BELGIUM

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

Policy and Procedure

Supreme Court Dismisses Appeal Against Judgment Recognizing In-house Counsel Privilege

On January 22, 2015, the Belgian Supreme Court partially dismissed an appeal brought by the Auditorate and the BCA against a judgment of the Brussels Court of Appeal in which it had held that legal advice from in-house counsel was protected from seizure by the BCA, on grounds of legal privilege.[1]

On March 5, 2013, the Court of Appeal's landmark judgment found that legal advice from in-house counsel, including draft advice and related correspondence, is privileged if they are members of the Belgian Institute for In-House Counsel ("IBJ/IJE").[2] The case concerned dawn raids carried out by the BCA on the premises of Belgacom, Belgium's incumbent telecommunications provider. The BCA seized various electronic files, including documents originating from or addressed to in-house counsel. Belgacom subsequently raised (and appealed) various procedural decisions, including a decision of the BCA refusing to set-aside documents containing the legal advice of Belgacom's in-house counsel.

The judgment interprets a statutory provision providing that "*advice rendered by company lawyers to the benefit of their employer and in the framework of their activity as legal counsel, is confidential.*"[3] It also expressly rejected the applicability of the EU *Akzo* ruling[4] (that in-house counsel advice on EU antitrust proceedings was not privileged) in national proceedings, even when enforcing EU competition law.

The Auditorate and the BCA appealed this judgment to the Supreme Court on procedural grounds, stating that the procedural decisions at issue should be heard by the former Competition Council rather than the Court of Appeal. In its judgment of January 22, 2015, the Supreme Court dismissed much of the appeal (other than grounds relating unrelated to the question of in-house counsel privilege).

The Supreme Court's judgment finds that legal advice from in-house counsel, where in-house counsel are members of the IBJ/IJE, is privileged and protected from seizure in BCA investigations. However, the protection only covers advice provided by members of the IBJ/IJE and is inapplicable to investigations carried out by the European Commission (the "Commission").

Supreme Court Upholds Appeal in Spira v. De Beers relating to a Request for Renewal of Interim Measures

1 Supreme Court (Case C.13.0532.F), judgment of January 22, 2015.

2 Brussels Court of Appeal (Case 2011/MR/3), judgment of March 5, 2013.

3 Article 5 of the Act establishing the Belgian Institute for In-house Counsel (IJE/IBJ), OJ, July 4, 2000, p. 23252 (convenience translation).

4 *Akzo Nobel Chemicals and Akcros Chemicals v. Commission* (Cases T-125/03 and T-253/03) EU:T:2007:287; *Akzo Nobel Chemicals and Akcros Chemicals v. Commission* (Case C-550/07 P) EU:C:2010:512.

On January 23, 2015, the Belgian Supreme Court granted A. Spira BVBA ("Spira")'s appeal against a March 26, 2013 judgment of the Brussels Court of Appeal which had annulled decisions renewing interim measures.[5]

In its judgment of January 23, 2015, the Supreme Court upheld continued interim measures against De Beers Auction Sales Belgium NV, requiring it to continue supplying diamonds to the appellant, A. Spira BVBA. The judgment overturns a decision by the Court of Appeal that had annulled the renewal of these interim measures.

Spira is an Antwerp-based diamond dealer. For approximately 70 years, Spira had been a 'Sightholder' of rough diamonds from the producers De Beers UK Ltd. and De Beers Auction Sales Belgium NV ("De Beers"). In 2003, De Beers implemented a "supplier of choice" ("SOC") system, under which Spira no longer qualified as a distributor for De Beers.

In 2003 Spira filed a complaint to the Commission, alleging that De Beers had infringed Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU"). TFEU. After the Commission rejected its complaint in two decisions in January 2007 and June 2008, Spira appealed the Commission's decisions before the EU's General Court. The General Court dismissed the appeals on July 11, 2013.[6]

While the appeals before the General Court were pending, Spira filed a complaint to the BCA in October 2009, claiming that the SOC system infringed Articles 2 APEC (now IV.1 CEL) and 101 TFEU, as well as Articles 3 APEC (now IV.2 CEL) and 102 TFEU. Spira also requested interim measures. These were granted in November 2010 when the President of the former Competition Council (the "President") ordered De Beers to supply Spira up until (i) one month after a judgment from the General Court rejecting Spira's claims, or (ii) one month after a decision by the Auditorate to dismiss the case. The order did not exclude the possibility that interim measures may be renewed thereafter. De Beers appealed this order

In its judgment of October 19, 2011, the Brussels Court of Appeal limited the duration of the interim measures to April 30, 2012, unless by that time either (i) the prosecutor issued a Statement of Objections ("SO"), or (ii) a dismissal decision by the Prosecutor was annulled (which would force the Prosecutor to reopen his preliminary investigation). The Court of Appeal further noted that the measures could be renewed if justified by new developments, *e.g.* external circumstances.[7]

Between April 10, 2012 and July 13, 2012, the President of the former Competition Council renewed the interim measures several times, extending them to October 2013. De Beers appealed these renewal decisions as well.

On March 26, 2013, the Brussels Court of Appeal annulled the orders renewing the interim measures. The Court found that the circumstances considered in the judgment of October 19, 2012 had not taken place, as: (i) the time limit of April 30, 2012 had expired and the Auditorate had not issued an SO, and a dismissal decision had not been annulled or issued; and (ii) there had been no change in any of the external circumstances originally considered by the Court. Because the prosecutor was not actively investigating the case in light of ongoing proceedings at the EU level, the Court of Appeal further held that interim measures could not be granted in the absence of an investigation on the merits.[8] Spira then brought the case before the Supreme Court.

In its judgment of January 23, 2015, the Supreme Court rejected the Court of Appeal's reasoning for two main reasons:

[5] Supreme Court (Case C.13.0369.N), judgment of January 23, 2015.

[6] *Spira v. Commission* (Joined Cases T-108/07 and T-354/08) EU:T:2013:367.

[7] Court of Appeal of Brussels (Case 2010/MR/1), judgment of October 19, 2011.

[8] Court of Appeal of Brussel (joined Cases 2012/MR/1, 2, 4, 6), judgment of March 26, 2013.

- First, the Court held that the nature of interim measures under Article 62(1) APEC (now IV.64 CEL) allowed for their renewal where the situation following expiry of earlier measures requires such renewal, and to the extent that the renewal does not undermine any benefit from of the earlier decision. Therefore, the Court of Appeal had erred in holding that new interim measures could only be adopted where there was a change of external circumstances.
- Second, the Court rejected the Court of Appeal's holding that there was no investigation and therefore that no interim measures could be granted. As long as the prosecutor had not adopted a dismissal decision, the preliminary investigation would be considered ongoing and interim measures could be ordered.

The Supreme Court therefore annulled the judgment and referred the case back to the Brussels Court of Appeal for a different bench to rule on the matter.

Brussels Court of Appeal Rules BCA's Dawn Raids in Travel Agents Case Were Illegal

On February 18, 2015, the Brussels Court of Appeal upheld a claim by travel agents against the BCA, holding that the BCA's dawn raids at their premises were illegal.[9]

In its investigation into restrictive practices in the travel sector, the BCA carried out dawn raids at the premises of various travel agents on February 23 and March 7, 2006. Several companies claimed that evidence gathered during the dawn raids was obtained illegally and therefore should not have been used in the Statement of Objections ("SO"). Consequently, they filed an appeal with the Brussels Court of Appeal.

Referring to the case law of the Constitutional Court, the Court of Appeal held that Article 15 of the Constitution (inviolability of the home), read in conjunction with Article 8 ECHR (right to privacy and family life), provides that dawn raids require prior judicial authorization in the form of a warrant. Any exception must be limited to what is strictly necessary to achieve a lawful objective, and must provide sufficient guarantees against abuse.

The Court of Appeal noted that the 1999 Competition Act, applicable at the time of the dawn raids, did not require a warrant and thus constituted an exception to the principle. It further found that, in the case at hand, the circumstances surrounding the dawn raids did not meet the conditions applicable to exceptions. Therefore, the dawn raids breached Article 15 of the Constitution.

The Court of Appeal also held that Article 6 ECHR requires that judicial review of the dawn raids be available within a reasonable period. However, it determined that neither the 1999 Competition Act, nor the ensuing 2006 APEC, contained a legal basis for such judicial review. Thus, there was no possibility to file an appeal against a dawn raid, in violation of Article 8 ECHR and Article 47 of the Charter of Fundamental Rights of the EU.

In light of the above, the Brussels Court of Appeal concluded that the appropriate remedy was to exclude the illegally obtained evidence. Therefore, it (i) annulled the BCA's decision to use data obtained during or pursuant to the dawn raids carried out in February and March 2006, (ii) prohibited the BCA from using this evidence in support of objections or a decision, and (iii) ordered the BCA to return the data and destroy any copies.

The BCA is likely to challenge the judgment before the Supreme Court.

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.

[9] Court of Appeal of Brussels (joined Cases 2013/MR/19, 20, 21, 22, 24, 25), judgment of February 18, 2015.

Policy and Procedure

Authority Gains Easier Access to Data Held by IT Service Providers

On March 1, 2015, the Finnish Competition Act was amended to grant the FCCA enhanced rights to conduct inspections in relation to businesses that have outsourced their IT services. The FCCA may now obtain information concerning a company under investigation directly from a third-party IT service provider. Before the amendment, the FCCA needed to obtain a separate inspection order to do so.

The amendment is not intended to broaden the inspection rights of the FCCA. The kinds of information and data that the FCCA can request and inspect will remain the same. The company under investigation is allowed to be present during the screening of the data, and to receive a copy of the data taken by the FCCA.

The intention is to put companies on equal footing, regardless of whether they have outsourced their IT services or provide them in-house. The increasing use of cloud computing is mentioned as an example of the reasons for the amendment. Backed-up data stored by third parties may also allow the FCCA to obtain information that has been deleted at the company's premises.

Finland has enacted strict provisions concerning data protection and the confidentiality of communication. As a result, IT service providers have at times refused to provide certain types of information, even to the company under investigation, unless additional safeguards are put in place. The amendment is expected to simplify this process by allowing direct access by the FCCA.

There is no express provision in the amendment which requires the FCCA to inform the company under investigation that the FCCA is accessing the company's data via a third party. In addition, the FCCA is under no obligation try to obtain the relevant data from the company's premises first. In theory, the amendment allows the FCCA to obtain a significant amount of data from an IT service provider before the company is informed that it is under investigation. The FCCA has yet to issue any guidance on how aggressively it will make use of its new powers.

FRANCE

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

Abuse of Dominant Position

The FCA Imposed a Fine of € 4.2 Million on the Main French Telecommunications Operator for Abuse of its Dominant Position

The FCA sanctioned TDF for an abuse of dominant position in the context of the launch of the digital terrestrial television in the French overseas territories.

By a decision of February 5, 2015, the FCA sentenced TDF to a fine of €4.2 million for having delayed, without any justification, the publication of its "hosting reference offer", which is needed by TDF's competitors, such as Outremer Telecom ("OMT") (the first alternative telecommunications operator in the overseas territories), in order to compete on the downstream market for digital terrestrial television broadcasting in the French overseas territories.[10] The FCA also found that TDF omitted a number of necessary elements from the hosting reference.

