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.

Horizontal Agreements

BCA's Second Settlement Decision Imposes €4 Million Fine in Industrial Batteries Cartel

On February 23, 2016, the BCA fined six undertakings a total of €3.857 million for their participation in the industrial batteries cartel.[1] From 2004 to 2014, the undertakings had agreed on the price of a lead surcharge applied to the price of motive power batteries, in breach of Article 101 TFEU. This was the BCA's second settlement decision since the settlement procedure entered into force with the new CEL in 2013.

The illegal practices related to "motive power batteries," a type of lead-based industrial battery used in forklifts, locomotives, and floor cleaners, and to the maintenance contracts for these batteries. Lead is a significant component and cost factor in the production of these batteries. The BCA found that, to manage lead price increases, the undertakings involved had agreed to calculate the amount of the lead surcharge to the net price of the motive power batteries. The BCA held that the lasting conduct constituted a single and continuous infringement, which had affected competition on the Belgian market as well as trade between Member States, as the relevant participants collectively represented about 70% of the Belgian market for industrial batteries.

Certain participants (including Battery Supplies and Enersys) obtained fine reductions for mitigating circumstances, specifically for extraordinary cooperation outside the leniency procedure and for inconsistent application of the surcharge. Emrol's fine was also reduced for its passive role as it entered the market later and only had a limited role in the cartel. The smaller undertakings, which were not part of an international group, received a fine reduction under the proportionality principle. As whistleblower, Exide benefited from full immunity from fines. Battery Supplies, Hoppecke, and Enersys were granted leniency fine reductions of 20%, 40%, and 30% respectively. Finally, all undertakings received a 10% fine reduction for acknowledging their involvement in the infringement and settling.

In addition, three individuals were granted immunity from prosecution. Fines against individuals were also introduced with the CEL in 2013.

Under Belgian law, settlement decisions cannot be appealed.

[1] The undertakings are: Battery Supplies NV ("Battery Supplies"), Celectric B.V., Emrol BVBA ("Emrol"), Enersys Inc. ("Enersys"), Exide Technologies ("Exide"), and Hoppecke Batterien GMBH & Co. KG ("Hoppecke").

© Cleary Gottlieb Steen & Hamilton LLP, 2017. All rights reserved.
This memorandum was prepared as a service to clients and other friends of Cleary Gottlieb to report on recent developments that may be of interest to them. The information in it is therefore general, and should not be considered or relied on as legal advice. Throughout this memorandum, "Cleary Gottlieb" and the "firm" refer to Cleary Gottlieb Steen & Hamilton LLP and its affiliated entities in certain jurisdictions, and the term "offices" includes offices of those affiliated entities.

Mergers and Acquisitions

BCA Approves Ahold/Delhaize Merger Subject to Remedies

On March 15, 2016, the BCA approved in Phase I the merger between supermarket chains Ahold NV ("Ahold") and Delhaize SA (Delhaize").[2] First filed with the Commission, the proposed merger was referred to the BCA at the parties' request, because the material overlaps were limited to Belgium.

The Auditorate investigated the merger's impact on the national market for the procurement of daily consumer goods and on local markets for the resale of these goods.

The BCA found that the merger would not significantly impede competition on the national market for the procurement of daily consumer goods. While the parties' position would be strengthened, this effect would be limited and would improve their negotiating strength with supra-national suppliers.

The merger would however significantly impede competition in local markets for the resale of daily consumer goods, where the parties were already close competitors. On some markets, the parties would have a combined market share of more than 50%, or of more than 40% with a large increment. The merger would also remove the significant competitive pressure exerted by new entrant Ahold.

To address these concerns, the College imposed remedies and conditionally approved the merger subject to the divestment of thirteen existing supermarkets (eight Albert Heijn outlets and five Delhaize outlets), as well as six yet-to-open outlets. The BCA stressed the importance of selling the outlets to a buyer with sufficient financial resources, expertise, incentive, and ability to be a viable and effective competitor to the merged entity and other competitors.

Despite the potential competitive impact of the merger, the BCA granted its conditional approval within Phase I time limits because the merging parties initiated a discussion and came forward with comprehensive remedies early in the procedure.

In October 2016, the U.S. Federal Trade Commission also approved the merger subject to divestitures.

BCA Conditionally Approves Kinepolis's Acquisition of Utopolis Cinemas in Phase II

On March 25, 2016, the BCA approved the takeover of two Utopolis movie multiplexes, in Turnhout and Lommel, by Kinepolis, a large movie theater operator in Belgium.[3] While the acquisition did not meet filing thresholds because Utopolis's turnover was below €40 million, Kinepolis had to notify the acquisition to the BCA based on conditions imposed at the time of its creation in 1997 (as a result of a merger of two cinema groups). The conditions required the BCA's approval for all future acquisitions of movie theaters.

In November 2015, Kinepolis notified the BCA of the planned acquisition of all four of Utopolis's multiplexes. In Phase I, the Auditorate raised serious doubts about the transaction, concluding that it would impede effective competition in markets for the screening of movies and in the upstream market for movie distribution, in which Kinepolis is also active. The deal would increase Kinepolis's market shares in local markets and in the national market for movie screening, and remove an important competitor, with effects on consumers, competitors, and movie distributors by way of price increases, reduced movie offerings, and a strengthened negotiating position.

Contrary to the *Ahold/Delhaize* merger, the parties did not discuss the topic of remedies early in the process. The remedies were finalized only as a result of lengthy discussions during Phase II. In the end, the College imposed both structural and behavioral remedies.

Kinepolis agreed to divest Utopolis's multiplexes in Mechelen and Aarschot, in effect acquiring only two of the four cinemas (and reducing the number of auditoriums and seats by 60%). As with the *Ahold/Delhaize* merger, the BCA mandated that the

[2] BCA, decision No. BMA-2016-C/C-10 of March 15, 2016, Case MEDE-C/C-16/0002.

[3] BCA, decision No. BMA-2016-IO-12 of March 25, 2016, Case MEDE-I/O-15/0030.

buyer must have the necessary financial resources and expertise to be a viable and effective competitor in the market.

In the non-divested Turnhout and Lommel theaters, Kinepolis agreed too to: (i) keep an existing voucher scheme with other cinemas; (ii) keep the cinemas open; and (iii) monitor moviegoers' customer satisfaction with price and quality, and report to the BCA.

Policy and Procedure

New Leniency Guidelines

On March 1, 2016, the BCA adopted new leniency guidelines ("Guidelines")[4], replacing the previous guidelines issued in 2007[5].

In addition to changes inspired by the BCA's experience since 2007, the new Guidelines reflect changes necessary as a result of the adoption of the new Competition Act (in the CEL), and notably new rules on sanctions against individuals, as well as the possibility for individuals to also submit leniency applications. The Guidelines also aim to align the Belgian rules with the European Competition Network's Model Leniency Programme, amended in 2012.

The Guidelines apply to leniency applications submitted as of their publication (March 22, 2016), except where an immunity or leniency application has already been filed in a case.

4 BCA Leniency Guidelines of March 1, 2016, Belgian OJ of March 22, 2016.

5 2007 Notice of the Competition Council on Immunity from Fines and Reduction of Fines in Cartel Cases.

FINLAND

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

Horizontal Agreements

Supreme Court Rules on Time-Barring in Antitrust Damages

On February 26, 2016, the Finnish Supreme Court ("Supreme Court") ruled for the first time on the time-barring of antitrust damages claims under Finnish law.[6] The Supreme Court was asked to determine the point in time when the limitation period begins. The ruling concerns claims brought before November 1, 2011, prior to the current rules under the Competition Act taking effect.

The Supreme Court decided that in this case the limitation period begins to run from the date the FCCA submits a fining proposal to the Market Court. The result is that potential claimants cannot necessarily wait until the Market Court's or SAC's final infringement decision before taking action.

According to the Act on Restraints of Competition (which was repealed in 2011 but continues to apply to infringements committed before November 2011), the period of limitations for damages claims is five years. Generally, the period of limitations begins to run as soon as the plaintiff has knowledge that it has suffered damages. This extends to situations where a plaintiff should have known, based on the evidence, that damages had occurred.

The Supreme Court clarified that the period of limitations begins to run when the plaintiff has received sufficient information to demonstrate awareness of the illegal nature of the infringement, the geographical area and duration of the infringement, and the identity of the infringers. In this case, the required level of information was contained in the FCCA's fining proposal. After the disclosure of this information, the plaintiff ought to have been sufficiently aware of the existence of the restriction on competition to determine, for its part, whether it had suffered damage.

The ruling relates to the so-called timber cartel damages litigation, where the State of Finland, dozens of municipalities, and about 650 private landowners are seeking damages exceeding €200 million from three Finnish pulp and paper companies for price-fixing in timber purchase contracts. The case before the Supreme Court relates to damages actions that were initiated in the Helsinki District Court ("District Court") on December 20, 2011.

The controversy of this question is highlighted by the fact that the District Court, the Helsinki Court of Appeal ("Court of Appeal"), and the Supreme Court all reached different conclusions on when the period of limitations began in this case. The District Court found that the FCCA's first press release concerning the investigation in 2004 contained sufficient information for potential plaintiffs to file their claims. The Court of Appeal, however, found that the plaintiffs could not have been expected to lodge claims before the final legally binding infringement decision because the cause of action was too uncertain. Finally the Supreme Court ruled that the period of limitations began to run from the date of the FCCA's fining proposal to the Market Court.

Market Court Fines the Finnish Bakery Federation for Unlawful Price Recommendations

On February 29, 2016, the Finnish Market Court fined the Finnish Bakery Federation €15,000 for unlawful price recommendations in 2007–2011.[7] The penalty is smaller than originally proposed by the FCCA.

The Finnish Bakery Federation is an association representing the professional and economic interests of

[6] Timber cartel damages litigation: 13 separate judgments, *e.g.*, Supreme Court, judgment KKO 2016:11, February 29, 2016; Helsinki Court of Appeal, judgment 2206, November 21, 2014; and Helsinki District Court, judgment 14/13974, March 28, 2014.

[7] Market Court, judgment MAO 121/16, February 29, 2016.

bakery proprietors and businesses. In June 2015, the FCCA submitted a proposal to the Market Court to fine the Finnish Bakery Federation €55,000. According to the FCCA, the Finnish Bakery Federation had published unlawful price recommendations in its press releases, letters to members, and editorials in the bakery trade magazine. The FCCA began to investigate the matter after the Finnish Bakery Federation issued a press release in August 2010 about the industry's weak profitability and the pressure to raise bakery product prices.

The Market Court held in its judgment that the Finnish Bakery Federation is an association of undertakings within meaning of Section 4 of the Finnish Competition Act and Article 101 of the Treaty on the Functioning of the European Union, and that the price recommendations constituted decisions by an association of undertakings. The Market Court held that the press releases, letters, and editorials contained price recommendations that were intended to increase prices of bakery products. Therefore, the Market Court held that the price recommendations constituted a restriction of competition by object.

