Between 2003 and 2012, pump prices increased by 40% for petrol, and 44% for diesel (in real terms). These increases were primarily due to higher taxation and increases in crude oil prices. The report also found that gross margins in the fuel supply chain were among the lowest in Europe, indicating that competition in the UK market was functioning relatively effectively.

The OFT also noted the growing market share of the supermarkets, which increased from 29% in 2004 to 39% in 2012. Although this shift has driven out many independent dealers from the market, it has been largely beneficial to consumers as supermarkets have on average sold their fuel more cheaply than competing retailers.

The OFT examined several concerns raised during the CFI, such as:

113 http://www.oft.gov.uk/shared_oft/markets-work/oft1475.pdf

114 http://www.oft.gov.uk/shared_oft/markets-work/road-fuels-cfi.pdf

- ***Price variations between geographical areas*.** The Report found that prices for petrol and diesel were lower areas with more competitors, and especially in areas where supermarkets were present. Higher fuel prices were found in rural areas due in part to the greater costs of transporting to those areas. Overall, evidence pointed to largely effective competition in the retail and wholesale road fuel sectors that did not merit further investigation. The OFT indicated that it may intervene in relation to its finding that motorway pump prices were relatively high and has called on the Department for Transport to consider introducing signs displaying fuel prices on the motorway (rather than only in service stops), in order to encourage competition.
- ***Independent Dealers*.** The OFT found that independent retailers have struggled to compete with supermarkets and major oil companies. However, it has not found sufficient evidence to justify an investigation into alleged anti-competitive practices against independents. In particular, the OFT did not find that the supermarkets or oil companies held a dominant position that brought them within Chapter II of the Competition Act 1998 (abuse of dominance). Further, the OFT did not deem the exit of independent dealers to be detrimental to consumers, *inter alia*, because supermarkets and oil companies tended to charge lower prices.
- ***Rocket and Feather Pricing*.** The OFT did not find convincing evidence to substantiate a suspicion that pump prices increase quickly in response to increases in crude oil, or wholesale prices, but decrease slowly in response to a fall in prices (so-called "rocket and feather" pricing).
- ***Speculation, Manipulation, and Price Reporting*.** The OFT investigated whether (1) speculative trading or manipulation in the oil or road fuel financial derivatives markets or (2) inaccuracies or distortions in crude oil or wholesale price reporting led to inflated pump prices. The Report did not find credible evidence to support these concerns.

The Report concluded that, based on the evidence collected, competition in the UK road fuel sector is working "relatively effectively." Therefore, the OFT do not propose to investigate the sector further on a national level. Nonetheless, the OFT does not rule out the possibility of taking action at a local level, and will continue to assess any evidence that points to anti-competitive practices in local markets.

Mergers and Acquisitions

OFT Refers Merger Between Royal Bournemouth And Christchurch Hospitals NHS Foundation Trust And Poole Hospital NHS Foundation Trust To CC

On January 8, 2013, the OFT announced that it had decided to refer the merger between the Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust (the "RBCH") and Poole Hospital NHS Foundation Trust (the "PHFT", and together, the "Trusts") to the CC. The merger was the first between two NHS foundation trusts examined by the OFT since the enactment of the Health and Social Care Act 2012 and thus confirmed the OFT's role in assessing the competition aspects of mergers involving NHS foundation trusts.

The OFT's assessment focused on two different clusters of medical services: (1) elective care (i.e., care that is planned and requires a referral from a GP or other healthcare professional); and (2) non-elective care (i.e., unplanned or urgent care, including accident and emergency, emergency services, maternity, and critical care services). The OFT found that the geographic scope for routine elective care was between 20 and 30 minutes of drive-time from the Trusts. The Trusts compete across these services generally by earning money based on the number of patients referred to them, in line with the general rule that "*money follows the patient*."

The OFT assessed whether the proposed merger would reduce the extent of competition between providers of elective and non-elective care, and lead to a reduction in the merged organization's incentives to maintain access, and maintain and improve the quality and /or efficiency of its clinical services. The OFT conducted a detailed assessment of the horizontal effects of the proposed merger, and in particular: (1) GP referral patterns over five clusters of medical specialties;[115] (2) the closeness of competition between the Trusts, and relative to other hospitals; and (3) competitive constraints.