The conduct took place during the first deployment phase of digital terrestrial television in the French overseas territories, during the calls for tender organized by France Television in 2010.

Since TDF owns most of the infrastructure required for digital terrestrial television, alternative operators need to be

[10] French Competition Authority, Decision no. 15-D-01 of February 5, 2015 relating to practices implemented in the sector of digital terrestrial television in the French overseas territories.

hosted on TDF's infrastructure to be able to compete on the market for digital terrestrial television broadcasting. Thus, TDF is subject to ex-ante regulatory rules set out by the French telecommunications regulator, the ARCEP, and has an obligation to publish reference offers specifying the technical and pricing conditions of the regulated hosting offer.

TDF argued that the FCA was not competent to impose sanctions for an alleged failure to comply with obligations set by ARCEP. The FCA therefore clarified that any sanctions it imposed would concern TDF's abuse of dominant position in the upstream hosting market, not its obligations under telecoms regulations.

The FCA therefore considered that, through its late and incomplete publication of the reference offer, TDF created an information asymmetry to the detriment of its competitors.

Although the investigation services attempted to hold four of TDF's parent companies accountable for TDF's practices, the FCA ultimately found that only two of them could be held liable for TDF's behavior. With respect to the other two parents, the FCA concluded that as their role was strictly financial, they did not constitute part of TDF's economic unit and were therefore not liable.

The FCA fined Three Millers for Concerted Price Increases of Flour Sold to Craft Bakeries

On March 26, 2015, the FCA fined three millers €1.1 million for concerted practices in the bakery flour sector. These practices were uncovered in the course of the packaged flour investigation

The FCA's decision on bakery flour provides an example of anticompetitive practices being uncovered in the course of another antitrust investigation conducted in a closely related sector. The FCA discovered evidence of the agreements implemented by millers on bakery flour prices among the documents that were seized during the dawn raids carried out in a separate investigation targeting the packaged flour sector. The FCA decided to deal with the two cases separately. After fining the packaged flour cartel participants a total of €242.4 million[11] (overturned on appeal), the FCA issued its decision on the bakery flour agreement on March 26, 2015, imposing a fine of €1.1 million.[12]

The FCA found that in the context of a sharp increase in wheat prices which occurred in 2007, three millers, Axiane Meunerie, Minoteries Cantin, and Grands Moulins de Strasbourg, held a meeting to agree on a target for price increases in flour sold to craft bakeries. The investigation services suspected no less than 20 millers of being involved in the coordinated price increases, but the FCA decided that only four millers could be sanctioned on the basis of the evidence available (in addition, one participant was not fined due to the FCA's procedural irregularities).

The FCA also noted that its use of evidence from the procedurally separate packaged flour investigation in the context of the bakery flour investigation could not be objected to as it constituted an internal preparatory decision that was taken to ensure (i) the use of separate procedures for the "*proper administration of justice*."[13]

The FCA found that the harm done to the economy was much less important in the bakery flour case than in the packaged flour case. Although the FCA considered the practices implemented by the millers in the bakery flour sector as serious, it noted that (i) the three millers had limited market shares in the market for flour sold to craft bakeries in France in 2007 (*i.e.*, around 8%) and (ii) the concerted practices had lasted for a short period of time (*i.e.*, 6 months). Therefore, the FCA applied a gravity rate of only 10% (versus 19% in the packaged flour case) and a multiplier of 0.5 for the duration.

11 French Competition Authority, decision No. 12-D-09 of March 13, 2012, on packaged flour.

12 French Competition Authority, Decision no. 15-D-04 of March 26, 2015, on bakery flour.

13 *Supra*, p.243.

Finally, the FCA used its ability to adjust the amount of the fines according to the firms' ability to pay , and reduced Axiane Meunerie's fine by 82.4%. This is a rare example of the FCA making a fine reduction based on the company's limited capacity to pay for the fine set. Axiane Meunerie proved its case by submitting sufficiently objective and comprehensive financial and accounting documents. The FCA rejected the argument that Minoteries Cantin and Grands Moulins de Strasbourg were similarly unable to pay based on their solvency ratio and level of indebtedness.

The FCA imposes fine of €192.7 Million for Anticompetitive Agreements in The Dairy Products Sector

On March 11, 2015, the FCA imposed a fine of €192.7 million on 11 companies for having entered into an anticompetitive agreement in the market for dairy products sold under retailers' private labels. The cartel was uncovered following a leniency application

The investigation was triggered in August 2011 when the French company, Yoplait, submitted a leniency application following its acquisition by General Mills. This led to a number of dawn raids by the FCA. Evidence obtained from these searches demonstrated that French dairy firms had (i) exchanged sensitive information regarding their current and future prices, future price increases and commercial strategy; and (ii) entered into a concrete agreement coordinating their implementation of price increases. These practices took place between 2006 and 2012.

In its statement of objections, the FCA accused the companies of committing two separate infringements—a concerted practice and an agreement—but ultimately decided to impose a single fine as both practices (i) were implemented at the same time, (ii) concerned the same products, and (iii) pursued the same overall aim.

To calculate the basic amount, the FCA applied a gravity rate of 16% and decided to apply reductions of up to 40% to this basic amount depending on the intensity of the participation of each company in the price-fixing agreement.

Based on the above, the FCA imposed a total fine of €193 million. Yoplait, as the first leniency applicant, was granted full immunity; while Senagral, who applied for leniency a few days after the dawn-raids, was granted a 35% fine reduction. In its decision, the FCA took into account the individual conduct and circumstances of each company. In this respect, (i) Laiterie de Saint Malo's fine was limited to €300,000 as it had only participated in the information exchanges for one year; (ii) Lactalis's fine was increased by 25% because it belonged to a large corporate group; and (iii) Novandie was granted a 15% fine reduction for having adopted maverick behavior which disrupted the cartel's functioning for at least one year.

Ultimately, all the infringing companies (except Yoplait, Senagral, and Laiterie de Saint Malo) were granted a 16% fine reduction for not challenging the FCA's objections and making compliance commitments. Senagral and Novandie received additional reductions due to their financial difficulties. But the FCA refused to let Senagral benefit from both a leniency reduction and a no-challenge reduction as it found that Senagral's choice not to challenge the objections had not assisted the FCA's investigation.

The decision has been appealed before the Paris Court of Appeals.

GERMANY

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

Horizontal Agreements

Potsdam Regional Court Declares Lump-Sum Compensation for Competition Law Infringements to be Void

On October 22, 2014, the Potsdam Regional Court found a lump-sum compensation clause for damages for competition law infringements to be void.[14]

In 2004, the plaintiff had purchased a fire fighting vehicle from the defendant Rosenbauer Feuerwehrtechnik GmbH ("Rosenbauer"). The agreement contained a clause stating that the supplier would have to pay 15% of the purchase price as compensation if he entered into an agreement restricting competition. In 2011, the FCO imposed a fine on Rosenbauer as a member of a price-fixing and quota cartel.[15] Therefore, the purchaser submitted a claim for damages in the amount of 15% of the purchase price.

The Potsdam Regional Court rejected the claim. It held that the clause was void because its scope, covering all kinds of competition law infringements, was too extensive. According to German Civil law, a lump-sum compensation clause is void if the lump sum exceeds the damage expected under regular circumstances. While a rate of 15% would be a suitable amount for damages resulting from hardcore restrictions, the Court found that this was not the case for all infringements, *e.g.*, information exchange.

Interestingly, in damage litigation against another fire fighting vehicle manufacturer and member of the above-mentioned cartel, the Higher Regional Court of Karlsruhe found the same clause to be valid.[16] Unlike the Potsdam Regional Court, it did not assess the clause in light of all possible kinds of competition law infringements but only the specific hardcore cartel in question.

Plans for Online Platform "Germany's Gold" Abandoned after FCO Investigation

The two main German public broadcasters, ARD and ZDF, abandoned their plans for an online platform called "Germany's Gold" after the FCO had required them to remedy competition concerns by making substantial changes to the platform. Subsequently, on February 18, 2014, the FCO closed its investigation.[17] Several commercial subsidiaries of ARD and ZDF and TV production companies had created a joint venture to launch an online video-on-demand platform, on which consumers could, subject to a charge or financed through advertisement, watch ARD- and ZDF-produced films or series.

The joint venture would have affected the national video-on-demand consumer market as well as the (upstream) market for video-on-demand licenses. The FCO found that the video-on-demand consumer market is

[14] *See* Potsdam Regional Court, judgment of October 22, 2014, case 2 O 29/14, available only in German at: http://www.gerichtsentscheidungen.berlin-brandenburg.de/jportal/?quelle=jlink&docid=KORE550602015&psml=sammlung.psml&max=true&bs=10.

[15] *See* National Competition Report, July – September 2011, p. 7; see FCO press release of February 10, 2014, available in English on the FCO's website at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2011/10_02_2011_Feuerwehrfahrzeuge.html?nn=3591568.

[16] *See* Higher Regional Court of Karlsruhe, judgment of July 31, 2013, case 6 U 51/12 (Kart.).

[17] *See* FCO, decision of February, 18, 2014, case B6-81/11. A case summary is available in German at: http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2015/B6-81-11.pdf?__blob=publicationFile&v=2. A press release is available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/16_09_2013_%20Germanys-Gold-aufgeben.html;jsessionid=EAAC9BF35343D14AF39706FCBE23B85B.1_cid362?nn=3591568.

separate from both wholly advertising-financed video-on-demand offers and the media libraries operated by public service broadcasters.

The ARD and ZDF subsidiaries compete downstream of the market for video-on-demand licenses. Regarding the video-on-demand consumer market, both ARD and ZDF are potential competitors and could, according to the FCO, both launch such video-on-demand platforms separately due to their large media rights portfolios.

Because the price for watching a video would have been determined centrally by the joint venture, as opposed to independently by either ARD or ZDF, price competition between them would have been eliminated. Moreover, the joint venture was also aimed at coordinating prices for video-on-demand licenses. These competition restrictions would have been appreciable, in particular, because the films and series that would have been offered on Germany's Gold had been produced by ARD and ZDF, financed by compulsory fees, and, therefore, would have had a distortive effect.

The FCO suggested it would have accepted the parties creating a technical platform allowing ARD and ZDF subsidiaries to offer their programming independently. The parties nevertheless decided to abandon the project completely.

The two largest German private broadcasters, ProSiebenSat1 and RTL, had encountered similar problems; the FCO prohibited their proposed joint venture to launch an online platform in 2011.[18]

FCO Investigates Two Potential Cartels Between Suppliers of Technical Building Equipment and Manufacturers of Metal Packaging

On February 3, 2015, public prosecutors and the FCO carried out dawn raids at the German premises of Dutch technical building equipment supplier Imtech, as well as at up to nine other German companies.[19] According to press coverage, the companies are suspected of price-fixing and bid-rigging. In November 2014, Dutch and German newspapers reported that Imtech and former subsidiaries of Ferrostaal, Caverion, and Cofely allegedly agreed to allocate overpriced bids for two of RWE's power stations. The FCO has not yet issued a press release.

On March 19, 2015, the FCO conducted dawn raids at eleven premises of several unidentified metal packaging manufacturers, as well as at the German metal packaging association (*Verband Metallverpackungen*).[20] The investigation was triggered by an anonymous tip-off. The FCO suspects that there could have been price—and capacity—fixing agreements in addition to customer allocation in the metal packaging industry, which predominantly consists of small and medium sized companies.