The Market Court found that, taking into account the nature, extent and duration of the infringement, the Finnish Bakery Federation should be fined €15,000. According to Section 13 of the Finnish Competition Act, the amount of the penalty payment may not exceed 10% of the turnover of an undertaking or association of undertakings concerned during the year in which the undertaking or association of undertakings were last involved in the infringement. The current text of the Competition Act does not allow the turnover of the members of the association to be included in the calculation of the penalty, as is the case in several other EU Member States. It remains to be seen whether this will change in the future, as the FCCA has lobbied for an amendment of the law in this regard.

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").

Mergers and Acquisitions

The FCA Conditionally Clears the Acquisition of Quick by Burger King

On January 22, 2016, the FCA published its decision of December 10, 2015 to clear, subject to commitments, the acquisition by Burger King of Quick, a rival chain of quick-service restaurants.[8]

On November 4, 2015, Burger King France ("Burger King") notified the proposed concentration, constituting the purchase of all shares of Financière Quick, the holding company of the Quick Group, to the FCA. Prior to the transaction, Quick was indirectly controlled by the French Caisse des Dépôts et Consignation.

Although Burger King and Quick both franchise and operate quick-service/hamburger restaurants, Burger King is a relatively small actor in France, with only 30 restaurants, compared to Quick's 405 restaurants. In addition, French firm Group Bertrand, to which Burger King belongs, owns several other catering establishments, such as the Brasserie Lipp, and chains, such as Bert's sandwich shops and Café Leffe.

In previous decisions, the FCA had distinguished between: (i) the market for quick-service restaurants, which generally offer relatively low prices and include fast-food chains as well as self-service cafeterias and take-away/home delivery outlets; and (ii) the market for more sophisticated "sit down" restaurants offering full service. However, the FCA noted that in several decisions, the Commission had: (i) questioned whether there were separate markets for eat-in quick-service restaurants and take-away and home delivery restaurants; (ii) considered a possible distinction between chained informal restaurants and independent quick-service restaurants; and (iii) left open the question of whether there were separate markets for hamburger and non-hamburger quick-service restaurants.

Although, according to the FCA, the market test showed that McDonald's, Kentucky Fried Chicken ("KFC"), Quick, and Burger King (*i.e.*, hamburger restaurants) exert a strong competitive constraint on each other, a majority of respondents to the market test stated that a segmentation between hamburger and non-hamburger quick-service restaurants was not relevant. A number of respondents nonetheless indicated that, in their opinion, should Quick or Burger King increase their prices, consumers would not be willing to switch to non-hamburger restaurants, which seemed to confirm the FCA's view that hamburger and non-hamburger fast food is only partially substitutable.

The FCA eventually decided to leave the exact product market definition open, as the conclusions of its competitive analysis would be identical under any definition. Indeed, the transaction did not trigger any competition concern in mainland France, as the merged entity would continue to face competition from other chained restaurants (*e.g.*, McDonald's, Subway, and KFC) in all areas where the parties' activities overlapped. The transaction was only likely to impede competition in Corsica, due to the very small number of quick-service restaurants in the island. More specifically, the merged entity would enjoy a quasi-monopoly in the Ajaccio area, as the only hamburger restaurants there are Quick, Burger King, and a smaller independent outlet.

To address this concern, the parties committed to: (i) terminate the franchise agreement currently in force between Quick and the Ajaccio franchisee, thus allowing the restaurant owner to enter into an agreement with a competing fast-food chain; and (ii) not to acquire, for a period of ten years, the aforementioned restaurant, or enter into a franchising

[8] French Competition Authority, Decision No. 15-DCC-170 of December 10, 2015 relating to the acquisition of sole control of Financière Quick by Burger King, available at: http://www.autoritedelaconcurrence.fr/pdf/avis/15DCC170VersionPublication.pdf.

agreement with that restaurant. Subject to these commitments, the FCA cleared the transaction. Incidentally, since then, Burger King has decided to sell the Quick chain in Belgium and Luxembourg.

France's Highest Administrative Court Confirms the Revision of the CanalSat Commitments

On March 21, 2016, France's highest administrative court (the "Conseil d'Etat") ruled that the FCA may revise any commitments or injunctions imposed as a condition to a merger clearance, including by simple comfort letter, to take into account evolutions of the competitive conditions in the relevant markets.[9]

In July 2012, the FCA cleared the acquisition of TPS and Canalsatellite by Vivendi/Canal Plus after a Phase II investigation, subject to several commitments and injunctions designed to preserve competition on the French pay-TV markets. The transaction resulted in merging the two main French pay-TV operators into one entity ("CanalSat") and therefore giving Canal Plus a near-monopoly on pay-TV markets.

The FCA was notably concerned that Canal Plus would use its bargaining power to enter into exclusive distribution agreements with channel publishers covering all broadcasting platforms, *i.e.*, not only CanalSat but also the platforms of the main French internet services providers Orange, Free, SFR, Bouygues/Darty, and Numericable, which would then be foreclosed, as they would be deprived of the channels necessary to attract consumers. To remedy these concerns, the FCA imposed an obligation on Canal Plus to submit distinct offers for each broadcasting platform. Furthermore, given that Numericable does not distribute the CanalSat channels, Canal Plus committed not to acquire exclusive rights for the distribution of independent channels on the Numericable platform.

In November 2014, Numericable took exclusive control of SFR, a major French provider of triple-play offers, which distributes CanalSat channels. The merger of SFR and Numericable broadcasting platforms therefore enabled Numericable's end customers to have access to CanalSat, thereby eliminating the need for the Numericable commitment. In a letter dated March 31, 2015 sent to Canal Plus, the FCA informed Canal Plus that the prohibition imposed as regards the acquisition of exclusive broadcasting rights on Numericable's cable platform did not apply anymore.

Numericable challenged this letter before the Conseil d'Etat by arguing that the FCA did not have jurisdiction to modify the commitments or injunctions it had imposed in a definitive merger clearance decision and that the FCA had wrongly considered that the Numericable and the SFR platforms had been merged.

First, the Conseil d'Etat found that even a simple comfort letter such as the one the FCA sent to Canal Plus is subject to judicial review, considering that the FCA's position expressed in the letter may: (i) have notable economic consequences; (ii) result in modifying the behaviors of the market participants concerned; and (iii) affect the rights of Numericable.

Second, the Conseil d'Etat considers that the FCA has a general power to interpret and modify the commitments or injunctions that accompany its merger clearance decisions. The FCA's role is not limited to ensuring the appropriate implementation of its decisions, it may also decide to adjust the commitments or injunctions it has imposed in the past and assess whether maintaining them appears relevant in view of the evolution of the relevant market.

Third, the Conseil d'Etat confirmed the FCA's assessment that the commitment in question was no longer necessary.

9 Conseil d'Etat, Case No. 390023, Decision of March 21, 2016, *Numericable/Canal Plus*, available at: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000032279779&fastReqId=838547381&fastPos=1.

Policy and Procedure

The FCA Issues an Opinion on the Creation of a Publicly Funded Electronic Platform for Taxis

On March 24, 2016, the FCA published an opinion on the implementation of the "Le.taxi" platform, a state-operated register enabling information to be collected on the real-time availability and geo-tracking of taxis. The FCA views such a platform favorably provided that this new tool is limited to the taxi hailing market and does not distort competition in the prior booking market.[10]

In the context of a new decree providing for the launch of a national register relating to the real-time availability and geo-tracking of taxis, the French Government had consulted with the FCA on the competition-related impact of such measure. The FCA made several recommendations aimed at preserving competition between taxis and chauffeur vehicles.

Consistent with its 2013 opinion on the same sector, the FCA defined two separate service markets in the private transportation for a fee sector: (i) the hailing market (that includes taxi ranks); and (ii) the pre-booking market. The hailing market is characterized by a legal monopoly for taxi drivers that are under the obligation to accept rides when they are hailed on the street or found at ranks. The pre-booking market on the other hand, is open to competition between taxi drivers and chauffeurs. On the pre-booking market, drivers can charge a fee for the journey to customer's pick-up point and the rides booked in advance tend to be longer, and therefore more profitable. As a result, the pre-booking market is more attractive than the hailing market, which led to an increasing number of taxi drivers operating on the pre-booking market and a shortage of taxi drivers on the hailing market.

[10] French Competition Authority, Opinion No. 15-A-20 of December 22, 2015, regarding a draft decree on a national register relating to the availability of the taxis, available at: http://www.autoritedelaconcurrence.fr/pdf/avis/15a20.pdf.

Moreover, taxi drivers faced an increasing competitive pressure from chauffeur vehicles on the hailing market. Indeed, even if chauffeurs are prohibited from operating on the hailing market, they increasingly use devices combining real-time reservation and geo-tracking. Such devices enable customers to locate the real-time position of a vehicle. Chauffeur vehicles can therefore attract customers on the pre-booking market who cannot immediately find a taxi on the street, *i.e.*, on the hailing market.

Consequently, the French Government sought to protect the legal monopoly of taxis on the hailing market and prohibited geo-tracking devices for chauffeur vehicles. Further, by a March 21, 2016 decree, the French Government put in place a national register, called "Le.taxi," from which information on real-time availability and geo-tracking of taxis is made available on mobile applications or search engines to enable customers to order a taxi electronically. The objective of this platform is to transpose the principles of taxi hailing to "electronic hailing" but not to create a pre-booking service. Taxi drivers will need to register to the platform to have their information shared with mobile applications and search engines.

In its December 22, 2015 opinion, the FCA agreed with the introduction of this state-operated register, subject to following conditions.

First, Le.Taxi should follow the core principles of taxi hailing as this platform seeks to develop electronic hailing and is not a pre-booking service. These core principles include: (i) taxi drivers are prohibited from charging for the journey to the pick-up point; (ii) the geo-tracking radius is restricted; (iii) all taxis geo-tracked should be made available to the customers; (iv) the customer has the freedom of choice regarding taxis; (v) taxi drivers are prohibited from refusing service; and (vi) taxi drivers bear liability in the event of failure to comply with the applicable regulations.

Second, the electronic platform must guarantee a clear separation between the hailing market and the pre-booking market to avoid any misappropriation of customer base. In this respect, access to the platform

should be granted only to applications dedicated to electronic hailing or applications operating with a clear distinction between their own pre-booking offers and offers by Le.taxi.

Third, the universality of the register should be protected, as electronic hailing is considered as an extension of the customer's field of vision. The FCA has therefore recommended that the platform should be offered to all taxis in the relevant geo-tracking radius. In particular, filtering devices should be based on purely objective criteria (such as vehicle seating capacity or means of payment) and should be activated at the client's sole initiative.

The French Government followed the FCA's three main recommendations. However, the FCA also raised some doubts with respect to Le.taxi's ability to make the hailing market attractive without any further private investment.

In particular, the FCA insisted on the need to solve the shortage of taxis on the hailing market and pointed out that increasing the number of taxis on this market could attract private investments. In this respect, the FCA recommended additional measures such as the issuance of free taxi driver licenses for taxis agreeing to operate on the hailing market only. The FCA also called for the creation of an observatory with the ability to compute statistics on the hailing market to increase transparency on the activity of taxi drivers.