The OFT considered that the Trusts were the each other's closest competitors and that as a merged entity it would not face sufficient competitive constraints across the full range of clinical services for the vast majority of patients in the catchment area. As such, the OFT concluded that there would be a substantial lessening of competition in the provision of four clusters of routine elective care specialties.[116] In particular, the merger might reduce the Trusts' incentives to continue to enhance the qualities of those services over the minimum required standards. In addition, the OFT considered that in relation to the provision of non-elective care in the relevant geographic area, the merger gave rise to the realistic prospect of a substantial lessening of competition. Finally, the OFT determined that the relevant customer benefits that the merger would deliver (including higher quality maternity and cardiology services) would outweigh the substantial lessening of competition. Accordingly, the OFT has referred the merger to the CC for an in-depth review.

Competition Committee Approves Sale Of Stansted Airport From Heathrow Airport Holdings (Formerly BAA) To Manchester Airport Group

On January 18, 2013, the CC approved the sale of Stansted Airport ("Stansted") to Manchester Airport Group ("MAG", comprising Manchester Airport Group Finance Limited ("MAGFL"), Manchester Airport Group PLC, and Manchester Airports Holdings Limited). This concludes the process of divestiture ordered in the CC's market investigation report of March 19, 2009 ("2009 Report"),[117] in which it found adverse competitive effects in the airport holdings of Heathrow Airport Holdings ("HAH", formerly BAA). The divestiture is subject to undertakings given by MAG to the CC that restrict its ability to divest Stansted within a five year period.

In its 2009 Report, the CC found, *inter alia*, that BAA's control of airports in South East England and Lowland Scotland had adverse effects on competition in those markets. The CC's remedy package required BAA to sell both Stansted and Gatwick and either of Edinburgh or Glasgow airports. The CC's findings were challenged by BAA on procedural grounds before the CAT, which upheld the appeal. However, this was eventually overturned by the Court of Appeal in October 2010.[118]

On July 19, 2011, the CC published its final decision concluding that there were no material changes or special reasons that would justify amending the decision in its 2009 Report to require BAA to divest Stansted and either Glasgow or Edinburgh airport (BAA had already sold Gatwick Airport in the meantime) ("2011 Decision"). BAA challenged the 2011 Decision in relation to the requirement to divest Stansted, but this was rejected by the CAT,[119] and subsequently by the Court of Appeal.[120] BAA proceeded with the sale of Stansted to MAG, as announced on January 18, 2013.

On January 18, 2013, the CC accepted interim undertakings from MAG Group for the purposes of preventing pre-emptive action, under section 157 of the

115 Specifically: Group A (rheumatology, rehabilitation, general medicine, general surgery and geriatric medicine), Group B (clinical haematology and dermatology), Group C (palliative medicine, cardiology and oral surgery), Group D (medical oncology, gynaecology, vascular surgery, neurology, ear, nose and throat, and trauma & orthopaedics), and Group E (cardiothoracic surgery).

116 Specifically: Groups A, B, C, and E. The OFT considered that in relation to Group D, "*it may be the case*" that the merger would lead to a substantial lessening of competition.

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

118 *Competition Commission v BAA Ltd & Anor* (EWCA Civ 1097), judgment of October 13, 2010 (http://www.bailii.org/ew/cases/EWCA/Civ/2010/1097.html)

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

120 *BAA Limited v Competition Commission* [2012] EWCA Civ 1077 (http://www.bailii.org/ew/cases/EWCA/Civ/2012/1077.html)

Enterprise Act 2002. The interim undertakings require MAG to obtain the CC's consent to enter into a transaction that would result in, or have substantially the same effect as a:

- Divestment of Stansted or a substantial part of its assets or property;
- Divestment of a shareholding or interest in Stansted Airport Limited or any affiliate of MAGFL that results in a change of control or creates a position of material influence in relation to Stansted Airport Limited;
- Divestment of a material shareholding or material interest in Stansted Airport Limited or any affiliate of MAGFL, which would affect the provision of management services to Stansted or Stansted Airport Limited, or reasonably be expected to result in an adverse effect to the overall financial position of Stansted or Stansted Airport Limited; or
- Divestment of a shareholding or interest in Stansted Airport Limited or MAGFL or any affiliate of MAGFL, to HAH or any of its affiliates.