Vertical Agreements

DCA Confirms FCO's Prohibition of HRS's Parity Clauses

On January 9, 2015,[21] the DCA rejected HRS's appeal against the FCO's decision of December 20, 2013,[22] approving the prohibition of parity clauses in HRS's

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18 *See* FCO, decision of March 17, 2011, case B6-94/10. A press release is available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2011/18_03_2011_RTL_Pro7Sat1_Untersagung.html?nn=3591568. See also National Competition Report, January-March 2011, p. 9. The DCA confirmed the decision.

19 *See* Handelsblatt press release of February 5, 2015.

20 *See* Börsen-Zeitung press release of March 24, 2015.

21 *See* DCA, judgment of January 9, 2015, case VI - Kart 1/14 (V). The decision is available in German at http://www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2015/VI_Kart_1_14_V_Beschluss_20150109.html. A press release by the FCO is available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/09_01_2015_hrs.html?nn=3591568.

22 *See* National Competition Report October-December 2013, p. 12. The decision of the FCO is available in German at: http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Kartellverbot/2013/B9-66-10.pdf?__blob=publicationFile&v=2. A press release in English is available at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/20_12_2013_HRS.html?nn=3591568.

contracts. These clauses contained obligations on hotels always to offer HRS—and, hence, HRS's customers—their most favorable conditions, in particular lowest room prices, maximum room capacity, and the best booking and cancellation conditions available online.

The Court confirmed the FCO's findings that HRS's parity clauses restricted competition on the hotel booking portal market as well as on the market for hotel rooms, because these clauses prevented hotels from determining their prices and booking conditions freely *vis-à-vis* HRS's competitors and their own customers.

The Court dismissed HRS's argument that intense and dynamic competition on the hotel booking portal market sufficiently overcame any restrictions. Rather, the Court held that the parity clauses reduced the economic incentive for other hotel booking portals to compete (by offering hotels a lower commission), as hotels were prevented from offering lower prices to them.

Further, the Court found that parity clauses prevent hotels from offering their rooms directly to their customers at more favorable conditions than on the HRS platform and, therefore, also restricted competition on the end-consumer market for hotel rooms.

Finally, the Court found that HRS's parity clauses prevented market entry of new platforms.

Although an appeal to the Federal Court of Justice would have been possible, HRS accepted the decision. In light of this decision, the FCO issued a Statement of Objections against Booking.com on April 2, 2015, for its use of parity clauses.[23]

Contrary to this approach, on April 21, 2014, competition authorities in France, Italy, and Sweden accepted Booking.com's offer to abolish price parity clauses with regard to online platforms but to keep them with respect to hotels' direct sales.

The Regional Court of Frankfurt Declares Unconditional Platform-Restrictions Anticompetitive

On July 31, 2014, the Regional Court of Frankfurt ("the Court") rejected an application for injunctive relief by global beauty products manufacturer Coty against a long-standing German distributor in order to stop it from selling certain Coty cosmetic products via the third-party online trade platform, Amazon Marketplace.[24]

Coty primarily based its claim on contractual arrangements with the sales partner, which included a total ban on sales via platforms.[25] The Court refused to grant Coty injunctive relief, declaring the relevant contractual obligations null and void for incompatibility with Section 1 GWB and Article 101 TFEU, respectively.

The Court restated the conditions established in Metro for permissible selective distribution systems, *i.e.*, objective, qualitative and uniform criteria, applied in a non-discriminatory way, which are necessary for the product and proportionate in the circumstances.[26] After reviewing recent German cases and literature which assesses the legality of sales restrictions regarding platforms, it concluded that a *per se* sales ban amounted to a restriction under Article 4 (c) of the Block Exemption.[27] Article 4(c) excludes selective distribution systems that

23 A press release is available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/02_04_2015_Booking.html?nn=3591286.

24 See Regional Court of Frankfurt, decision of July 31, 2014, available in German at: http://www.telemedicus.info/urteile/Kartellrecht/1533-LG-Frankfurt-a.M.-Az-2-03-O-12813-Plattformverbot-kartellrechtswidrig-Coty.html.

25 Coty also based its claim on alleged IP-violations. The Court rejected these claims as Coty failed to establish actual harm to the brand image as opposed to mere possible harm.

26 European Court of Justice, decision of October 25, 1977, Case 26/76 - Metro SB-Großmärkte GmbH, para. 20; see also European Court of Justice, decision of December 11, 1980, Case 31/80 L'Óreal, paras. 15-16.

27 Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101 (3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices ("Block Exemption Regulation").

intend to restrict retailers' active or passive sales (which include online-sales) to end users from the safe harbor provided by the Block Exemption.[28]

According to the Court, the fact that this conclusion is inconsistent with the wording of the Commission's Guidelines on Vertical Restraints—which appear to permit some degree of restriction of sales via platforms—is no obstacle. The Court considered that the Guidelines were outdated given the European Court of Justice's (the "ECJ") preliminary ruling in *Pierre Fabre Dermo-Cosmétique.*[29] The Court also noted that the Guidelines only bind the Commission, but not national courts.

Lastly, the Court assessed whether the total sales ban via platforms could benefit from individual exemption under Section 2 GWB and Article 101(3) TFEU. With less restrictive alternatives to the total sales ban on platforms available, *e.g.*, specific qualitative criteria that Coty could impose, the Court also rejected the individual exemption.

In an *obiter dictum*, the Court stated that even a ban limited to the Amazon Marketplace Platform would have been inadmissible, as there are no product-specific requirements that make sales via Amazon "inappropriate" for (luxury) cosmetic products.

Additional Fine for Resale Price Maintenance in Mattress Case

On February 6, 2015, the FCO fined mattress manufacturer Metzeler Schaum GmbH ("Metzeler") €3.38 million for imposing resale prices on its retailers from early 2007 to July 2011.[30] In August 2014, the FCO had already fined Recticel Schlafkomfort GmbH ("Recticel"), another mattress manufacturer, €8.2 million for the same infringement.[31]

The FCO found that Metzeler had agreed with its retailers that certain products should be sold at a pre-determined price set by Metzeler. These price agreements were mainly related to promotional campaigns. In advance of such advertising efforts, Metzeler reminded the retailers that the pre-determined prices were fixed prices without any scope for discount. In order to guarantee a stable price, Metzler requested that advertising was not to contain any price comparisons, discounts promises, or strike-through prices.

Moreover, Metzeler intervened against retailers seeking to undercut pre-determined prices. Whenever retailers complained about other retailers not complying with the fixed prices, Metzeler contacted these deviating retailers to encourage them to raise their prices again, often succesfully.

When setting the fine, the FCO took into account Metzeler's cooperation during the proceedings. While the fines against Metzeler and Recticel already add up to the highest fining amount ever imposed for parallel schemes of vertical infringements, proceedings against two further companies are still ongoing.

FCJ Allows Appeal against DCA Decision on Exclusive Distribution and Non-Compete Obligations in Laboratory Chemicals Sector

On December 14, 2014, the FCJ partially allowed an appeal on points of law against the first-instance decision of the DCA,[32] that had largely confirmed the FCO's finding that an exclusive distribution and non-compete agreement between Merck KGaA, Darmstadt ("Merck"), the leading producer of laboratory chemicals in Germany, and VWR International Europe bvba ("VWR"), a wholesaler of such chemicals, violated competition law.[33]

In 2009, the FCO adopted a decision against Merck and VWR prohibiting them from continuing to apply an

[28] Without prejudice to the possibility of prohibiting a retailer from operating out of an authorized place of establishment.

[29] European Court of Justice, decision of October 13, 2011, Case 439/09 *Pierre Fabre Dermo-Cosmétique SAS*.

[30] *See* FCO press release of February 6, 2015, available in English on the FCO's website.

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

[32] *See* FCJ, decision of December 16, 2014, case KVZ 1/14, available in German on the FCJ's website.

[33] *See* DCA, decision of November 13, 2013, case VI - Kart 5/09 (V).

exclusive distribution agreement for laboratory chemicals.[34] The FCO found that appointing VWR as the exclusive distributor for Merck's laboratory products in Germany (and a number of other European states), and therefore obliging VWR not to advertise or distribute competing products from other manufacturers in these countries, infringed Article 101(1) TFEU and Section 1 GWB as well as Section 20(1) GWB.

Merck and VWR appealed this finding in 2013. The DCA largely confirmed the FCO's findings, but also annulled parts of the decision. First, the DCA found that the non-compete clause did have the effect of restricting competition in the sale of laboratory chemicals manufactured by Merck's competitors given that these competitors lost VWR as a major trading partner. Second, the DCA confirmed that the exclusive distribution right had the object and effect of restricting competition between wholesalers of laboratory chemicals, because VWR turned into the only supplier of Merck chemicals for competing wholesalers. These wholesaler previously had the option to purchase Merck chemicals directly from Merck. Further, the exclusive distribution right restricted competition in the sale of Merck chemicals to end customers, who could now only buy Merck chemicals from wholesalers, instead of directly from Merck.

The DCA found that whilst the exclusive distribution right could to some extent be exempted under the Commission's Vertical Block Exemption Regulation (Regulation 330/2010 on vertical agreements, "BER"), the non-compete clause did not meet the criteria set forth in the BER.

According to Article 5(1) (a) BER, the exemption does not apply to indirect non-compete obligations that last indefinitely or that exceed five years. Given that the agreement lasted 5 years, and was subject to automatic extension, the DCA regarded the agreement as indefinite.

Concerning VWR's exclusive distribution right, the DCA distinguished between exclusive distribution to end customers, such as laboratories, and exclusive distribution to wholesalers, confirming the FCO's practice of distinguishing sub-markets for different product groups of laboratory chemicals. The DCA found that the conditions of the BER were satisfied in respect of the exclusive distribution of all laboratory chemicals to end customers, and of laboratory chemicals to wholesalers, but not in respect of wholesale of microbiology, solvents and inorganic reagents. These latter markets were excluded because Merck's market share in these markets exceeded 30%.[35] (The DCA took the view that when calculating the market shares, only sales to wholesalers, but not end customers, were relevant.)

Because of Merck's position as the market leader on the markets for microbiology, solvents, and inorganic reagents, the exclusive distribution right with regard to these products also violated Section 20(1) GWB.[36] The DCA found that small and medium-sized wholesalers competing with VWR were dependent on being supplied with Merck products and that Merck had violated the principle of non-discrimination by exclusively supplying VWR.

The FCJ found that the appeal raised the question whether, relevant wholesale-level market shares should include sales to end customers. An appeal was only allowed on this point in respect of microbiology because Merck's sales share on other markets (the markets for solvents and for inorganic reagents) exceeded 30% regardless of the method of calculation.

[34] FCO, decision of July 14, 2009, case B3-64/05; a case summary in German is available at the FCO's website.

[35] At the time of the conclusion of the agreement, the previous BER (Regulation 2790/1999) was still in force, according to which only the market share of the supplier on the supply market was to be taken into account (Article 3(1)).

[36] Section 20(1) GWB prohibits abusive and discriminatory conduct by companies on which small or medium-sized companies depend as suppliers or purchasers of certain kinds of goods or commercial services.