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

FCO Accepts Commitments to Change Full Function Joint Venture into Production Joint Venture

On December 21, 2015, the FCO accepted commitments offered by Boomex Produktions- und Handelsgesellschaft chemischtechnischer Artikel mbH ("Boomex"), Carl Warrlich GmbH ("Warrlich"), and Carbo GmbH ("Carbo") to end Carbo's sales activities and change Carbo from a full function joint venture into a pure production joint venture as of December 31, 2015.[11]

Boomex and Warrlich produce different types of ignition products. And Carbo is a 50/50 joint venture of Boomex and Warrlich that produces a specific type of grill lighter. Carbo achieves approximately 70–90% of its revenues from sales to Boomex and Warrlich. Carbo also achieves revenues from sales to other customers, including, in particular, one major customer (accounting for 20–30% of its turnover), as well as a number of smaller customers (0–5% of its turnover).

The FCO found that the relevant product market for the parties' activities was ignition products. According to the European Commission ("Commission"), this product market includes ignition products made from the same basic emulsion even if sold in different forms (*e.g.*, gels, liquids, cubes, and blocks).[12] Under this definition, Boomex, Warrlich and the joint venture were active in the same market.

The FCO stated that Article 101 of the Treaty on the Functioning of the European Union ("TFEU"), as well as Section 1 GWB, applied to agreements and concerted practices between partners of a joint venture, in this case between Boomex and Warrlich. The mere fact that Boomex and Warrlich supplied almost all of the German retailers, including discounters, indicated that having a joint venture with sales activities would raise competitive concerns. Even if the joint venture achieved only limited turnover from its sales activities, it would still be possible for the joint venture's partners to coordinate their respective market behavior through these activities. Furthermore, the FCO presumed that Boomex and Warrlich would use the information exchanged via the joint venture when determining their own market behavior. The fact that the directors of the joint venture were also shareholders or senior employees of Boomex and Warrlich confirmed this assessment.

The block exemption regulation for specialization agreements did not apply because the joint venture partners also produced and sold ignition products. Article 101(3) TFEU also did not apply. *Inter alia*, the FCO found that a full function joint venture was not necessary to achieve the efficiency gains claimed by the parties.

Cartel Follow-On Damage Claims Against Sugar Manufacturers

More than 30 companies have sued members of the sugar cartel, Südzucker AG ("Südzucker"), Pfeifer & Langen GmbH ("Pfeifer & Langen"), and Nordzucker AG ("Nordzucker"), for damages that add up to more than €400 million in German regional courts.

The claimants rely on a 2014 FCO decision in which the FCO fined three major German sugar manufacturers, Südzucker, Nordzucker, and Pfeifer & Langen, as well as on seven individuals approximately €280 million for price-fixing and market and quota allocation.[13] The infringements related both to

[11] FCO decision of December 21, 2015, case B3-93/15.

[12] *Legal & General Ventures/IWP* (Case COMP/M.2880), Commission decision of September 3, 2002.

[13] *See* FCO press release of February 18, 2014, available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/

industrial sugar and to retail/consumer sugar and took place between the mid-1990s and 2009. All sugar manufacturers settled the case with the FCO.

Beverage and confectionary manufacturers as well as one wholesaler, Kaufland, filed actions in the Regional Courts of Mannheim, Hanover, and Cologne. Among the claimants are August Stork KG (claiming more than €100 million), Zentis, Ehrmann, Gropper and Bauer—who brought a common claim as Zuckergeschädigten Klage KG claiming €118 million in damages—Nestlé (claiming €50 million), the Theo Müller group, Lauterecker Fruchtsäfte, Göbber, Paulaner, and the Krombacher group.

More than 110 companies requested access to the FCO file. The District Court of Bonn granted access to file in 26 cases on January 8, 2016.

FCO Imposes Fines on Members of Sanitary Sector Cartel

On March 22, 2016, the FCO fined nine wholesalers and one individual approximately €21.3 million for involvement in illegal horizontal agreements in the sanitary, heating, and air conditioning sectors.[14]

The FCO found that the undertakings had coordinated the calculation of their gross price lists and sales prices over several years via a so-called "calculation committee." At this committee's meetings, which took place at least four times a year, the undertakings exchanged information on gross prices, purchasing conditions, discounts, and other relevant developments. The FCO found that the common calculation basis significantly restricted competition between the involved undertakings, even if they continued to individually issue their own gross price lists.

The coordination concerned at least 250,000 products in the sanitary sector and dated back to the 1970s, when small and medium sized undertakings, such as the wholesalers in this case, did not yet have the technical capabilities to issue separate price lists individually for such a large number of products. The FCO did not, therefore, raise objections to the practice initially. The FCO found, however, that over time the technical deficiencies justification had diminished. The undertakings should consequently have ceased their coordination.

In calculating the fines, the FCO took into account as a mitigating circumstance that the undertakings competed with considerably larger market participants. In addition, all cartel participants cooperated with the FCO, with nine of the undertakings and one individual reaching settlements.

Abuse

Regional Courts of Düsseldorf and Mannheim Rule on the Compulsory License Objection After the ECJ Decision in Huawei

On November 3 and 27, 2015, the Regional Court of Düsseldorf and the Regional Court of Mannheim ruled on the so-called "compulsory license objection."[15] These are the first decisions on this issue at the national level after the ECJ rendered its landmark decision in the *Huawei* case in July 2015.[16] In both cases, the German courts rejected the objection invoked by alleged infringers of standard-essential patents ("SEPs") and granted injunctive relief to the SEP holders.

According to the ECJ, to avoid an abuse of dominance, SEP holders must adhere to the following process: (i) prior to seeking injunction, the SEP holder must alert the alleged infringer; (ii) if the alleged infringer expresses a willingness to conclude a licensing

EN/Pressemitteilungen/2014/18_02_2014_Zucker.html?nn=3591568.

[14] *See* FCO press release of March 22, 2016, available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/22_03_2016_SHK.html?nn=3591568.

[15] Regional Court of Düsseldorf judgment of November 3, 2015, case 4a O 144/14 and Regional Court of Mannheim judgment of November 27, 2015, case 2O 106/14.

[16] *See Huawei Technologies Co. Ltd v. ZTE Corp*., *ZTE Deutschland GmbH* (Case C-170/13) EU:C:2015:477, paragraphs 61–67.

agreement, the SEP holder must provide a specific written offer for a license on fair, reasonable, and non-discriminatory ("FRAND") terms and specify the royalty rate, to the alleged infringer; (iii) if the alleged infringer does not accept the offer, it promptly has to provide a specific written counter-offer; and (iv) if the SEP holder rejects the counter-offer, the alleged infringer has to provide appropriate security (bank guarantee or deposit).

In the first case, on November 3, 2015, the Regional Court of Düsseldorf left unanswered whether the applicant for injunctive relief was indeed the holder of an SEP and thus in a dominant position. Instead, the court ruled out any abusive behavior of the patent holder based on the grounds that the alleged infringer was not willing to conclude any sort of licensing arrangement. Although the patent holder had initially provided a specific written offer for a license on FRAND terms, the alleged infringer did not furnish a prompt counter-offer nor did he provide appropriate security. In the court's view, this behavior barred a compulsory license objection.

In the second case, the Regional Court of Mannheim applied similar reasoning, reaching an analogous conclusion, namely that the alleged infringer was "not willing to conclude a FRAND license" (having made no counter-offer and produced no security) and was therefore barred from invoking the compulsory license objection. In the court's view, it was irrelevant that the SEP holder alerted the alleged infringer of the infringement only after he filed his action for injunctive relief because, even three months after obtaining knowledge of the action, the alleged infringer remained "unwilling." Given the infringer's stance, the Regional Court of Mannheim found it unnecessary to evaluate whether the offer met the FRAND standard.

License for Electricity Supply Has To Be Newly Tendered

On January 26, 2016, the FCJ rejected the appeal of the City of Titisee-Neustadt ("Titisee-Neustadt")[17] against the DCA's July 15, 2015 decision.[18] The DCA had declined Titisee-Neustadt's request for suspensory measures on the FCO's January 28, 2015 decision.[19]

The FCO found that Titisee-Neustadt had violated competition law when it granted a license for electricity supply to an entity that was partly owned by Titisee-Neustadt.

In 2009, Titisee-Neustadt decided to re-communalize its electricity supply from the expiration of the current license. Titisee-Neustadt engaged in a tender process to allocate the contract for the supply of electricity. At the end of the process, Titisee-Neustadt awarded the license to an entity 60% owned by Titisee-Neustadt.

The FCJ rejected the constitutional arguments put forward by Titisee-Neustadt's local self-government and confirmed the decision of the DCA. The DCA had found that municipalities have a dominant position when granting licenses for electricity, as well as other supplies, and must not discriminate when granting such licenses. In this regard, the same standards apply under competition law as well as German energy law. The tender has to be structured in a way that companies interested in participating in the tender can understand which factors are relevant for the municipality. The ban on discrimination also means that the choice of company has to be made based on transparent facts and cannot take into account criteria with no relevance to the service at stake. The relevant criteria are laid down in Section 1(1) EnWG (the EnWG contains the core provision of German energy law). Fiscal criteria, which Titisee-Neustadt apparently took into account, must not be considered when granting a license, as they are not specified in Section 1(1) EnWG.

FCO Starts Probe into Facebook for Abuse of Dominance

On March 2, 2016, the FCO announced that it had initiated proceedings against Facebook Inc. as well as its Irish and German subsidiaries (together

[17] FCJ judgment of January 26, 2016, case KVZ 41/15.

[18] DCA judgment of July 15, 2015, case VI-2Kart 1/15 (V).

[19] FCO decision of January 28, 2015, case B8-175/11.

"Facebook") to investigate whether it had abused its potentially dominant position on a social network market by infringing data protection law.[20] While the market has yet to be precisely defined, the FCO claims to have some evidence of Facebook's dominance.

In addition to defining the relevant market, the FCO will have to assess whether Facebook violated data protection law and, if so, whether the violation also infringed competition law. In the FCO's view, Facebook might impose unfair and thus abusive conditions on users: Facebook collects its users' personal data to enable its customers, *i.e.*, advertisers, to target their ads to a particular audience. While users have to agree to such use of their data when they join the social network, Facebook's complicated terms of use might make it difficult for users to understand the scope of the data usage they are consenting to.

The FCO, however, highlights that a violation of data protection law does not necessarily entail a violation of competition law. A key element of the FCO's investigation will be to explore and analyze this connection.

Vertical Agreements

FCO Fines LEGO GmbH

On January 12, 2016, the FCO fined LEGO GmbH €130,000 for vertical price-fixing (resale price maintenance) practices in the sale of its so-called "high-light articles."[21] LEGO sales representatives were found to have regularly forced retailers in northern and eastern Germany to raise their resale prices of these products in 2012 and 2013.