MAG must seek the CC's approval in writing and disclose all relevant facts. The consent of the CC is voidable if MAG does not give full disclosure. MAG is required to notify the CC if it becomes aware that it has submitted incomplete information.

Final undertakings (which are identical to the interim undertakings,[121] and will remain in force for five years from January 18, 2013) were accepted by the CC on February 5, 2013.[122]

CC Makes Provisional Findings Against Groupe Eurotunnel Following Seafrance Asset Acquisition

Following its issues statement of December 17, 2012, [123] on February 22, 2013, the CC published provisional findings [124] that rail transport services provider Groupe Eurotunnel S.A.'s ("Eurotunnel") acquisition in July 2012 of three ferries and certain other assets from the liquidated business of Seafrance S.A. ("Seafrance") may lead to a substantial lessening of competition ("SLC") in passenger and freight transport services operating across the English Channel. As a possible remedy, the CC is considering compelling Eurotunnel to divest itself of the acquired assets.[125]

The CC found the asset acquisition to be a relevant merger situation within the meaning of the Enterprise Act, given that the share of supply test was satisfied and the assets could be considered to be an enterprise. In reaching this finding, the CC noted that Eurotunnel had assigned value to the Seafrance brand, and was able to put the acquired ferries back into operation very quickly by closely cooperating with, and continuing to employ, a large proportion of the former Seafrance workforce.

The other key items contained in the provisional findings and notice of possible remedies are as follows:

- ***Market definition.*** The CC confirmed the view taken in the issues statement in relation to the relevant market definition. By analyzing travel and pricing statistics along with freight customer testimony, the CC has provisionally found separate relevant markets in transport services for passengers and freight, operating on various "short sea" routes, including the Channel tunnel and various ferry links.

[121] http://www.competition-commission.org.uk/assets/competitioncommission/docs/2007/130118_mag_notice_of_acceptance_of_interim_purchaser_undertakings.pdf

[122] http://www.competition-commission.org.uk/assets/competitioncommission/docs/2007/130205_mag_notice_of_acceptance_of_final_purchaser_undertakings.pdf

[123] http://www.competition-commission.org.uk/assets/competitioncommission/docs/2012/eurotunnel-seafrance/eurotunnel_issues_statement.pdf

[124] http://www.competition-commission.org.uk/assets/competitioncommission/docs/2012/eurotunnel-seafrance/provisional_findings_excised.pdf

[125] http://www.competition-commission.org.uk/assets/competitioncommission/docs/2012/eurotunnel-seafrance/remedies_notice.pdf

- ***Counterfactual.*** The CC provisionally found that but for the acquisition of the Seafrance assets by Eurotunnel, the most likely outcome would have been acquisition of some or all of those assets by the DFDS Seaways / Louis Dreyfus Armateurs joint venture – one of the unsuccessful bidders in the Seafrance liquidation auction before the Commercial Court of Paris.
- ***Effect on competition.*** The provisional findings conclude that the acquisition would lead to an SLC, as Eurotunnel would be able to increase tunnel crossing prices without losing sales to competing ferry operators. This SLC would result from the likely withdrawal of the DFDS Seaways / Louis Dreyfus Armateurs joint venture from the Dover–Calais ferry route in the short to medium term. If this were to happen, the CC estimates that Eurotunnel would have a market share in excess of 40% in both relevant markets, leading to increased Eurotunnel and cross-Channel ferry prices and worsening service quality.
- ***Countervailing factors.*** The provisional findings dismiss the possibility raised in the issues statement that competition would return to the markets by entry of new participants or expansion of existing ones (primarily P&O, which was considered Eurotunnel's only significant competitor).
- ***Remedies.*** The CC provisionally considers that the appropriate remedy to the SLC would be to require Eurotunnel to sell (to an independent and financially viable market participant) the three ferries and the contract under which former Seafrance employees continue to operate the ferries. This would prevent the harm to competition caused by Eurotunnel controlling ferry and tunnel routes simultaneously. The provisional findings leave open the question of how exactly the divestiture should be structured and to whom and when it should be made (P&O is, however, ruled out owing to its already significant market share). The CC considers that the separation of Eurotunnel's tunnel and ferry businesses at the management level or a price cap on tunnel services would be ineffective and difficult to monitor.