FCO Restricts Duration and Scope of Non-Compete Clauses in Factory Outlet Centers

On March 3, 2015, the FCO announced that a non-compete clause with a 150km air radius in the lease agreements of VR Franconia GmbH (VR), the operator of the factory outlet center (FOC) Wertheim Village, is anti-competitive to the extent its reach exceeds 50km and its duration exceeds a period of 5 years. VR agreed with its tenants—branded goods manufacturers— to a radius clause that provided they would not open a store in other FOCs in which they sell the same brands as in Wertheim Village, within an air radius of up to 150km, during the term of the lease.

The FCO's investigation was initiated by a complaint of an FOC operator, who established a new FOC 147km away from Wertheim and argued that it had difficulties in acquiring tenants because of VR's radius clause.

The FCO noted that most of the customers of Wertheim Village live within a 100km radius; therefore a radius of 150km goes beyond the scope of the geographic market. In the FCO's view, the non-compete clause as applied until now restricts other FOC operators and tenants applying a legal standard of appreciable restriction of contractual freedom rather than a foreclosure standard. The FCO also concludes that the radius clause is not necessary to protect VR's interest (*e.g.*, investments in the FOC and marketing). It therefore found that the clause infringed the German prohibition provision Section 1 ARC. The FCO therefore prohibited VR from continuing to enforce its radius clause to the extent it exceeds 50km and its duration exceeds a period of 5 years.

VR has appealed the FCO's decision at the DCA and applied for suspension of the decision's immediate enforceability.

Unilateral Conduct

FCO Fines SodaStream Anew for Market Foreclosing

On January 22, 2015, the FCO fined SodaStream GmbH ("SodaStream")[37] €225,000 for a repeated abuse of its dominant position on the market for refilling of CO_2 gas cylinders used in soda carbonating machines. SodaStream also failed to comply with the FCO's prohibition decision of 2006.[38]

In 2006, the FCO had found that SodaStream had acted abusively by reserving the right to refill its gas cylinders for SodaStream's soda drink makers.[39] The FCO ordered SodaStream to permit third-party suppliers refilling SodaStream gas cylinders and issued a prohibition decision that the FCJ confirmed in 2008.[40]

SodaStream subsequently modified its marketing concept but retained safety instructions and warranty exclusions which implied that SodaStream was exclusively entitled to refill its gas cylinders. SodaStream advised end users that (i) SodaStream cylinders should only be refilled by and returned to SodaStream or authorized retailers, and (ii) unauthorized refilling may be hazardous, illegal, and may infringe SodaStream's rights resulting in a warranty exclusion. In addition, SodaStream further strengthened its market position through the acquisition of its competitor Wassermax in 2009.

Consequently, in 2012 the FCO initiated new abuse proceedings and carried out dawn raids at SodaStream's premises. SodaStream cooperated and reached a settlement with the FCO, committing to adjust the labeling and accompanying security instructions of its soda makers

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37 Soda Stream previously operated under the name "Soda Club".

38 *See* FCO press release of January 22, 2015, and FCO case report of January 29, 2015, both available in English on the FCO's website; see also FCO decision of January 22, 2015, case B3-164/14, available in German on the FCO's website.

39 *See* National Competition Report January – March 2006, p. 7.

40 *See* FCJ decision of March 4, 2008, case KVR 21/07, available in German on the FCJ's website.

and cylinders, and to include a statement that third-parties may refill its gas cylinders if they comply with legal requirements.

Higher Regional Court Rejects Abuse of a Dominant Position Claim by Insisting on Contract Terms

On December 9, 2014, the Frankfurt Court of Appeals (the "Court") rejected Kabel Deutschland's claim that Deutsche Telekom is abusing its market dominance and relative market dominance under Sections 19 and 20 GWB by charging contractually agreed rental fees for its cable duct infrastructure, which were well above those set by the Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway ("FNA") under the Telecommunications Statute.[41]

The broadband cable operator Kabel Deutschland, founded by an investment consortium, had purchased part of Deutsche Telekom's broadband cable network in 2003. The cable duct infrastructure itself was not transferred in this transaction (as it was being used by several other operators downstream). Kabel Deutschland instead leases the infrastructure from Deutsche Telekom in order to provide its services.

The claimant alleged that Deutsche Telekom had abused its dominant position by charging excessive rental fees to use its cable duct infrastructure. In Germany, the FNA under the Telecommunications Statute has the authority to set rental fees retrospectively for that part of the infrastructure that connects the provider with the end user.

Kabel Deutschland appealed the decision of the Regional Court of Frankfurt, which had rejected its claim, and asked the Court to confirm the level of rental it had to pay Deutsche Telekom, arguing that this should pay an an adjusted rental fee for the use of Deutsche Telekom's infrastructure, and requesting the reimbursement of all excessive payments made over the previous years.

The Court first assessed whether Deutsche Telekom had abused its market position at the negotiation stage of the contract by imposing artificially high prices. The Court rejected this because the rental fees agreed to at the time of the transaction were part of the purchase price of the whole business and therefore could not be considered in isolation. The relevant market was the "market for the acquisition of companies." Deutsche Telekom did not have a dominant position in that market, as there were several other investment targets available for the investor consortium to choose from, so dominance and abuse were rejected. Regarding the market for the supply of cable duct infrastructure, the Court considered that Deutsche Telekom was likely dominant. However, since that dominance was a direct consequence of the transaction, Deutsche Telekom could not have abused it at the negotiation stage. Abuse therefore was again rejected.

Next, the Court assessed whether Deutsche Telekom had abused its dominant position by refusing to adjust its rental fees in line with the FNA's set fees. The Court rejected this for the following reasons. In theory, conduct during the life of the contract could amount to an abuse. However, Deutsche Telekom's insisting on the negotiated terms in these circumstances was consistent with general principles of German contract law, which apply also to dominant companies in a free market. The Court did not find any exceptional circumstances justifying intervention in favor of Kabel Deutschland, which had been able to operate a successful business despite the high rental fees. Moreover the investor consortium had engaged in a thorough due diligence process before the acquisition in 2003. It had entered into the contract well-informed, and the contract did not create a right to have prices adjusted to reflect changing market conditions.

[41] *See* Court of Appeals Frankfurt, decision of December 9, 2014, available in German at: http://www.lareda.hessenrecht.hessen.de /jportal/portal/t/1ezh/page/bslaredaprod.psml?doc.hl=1&doc.id=KORE202032015&documentnumber=1&numberofresults=1&showdoccase=1&doc.part=L&paramfromHL=true#focuspoint.

Kabel Deutschland has appealed the Court's decision, before the FCJ.[42]

Preliminary Ruling Request by DCA Regarding Fixed Resale Prices for Prescription-Only Medication

On March 24, 2015, the DCA referred several questions for a preliminary ruling regarding Section 78(1) of the Medicinal Products Act ("AMG") to the ECJ.[43]

The questions arose in proceedings between the two associations "Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V. (ZBW)" and "Deutsche Parkinson Vereinigung e.V. ("DPV").

DPV promoted to its members a bonus scheme run by DocMorris, an online pharmacy based in the Netherlands. Under the scheme, DocMorris offered new customers €5 for their first order of prescription-only medication for Parkinson disease with delivered to Germany. All subsequent orders from Germany of the medication were rewarded with €2.50 for each prescription. In addition, customers received a bonus of 0.5% of the value of the medication when ordering.

ZBW alleges that DocMorris' bonus system is a breach of sections 1 and 3 of the Medicinal Product Pricing Regulation and section 78(1) AMG (now section 78(1) sentence 4 AMG). In Germany, pharmacies are bound to charge a fixed, uniform resale price for prescription-only medication, with discounts being illegal.[44] The AMG had been specifically amended to require that pharmacies based in other EU Member States delivering prescription only-medication to customers in Germany also abide by the fixed resale price.[45]

The DCA has contacted the ECJ because the Commission has initiated formal infringement proceedings against Germany, alleging that the resale price maintenance of prescription-only medication is an obstacle to free trade within the European Union, as it amounts to a quantitative restriction on imports prohibited under Article 34 TFEU. However, the German authorities argue that according to Article 36 TFEU, this is not justified on the basis of the protection of health and life of humans. Germany claims that the restrictions are necessary to ensure a nationwide presence of stationary pharmacies in the country.

The DCA has asked the ECJ whether the national laws imposing resale price maintenance of prescription-only medication are in breach of Article 34 TFEU, and if so whether they could be justified under Article 36 TFEU for the reasons given by the German authorities. In addition, the DCA has asked for clarification regarding what factual requirements have to be met for the justification under Article 36 to be satisfied.

Mergers and Acquisitions

FCO Clears Acquisition of GAGFAH by Deutsche Annington

On January 28, 2015, the FCO cleared Deutsche Annington Immobilien SE´s ("DAI") acquisition of 95% minus 10,000 shares and sole control of GAGFAH S.A., Luxemburg ("GAGFAH").[46] The transaction creates the largest residential real estate company in Germany and the second- largest publicly listed real estate company in continental Europe.

[42] Appeal to refuse leave to appeal is pending: *see* FCJ, KZR 2/15 [No public information available yet.].

[43] *See* DCA Press Release of March 24, 2015, available in German at: http://www.olg-duesseldorf.nrw.de/behoerde/presse/Presse_aktuell/20150324_PM_Apotheke/index.php.

[44] The FCJ has established that a bonus scheme that is conditional upon the purchase of prescription-only medication is considered a de facto discount on the prescription-only medication; see FCJ, decision of September 9, 2010, available in German at: http://tinyurl.com/BGH-I-ZR-193-07.

[45] Sentence 4 of Section 78 (1) was inserted by statute dated October 19, 2012, Federal Law Gazette I, p. 2192.

[46] *See* the FCO's case summary of February 26, 2015 available only in German at: http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Fusionskontrolle/2015/B1-241-14.pdf?__blob=publicationFile&v=2.

Traditionally, the FCO has defined the relevant product markets for residential rental units relatively broadly, with geographical markets limited to city borders and the cities' outskirts. In this particular case, the FCO has considered narrower markets, given that the parties' activities are focused on offering affordable residential property for low- and mid-income groups. The FCO assessed the transaction based on various alternative product market definitions. As a first step, the FCO sub-segmented regional rental real estate markets based on the type of the offered flats, *e.g.*, by equipment or size. Second, the FCO sub-segmented markets by rental prices per square meter. As to the geographic scope of the markets, the FCO did not confine the markets to city borders, but looked to the broader region around the cities, especially in larger cities such as Hamburg.

While in such narrow markets the parties' market shares were significantly larger than 30% in three cities, the FCO found that this would not lead to competitive concerns, given that the incremental increase in market shares was relatively insignificant (*i.e.*, below 2%). Further, the FCO found that there were a sufficient number of large remaining competitors post-transaction.

FCO Blocks EDEKA's Acquisition of Kaiser's Tengelmann

On April 1, 2015, the FCO blocked the acquisition of Kaiser's Tengelmann supermarket chain ("Tengelmann") by its competitor EDEKA.[47] The FCO held that the transaction would significantly impede effective competition in several already highly concentrated food retail markets in greater Berlin, Munich, Upper Bavaria, and North Rhine-Westphalia.

The FCO defined the geographic markets as local or regional depending on consumers' purchase behavior. In large cities, the FCO also analyzed the competitive situation in city districts. In its analysis, the FCO considered all distribution channels in the food retail sector, including full-range retailers such as REWE, Tengelmann, and EDEKA, discounters like Aldi and Lidl, and organic food supermarkets.