LEGO monitored the resale prices at which selected retailers sold LEGO's high-light articles. In some cases, LEGO threatened retailers who did not adhere to the resale prices indicated in LEGO's lists with either a reduction or outright refusal to supply. In other cases, LEGO discounted retailers' purchases on the condition they maintained the listed resale prices.

According to the FCO, it granted LEGO a significant fine reduction because of LEGO's cooperation with the investigation and the fact that LEGO and the FCO reached a settlement.

FCO Fines Roasted Coffee Distributors

On January 18, 2016, the FCO announced that it had fined retailers of Melitta roasted coffee €50 million for vertical price-fixing practices.[22] The companies fined included Edeka Zentralhandelsgesellschaft GmbH and Edeka Zentrale AG & Co. KG, Kaufland Stiftung & Co. KG and Kaufland Warenhandel GmbH & Co. KG, Metro Dienstleistungs-Holding GmbH, Rewe–Zentral-Aktiengesellschaft ("Rewe"), and Dirk Rossmann GmbH ("Rossmann"). Melitta Europe GmbH & Co. KG, the legal successor of Melitta Kaffee GmbH ("Melitta"), was not fined in view of its cooperation with the FCO. Rewe's fine was also reduced based on its cooperation. All companies reached a settlement with the FCO—leading to a further fine reduction—except for Rossmann, who appealed the decision on December 23, 2015.

The FCO's investigations showed that, in 2014, employees at Melitta and various other retailers had agreed to comply with minimum retail prices that were set, monitored, and enforced by Melitta. This basic agreement covered several resale price-related aspects, such as shelf prices, promotional rates, and continuous low price concepts. As a part of the agreement, Melitta and the retailers implemented several collective resale price increases and coordinated promotional activities around special events, such as special Easter promotions. Melitta also offered incentives for resale price increases, such as payments,

[20] *See* FCO press release of March 2, 2016, available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/02_03_2016_Facebook.html?nn=3591568.

[21] FCO press release of January 12, 2016, available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/12_01_2016_Lego.html?nn=3591568.

[22] FCO case report of January 18, 2016, available in German at: http://www.bundeskartellamt.de/SharedDocs/Meldung/DE/AktuelleMeldungen/2016/18_01_2016_Fallbericht_Melitta-vertikal-aktualisiert.html.

or used threats to enforce cooperation from retailers. In addition, Melitta and the retailers regularly circulated lists that tracked the retailers' resale prices. The basic agreement ended in mid-2008 following FCO inspections of several parties' premises.

Court of Appeal of Nürnberg Upheld that Articles of Association Restrict Competition

On January 26, 2016, the Court of Appeal of Nürnberg upheld a decision that the registered cooperative Taxi-Zentrale Nürnberg eG ("Taxi-Zentrale") cannot prohibit its members from disclosing their GPS position to its competitors or putting adverts for these competitors on their taxis, since this infringes Sections 1 and 33 GWB.[23]

Taxi-Zentrale is the only taxi provider in Nürnberg that communicates with its member taxis over the radio to pass on taxi bookings. With 300 members and 500 connected taxis, its members account for around 99% of all taxis in Nürnberg.

Taxi-Zentrale's articles of association do not allow the members to disclose their GPS position to other taxi providers when fulfilling bookings from Taxi-Zentrale. They also prohibit Taxi-Zentrale's members from displaying advertisements for other taxi providers on their taxis.

The smartphone-app provider MyTaxi initiated proceedings against Taxi-Zentrale alleging that these provisions infringe Sections 1 and 33 GWB. The app provider, whose app allows customers to locate and book taxis in their vicinity, is one of Taxi-Zentrale's competitors.

Taxi-Zentrale defended these provisions, claiming that the restrictions were necessary to: (i) prevent competitors from identifying the most lucrative routes based on the collected GPS data of the taxis and cherry picking their customers; and (ii) not mislead customers into believing the taxi had been provided by a competitor, rather than Taxi-Zentrale.

[23] *See* Court of Appeal of Nürnberg judgment of January 22, 2016, case 1 U 907/14.

The Court of Appeal of Nürnberg rejected these claims, finding that the taxis were free to choose who to disclose their GPS data to and that it would also be unreasonable to expect them to log out of Taxi-Zentrale's system before accepting bookings from other providers. Regarding advertising, the court held that customers that have booked a taxi will generally know which provider they have used. In all other cases, the risk of misleading customers as to the provider would not be substantial enough to justify anticompetitive restrictions.

The Court of Appeal of Nürnberg did not grant Taxi-Zentrale the right to appeal the decision.

Mergers and Acquisitions

FCO Concludes Proceedings Against Bongrain Europe SAS

On January 7, 2016, the FCO fined Bongrain Europe SAS ("Bongrain"), which belongs to the French Savencia group ("Savencia"), €90.000 for providing incorrect information in a merger notification.[24]

Savencia held 24.7% of Andechser Molkerei Scheitz GmbH ("Andechser") since 1999 and acquired shareholdings in Molkerei Söbbeke Gmbh ("Söbbeke") successively between 2011 and 2013. Andechser and Söbbeke are the two largest organic dairies in Germany. After clearing Bongrain's acquisition of Söbbeke, the FCO found out that Bongrain had provided false information when it had notified the acquisition in 2011. In particular, Bongrain had understated Söbbeke's and Andechser's sales figures of organic yogurt in Germany. In failing to notify the concentration correctly, Bongrain committed an administrative offence under German law that has now resulted in the fine.

[24] *See* FCO press release of January 7, 2016, available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/07_01_2016_Bongrain.html;jsessionid=3FA3D49C11C4999980DD3135AE3C2601.1_cid387?nn=3591568.

German Minister for Economic Affairs Grants Authorization for Acquisition of Kaiser's Tengelmann by EDEKA

On March 17, 2016, the Federal Minister for Economic Affairs granted ministerial authorization for the acquisition of Kaiser's Tengelmann supermarket chain by its competitor EDEKA, subject to conditions.[25]

It was the first time in German merger control history that a ministerial authorization was granted subject to a set of conditions. These conditions relate to all regions and areas in which Kaiser's Tengelmann operates and capture, *inter alia*, aspects of administration, logistics, and storage at meat processing plants. The conditions also appear to have been aimed at the preservation of jobs and workers' rights.

To that end, the Minister found that the protection of common interests, in particular saving several thousand jobs, outweighed the FCO's competition concerns. And the conclusion of collective labor agreements was considered a prerequisite by the Minister for the completion of the merger.

On April 1, 2015, the FCO had initially blocked the transaction, holding that it would significantly impede effective competition in several already highly concentrated food retail markets in greater Berlin, Munich, Upper Bavaria, and North Rhine-Westphalia.[26]

On August 3, 2015, the Monopolies Commission, the German government's advisory body on competition issues, published a special report on the proposed transaction.[27] The Monopolies Commission made a recommendation to the Federal Minister for Economic Affairs to refuse (even with remedies) the authorization requested by the parties.

However, on January 12, 2016, the Minister stated that he was planning to clear the transaction subject to remedies. Following the announcements in early February 2016 by competitors they intended to appeal the decision, the Minister demanded further remedies from the parties in late February.

The decision is not yet final. Despite the additional remedy requirements, two competitors, REWE and Markant, have appealed the ministerial authorization decision at the DCA.

Separately, on April 18, 2016, EDEKA and Kaiser's Tengelmann announced that they have appealed the decision by the FCO at the DCA.

---

25 *See* Federal Ministry for Economic Affairs press release of March 17, 2016, available in German at: http://bmwi.de/DE/Presse/pressemitteilungen,did=757968.html.

26 *See* National Competition Report, January–March 2015, pp. 15–16.

27 *See* National Competition Report, July–September 2015, pp. 13–14.

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").

Fining Policy

Council of State Confirms that the Subsequent Annulment of an Infringement Decision Does Not Entitle a Leniency Applicant that Paid a Reduced Fine to a Refund

On January 29, 2016, the Council of State upheld the TAR Lazio's judgment stating that a leniency applicant that pays a reduced fine, and does not appeal the infringement decision of the ICA, cannot claim to be entitled to a refund if the decision is subsequently annulled in an appeal brought by co-cartelists.

On February 22, 2012, the ICA sanctioned various maritime services agencies involved in a price-fixing cartel in the market for maritime agency services.[28] One of these agencies, Hapag-Lloyd, filed a leniency application pursuant to Article 15 of the Italian Antitrust Law. As a result, Hapag-Lloyd was given a 50% reduction and paid the adjusted fine. The other maritime services agencies appealed the ICA's judgment before the TAR Lazio. Hapag-Lloyd decided not to intervene in the proceedings.

On January 15, 2013, the TAR Lazio upheld the appeal of the maritime companies and annulled the ICA's decision, finding that there was no proof of the alleged horizontal agreement.[29] Based on this ruling, Hapag-Lloyd immediately asked the ICA for the restitution of the fine paid, plus interest. The ICA responded that any assessment regarding restitution would be dependent upon the outcome of an appeal it had filed with the Council of State to overturn the TAR Lazio decision.

On July 4, 2014, the Council of State confirmed the TAR Lazio's judgment.[30] Hapag-Lloyd subsequently claimed it was entitled to a refund because the annulment would apply to all of the original addressees. However, in October 2014, the ICA rejected Hapag-Lloyd's request,[31] finding that Article 2909 of the Italian Civil Code, pursuant to which the force of *res iudicata*[32] of a judgment extends only to the parties to the proceedings concluded by this judgment, is applicable to administrative proceedings.

Hapag-Lloyd appealed this decision before the TAR Lazio, arguing that the ICA's decision clashed with both the European principles of effectiveness and equivalence and discouraged companies from participating in the leniency program. On April 30, 2015, the TAR Lazio rejected the appeal stating that Hapag-Lloyd lacked standing to bring a claim because it had elected not to participate in the first annulment proceeding.[33]

On January 29, 2016, the Council of State upheld the TAR Lazio's judgment, and confirmed that Article 2909 of the Civil Code is not in breach of EU law.[34] Indeed, the principle enshrined in this provision is justified by the need to clearly identify the parties affected by a given ruling. Consequently, a party that does not appeal an ICA decision cannot benefit from a later annulment resulting from a co-cartelist's appeal. Therefore, the reason why Hapag-Lloyd could not obtain a refund was not related to its participation in

[28] ICA, decision of February 22, 2012, *Servizi di Agenzia Marittima* (Case I733, No. 23338).

[29] TAR Lazio, judgment of January 15, 2013, *C.S.A. S.p.A., K-Line Italia S.r.l., C.M.A. C.G.M. Italy S.r.l., Assagenti, Coscon Italy S.r.l., Gastaldi & C S.p.A., and Agenzia Marittima Prosper S.r.l. v. ICA* (Judgment No. 362).

[30] Council of State, judgment of July 4, 2014, *ICA v. C.S.A. S.p.A., K-Line Italia S.r.l., C.M.A. C.G.M. Italy S.r.l., Assagenti, Coscon Italy S.r.l., Gastaldi & C S.p.A., and Agenzia Marittima Prosper S.r.l.* (Judgment No. 3406).

