BELGIUM

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

Horizontal Agreements

Suspension of Exclusivity Clause in International Show-Jumping Regulations: Brussels Court of Appeal Confirms Interim Measures

On April 28, 2016, the Brussels Court of Appeal upheld the BCA decision of July 27, 2015 imposing interim measures on the Fédération Equestre Internationale ("FEI"), the governing body for equestrian sports. [1]

On July 27, 2015, the BCA granted interim measures to Global Champions League ("GCL") and ordered the FEI to suspend the exclusivity clause contained in its General Regulations until the adoption of a decision on the merits of the case.[2] This clause forbid athletes and horses from competing in FEI approved events if they have participated in an event not approved by the FEI in the past six months. The BCA found that the suspension of the clause was necessary to enable the organization of the GCL in 2016, in particular because no athlete would compromise their required FEI accreditation for participation in the Rio 2016 Olympic games by taking part in the GCL. On August 4, 2015, the FEI sought the annulment of this decision before the Brussels Court of Appeal, which rejected all of the FEI's claims.

First, the FEI argued that the College had breached Article 11 of Regulation 1/2003[3] by not respecting its duty to inform the European Commission ("Commission") before initiating its investigation. The Brussels Court of Appeal rejected this argument, stating that third parties have no subjective right to information on this basis, which exclusively aims at ensuring cooperation between the Commission and national authorities.

Second, the FEI contested the BCA's jurisdiction to impose interim measures with scope that extends beyond the territory of the European Union ("EU"). The Brussels Court of Appeal found that the exclusivity clause was implemented within the EU, which is sufficient to establish the competence of the Commission. It further emphasized that national competition authorities must ensure compliance with national competition law but also with European competition law. In addition, the Brussels Court of Appeal confirmed that the clause in question was sufficiently linked to the Belgian territory for the BCA to consider itself as "well placed to act" within the meaning of the Commission's Notice on cooperation within the Network of Competition Authorities.[4]

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1 Brussels Court of Appeal, judgment of April 28, 2016, Case 2015/MR/1.

2 BCA, decision No. 1BC-2015-V/M-23 of July 27, 2015, Case CONC-V/M-0016.

3 Council Regulation (EC) No. 1/2003 of December 16, 2002 on the Implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1/1 ("Regulation 1/2003").

4 Commission notice on cooperation within the Network of Competition Authorities, OJ 2004 C 101/03.

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Third, the FEI pleaded an infringement of its rights of defense. The Brussels Court of Appeal confirmed that Article 6 TFEU was not applicable to the proceedings before the College as the latter did not issue any measure of a criminal nature. With regard to the time allotted to the FEI to prepare its defense, the Brussels Court of Appeal pointed out that Article IV(64) CEL provides for an accelerated procedure for all parties, subject to time extension upon request. Considering the absence of such a request, the period of five days granted to the FEI was considered reasonable. With regard to the equality of arms' principle, the Brussels Court of Appeal held that it could not be implied from the contacts between the auditor and the plaintiffs that the guarantee of impartiality was infringed.

Fourth, the Brussels Court of Appeal found that the College did not err in law in alleging a *prima facie* breach of Article 101(1) TFEU and Article IV(1) CEL. First, the Brussels Court of Appeal recalled that the FEI falls within the scope of application of these provisions: it qualifies both as an undertaking and as an association of undertakings, because its members also pursue lucrative economic activities. Second, although it is not established that the object of the exclusivity clause is to restrict competition, the Brussels Court of Appeal found that the clause has *prima facie* the effect of excluding riders and horse owners from accredited events organized by the FEI for at least a period of six months. The FEI claimed that this exclusion is justified under three legitimate objectives: (i) the horses' health; (ii) the integrity of sport; and (iii) the calendar of equestrian events. The Court dismissed this argument, stating that these objectives could also be achieved by other less restrictive means.

Fifth, the Brussels Court of Appeal confirmed that the *prima facie* infringement creates a risk of serious and imminent harm that would be difficult to remedy. The Brussels Court of Appeal held that the BCA had adequately established the gravity and imminence of the harm linked with the impossibility of organizing the GCL in 2016, and underlined that GCL events had already been cancelled in 2014 and 2015 due to of its failure to obtain the FEI's accreditation.

Finally, the Brussels Court of Appeal found that the interim measures fulfilled the requirement of urgency: the BCA had indeed acknowledged that it would take at least two years to decide on the complaint on the merits introduced in 2015. The Brussels Court of Appeal also established that the urgency had not been created by the behavior of the plaintiffs.

This was the second time that the Brussels Court of Appeal confirmed the BCA's decision in this case. On October 22, 2015, it had already rejected the FEI's request to suspend the interim measures while the appeal was pending.