The FCO found that in many markets, EDEKA and REWE (including their discounters Netto and Penny) would remain the only two retailers offering an extensive product range with a high proportion of branded goods. The transaction would eliminate an important and regionally strong competitor with shares between 10% and 30% in almost all of the relevant local or regional markets, thereby increasing the remaining competitors' power to raise prices. In addition, the FCO found that the transaction would significantly impede effective competition in several food retail procurement markets, since it would increase EDEKA's, REWE's, and the Schwarz group's (owning Kaufland and Lidl) buyer power *vis-à-vis* branded goods manufacturers.

In its Statement of Objections of February 17, 2015, the FCO had already decided not to oppose the acquisition of roughly 100 of Tengelmann's 450 branches.[48] It also decided not to oppose the acquisition of a further 70 branches, and included organic food supermarkets in its analysis.

In its remedy proposal, EDEKA and Tengelmann, offered to give up around 100 Tengelmann branches in Berlin and Bavaria. The FCO found the remedy proposal insufficient to eliminate the competition concerns, in particular as the branches to be divested would have insufficiently reduced the market share increment or did not raise competition concerns in any event.

Interestingly, the FCO indicated in its press release that the transaction could have been cleared if Tengelmann's three regional distribution networks—at least in critical regional

[47] *See* FCO press release of April 1, 2015, available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/01_04_2015_Edeka_Untersagung.html?nn=3591568.

[48] *See* FCO press release of February 17, 2015, available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/17_02_2015_Edeka_Tengelmann_Einsch%C3%A4tzung.html;jsessionid=B419493F9745C62B6CA491BD4969F008.1_cid371?nn=3591568.

retail markets—had been divested to one or two independent competitors (so as to eliminate competition concerns in the procurement markets). While the FCO stated that it had received concrete indications that purchasers were interested in these partial networks, it pointed out that EDEKA and Tengelmann had not agreed to these conditions proposed by the FCO.

EDEKA and Tengelmann appealed the prohibition decision before the DCA. Moreover, on April 29, 2015, EDEKA and Tengelmann applied for a so-called "Ministerial Authorization,"[49] by which the German Federal Minister for Economic Affairs and Energy can overrule a FCO prohibition decision if the negative effect on competition caused by the transaction is outweighed by benefits to the economy as a whole, or if the concentration is justified by an overriding public interest.

FCO Clears Acquisition of Ahaus-Alstätter Eisenbahn Holding AG by VTG AG

On December 4, 2014, the FCO approved the acquisition of Ahaus-Alstätter Eisenbahn Holding AG ("AAE") by VTG AG ("VTG") in a phase-I decision.[50] In the same decision, the FCO cleared the acquisition of a minority stake in VTG by AAE's former majority shareholder, Mr. Andreas Goer.

Both companies provide rail logistic services. While AAE is primarily active in the rental of freight cars, VTG's business is divided into three segments, namely freight car rental, rail logistics, and container logistics. Although the FCO stated that the different types of freight cars (conventional freight cars and container freight cars) are to be distinguished from each other, it ultimately left the exact market definition open as the transaction did not raise competition concerns under any possible market definition.

Nevertheless, due to overlaps between the parties' fleets of covered freight cars, the FCO examined the overlaps closely. First, the FCO stated that most of the freight cars belong to Deutsche Bahn AG and other state-owned or previously state-owned railway companies in Europe and should be excluded from the market for the rental of freight cars as they are exclusively used by the national railways themselves. Second, the FCO found that without the freight cars of national railways and under a narrow market definition, the transaction would lead to a high combined market share on a possible market for the rental of covered freight cars. However, despite this high market share, the FCO did not identify a significant impediment of effective competition because other competitors would still effectively constrain the parties' scope of action. Furthermore, the FCO considered a possible market entry by national railways and their strong position on the downstream market for forwarding and transport services. Finally, the FCO took into account competitive pressure from neighboring markets (transport by truck or ship).

FCO Publishes Withdrawals of Notifications

On January 16, 2015, the FCO announced the withdrawal of two merger notifications:

BayWa's Plan to Increase its Shares in RaiWa Lobsing to Above 50%. On November 17, 2014, BayWa AG ("BayWa") withdrew the notification of its plan to increase its shares in Raiffeisen-BayWa Waren GmbH Lobsing-Siegenburg-Abensberg-Rohr ("RaiWa Lobsing") to more than 50%.[51] The FCO had previously informed BayWa about its competition concerns. BayWa is the biggest distributor of agricultural products in Germany with a strong focus on Southern Germany. According to the FCO's preliminary assessment, the merger would have strengthened BayWa's dominant position on various regional markets in Southern Germany, *e.g.*, the markets for grain procurement, oilseed procurement as well as for the sales of fertilizers, pesticides and seeds. As a result of

[49] *See* Tengelmann press release of April 29, 2015, available in German at: http://tengelmann.de/home/presse/presse-aktuell/newsdetail/datum/2015/04/29/unternehmensgruppe-tengelmann-und-edeka-reichen-antrag-auf-ministererlaubnis-ein.html.

[50] *See* the FCO's case summary of January 9, 2015, available in English on the FCO's website.

[51] *See* the FCO's case summary of January 16, 2015, available only in German on the FCO website.

the FCO's concerns, BayWa preferred to abandon the planned acquisition and withdrew its notification.

Acquisition of Frauenthal by TBC. On December 18, 2014, TBC Netherlands Cooperative U.A. ("TBC"), an acquisition vehicle of The Boler Company and its subsidiary Hendrickson Investment Company ("Hendrickson"), withdrew their notification of the proposed acquisition of Frauenthal Automotive Sales GmbH ("Frauenthal").[52] Frauenthal produces metal components for suspensions of commercial vehicles (leaf springs and parabolic control arms). TBC's parent, Hendrickson, was active in the same market via its 50% subsidiary Muelles y Ballestas Hispano-Alemanas SA ("MBHA") at the time of the notification, which had led to significant horizontal overlaps in Germany. However, due to Hendrickson's divestiture of its shares in MBHA during the phase-II investigation, the acquisition was no longer notifiable. While the FCO's press release does not explain why this was the case though it seems that the parties turnovers no longer met the German turnover thresholds after the divestiture.

Policy and Procedure

DCA Declares FCO Press Releases on Companies' Involvement in Cartel Activities to be Valid

On October 9, 2014, the DCA decided that the FCO was entitled to publish names of companies fined for cartel activities in its press release.[53] Two members of the *German Sausage Cartel*, whom the FCO fined for price-fixing,[54] complained against the publication of their names and their involvement in the cartel in the FCO's press release as published on its website.

Although the plaintiffs withdrew their claim shortly before the decision was announced, the DCA ruled on the press releases' legality in its decision concerning procedural costs.[55] It found that the content of the FCO's press release did not violate the plaintiffs' general right of personality.[56]

The Court considered the company's general right of personality on the one hand and the public interest in access to information on the other and found that the latter prevailed for the following reasons: The fine imposed on the claimant is a fact, not a mere suspicion. Further, the level of public interest in cartel infringement is high as it directly impacts consumers. Finally, the FCO had not concealed the fact that the fines were not final but could be appealed.

FCJ Rules on Limitation of Cartel Infringements

On December 16, 2014, the FCJ upheld a DCA decision[57] finding a project development company's participation in a cartel not being time-barred.[58]

In August 2009, the Cartel Office of North Rhine-Westphalia fined a project development company and one of its managing directors for an agreement with its sole competitor to withdraw its offer for the realization of a department store in a city in North Rhine-Westphalia in exchange for a monetary compensation. The Cartel Office became aware of the cartel infringement when the project development company, after it had withdrawn its project, sued its competitor for compensation in April 2006. Since in its claim, the project development company had called the respective managing director as a witness for the conclusion of the agreement, the Cartel Office initially

[52] *See* the FCO's case summary of January 16, 2015, available only in German on the FCO' website.

[53] *See* DCA, judgment of October 9, 2014, case VI-Kart 5/14, available only in German at: http://www.justiz.nrw.de/nrwe/olgs /duesseldorf/j2014/VI_Kart_5_14_V_Beschluss_20141009.html.

[54] *See* National Competition Report, July – September 2014, p. 11.

[55] In the event that the action is withdrawn, the court separately decides on fees and extrajudicial costs.

[56] Under German law, the right of personality is not limited to natural persons, but is also applicable to legal persons (*e.g.*, companies).

[57] *See* DCA, judgment of January 23, 2014, case number V-1 Kart 9-10/13 (OWi), available in German on the DCA's website.

[58] *See* FCJ, decision of December 16, 2014, case number KRB 24/14, available in German on the FCJ's website.

opened proceedings only against this managing director. However, in August 2007, it raided both the project developing company, as well as the managing director, and subsequently fined both in August 2009.

On appeal, the Public Prosecutor General of North Rhine-Westphalia found that a different managing director had participated in the withdrawal agreement and therefore closed the proceedings against the managing director the Cartel Office had fined.

However, the DCA found that the project development company's cartel infringement would not have become time-barred just because the Cartel Office had initially initiated proceedings against the wrong managing director. The DCA referred to the FCJ's case law holding that investigation measures undertaken against the representative body of a company also result in an interruption of the statutory limitation period towards the company.[59] The DCA held that this case law applies even if the Cartel Office investigates the wrong managing director, since the investigation concerns a member of the board of directors and therefore the company.

The FCJ rejected the company's appeal against the DCA's judgment without a hearing and held that at least the August 2007 search warrant, which was explicitly directed against the project development company, interrupted the five year limitation period pursuant Section 33(4)(1) of the Administration Offences Act.

Düsseldorf Labor Court of Appeal Denies CEO's Liability for Cartel Fines Imposed on Former Employer

On January 20, 2015, the Düsseldorf Labor Court of Appeal (the "Court") found that a former CEO is not liable for cartel fines imposed on his former employer,[60] thereby confirming the preceding decision by the Essen Labor Court.[61]

GfT Gleistechnik and its parent company, ThyssenKrupp, had sued the former CEO for reimbursement of cartel fines totaling €191 million that had been imposed on the companies by the FCO. Further, the companies had filed an action for a declaratory judgment, stating that the CEO is (co-) liable for all existing (including damages of €100 million arising from a settlement with a plaintiff) and prospective damages resulting from the cartel.

The Court dismissed the claim, arguing that cartel fines imposed on a company are not reimbursable by a natural person given that the relevant paragraph in the German Competition Act[62] aims at fining the respective company itself, thereby absorbing the advantages resulting from participating in the cartel. The Court found that this general principle would be undermined by passing on the fine to the responsive employee(s). Moreover, the Court argued that German antitrust law explicitly differentiates between cartel fines against natural persons—which are limited to €1 million—and fines against companies, which may amount to 10% of the consolidated worldwide turnover in the financial year preceding the FCO's decision. The decision is not yet final, as ThyssenKrupp has appealed the decision on grounds of law to the FCJ.

With respect to the additional action for a declaratory judgment, the Court suspended the proceedings until the final decision in the parallel criminal proceedings. If the CEO's criminal liability pursuant to section 298 of the German Criminal Code were proved, so the Court found, the CEO could have (at least) limited liability for any damages (but not for the cartel fine itself) arising from his irregular behavior according to German company-law principles.