[31] ICA Notice No. 48335, October 14, 2014.

[32] A matter judged, *i.e.*, once a matter has been litigated, it may not be re-litigated.

[33] TAR Lazio, judgment of April 30, 2015, *Hapag-Lloyd (Italy Srl) v. ICA* (Judgment No. 6241).

[34] Council of State, judgment of January 29, 2016, *Hapag-Lloyd (Italy Srl) v. ICA* (Judgment No. 362).

the leniency program, but rather is a consequence of it not appealing the ICA's decision. As a leniency applicant, which had obtained only a 50% fine reduction, Hapag-Lloyd could have appealed the remaining amount of the fine, putting itself in the same position as the other non-leniency applicant co-cartelists.

Vertical Agreements

The ICA Closes Proceedings Against Expedia in the Most Favored Nation Clauses Saga Without Imposing Any Sanctions

On March 23, 2016, the ICA closed proceedings against Expedia Inc. and Expedia Italy S.r.l. (together, "Expedia") under Article 101 TFEU with respect to Most Favored Nation Clauses ("MFN" or "parity clauses") contained in agreements entered into by Expedia and partner hotels, without imposing any sanctions.[35]

Proceedings were opened on May 7, 2014, also involving Booking.com B.V. and Booking.com (Italia) S.r.l. (together, "Booking.com"). On December 11, 2014, Booking.com submitted commitments under Article 14-*ter* of the Italian Antitrust Law. On April 21, 2015, the ICA, acting in consultation with the French and Swedish competition authorities as well as the Commission, accepted commitments submitted by Booking.com. The investigation continued against Expedia, which repeatedly asked for an extension of the deadline for submitting commitments.

Ultimately, Expedia failed to submit commitments before the expiration of the statutory deadline. Nevertheless, the ICA noted that Expedia modified its contracts with partner hotels in the same way as Booking.com had. The ICA noted that the parity clause—the initial subject of the investigation—was no longer in effect. The ICA thus concluded that there were no longer grounds to proceed against Expedia under Article 101 TFEU.

[35] *See* ICA, decision of March 23, 2016, *Mercato dei servizi turistici - prenotazioni alberghiere* (Case I779).

Policy and Procedure

The TAR Lazio Affirms that Antitrust Proceedings Are Autonomous from Criminal Proceedings but that Evidence Produced in a Criminal Proceeding May Be Used to Demonstrate an Antitrust Violation

On February 5, 2014, on the basis of a decision concerning a criminal investigation regarding tender procedures, the ICA started its own investigation into possible collusion in the market for the supply of electromechanical goods and services for the railways sector.[36] On May 27, 2015, the ICA adopted an infringement decision against the main companies that supplied goods and services to the contracting entity Trenitalia S.p.A. ("Trenitalia").[37]

According to the ICA, from 2008 through 2011, the companies engaged in bid rigging concerning some national tenders, allocating the tenders among themselves through a continuous and systemic exchange of information. The ICA fined the companies varying amounts and ordered them to abstain from such conduct in the future.

The companies appealed the ICA's decision before the TAR Lazio. The appellants argued that Trenitalia had unlawfully terminated—on the basis of a wrongful application of the Italian Code of Public Contracts—the on-going supply contracts in light of the antitrust infringement and that the ICA's administrative proceedings should have been suspended until the conclusion of the criminal investigation. The companies further argued that the antitrust infringement had not been sufficiently proved by the ICA because the ICA had based its decision on evidence gathered in the criminal investigation, without assessing it in light of the general competition law framework.

Moreover, the parties challenged the ICA's use of wiretapping records not yet authorized in the parallel criminal proceedings. They argued that such use

[36] ICA, decision of February 5, 2014, *Forniture ferroviarie* (Case I759, No. 24781).

[37] ICA, decision of May 27, 2015, *Forniture ferroviarie* (Case I759, No. 25488).

would have been in breach of Article 270 of the Italian Code of Criminal Procedure, pursuant to which wiretapping records cannot be used in criminal proceedings unless previously authorized. This provision should be applicable to antitrust proceedings because they are considered criminal in substance, pursuant to the European Court for Human Rights case law.

On March 10, 2016, the TAR Lazio rejected the appeal.[38] It stated that the antitrust proceeding is fully independent from the criminal one, and it followed that the ICA does not have to wait for the conclusion of a criminal indictment to determine the existence of an antitrust infringement. Moreover, pursuant to administrative case law, evidence which has been properly acquired in the context of a criminal investigation can be used by the ICA as indicative evidence together with other elements. The TAR Lazio stated that Article 270 paragraph 1 of the Italian Code of Criminal Procedure is only applicable to criminal proceedings, where evidence used can lead to serious consequences, such as the deprivation of individual freedom. The issue is different in the case of administrative proceedings because the sanctions do not have the same ramifications. In this context, wiretapping records can be lawfully used out of the original criminal proceedings when they have been lawfully acquired pursuant to the rules concerning the gathering of evidence.

[38] TAR Lazio, judgment of March 10, 2016, *Pm & C. Scarl v. ICA* (Judgment No. 3075); TAR Lazio, judgment of March 10, 2016, *Firema Trasporti v. ICA* (Judgment No. 3077); and TAR Lazio, judgment of March 10, 2016, *Società Elettromeccanica Pm Srl v. ICA* (Judgment No. 3078).

NETHERLANDS

This section reviews developments under the Competition Act of January 1, 1998 (the "Competition Act"),[39] which is enforced by the Netherlands Authority for Consumers and Market (Autoriteit Consument & Markt, "ACM").[40]

Horizontal Agreements

Rotterdam District Court Annuls Fine Imposed on Dutch Association of General Practitioners

On December 17, 2015, the Rotterdam District Court annulled[41] a decision in which the ACM fined[42] the Dutch Association of General Practitioners ("LHV") approximately €8 million for breach of Article 6 of the Competition Act.

LHV is an association with a 95% membership of general practitioners ("GPs") in the Netherlands. LHV represents the GPs' interests by, *inter alia*, developing and issuing policies. LHV's policy on "Establishment" recommended that a balanced number of GPs establish themselves in certain regions so as to avoid under- or overcapacity. It was recommended that GPs periodically check whether there was a balanced number of GPs and that permanent overcapacity should be resolved. This policy document was notified to the GPs. The ACM found that the LHV's recommendation aimed to restrict competition in the market for GPs and therefore constituted a restriction by object and imposed a €5.9 million fine. LHV appealed this decision.

The Rotterdam District Court agreed with the ACM that LHV's recommendation constituted a decision by an association of undertakings within the meaning of Article 101 TFEU. However, in view of the wording, objective, and economic and legal context of the recommendation, the Rotterdam District Court disagreed with the ACM that it constituted a restriction of competition by object. Instead, and in reference to *Cartes Bancaires*,[43] it held that the nature of the services at issue as well as the real conditions of the functioning and structure of the markets need to be taken into account when assessing the economic and legal context of LHV's recommendation. The Rotterdam District Court disagreed with the ACM that the recommendation amounted to a quantitative restriction of competition, in particular because LHV did not set any number of patients per GP.

Moreover, the Rotterdam District Court noted that, in practice, GPs are not in a position to influence the establishment of new GPs in the market. Rather, this power belongs to health insurance companies who offer GPs reimbursement contracts. The Rotterdam District Court therefore did not find a restriction of competition by object and annulled the ACM's decision.

ACM Fines Cold Storage Companies

In March 2016, the ACM published its December 22, 2015 decision in which it fined cold storage (freezing and refrigerated storage) undertakings Eimskip, Kloosbeheer, Samskip, and Van Bon approximately €12.5 million for different cartel agreements between 2006 and 2009.[44] It also imposed individual fines of up to €144,000 on five directors, of which two received a 10% reduction because they made use of the ACM's settlement procedure.

The undertakings were involved in anticompetitive practices between 2006 and 2009, during which two of the undertakings were simultaneously engaged in merger discussions. The fined undertakings were found to have been involved in price-fixing, sharing customers, bid rigging, and exchange of (and/or

---

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

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

41 Rotterdam District Court, Judgment of December 17, 2015, ECLI:NL:RBROT:2015:9352.

42 Case 6888 (*De Landelijke Huisartsen Vereniging*), ACM decision of December 30, 2011.

43 *CB v. Commission* (Case C-67/13 P) EU:C:2014:2204. The Rotterdam District Court also referred to *Allianz Hungária Biztosító and Others* (Case C-32/11) EU:C:2013:160.

44 Cases 13.0698.31, 15.0710.31, 15.0327.31, and 15.0328.31 (Koel- en Vrieshuizen), ACM decisions of December 22, 2015.

agreement on) competitively sensitive information such as pricing, storage capacity/utilization rates, and passing on of price increases.

The ACM imposed relatively high fines, which illustrates its view that the arrangements constituted serious restrictions of competition in the Dutch cold storage market. One of the undertakings benefitted from the ACM's settlement procedure and received a 10 % fine reduction. Another participant received a 10% reduction because of its extensive cooperation that went beyond the level of what is legally required.

CBb Upholds Fine in Silverskin Onions Cartel

On March 24, 2016, the Trade and Industry Appeals Tribunal (the "CBb") upheld a judgment of the Rotterdam District Court,[45] upholding a €9 million fine[46] in the silverskin onions cartel.[47]

In 2012, the ACM fined five growers and processors of silverskin onions for their involvement in a cartel from 1998 to 2010. The ACM found that those companies controlled and restricted supply by: (i) agreeing on the maximum acreage on which each of them would sow silverskin onions; (ii) buying assets of companies that ceased their activities (thereby foreclosing new market entry); and (iii) price-fixing and exchanging pricing information. The ACM concluded that these activities constituted a single and continuous infringement. It fined the cartel participants based on the companies' EU-wide turnover. The undertakings contested this decision, arguing that: (i) the activities constituted separate infringements because they occurred at different times; and (ii) that the ACM should have used the companies' turnover in the Netherlands as a basis for calculating the fines.

Similar to the Rotterdam District Court,[48] the CBb dismissed the undertakings' claims. In particular, it held that due to their common objective of restricting supply and thereby artificially keeping prices at a higher level, those separate activities (*deelgedragingen*) formed part of an overall plan, and therefore, constituted a single and continuous infringement. Concerning the fine calculation, the CBb noted that the ACM's fining guidelines do not require that fines only be based on turnover achieved in the Netherlands. In addition, the fined undertakings also sold their products to buyers outside of the Netherlands, but within the EU. The CBb therefore concluded that the ACM was right in basing its fine on the companies' EU-wide turnover.