The CC invited responses to its provisional findings by March 12, 2013, and to its notice of possible remedies by March 5, 2013. The CC will publish its final report by April 14, 2013, at the latest.

Policy and Procedure

Government Proposes Significant Reforms To Private Competition Law Litigation In The UK

On January 29, 2013, the UK Government published a response to the consultation on private actions in competition law[126] issued in April 2012 by the Department of Business, Innovation, and Skills ("BIS") (the "Response").[127]

The Government's reform plan aims to simplify the process by which private individuals and companies may claim damages caused by anti-competitive behavior. It aims, in particular, to minimize the time and costs involved in pursuing private actions in the UK.

The Response proposes a number of significant reforms:

- ***Increased CAT Powers.*** In order to establish the CAT as the principal forum for competition actions in the UK, its jurisdiction will be extended to hear standalone private cases (i.e., those in which a finding of anti-competitive behavior has not yet been made by the CAT). It would be given powers to grant injunctions, and a fast-track procedure will be made available for simpler competition claims in the CAT (which will prioritize cases involving companies which would otherwise find it more difficult to obtain access to justice, such as SMEs). Courts will be able to transfer all competition cases to the CAT (or initiate claims in the CAT), and limitation periods in the CAT will be harmonized with those of the

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

[127] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/70185/13-501-private-actions-in-competition-law-a-consultation-on-options-for-reform-government-response1.pdf

High Court. In addition, the Government has decided not to propose a controversial rebuttable presumption of loss in cartel cases, or to legislate on the applicability of the defense of passing-on from tort law, to competition claims.

- ***Collective "opt-out" litigation.*** An "opt-out" collective action will be introduced for both standalone and follow-on cases. In such actions, all parties who fall within a defined represented group are bound by the outcome of the case, unless they opt out. "Opt-out" collective actions can be brought by claimant businesses and/or consumers, or genuine representatives (such as trade or consumer associations). The CAT must certify whether a collective action on an "opt-out" basis is the most suitable way for an action to proceed. Safeguards against vexatious claims would include: a strict judicial certification process; a prohibition on treble or exemplary damages; retaining the loser-pays rule for costs, and; by prohibiting contingency fees.

- ***Alternative Dispute Resolution ("ADR")***. The Government has decided to promote ADR, but does not propose to make it mandatory on parties. A new opt-out collective settlement regime would enable the CAT to approve a collective settlement agreement on an opt-out basis. The settlement will be mutually agreed by a representative of those who have suffered loss as a result of competition law, and a potential defendant. In addition, the CAT Rules governing formal settlement offers (or "Calderbank" offers) will be aligned with those of the High Court. The OFT will also be given a discretionary power to certify whether a voluntary redress scheme submitted by a business has followed a reasonable process. However, the OFT will not be able to impose such a redress scheme or to certify whether the amount of compensation is reasonable. Once certified by the OFT, the scheme will become legally binding. Under the OFT's current guidance, it can grant a reduction of fine to businesses who offer a voluntary redress scheme, at its discretion.

- ***Leniency Materials.*** The Government has decided not to take action on the issue of protecting leniency materials from disclosure in private actions, pending proposals by the European Commission on this topic.

Most of the proposals set out in the Response will require legislation, and BIS does not indicate when they would likely be implemented. Changes that do not require legislation will be introduced with the co-operation of the competition authorities.

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