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[59] *See* FCJ, judgment of December 5, 2000, case number 1 StR 411/00, available in German on the FCJ's website; decision of July 5, 1995, case number KRB 10/95.

[60] *See*, Düsseldorf Labor Court of Appeal, decision of January 20, 2015, Case 16 Sa 459/14, press release available in German only at: http://www.jm.nrw.de/JM/Presse/presse_weitere/PresseLArbGs/20_01_2015_/index.php.

[61] *See* National Competition Report April - June 2014, p. 15-16.

[62] Section 81 GWB.

DCA Upholds Dismissal of CDC Damage Claims in Cartel Follow-on Action

On February 18, 2015, the DCA confirmed the dismissal of cartel follow-on damage claims brought by the Belgian special purpose vehicle CDC[63] following an appeal from CDC against a landmark decision of the Düsseldorf District Court (the "District Court") from 2013.[64]

In the aftermath of a 2003 decision, in which the FCO had found various German cement producers to be in breach of antitrust laws, CDC sought to bring a collection of damage claims which were assigned to it by several cement purchasers. The District Court dismissed the lawsuit on the merits.[65] With its appeal, CDC introduced additional "precautionary" assignments by which most of the assignors had again assigned their damage claims to CDC in 2014.

The DCA held that all damage claims brought by CDC were time-barred. With regard to the commencement of the limitation period, the DCA followed the District Court's approach in finding that extensive, detailed and unequivocal press coverage could suffice for the aggrieved party to obtain the required knowledge of the circumstances. When damage amounts in the range of hundreds of millions of Euros are at stake, it may be assumed that the allegedly harmed cement purchasers will be monitoring their market carefully, in particular with regard to the defendants as "eminently important" suppliers. Failure to be aware of the extensive press coverage of the concluded cartel proceedings in the given circumstances amounts to gross negligence.

According to the DCA, the limitation period had not been suspended by lawfully bringing an action because CDC had lacked standing throughout the entire first-instance proceedings. The assignments prior to June 2008 were in violation of the German Legal Consultation Act because the CDC lacked the special license required for the commercial collection of third party claims. The assignments after June 2008 were in breach of public policy because they threatened to undermine the German "loser pays" principle since CDC's insufficient funding would not have allowed for reimbursement of court and defense costs in case of defeat. The DCA further held that the renewed "precautionary" assignments in 2014 amounted to a procedurally impermissible amendment of the initial action. They could, therefore, not have been taken into consideration when deciding the case.

Moreover, the DCA found that even if the limitation period had been suspended by the initiation of antitrust proceedings, it had in any case elapsed by the time of the renewed assignments in 2014. This finding notwithstanding, it is noteworthy that the DCA significantly expanded the scope of the cartel-specific suspension rules, which had only been introduced as of July 1, 2005. In contrast to the District Court's finding, the suspension rules shall also apply to damage claims that arose prior to July 1, 2005 if (i) the damage claims in question were not time-barred at that time, and (ii) the decision of the Commission or the competition authority of an EU Member State was not final and legally binding at that time.

The DCA's decision, which CDC has decided not to appeal, certainly raises the bar for vehicles like CDC that consider bringing "collective" follow-on actions before German courts. However, in principle, such vehicles may continue to operate—they will only need to ensure that they are sufficiently funded to cover potential court and defense costs in proceedings which they initiate.

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

64 Düsseldorf District Court, decision of December 17, 2013, case 37 O 200/09; also *see* National Competition Report October – December 2013, p. 8 et seq; CGSH Alert Memo of January 8, 2014, available on the CGSH website.

65 For further details *see* National Competition Report October – December 2013, p. 9 et seq; CGSH Alert Memo of January 8, 2014, available on the CGSH website.

ITALY

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

Horizontal Agreements

The ICA Fines eight Concrete Manufacturers and a Consultancy firm a Total of Over €12.5 million for Price Fixing and Market Allocation in One of the First Cases Applying its New Guidelines on the Method of Setting Antitrust Fines

On March 25, 2015,[66] the ICA found that nine companies active in the concrete industry infringed Article 101 TFEU, by participating in two anticompetitive agreements: one relating to the provinces of Udine, Pordenone, Gorizia and Treviso (which was in place for of four years); and another in the province of Trieste (which was in place for two years. The investigation was launched in January 2014, following an immunity application from Calcestruzzi Spa (which escaped fines on foot of the immunity application). According to the ICA, the infringing companies had used a third-party consultancy firm, Intermodale, since 2010 to organize weekly meetings during which they exchanged competitively sensitive information and allocated customers among themselves. Intermodale was also in charge of imposing sanctions on deviating companies, although the penalty system was never effective.

The decision is of particular significance because it is the first in which the ICA applied its new fining guidelines.[67] To determine the basic amount of the fine, the ICA established that, due to the particularly serious and secret nature of the violation, the 15% minimum set forth in the new guidelines (the minimum fine would be at least 15% of the sales of the products to which the infringement related) was applicable. The ICA rejected the argument raised by certain companies that it should derogate from the 15% minimum envisaged for secret cartels in the case of single-product companies. This argument was based on the fact that for these companies the value of sales coincides with the total turnover and thus, the application of the 15% minimum could lead to the application of a disproportionately heavy fine. In doing so, the ICA clarified that the application of § 14 of the fining guidelines provides for additional criteria for evaluating the gravity of the conduct (*e.g.*, the competitive conditions in the relevant market; the nature of the products or services concerned; the actual implementation of the illegal conduct; and its economic impact on the market and/or on consumers), which the ICA may take into account when quantifying the percentage to be applied to the value of sales, but which cannot be used to derogate from the 15% minimum applicable to cartel-like infringements. Concerning Intermodale, the ICA established that the value of sales corresponding to the infringement was 50% of its overall turnover (corresponding to the estimated payments received from the participants to manage the cartel).

As regards the duration of the infringements, in line with the new guidelines and the most recent practice of the Commission, the ICA made reference to the actual years and months the collusion persisted, applying a multiplication factor of 3.83 and 2.08, respectively, for each cartel.

With respect to mitigating circumstances, the ICA held that it could not take into consideration the parties' cooperation during the proceedings, as the new guidelines exclude this possibility in cases where the leniency program applies (although only one company, Calcestruzzi SpA, had applied for leniency). The ICA also refused to take it into

[66] Mercato del calcestruzzo Friuli Venezia Giulia (Case I772).

[67] On the same day the ICA decided *SEA/Convenzione ATA* (Case A474), sanctioning SEA for an abuse of dominance consisting in having interfered in a tender process with the aim of preventing a potential competitor from entering into the market for the management of airport infrastructure and in the markets for handling services. However, this decision does not provide useful guidance on the criteria followed by the ICA in setting the amount of the fine as the relevant company's figures (and the percentages applied) have been redacted as confidential.

account as a mitigating circumstance the adoption of compliance programs by certain of the companies involved. In the ICA's held that it was unable to judge the effectiveness of such compliance programs as they were adopted after the Statement of Objections for this case was issued. The ICA also considered irrelevant the training seminars held before the adoption of a compliance program, as they could not be considered implementation of a compliance program.

The financial weakness of the companies involved was taken into account by the ICA as a mitigating circumstance, although this factor is not expressly mentioned in the guidelines. The ICA considers this mitigating circumstance applicable when the company reports in each of the previous three financial periods both a net loss and negative operating income. Two companies fulfilled these criteria and their fines were reduced by 15%. The final amount of the fines was then capped at 10% of the companies' total annual turnover, thus significantly reducing the fines levied on all but one company.

By contrast, the ICA rejected the companies' claims of inability to pay in light of either: (i) the low amount of the fine; (ii) the low amount of the fine as compared to the company's overall turnover, in terms of net worth and total assets; or (iii) the limited impact of the fine on the solvency and liquidity of the company (including its controlling shareholder). The ICA also added that the financial situation of minority shareholders could be taken into account.

Merger Control

The Italian Supreme Administrative Court Confirms an ICA Decision on Local Gas Distribution Markets

On January 26, 2015, the Council of State reversed two judgments by the TAR Lazio[68] which had annulled a decision of April 17, 2013, of the ICA[69] prohibiting the acquisition by Italgas (Italy's main gas distributor) and Hera/Acegas-Aps (a major local gas distributor in the northeastern Italian regions) of joint control over a local gas provider, Isontina Reti Gas ("IRG") operating in certain small local areas (the "ATEMs").[70] The operation was structured in two phases: (i) the acquisition by Italgas and Hera/Acegas-Aps of IRG; and (ii) the transfer to IRG of Italgas and Hera/Acegas-Aps' distribution concessions related to the above-mentioned ATEMs. Moreover, Italgas and Hera/Acegas-Aps agreed not to participate in any tender that would occur in the ATEMs.

The ICA stated that the transaction was ultimately aimed at creating a vehicle to participate in competitive tenders for gas distribution concessions in the ATEMs. The ICA took the view that the relevant product and geographic markets coincided with each individual tender for the exclusive distribution concession in each of the ATEMs (as it would be only during the tender procedures when the undertakings would compete against each other). According to the ICA, since local gas distribution is a legal monopoly, competition is limited to tenders for the relevant concessions.

Since the merger was intended to take place after the enactment of new sector regulation, the ICA could not base its substantive analysis on past behavior in previous tender procedures (*i.e.*, which and how many undertakings would actually participate). Thus, the ICA's assessment, aimed at identifying potential competitors, was mainly based on information received in response to its market test and focused not on companies in possession of the formal requirements for participation in the tenders, but only those that could have an *actual chance* of participating.

In 2014, the TAR Lazio set aside the ICA decision contesting, *inter alia*, the definition of the relevant market adopted by the ICA. In particular, the TAR Lazio reiterated the well-settled principle according to which a geographic market must show specific elements which differentiate it

68 *Acegas-Aps* (Judgment 3046/14) and *Italgas* (Judgment 3047/14), of March 20, 2014.

69 Italgas – Acegas-Aps/Isontina Reti Gas (Case C11878).

70 *Italgas – Acegas-Aps* (Judgment 334/15), of January 26, 2015.

from contiguous markets. The TAR Lazio maintained that the ATEMs at issue could not be distinguished from the national market as autonomous relevant markets because the mere existence of "*a monopoly on the supply side*" in a given local area cannot, in itself, be conclusive as to the geographic scope of the relevant market.

Upon appeal brought by the ICA, the Council of State dismissed the TAR Lazio judgment, maintaining that, in cartel cases, the definition of the relevant geographic market should be inferred from the anticompetitive conduct under scrutiny and from its scope. Thus, in the case at hand, the relevant geographic market could coincide with the single tender which such conduct potentially affects. Furthermore, an ATEM cannot be considered a minor part of the national gas distribution market, since tenders at the national level do not exist. Finally, the Council of State found that the ICA was correct in concluding that, absent the operation, the parties would have attempted to obtain the relevant concessions in competition with one another. This was legitimate enough to prove that the merger should be prohibited, as it was not necessary to also demonstrate actual negative effects on competition. In light of this reasoning, the Council of State upheld the ICA's decision prohibiting the merger, finding that the operation would negatively affect the competitiveness of the tender process by consistently reducing the number of participants.

Policy and Procedure

Amendment to the Italian Merger control Thresholds

As of March 16, 2015, Italian merger control thresholds were raised to: (i) €492 million for the combined aggregate national turnover of all the undertakings concerned; and (ii) €49 million for the aggregate national turnover of the target undertaking.[71] The above thresholds are cumulative.