Mergers and Acquisitions

CBb Annuls ACM's Market Definition in Rusk Merger Prohibition Case

On February 11, 2016,[49] the CBb annulled a judgment of the Rotterdam District Court[50] that had upheld the ACM's market definition in the prohibited merger of rusk/gingerbread companies Continental Bakeries BV ("CB") and A.A. ter Beek ("Ter Beek").[51]

CB and Ter Beek produce private label rusk, and Ter Beek also produces branded rusk (under the *Bolletje* brand). CB and Ter Beek are active on the upstream rusk market, selling rusk to retailers/supermarkets. On the downstream market, those retailers sell rusk to consumers. The ACM found that the downstream rusk market comprises both private label rusk and branded rusk (due to customer switching). It also found that the substitutability of these products downstream significantly affected upstream negotiations between producers and retailers. The ACM therefore concluded that there was also a single upstream market for private label and branded rusk. The ACM identified serious competition concerns and dismissed the

45 Rotterdam District Court, Judgment of March 20, 2014, ECLI:NL:RBROT:2014:2045.

46 Case 6964 (*Zilveruien*), ACM decision of May 25, 2012.

47 Trade and Industry Appeals Tribunal, Judgment of March 23, 2016, ECLI:NL:CBB:2016:56.

48 Rotterdam District Court, Judgment of March 20, 2014, ECLI:NL:RBROT:2014:2045.

49 Trade and Industry Appeals Tribunal, Judgment of February 11, 2016, ECLI:NL:CBB:2016:23.

50 Rotterdam District Court, Judgment of February 27, 2014, ECLI:NL:RBROT:2014:1323.

51 Case 7321 (*Continental Bakeries – A.A. ter Beek*), ACM decision of December 14, 2012.

parties' proposed remedies. The Rotterdam District Court upheld the contested decision.[52]

Upon appeal to the CBb, the appropriateness of the market definition was considered. The parties argued that while private label and branded rusk constitute a single downstream product market, this is not the same for the upstream market. In particular, retailers in the upstream market have different purchase procedures for private label (individual negotiations) and branded rusk (periodical tenders). Moreover, the main upstream competitors of private label rusk manufacturers are other private label manufacturers and not manufacturers of branded rusk.

The CBb agreed with the parties and, in reference to Commission precedent in *Friesland Foods/Campina*,[53] held that because private label and branded rusk belong to a single downstream market, this does not automatically mean that the upstream market mirrors the downstream market. The CBb acknowledged the different upstream purchase procedures for private label and branded rusk. It also noted that the mere fact that a product has a branded and private label variant does not mean that they belong to the same product market.

The CBb concluded that the ACM insufficiently demonstrated that private label rusk and branded rusk form part of the same upstream product market, and annulled the ACM's decision. However, the CBb's annulment came too late to proceed with the proposed merger: Ter Beek was acquired by German biscuit manufacturer Borggreve in 2013.

[52] Rotterdam District Court, Judgment of February 27, 2014, ECLI:NL:RBROT:2014:1323.

[53] *Friesland Foods/Campina* (Case COMP/M.5046), Commission decision of December 17, 2008.

SPAIN

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

Horizontal Agreements

Spanish Supreme Court Upholds Parent Company Liability even Though the Parent Was Not a Party to the Infringement Proceedings

On January 18, 2016, the Spanish Supreme Court (“Supreme Court”) overturned a judgment from the Spanish High Court (“High Court”) but upheld the fines imposed by the CNC on two pump makers, Bombas Caprari, S.A. (“Bombas Caprari”) and its parent company, Caprari S.p.A. (“Caprari”).[54]

In June 2011, the CNC found that several companies in the market for pumps had been exchanging competitively sensitive information and agreeing on sales terms in breach of Article 1(1) LDC and Article 101(1) of the Treaty on the Functioning of the European Union (“TFEU”). The CNC found Bombas Caprari and its parent company, Caprari, jointly and severally liable and fined them €823,800.[55]

Bombas Caprari and Caprari filed an appeal against the CNC’s decision before the High Court alleging, *inter alia*, that the administrative proceedings were vitiated by procedural flaws and breached the right to presumption of innocence.[56] The appeal was dismissed by the High Court on May 30, 2013.[57]

The two companies appealed the judgment to the Supreme Court claiming, *inter alia*, that the judgment lacked completeness, congruence, and sufficient reasoning. Specifically, Caprari alleged that it had not been involved in the infringement, was not a party to the administrative proceedings, nor was it duly notified of the infringement decision (only its subsidiary Bombas Caprari was), and none of these issues had been addressed by the High Court in its judgment.

The Supreme Court dismissed the appeal with regard to all but the above claims. The Supreme Court found that the High Court had failed to rule on the issue of parental liability, which Caprari had put forward as its main plea for annulment. The High Court judgment did not even refer to Caprari’s claim in relation to the parent company’s liability for the conduct of its subsidiary.

The Supreme Court then went on to analyze the issue of parental liability and stated that, according to Spanish and EU case law, where the parent company holds a substantial shareholding in a subsidiary, a rebuttable presumption arises that the parent company exercises decisive influence over the subsidiary. The Supreme Court found that the appellants had not provided any evidence to rebut this presumption. It could therefore be presumed that Caprari, which held 73% of Bombas Caprari, exercised a decisive influence over its subsidiary.

The Supreme Court also found that the fact that Caprari was not a party to the administrative proceedings could not have breached its rights of defense because it was not credible that Caprari was unaware of the initiation and developments of an infringement procedure for anticompetitive conducts against its subsidiary. Therefore, the Supreme Court dismissed the appellant’s plea. A similar conclusion was reached, in relation to other pump producers investigated regarding the same conduct, in a Supreme Court judgment of October 27, 2015.[58]

[54] Case 2359/2013, judgment of the Spanish Supreme Court of January 18, 2016.

[55] *Bombas de fluidos* (Expte. S/0185/09), CNC decision of June 24, 2011.

[56] They also claimed that the CNC erred in the legal characterization of the facts as a cartel and that the sanction imposed was disproportionate.

[57] Case 397/2011, judgment of the Spanish High Court of May 30, 2013.

[58] Case 1038/2013, judgment of the Spanish Supreme Court of October 27, 2015.

This judgment (and the similar 2015 judgment) confirm the readiness of the Supreme Court to declare a controlling parent and their subsidiaries jointly and severally liable for competition law infringements in circumstances where there is no direct evidence of the involvement of the parent company or in events where the company did not take part in the infringement procedure. Notably, the Supreme Court's approach—finding a rebuttable presumption of decisive influence at 73%—goes further than the European courts, which have only established the presumption in cases of wholly owned or almost wholly owned subsidiaries.

Spanish High Court Annuls CNC's Decision Due to Excessive Length of the Procedure

On January 25, 2016, the High Court issued a series of judgments on appeal by several port operators and shipping companies against a decision of the CNC of September 26, 2013.[59] In its decision, the CNC had fined the operators and companies approximately €43.5 million for agreeing on the prices, terms, and conditions of container transport services at the Port of Valencia.[60]

According to Article 36(1) LDC, the deadline for issuing and notifying a decision that terminates an infringement procedure is 18 months from the opening of the procedure. In addition, Article 37(1) LDC foresees that the 18-month deadline is suspended when certain circumstances arise. Finally, Article 38(1) LDC provides that the expiration of the 18-month period laid down in Article 36(1) LDC is also the expiration of the infringement procedure.

In the present case, the time limit ran from June 14, 2011 (*i.e.,* the date on which the infringement procedure was formally opened), therefore the original deadline for the CNC to issue and notify a final decision on the procedure was December 14, 2012. Nevertheless, the CNC's final decision was only made on October 1, 2013. Even though more than 18 months had passed since the opening of the procedure, the deadline had been suspended up to 296 days by the CNC, since certain circumstances laid out in Article 37(1) of the LDC had been met. Those days were added by the CNC to the date on which the opening decision of the procedure was issued, thus, in the view of the CNC, the effective deadline for issuing and notifying a final decision was October 6, 2013.

The High Court found that only the suspensions decided within the 18-month deadline are valid. In other words, suspensions of the statutory deadline cannot be taken into account if such suspensions are made after the expiry of the original 18-month period.

In the case at hand, the statutory deadline to make a final decision on the procedure had been suspended six times by the CNC. However, three of those suspensions had been decided after the expiration of the original 18-months deadline (*i.e.,* December 14, 2012). The High Court therefore held that those suspensions could not be taken into account to extend the maximum duration of the infringement procedure. As a result, the High Court held that the statutory deadline could only be extended until June 7, 2013.

Since the CNC's decision had only been notified to the appellant on October 2, 2013, the High Court annulled the CNC's decision as well as the fines for all port operators and shipping companies.

Abuse

Spanish Supreme Court Overturns CNMC's Decision Fining Gas Natural Distribución

On March 4, 2016, the Supreme Court annulled the judgment of the High Court[61] upholding the CNMC's decision of July 29, 2011[62] that fined Gas Natural Distribución SDG, S.A. ("Gas Natural") €620,000 for abuse of dominance.[63]

[59] Cases 534/2013, 550/2013, 566/2013, 570/2013, 571/2013, 572/213, 574/2013, 575/2013, 577/2013, and 578/2013, judgments of the Spanish High Court of January 25, 2016.

[60] *Puerto de Valencia* (Expte. S/314/10), CNC decision of September 26, 2013.

[61] Case 477/2011, judgment of the Spanish High Court of April 30, 2013.

[62] *Gas Natural* (Expte. S/0184/09), CNMC decision of July 29, 2011.

[63] Case 2163/2013, judgment of the Spanish Supreme Court of March 4, 2016.

In its 2011 decision, the CNMC concluded that Gas Natural had abused its dominant position by refusing requests made by its competitor Iberdrola to switch certain customers' natural gas supplier between July 2007 and May 2009. Specifically, Iberdrola sent to Gas Natural a request to access its distribution networks for 399 clients, alleging that they had contracted the service with Iberdrola by telephone and enclosing the recordings of the verbal consent given by the clients. Gas Natural refused Iberdrola's access request claiming that the recordings did not fulfill the requirements laid down in Article 5(2) of the Royal Decree 1906/1999, which regulates consumer contracts entered into over the phone or online subject to general terms and conditions. In September 2009, Iberdrola lodged a complaint against Gas Natural before the CNMC for abuse of dominance. The CNMC found that the behavior of Gas Natural constituted an infringement of Article 2 LDC and Article 102 TFEU.

Gas Natural filed an appeal against the CNMC's decision before the High Court arguing, *inter alia*, that the requests in question were duly refused, in accordance with the applicable legislation. The appeal was dismissed by the High Court on April 30, 2013.

The Supreme Court disagreed with both the CNMC and the High Court, holding that verbal consent given by the clients to switch supplier was not permitted under the applicable legislation in force when Gas Natural's alleged anticompetitive conduct took place. Consequently, the Supreme Court found that there was insufficient legal basis to sanction Gas Natural's behavior as an infringement of Article 2 LDC or Article 102 TFEU because it could not be regarded as an unjustified refusal constituting an abusive practice contrary to competition rules.

Furthermore, the Supreme Court highlighted that retroactively applying the Royal Decree 104/2010, which allows the switching of gas supplier on the basis of recorded, verbal requests, would imply conferring retroactive effectiveness to an unfavorable, restrictive measure on Gas Natural, and it would therefore infringe the principle of non-retroactivity of punitive and non-favorable laws embodied in Article 9(3) of the Spanish Constitution and Article 128 of the Spanish Administrative Act.