[71] The amendment to the thresholds is based on the increase in the GDP deflator index.

NETHERLANDS

This section reviews developments under the Competition Act of January 1, 1998 (the "Competition Act"),[72] which is enforced by the Netherlands Authority for Consumers and Market (Autoriteit Consument & Markt, "ACM").

Judicial Appeals

District Court Refuses Disclosure Of Documents For Damages Proceedings

On March 27, 2015, the Amsterdam District Court (the "District Court") rejected claims from both the claimant and defendants to disclose documents relating to a cartel, including an un-redacted version of a Commission decision.[73] The litigation stems from the airfreight case, in which 11 airlines were fined a total of €799 million for fixing prices for air cargo prices.[74] The claim vehicle Equilib initiated proceedings seeking damages against the airlines.

Equilib argued that it needed an un-redacted version of the airfreight decision to substantiate its damages claim. The Commission expressed no concerns over disclosing an un-redacted version so long as confidential information would be adequately protected. Equilib therefore proposed a "confidentiality ring," under which the documents would only be accessible to Equilib and its lawyers and experts. The airlines, objected arguing that information necessary for Equilib's damages claim was publicly available in the summary of the Commission's decision.

The District Court stated that it was necessary to weigh the interest of disclosing documents for the purpose of preparing a damages claim against the interest of protecting confidential information. In doing so, it is necessary to take into account (i) the extent to which any

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

[73] Amsterdam District Court, Judgment of March 27, 2015, ECLI:NL:RBAMS:2015:1778.

[74] *Airfreight* (Case COMP/39258) , Commission decision of November 9, 2010.

claims or defense arguments which would justify disclosure are supported by the available facts and evidence; (ii) the extent and costs associated with any disclosure; and (iii) whether the requested documents contain confidential information (and what the applicable rules regarding disclosure of this information are).

The District Court rejected Equilib's arguments and held that Equilib had not sufficiently explained the need for disclosure, particularly in light of the available information in the Commission's summary decision. Moreover, disclosure would affect the rights of the addressees and non-addressees, which should be safeguarded. Considering the length of the decision—over 300 pages—disclosing the requested documents would thus be an extensive, time-consuming, and difficult exercise. In addition, the court noted that the Commission would be better equipped to disclose evidence because its process of disclosure was already at an advanced stage.

Equilib and the airlines also requested other documents that they considered were necessary to substantiate their claim: Equilib argued it needed documents concerning the cartel, including e-mails and meeting minutes, and the airlines requested documents such as transport documents and 'airway bills.'

The District Court ruled that requesting these documents was premature because at the present stage of the damages proceedings, Equilib still needed to substantiate its arguments generally. The Court also noted that collecting the requested documents would take considerable time and entail significant costs. This would delay proceedings considerably, and it was still uncertain if all of the requested documents would be needed by the parties. The District Court heard a similar damages claim against the airlines on the same day and reached an identical conclusion.[75]

[75] Amsterdam District Court, Judgment of March 27, 2015, ECLI: NL:RBAMS:2015:1780.

Decisions

ACM Conditionally Approves Newspaper Merger

On February 11, 2015, after an in-depth investigation, the ACM conditionally approved the acquisition of British publishing company Mecom Group Plc. ("Mecom") by Belgian publishing company De Persgroup Publishing N.V. ("De Persgroup").[76]

De Persgroep publishes national newspapers De Volkskrant, Algemeen Dagblad, Trouw, and Amsterdam paper Het Parool. Mecom, via its subsidiary Wegener, publishes various regional Dutch newspapers. The transaction as notified would have created a publishing company that publishes national and regional newspapers and delivers free local papers across almost the entirety of the Netherlands. According to ACM chairman Chris Fonteijn the ACM assesses media mergers, including newspaper mergers as in this case, as to whether consumers will continue to have "enough choice".[77]

The ACM assessed the effects of the merger in three areas:, (i) advertising space in newspapers, (ii) printing capacity, and (iii) delivery of newspapers. Concerning advertising space, it found that De Persgroep and Mecom were not close competitors because their newspapers (national and mainly regional, respectively) primarily attract different advertisers. Concerning printing, the ACM did not identify any problems because would continue to be enough printing capacity for other newspaper post-merger.

With respect to delivery of newspapers, the ACM found that in each region of the Netherlands, the publisher with the highest number of subscribers delivers its own newspapers and the morning newspapers of all other publishers, which keeps delivery costs low. The ACM raised concerns that post-merger, other publishers would become too dependent on the merged entity, whose delivery territory

[76] Cases 14.0810.22 and 14.1067.24 (Persgroep Publishing N.V. / Mecom Group Plc) ACM decision of February 11, 2015.

[77] *See* https://www.acm.nl/nl/publicaties/publicatie/13833 /De-Persgroep-mag-Mecom-overnemen/.

would cover two thirds of the Netherlands. In order to address this concern, De Persgroep offered to continue its existing delivery arrangements with other publishers, including those that do not have an own distribution network, for a period of ten years.

PORTUGAL

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

Abuse

Lisbon Court of Appeal Confirms Abuse of Dominant Position Decision Against Sport TV

On March 11, 2015, the Lisbon Court of Appeal (Tribunal da Relação de Lisboa, the "Court") confirmed[78] the PCA decision fining Sport TV for abuse of dominant position in the market of conditional-access premium sports TV channels.

Sport TV is the main provider of subscription sport television channels. In 2013, it was fined €3.7 million by the PCA for maintaining, for over six years, a discriminatory pricing system in its channel distribution contracts with subscription-based television operators. On June 4, 2014 the Competition, Regulation and Supervision Tribunal confirmed the abuse of dominant position, but decreased the fine to €2.7 million. Sport TV appealed the Tribunal's judgment to the Court, which fully dismissed the action.

Sport TV put forward different procedural and substantive arguments. Substantively, it's principal claim was that European decisional practice rarely condemns purely discriminatory exploitative conduct. The Court found this to be irrelevant, holding that the higher number of exclusionary conduct decisions results from the Commission's enforcement priorities, namely set out in the Guidance on the Commission's enforcement priorities with respect to abusive exclusionary conduct by dominant undertakings.[79] The Court pointed out that this Guidance does not mean that exploitative conduct is not forbidden, and that such the anticompetitive nature of such conduct is in fact mentioned in in the Commission's Guidance.

Mergers and Acquisitions

Competition Tribunal Confirms PCA's Prohibition Decision

On January 28, 2015, the Competition, Regulation and Supervision Tribunal dismissed the appeal against the PCA's July 31, 2014 prohibition decision of an acquisition of joint control by Controlinveste Media, NOS, and Portugal Telecom of three different companies—Sport TV, Sportinveste Multimédia. and PPTV.

The PCA prohibited the transaction because it found that it would significantly impede competition at both the vertical and horizontal level in the market for premium sports television transmission rights and on the market for premium sports conditioned access channels.

The notifying parties appeal argued that the PCA's decision to commence an in-depth investigation should be annulled, as the transaction had already been tacitly cleared at an earlier stage. The Competition, Regulation and Supervision Tribunal disagreed and dismissed the action in its entirety.

SPAIN

This section reviews developments under the Laws for the Defense of Competition of 1989 and 2007("LDC"), which are enforced by the regional and national competition authorities, Spanish Courts, and, as of 2013, by the

[78] Lisbon Court of Appeal, judgment of March 11, 2015, Proc. 204/13.

[79] Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ 2009 C 45/7.

National Markets and Competition Commission ("CNMC"),which comprises the CNMC Council ("CNMCC") and the Competition Directorate ("CD").

Horizontal Agreements

The CNMC Fined Five Oil Companies €32.4 Million For Fixing Prices and Exchanging Anti-Competitive Information

On February 20, 2015, the CNMC imposed fines on five oil companies, namely Repsol ("Repsol"), Compañía Española de Petróleos ("Cepsa"), Disa Corporación Petrolífera ("Disa"), Meroil ("Meroil") and Galp Energía España ("Galp"), for violating Article 1 LDC and Article 101 TFEU by fixing prices at several petrol stations in Spain and by engaging in anticompetitive exchanges of information.

In particular, the CNMC held that: (i) an agreement on prices entered into between Repsol and Cepsa for coordinating their behavior in their respective petrol stations of Illueca and Brea de Aragón (region of Zaragoza); (ii) a non-aggression agreement concluded between Cepsa and Repsol to protect their respective branded petrol stations; and (iii) several exchanges of strategic information between these two oil companies regarding petrol stations managed by one of them but branded and supplied exclusively by the other were in breach of Article 1 LDC and Article 101 TFEU.

Similarly, the Spanish Competition Authority found that two agreements entered into between Cepsa and Disa, namely a non-aggression agreement on prices and an agreement on prices applicable within the territory of Ceuta, were in breach of Competition Law.

The CNMC also considered that several information exchanges between Disa and Meroil on prices applied at petrol stations in the surrounding area of Sant Joan Despí (region of Barcelona), and about their operating margins, were anticompetitive.

Finally, the CNMC found that an exchange of information regarding a supply and branding contract between Galp and Meroil was in breach of Article 1 LDC and Article 101 TFEU.

In determining the amount of the fine, the CNMC took into consideration the Supreme Court judgment of January 29, 2015[80] according to which the notion of "total turnover" refers to the turnover of the infringing undertaking in all the markets in which it is active and not only to the turnover in the market affected by the infringement. In addition, the CNMC stated that the 5/10 % limits set out in Article 63(1) LDC do not constitute a capping ceiling, applicable ex post once the fine has been calculated, but rather, they act as the upper limit of a range or scale within which the fine must be determined based on the gravity and the duration of the specific infringement. The CNMC determined that the infringement was "very serious" as it concerned horizontal agreements between competitors thereby justifying the imposition of fines of up to 10 per cent of the total turnover of the undertakings. As such, the CNMC imposed on Repsol the highest fine (€20 million) followed by Cepsa (€10 million), Disa (€1.3 million), Galp (€800.000) and Meroil (€300.000).

It is noteworthy that the CNMC has been carrying out different investigations against oil companies. The CNMC has indeed also recently fined Repsol €8.75 million[81] as well as Cepsa €2.5 million[82] and BP €0.75 million[83] for alleged non-compliance with a decision adopted in 2009 regarding indirect price at service stations.

Fining Policy

The Spanish Supreme Court Adopts a Landmark Judgment on the Method of Calculation of Fines

On January, 29, 2015, the Third Chamber of the Spanish Supreme Court issued a judgment clarifying the procedure for calculating fines under Articles 1, 2, and 3 of the

80 Case 2872/2013, Judgment of the Supreme Court of January 29, 2015.

81 *Repsol* (Case SNC/0032/13), CNMC Decision of March 12, 2015.

82 *Cepsa* (Case SNC/0033/13), CNMC Decision of January 29, 2015.

83 *BP* (Case CNC/0034/13), CNMC Decision of January 29, 2015.

Spanish Competition Act, in case number 2872/2013 *BCN Aduanas*.

Pursuant to Article 63(1) LDC, competition law infringements may be punished with a fine of up to 1%, 5%, or 10% of the total turnover of the infringing undertaking in the immediately preceding business year, depending on whether such infringements are classified as minor (*e.g.*, failure to cooperate with the CNMC during an inspection), serious (*e.g.*, most instances of abuse of a dominant position) or very serious (*e.g.*, cartel), respectively.