It is remarkable that the judicial proceedings leading to the annulment of the CNMC decision lasted almost five years. This is illustrative of the lengthy period it may take for a CNMC decision to be confirmed or annulled.

SWEDEN

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

Horizontal Agreements

Swedish Health Care Providers Appeal a Stockholm's Court Fining Decision for Anticompetitive Agreements

On December 18, 2015, the Stockholm District Court fined Aleris Diagnostik AB ("Aleris"), Capio S:t Görans Sjukhus AB ("Capio"), and Hjärtkärlgruppen i Sverige AB ("HKG") approximately €3 million after finding that they had entered into anticompetitive agreements with the purpose of allocating volumes and share information with respect to Stockholm County Council's (the contracting authority) procurement of clinical physiology services.[64]

Aleris, Capio, and HKG are active in the market for various medical services. The three companies entered into agreements under which the parties would use each other as subcontractors regardless of who won the tender. One of the parties would bid for the entirety of the volume despite not having the entire capacity necessary to fulfill the tender. The agreements granted the right to another party, which did not win the bid, to perform up to 50% of the medical services as a subcontractor. The subcontractor was also entitled to almost the entirety of the payment for the tender.

The District Court in Stockholm undertook a comprehensive analysis of the agreements to determine whether they had an anticompetitive object. The court initially noted that volume-sharing resembles a customer sharing practice and that these type of practices are particularly harmful for competition. Further, the District Court in Stockholm found that the object of the agreements in question was to reduce the risks in a competitive tender and to give the parties of the agreement control over the structure of the market after the tender. Moreover, the court noted that the agreements had increased the parties chances of maintaining their positions after the tender regardless of the outcome of the tender. In light of this, the court concluded that the agreements had an anticompetitive object.

In addition to the agreements, the SCA had also claimed that the parties had illegally shared information by notifying each other about which tenders they were going to participate in and the quantities they were going to offer. The District Court in Stockholm concluded that, because they had found that the agreements constituted an infringement by object, the sharing of information would be included in the same infringement.

The parties had argued that the contracting authority had structured the tender in such a way that the parties felt pressured to use each other as subcontractors. The parties also claimed that the cooperation had been transparent and that the contracting authority had been aware of them using each other as subcontractors. The District Court in Stockholm concluded that the parties had not been forced to construct the contract in the way it was done and that there were other less anticompetitive options. Furthermore, it stated that the facts showed that the contracting authority had not been aware of the details of the agreements and that, in any case, this was irrelevant as the transparency of an agreement is of no significance when determining whether it has an anticompetitive object or result.

After these findings, the District Court in Stockholm went on to assess whether the exception in the Swedish Competition Act (equivalent to Article 101(3) of the Treaty on the Functioning of the European Union ("TFEU")) was applicable. The District Court in Stockholm initially concluded that the agreements had created some benefits in the relevant market because a small amount of patients could avoid being referred to two different providers. However, it also found that these benefits did not outweigh the restrictions on competition that the agreements entailed and that they only affected a small number of patients. Furthermore, it concluded that these

[64] Stockholm District Court judgment of December 18, 2015 (T 12305-13).

agreements were not indispensable to attaining these benefits and that, considering the high market shares of the parties, they could not claim that the agreements had not given them the possibility to eliminate competition.

Mergers and Acquisitions

The SCA Approves the Buyer Offered as Part of a Remedy to Address Competition Concerns in the Market for Food and Meal Replacement Products

On December 29, 2015, the SCA accepted the proposed buyer presented by Orkla ASA ("Orkla") and Cederroth Intressenter AB ("Cederroth") after an earlier commitment order from the District Court in Stockholm.[65]

On March 2, 2015, Orkla, a market leading provider of weight reduction products, notified the SCA about its intention to acquire sole control of Cederoth, the third largest operator in the market. The SCA initiated Phase II procedures on April 8, 2015 and submitted a summon application to the District Court in Stockholm claiming that the transaction would substantially restrict competition in the Swedish market for food and meal replacement products.

On June 25, 2015, the SCA adjusted its motion after the parties offered to submit commitments addressing the competition concerns. The parties accepted this new motion and the District Court in Stockholm thereby upheld the SCA's motion ordering the parties to divest Cederroth's brand Allevo.

Orkla acquired Cederroth on August 31, 2015 and, in accordance with the offered commitments, a Monitoring Trustee supervised the care of the brand proposed to be transferred until a buyer was identified and approved by the SCA. On December 22, the parties presented a full report and a buyer for the brand Allevo. The SCA examined the information submitted and formally approved the buyer.

The Swedish Competition Authority Goes to Court to Prohibit a Transaction on the Swedish Market for District Heating Pipes

On February 12, 2016, the SCA submitted a motion to the District Court in Stockholm in order to prohibit a merger between two companies active in the market for district heating pipes.

On September 8, 2015, Logstor notified its intention to acquire sole control over Powerpipe. The SCA initiated Phase II procedures on October 13, 2015, and submitted a summon application to the District Court in Stockholm. The SCA's claims that the transaction would significantly impede competition on the market for insulated piping, primarily because the parties are each other's closest competitors.

The summon submitted by the SCA argues that the parties are the most influential competitors on the Swedish market and that the transaction would lead to fewer competitors on the market while increasing Logstor's market power and creating a dominant player. Moreover, the SCA argued that the transaction would eliminate an important competitive force. Powerpipe had contributed to keeping prices down and provided fast and reliable distribution thereby increasing customer satisfaction. Although the immediate effect would be to eliminate competition between the parties, the transaction would also give the remaining competitors the opportunity to benefit from the reduction of competitive pressure.

The SCA did not identify any countervailing buyer power that could neutralize the dominant position of the combined entity nor any potential competition capable of entering the market. Furthermore, the SCA did not consider that the efficiency gains presented by the parties were capable of counteracting the negative effects resulting from the transaction. Thus, the transaction would risk leading to price increases and less offerings for consumers on the Swedish market for district heating pipes.

[65] SCA decision of December 29, 2015 (DNR 549/2015).

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").

Horizontal Agreements

The FCC Fines Two Dealers of Pianos for Price-Fixing Arrangements

On January 7, 2016, the FCC announced that it had fined piano dealers Musik Hug AG and Management AG AKHZ (formerly Krompholz AG) 518,000 CHF.[66]

On December 14, 2015, the FCC found that both dealers had agreed on price lists and discounts for pianos and grand pianos manufactured by Steinway & Sons and Grotrian-Steinweg. In addition, the FCC held that La Bottega del Pianoforte SA had, in an unlawful manner, aligned its prices with those of Musik Hug AG and Management AG AKHZ. However, as La Bottega del Pianoforte SA was the first undertaking to report this behavior to the FCC, it benefited from full immunity from a fine. As far as the manufacturers Steinway & Sons and Grotrian-Steinweg are concerned, the FCC considered that they did not issue minimum or fixed prices, but supported the implementation of the unlawful agreements between the dealers by printing the agreed price lists. Both manufacturers have entered into an amicable settlement with the FCC, under which they will each voluntarily cease printing such lists in the future.

The investigation was opened on November 28, 2012 following a request from an administrative body of the canton of Zurich. Suspicion of bid rigging for the supply of pianos to an arts school were not confirmed. The investigation, however, revealed the price-fixing agreements.

The FCC Launches an Investigation into Possible Price-Fixing and Market Allocation Agreements in the Zinc Industry

On February 15, 2016, the FCC opened an investigation against various zinc manufacturers and dealers in northern, eastern, and French-speaking Switzerland.[67] Searches were conducted in several companies.

According to the FCC's press release,[68] there are indications that companies active in the manufacture and trade of zinc may have entered into agreements that fixed both prices and price premiums for zinc works. Moreover, there are indications that the companies entered into agreements under which they may have allocated customers and territories among themselves.

Abuse

The FCC Launches an Investigation into the Cable Network Sector in the Canton of Geneva

On March 31, 2016, the FCC announced that it has opened an investigation against Naxoo SA ("Naxoo") (formerly 022 Télégenève SA). The purpose of the investigation is to determine whether the behavior of Naxoo constitutes an unlawful restriction of competition within the meaning of the Swiss Competition Act, including whether Naxoo holds a dominant position in the cable network market in certain areas of the canton of Geneva and, if so, whether this results in a dominant position in the

---

[66] FCC press release, January 7, 2016, available in French and German at: https://www.weko.admin.ch/weko/fr/home/actualites/communiques-de-presse/nsb-news.msg-id-60210.html.

[67] The procedure was launched against: Vereinigung Schweizerischer Verzinkereien (VSV), Schweizerische Fachstelle Feuerverzinken (SFF), Epos Verzinkerei AG Däniken, Galvaswiss AG, Schweizerische Drahtziegelfabrik AG, Zinctec AG, Verzinkerei Lenzburg AG, Verzinkerei Oberuzwil AG, Verzinkerei Stooss AG, Verzinkerei Unterlunkhofen AG, Verzinkerei Wattenwil AG, Verzinkerei Wettingen AG, Verzinkerei Wollerau AG, Zinguerie-Sablage-Métallisation SA in liquidation, and their respective affiliates.

[68] FCC press release, February 17, 2016, available in French and German at: https://www.weko.admin.ch/weko/fr/home/actualites/communiques-de-presse/nsb-news.msg-id-60662.html.

downstream networks that are installed in buildings. The investigation seeks to determine whether Naxoo is abusing its position by limiting or preventing third party access to such networks. According to the FCC's press release,[69] there are indications that other companies (and notably companies providing satellite services) were hindered or prevented by Naxoo from accessing networks installed within buildings. This access is needed for the provision of third party services. There are indications that building owners would face an immediate threat of being barred from the services performed by Naxoo if the networks installed in the buildings were not used exclusively for services provided by Naxoo and its partners.

Vertical Agreements

Federal Administrative Court Annuls FCC Decision on Price Recommendations

On December 17, 2015, the Federal Administrative Court annulled a decision of the FCC regarding alleged resale price maintenance between an importer of mountaineering equipment (Altimum SA) and its retailers.[70] On August 20, 2012, the FCC had concluded that the price recommendations issued by Altimum amounted to a vertical agreement between Altimum and its retailers on resale prices.

As a preliminary remark, the Federal Administrative Court stated that distribution agreements that are not in violation of EU competition law are, in principle, also permissible under the Competition Act. The court then held that price recommendations amount to resale price-fixing if either: (i) the recommended price has (explicitly or tacitly) been accepted by retailers (*i.e.*, an agreement); or (ii) the issuer of the recommendation pressures the retailers or incentivizes adherence to the recommendation and the recommendation is followed by retailers to a great extent ("*dans une large mesure*") (*i.e.*, a concerted practice).

When assessing the effects on competition, the Federal Administrative Court confirmed that an agreement must have actual significant negative effects on effective competition to be illicit under the Competition Act. In its assessment of those negative effects, it concluded that the market position of the issuer of the price recommendation is relevant but not sufficient to establish negative effects. In addition, the degree of adherence to the recommendation and the market position of those retailers that adhere to the recommendation must be taken into account.

The decision of the Federal Administrative Court is significant for two reasons. First, the FCC had taken a rather strict approach towards price recommendations in the past by heavily relying on the degree of adherence. As a consequence, issuers of price recommendations that did not induce or force retailers to adhere to the recommendation risked being charged with participation in an illicit vertical price agreement rather than being accused of unilateral conduct. The Federal Administrative Court has now clarified that resellers' mere adherence to a price recommendation is not sufficient for the recommendation to qualify as an agreement or concerted practice nor to establish the recommendation's negative effects on competition. Second, it has been debated in Switzerland whether agreements that are considered to be particularly harmful to competition should be prohibited regardless of their actual effects. The Federal Administrative Court has now confirmed that even hardcore agreements, including vertical price agreements, are only prohibited if there is proof of actual negative effects on competition.

[69] FCC press release, March 31, 2016, available in French and German at: https://www.weko.admin.ch/weko/fr/home/actualites/communiques-de-presse/nsb-news.msg-id-61165.html.

[70] *See* Federal Administrative Court Judgment B-5685/2012, December 17, 2015, available in French at: http://www.bvger.ch/publiws/download?decisionId=94c41efe-d067-4b1a-a08b-3a7c524d7719.

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").

Abuse

The High Court Finds No Abuse of Dominance by Google in Online Search and Map Services

On February 12, 2016, the High Court dismissed a claim by Streemap.eu Limited ("Streetmap") alleging an Article 102 TFEU abuse of dominance by Google in the market for online search (or online search advertising) for eight years.[71]

In addition to its general online search business, Google has operated Google Maps, an online map service that competes with Streetmap's own product, since 2005. In 2007, Google introduced "OneBox," a general online search service feature that includes a thumbnail map when a user searches for an address or location. The thumbnail appears above Google's algorithmically generated "natural" search results, and clicking on the thumbnail directs users to Google Maps. Streetmap alleged that by providing the OneBox service, Google had either tied, bundled, or unfairly favored its own service with its presumptively dominant general search service.[72]

The High Court observed that it was common ground that OneBox had clear positive effects for users of Google's general online search service, and noted that the "unusual and challenging feature of this case is that conduct which was pro-competitive in the market in which the undertaking is dominant is alleged to be abusive on the grounds of an alleged anticompetitive effect in a distinct market in which it is not dominant."[73] In this context, the High Court ruled that the abuse alleged by Streetmap was not sufficiently obvious to forego the need to establish actual adverse effects on competitors, and that there must be a sufficiently appreciable effect on competition. The High Court distinguished this latter position from that taken by the European Court of Justice ("ECJ") in *Post Danmark II*, holding that the ECJ's view that no appreciable effects must be shown is limited to cases where the abusive conduct takes place in the market where an undertaking is dominant.

After a lengthy review of factual evidence, including internal documents from both parties, live experiments that compared user behavior with and without OneBox, and expert economist testimony, the High Court found that OneBox did not have an appreciable effect on competition for online map services, and was therefore not abusive.

In the alternative, the High Court considered whether OneBox could be objectively justified notwithstanding an appreciable adverse effect on competition. The High Court held that, as OneBox's procompetitive effects in general online search were not in dispute, whether its introduction was objectively justified concerned whether its restrictive effect on competition for online map services was sufficiently proportionate.

Streetmap argued that a number of alternatives or variations of OneBox would have been less damaging to competition, and that Google's implementation was therefore disproportionate. These proposals included the inclusion of links to competing online map providers' services, the ability for users to change OneBox to use third party services to generate thumbnails, and the conversion of the OneBox map thumbnail to a link to multiple services rather than only Google Maps. The High Court ultimately found that none of these proposals would address the core of Streetmap's complaint—the Google Maps thumbnail image—and that they would, in any event, be unduly

71 *Streetmap.eu limited v. Google Inc., Google Ireland Limited, and Google UK Limited* [2016] EWHC 253 (Ch).

72 Google disputed both the definition of the "online search" market and that it was dominant in any event. The High Court proceeded on the basis of a consent order under which it would examine whether Streetmap's abuse allegation had any merit on the assumption that Google was dominant in online search, with the question of whether dominance in fact existed to be determined subsequently.

73 *Streetmap.eu limited v. Google Inc., Google Ireland Limited, and Google UK Limited*, *supra*, paragraph 84.

burdensome for Google to implement for technical reasons.

The High Court therefore concluded that the introduction of OneBox was not abusive as it did not appreciably effect competition for online map services, and if it did it was a proportionate and objectively justified technical improvement.

Mergers and Acquisitions

CMA Approves BT's Acquisition of EE After a Phase II Investigation

On January 15, 2016, following a "fast track" Phase II investigation,[74] the CMA approved BT Group Plc's ("BT") acquisition of EE Limited ("EE").[75] BT and EE are both telecommunication companies, with each company respectively the largest supplier of fixed and mobile communication services in the U.K.

The CMA considered the effects of the proposed transaction on national markets for: (i) retail mobile services; (ii) retail broadband services (including overall supply of "superfast" broadband and rural supply of regular and "superfast" broadband), where the parties are competitors; (iii) wholesale broadband services; (iv) mobile backhaul (the fixed network infrastructure used to connect mobile network infrastructure), where BT supplies EE; and (v) wholesale mobile services, where EE supplies BT.

With respect to the retail mobile and retail broadband markets where the parties overlap, the CMA concluded that there would be no adverse effects on competition. In retail mobile markets BT's presence is limited (because it is a mobile virtual network operator), and in retail broadband markets EE was found to have a limited market share in both regular and superfast segments.

With respect to wholesale broadband and mobile backhaul, the CMA found that the merged entity would not have an increased ability to foreclose other broadband service providers. Specifically, BT's Openreach network and pricing is subject to regulation by OFCOM, who informed the CMA that a combination of existing price controls and future adaptions to pricing formulas imposed by the authority would restrict any ability to foreclose downstream purchasers. In addition, with respect to mobile backhaul, the CMA found that the relatively small contribution backhaul prices make to mobile operators' overall costs would make any price increases or degradations to quality of service unlikely.

With respect to wholesale mobile, the CMA first observed that—given BT's marginal presence in the downstream retail mobile market—the transaction would be unlikely to create an incentive or increased ability to foreclose mobile-only customers. However, the CMA noted that the merged entity would become a more significant supplier of retail bundles that combined fixed and mobile services, which are purchased by other customers on a tender basis. The CMA therefore assessed the merged entity's ability and incentive to: (i) stop entering bids (cutting off supply); (ii) enter weak bids with less competitive terms; and (iii) provide poor service on future competitive bids, and under existing contracts.

The CMA found that the merged entity would have little incentive to forego business by making no or weak bids due to the presence of three other upstream competitors who could supply bundled service providers, and because end consumers could continue to purchase fixed and mobile services separately. The CMA also found that poor service was unlikely given sufficient contractual protection, and that even though EE already had the ability to degrade a customer's service, it had not done so, and would not have any additional incentive to do so.

After determining that the discrete horizontally and vertically affected markets would not be adversely affected, and the potential conglomerate effects arising from bundling in the wholesale mobile market,[76] the

[74] At the merging parties' request, the CMA may forego a full Phase I investigation if there are *prima facie* competition concerns arising from a proposed transaction.

[75] *BT Group plc/EE Limited* (Case ME/6619-15), CMA's Final Report of January 15, 2016.

[76] The CMA's October 28, 2015 provisional findings report noted without elaboration that the inquiry group

CMA considered any "interrelated effects" arising from the merged entity's incentives over several markets (*i.e.*, if the parties' presence in neighboring markets could aggravate competitive concerns in another without direct bundling or tying). The CMA examined different combinations of vertical and horizontal markets, but ultimately determined that there would be no additional "interrelated" anticompetitive effects, as the merged entity would lack the ability or incentive to foreclose competitors in vertical markets, and the increments at the horizontal level were limited.

In light of the Phase II investigation's findings, the CMA unconditionally approved the transaction.

CLEARY GOTTLIEB

were split in their view of the wholesale mobile market, but lacked the two thirds majority required to find a "substantial lessening of competition" under the Enterprise and Regulatory Reform Act 2013. The final report was unanimous in this regard.

Our Offices

New York
One Liberty Plaza
New York, NY 10006-1470
T: +1 212 225 2000
F: +1 212 225 3999

Washington
2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
T: +1 202 974 1500
F: +1 202 974 1999

Paris
12, rue de Tilsitt
75008 Paris, France
T: +33 1 40 74 68 00
F: +33 1 40 74 68 88

Brussels
Rue de la Loi 57
1040 Brussels, Belgium
T: +32 2 287 2000
F: +32 2 231 1661

London
City Place House
55 Basinghall Street
London EC2V 5EH, England
T: +44 20 7614 2200
F: +44 20 7600 1698

Moscow
Cleary Gottlieb Steen & Hamilton LLC
Paveletskaya Square 2/3
Moscow, Russia 115054
T: +7 495 660 8500
F: +7 495 660 8505

Frankfurt
Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
T: +49 69 97103 0
F: +49 69 97103 199

Cologne
Theodor-Heuss-Ring 9
50688 Cologne, Germany
T: +49 221 80040 0
F: +49 221 80040 199

Rome
Piazza di Spagna 15
00187 Rome, Italy
T: +39 06 69 52 21
F: +39 06 69 20 06 65

Milan
Via San Paolo 7
20121 Milan, Italy
T: +39 02 72 60 81
F: +39 02 86 98 44 40

Hong Kong
Cleary Gottlieb Steen & Hamilton (Hong Kong)
37th Floor, Hysan Place
500 Hennessy Road
Causeway Bay
Hong Kong
T: +852 2521 4122
F: +852 2845 9026

Beijing
Cleary Gottlieb Steen & Hamilton LLP Beijing Representative Office
45th Floor, Fortune Financial Center
5 Dong San Huan Zhong Lu
Chaoyang District
Beijing
100020
China
T: +86 10 5920 1000
F: +86 10 5879 3902

Buenos Aires
CGSH International Legal Services, LLP-
Sucursal Argentina
Carlos Pellegrini 1427 – Floor 9
C1011AAC Buenos Aires
Argentina
T: +54 11 5556 8900
F: +54 11 5556 8999

São Paulo
Cleary Gottlieb Steen & Hamilton
Consultores em Direito Estrangeiro
Rua Funchal, 418, 13 Andar
São Paulo, SP Brazil 04551-060
T: +55 11 2196 7200
F: +55 11 2196 7299

Abu Dhabi
Al Sila Tower, 27th Floor
Sowwah Square, PO Box 29920
Abu Dhabi, United Arab Emirates
T: +971 2 412 1700
F: +971 2 412 1899

Seoul
Cleary Gottlieb Steen & Hamilton LLP
Foreign Legal Consultant Office
19F, Ferrum Tower
19, Eulji-ro 5-gil, Jung-gu
Seoul 100-210, Korea
T:+82 2 6353 8000
F:+82 2 6353 8099