In the judgment subject to appeal, the Spanish High Court applied a method for the calculation of fines for competition law infringements which was different to the method traditionally applied by the CNMC and by the Commission under Article 23(2) of Regulation 1/2003. In particular, according to the High Court, the 1/5/10% turnover limits established in Article 63(1) LDC for competition law infringements had to be taken into account *ex ante* as a sliding scale, and not as an *ex post* limit or cap on the final amount of the fine. The High Court also established that these turnover limits should be interpreted as referring exclusively to the turnover of the infringing undertaking in the market/s affected by a competition law infringement, and not to the total turnover of the infringing undertaking in all the markets in which it is active.

In its judgment of January, 29, 2015, the Supreme Court analyzed both these issues.

On the one hand, the Supreme Court confirmed that the limits set out in Article 63(1) LDC should be interpreted as the upper limit of a range or scale within which the fine must be determined based on the nature/gravity of the specific infringement. This means that the CNMC must take these limits into account *ex ante*, so that for instance, in the case of a so-called serious competition law infringement, the CNMC must set a fine between >1 and 5% of the infringing undertaking's turnover, depending on the nature/gravity of the specific infringement. The precise amount of the fine must be determined within those limits, applying the criteria set out in Article 64(1) LDC, *e.g.*, the size and the characteristics of the market affected by the infringement, the market shares of the infringing undertaking, the duration of the infringement, *etc*. According to the Supreme Court, interpreting the 1/5/10% limits of Article 63(1) LDC as a cap, applicable *ex post*, would be contrary to Spanish law, in particular, to the principle of legality. In the Supreme Court's view, such principle requires that all administrative and criminal sanctions be subject to a minimum and a maximum limit established by law, and that, for each specific infringement, the sanction be determined based on the gravity of the infringement within those limits.

On the other hand, the Supreme Court established that the relevant turnover for the purposes of applying Article 63(1) LDC is the total turnover of the infringing undertaking, rather than only the turnover obtained in the market/s affected by a specific competition law infringement.

SWITZERLAND

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

Cartels

The FCC Launches an Investigation into Companies Active in the Sector of Gravel and Landfills for Inert Materials

On January 12, 2015, the FCC opened an investigation against a number of companies active in the sector of gravel and landfills for inert materials in the canton of Bern. Searches were carried out in the companies concerned.

According to its press release,[84] the FCC has that companies active in the gravel and landfills for inert

[84] A version in German or French is available at: https://www.news.admin.ch/message/index.html?lang=fr&msg-id=55868.

materials in the canton of Bern are party to agreements on prices and quantities. In addition, there are indications that the undertakings concerned have a dominant position and abused it by refusing trade relations with third parties, exercising discrimination, as well as subordinating contracts to acceptance of additional services. The investigation must determine if there are indeed illegal restrictions on competition. Companies involved in these proceedings are: Kies AG Aaretal KAGA, Messerli Kieswerk AG, K. & U. Hofstetter AG, Kästli Bau AG Kieswerk Daepp AG, KIESTAG, Steinigand Kieswerk AG Kieswerk Heimberg AG and affiliates, particularly their parent company.

The FCC Imposes Fines on Tunnel Cleaning Companies for Price-Fixing and Allocation of Territories

On March 5, 2015, the FCC announced that it has imposed fines on three companies active in the fields of tunnel cleaning. According to the FCC's press release,[85] the three companies concerned have coordinated for years on prices and bids, so as to allocate public procurement contracts among themselves. The FCC found that the agreements concluded by the companies concerned, which were all active at a supra-regional level between 2008 and 2013, constitute agreements on prices and territories contrary to the law on cartels. In these agreements, the companies exchanged information on their prices at public tenders and decided which company was awarded the contract in a certain area. The fines amounted to a total of CHF 161'000.

The companies provided the FCC with details of their involvement in the infringement in order to benefit from a fine reduction. The ISS Kanal Services AG, as the first cooperating company benefited from a total immunity from fine; the Franz Pfister Maschinelle Reinigungs AG, as the second cooperating company, received a 50% fine reduction; and BESA Strassenunterhalt AG, as a third cooperating company, received a 10% fine reduction.

The companies involved also entered into settlement agreements with the FCC. The purpose of these agreements is to shorten the proceedings before the FCC and to set future conduct in a way which is compliant with the law on cartels.

The Competition Commission launches an Investigation Concerning Possible Parallel Import Restrictions for Ultrasound Medical Equipment

On March 10, 2015, the FCC opened an investigation against GE Medical Systems (Schweiz) AG and its affiliated companies due to possible impediment to the direct and parallel imports of GE ultrasound medical equipment.

According to its press release,[86] the FCC has indications that GE Medical Systems (Schweiz) AG and its affiliates have hindered or prevented the direct and/or parallel import into Switzerland of ultrasound medical equipment. As part of the investigation, it must be examined whether the direct and/or parallel imports of GE ultrasound medical equipment were actually hindered or prevented.

UNITED KINGDOM

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

Market Investigation

CMA Final Report on Investigation Into Payday Lending Market

On March 26, the CMA published its final report on competition in the payday lending market. Payday loans are short-term unsecured loans generally taken out for less than a year, and for less than £1000 (typically around £230). The OFT had referred the case for a market

85 A version in German or French is available at: https://www.news.admin.ch/message/index.html?lang=fr&msg-id=56440.

86 A version in German or French is available at: https://www.news.admin.ch/message/index.html?lang=fr&msg-id=56504.

investigation on June 27, 2013[87] and the CMA has now consulted on its provisional June 2014 report which identified various competition concerns,[88] and has proposed remedies (October 2014).[89]

The final report identifies several aspects of the UK payday lending market that suggest that competition in the market is ineffective, including high overall costs of lending, low levels of consumer switching, and relatively high profit margins. The issues identified in the report are separate from broader questions of public policy surrounding payday lending and consumer credit that are under scrutiny from other agencies such as the Financial Conduct Authority. (In January 2015 parliament adopted legislation that capped the fees payday lenders could charge consumers and the FCA has adopted rules (aimed at high-cost short-term credit providers) in its Consumer Credit Sourcebook (CONC) that prevent payday lenders from 'rolling over' payday loans more than twice.)

The CMA's investigation uncovered several features of the market that point to limited competition:

- Average costs for a £100 one-month loan were in the region of £28.
- Besides those changes in prices necessitated by the statutory price-cap, lenders had changed their fees at most only once since 2008.
- Demand in the market does not respond quickly to changes in loan price; lower priced lenders have not generally been more successful in attracting customers. Indeed, customers often take out loans that are far more expensive than comparable products available in the market.
- A profitability analysis suggests that lenders achieve substantial profits in excess of their costs of capital. These features led the CMA to conclude that price-constraints on lenders were weak.

On market definition, the CMA concluded that payday lending could be differentiated from other forms of credit due to specific differentiating features. In particular, payday lending customers generally did not consider payday lending to be substitutable with other forms of credit (partly because they had limited access to other forms of credit). And the costs of other credit products had limited influence on payday loan prices.

The CMA identified several factors that it considers responsible for the low demand-side substitutability it observed in consumer surveys: First, the urgency with which loans were required was not conducive to consumers shopping around; second, the complexity of the loan charges made identifying the best overall price difficult for consumers; third, customers were less sensitive to charges for failing to repay their loans in time; fourth, lead-generator websites, which seek to secure a loan within a short time, often promoted more expensive loans without customers understanding the nature of the service (and that the terms may be less favorable and more expensive); and fifth, the negative reputation of the sector meant that customers were less likely to source loans from alternative suppliers as the perceived risk of switching suppliers was high.

Although the CMA noted that the market was characterized by new entry (at a rate of about 2-5 new entrants per quarter since 2008), such new entrance did not affect market prices. The lead-generator model was the main channel through which these entrants developed customers, but this channel did not encourage price competition. In addition, new entry was not an effective competitive constraint because businesses found it difficult to raise awareness of their products, and because new entrants suffered possible cost disadvantages due to relatively limited experience of customer credit profiles

87 Available at: https://assets.digital.cabinet-office.gov.uk/media/532ad579e5274a226b000307/payday-MIR.pdf.

88 Available at: https://assets.digital.cabinet-office.gov.uk/media/5397eef5ed915d1069000003/Notice_of_provisional_Findings.pdf.

89 Available at: https://assets.digital.cabinet-office.gov.uk/media/5435a640ed915d1336000005/Payday_lending_PDR_and_appendices.pdf.

compared with established lenders. Second, the CMA cited the history of lax regulatory compliance and widespread irresponsibility (including the banking sector as a whole) as reducing customers' incentives from trading with these entrants.

The CMA found that these structural and conduct features adversely affect competition and caused customer detriment through higher prices and reduced price-innovation. The CMA quantified the level of historic consumer overcharging due to these features as up to an average of £14 per loan, amounting to a total industry-wide overpayment of up to £85 million in 2012 alone.

The CMA identified that the statutory price-cap would mitigate some of the consumer detriment caused by the lack of effective competition, although the detriment would remain material. Accordingly, the CMA has proposed a package of remedies designed to improve competition in the sector, including: measures to require lenders to publish prices on a price comparison website, recommendations to the FCA to improve the visibility of fees and to assist customers to shop around (including by increasing transparency in the role of lead-generators), and requiring lenders to provide consumers with a summary of the costs of borrowing.

Policy and Procedure

Government Confirms Intention to Introduce Criminal Offence for Energy Market Manipulation and Insider Trading

On January 22, 2015, in response to a consultation in August 2014,[90] the Government confirmed its intention to create criminal sanctions for wholesale energy market manipulation and insider trading. The Government's response should be read in conjunction with the draft Regulations for the Electricity and Gas (Market Integrity and Transparency) (Criminal Sanctions) Regulations 2015.

The proposed sanctions are intended to support the existing provisions of Regulation 1227/2011 (REMIT),[91] which create civil sanctions for energy market manipulation and insider trading, and which were enforced in the UK under a civil regime since the enactment of civil enforcement regulations on June 29, 2013. The proposed criminal sanctions are intended to reinforce the REMIT rules. The offence would apply to legal persons (corporations, and their officers or natural persons), and could be committed either intentionally or recklessly.

The Government has identified three principal reasons for the need for criminal sanction: First, to align the regime with the financial markets regime, second, to increase the dissuasive effect over the existing civil regime, and third, to make sanction commensurate with the significant harm that breaches can cause. Subject to parliamentary approval, the regulations will come into force in April 2015.

Consumer Rights Act 2015 receives Royal Assent

On March 26, 2015, the Consumer Rights Act 2015 received royal assent. The Act contains a number of provisions that affect private actions for infringements of competition law. The most significant changes in schedule 8 of The Act (in accordance with s.81) is the creation of an 'opt-out' system for collective redress for infringements of competition law (by amending s.47B of the Competition Act 1998). The new regime means that claims can be brought before the Competition Appeal Tribunal (CAT) by a defined group, without individual claimants having to opt-in to the litigation. The Act also amends section 47A of the Competition Act 1998 so as to allow claimants to bring actions for damages on a stand-alone basis before the CAT.

90 Strengthening the regulation of wholesale energy markets through new criminal offences, Department of Energy and Climate Change, URN 14D/277, August 2014.

91 Regulation No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency (REMIT).

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