BCA Adopts Settlement Decision for Market-Sharing Agreements Between SMEs in River Cruise Sector

On May 27, 2016, the Auditorate adopted a settlement decision fining SPRL Dinant Croisière, SPRL Compagnie des Bateaux de Dinant, and SA Dinant Evasion (together, "Group P") a total of €64,100, and granting Sarcelles SPRL and Bateaux Mouche Belgique SPRL (together, "Group M") full immunity from fines.[5]

The Auditorate found that the undertakings had infringed Article IV(1) CEL by concluding two successive agreements, respectively entered into in 1983 and 2013, which had the object of restricting competition in the market for cruise services on the Meuse and Lesse rivers. The agreements provided for market allocation through the sharing of production means and revenues, as well as through common price-setting and exclusivity agreements with third companies.

In determining the fines, the Auditorate applied the three factors mentioned in the BCA's 2014 Guidelines on the method of setting fines. First, it considered the extreme gravity of cartel practices under competition law, both at the EU and Belgian level. Second, it looked at the duration of the infringement. Given the fact that SMEs can only be fined for anticompetitive practices since October 2006,[6] and that the tourist

[5] BCA, decision No. ABC-2016-I/O-15-AUD of May 27, 2016, Case CONC-I/O-14/0028.

[6] Since the entry into force of the APEC.

season for cruises ends in October, the Auditorate only considered the period between 2007 and 2014 for the determination of the fine. Third, it considered the benefits of the deterrent effect of its decision.

As the first leniency applicants, Group M was granted full immunity from fines, in accordance with the BCA's 2007 cartel leniency guidelines. The Auditorate also reduced Group P's fines because the companies had applied for leniency at an early stage in the procedure and had provided additional explanation on the functioning of the agreements. Finally, in exchange for acknowledging the infringement as part of the settlement procedure, the fines were reduced by an additional 10% pursuant to Article IV(54) of the CEL

Brussels Court of Appeal Annuls BCA Cement Cartel Decision, Confirming that Lobbying Activities May Fall Outside the Scope of Competition Law

On June 30, 2015, the Brussels Court of Appeal overturned a BCA decision dated August 30, 2013. The Brussels Court of Appeal ruled in favor of three cement producers (Holcim, Compagnie des Ciments Belges, and Cimenteries CBR), their sector association Febelcem, and the Centre national de Recherches scientifiques et techniques pour l' Industrie Cimentière ("CRIC"), who had been fined €14.7 million in total for an infringement of Article 101(1) TFEU and Article 2 APEC.

On August 30, 2013, the BCA found that the plaintiffs had engaged in anticompetitive collusion aimed at delaying the adoption of standards and certifications allowing ground granulated blast furnace slag to be used as a substitute for cement in the production of ready-mix concrete.[7] The BCA concluded that the plaintiffs had manipulated the standardization process with the object, and potential effect, of hindering entry of this product and of potential competitors in the market, thereby protecting their own interests and position in the market. The plaintiffs appealed this decision.

In its judgment, the Brussels Court of Appeal first dismissed the procedural arguments brought by the parties. It confirmed that Article 6 of the European Convention on Human Rights ("ECHR") was applicable to the proceedings given the criminal nature of the sanction imposed by the Competition Council, but concluded that the plaintiffs' right to a fair trial had not been violated. In particular, the Brussels Court of Appeal found that the plaintiffs did not justify: (i) in what way the long duration of the procedure had affected their rights of defense; (ii) that public access had been given to the decision through its publication both in the Belgian Official Gazette and on the website of the BCA; and (iii) that the Brussels Court of Appeal's unlimited competence within the meaning of Article IV(79) CEL is of such a nature that the guarantee of impartiality required under Article 6 ECHR was ensured.

On the merits, the Brussels Court of Appeal held that the plaintiffs did not breach Article 101(1) TFEU nor Article 2 APEC because the practices did not take place "on" the market, and therefore could not give rise to competition law infringements. The Brussels Court of Appeal first stated that the plaintiff's participation in the activities of standard-setting organizations was essential to ensure balanced standardization processes, and underlined that the plaintiffs had no decision-making power in the relevant bodies and procedures. It further found that the practices had taken place in the context of certification and normalization processes complying with European transparency and non-discrimination requirements. Hence, contrary to the Competition Council, the Brussels Court of Appeal concluded that the practices had not gone beyond the limits of permissible lobbying activities, described in the Commission's 2006 Green Paper[8] as "activities carried out with the objective of influencing the policy formulation and decision-making processes," that should *a priori* be considered as "outside-market" activities. The Brussels Court of Appeal ruled that the plaintiffs could not have restricted nor distorted

[7] Brussels Court of Appeal, judgment of June 30, 2015, Cases 2013/MR/11, 12,13, 14, and 15.

[8] Green Paper on the European Transparency Initiative, COM(2006) 194 final of May 3, 2006.

competition on the relevant market, and annulled the BCA's decision in its entirety.

Mergers and Acquisitions

BCA Imposes Fine on Nethys for Noncompliance with Remedies

On June 13, 2016, in accordance with Article IV(48)1 CEL, the College fined Nethys SA ("Nethys," previously TECTEO Services GROUP) €63,296 for noncompliance with previous merger commitments.[9] Nethys is primarily active in the energy and telecommunication sector.

On March 26, 2014, the BCA had conditionally approved the acquisition by Nethys of Editions de l'Avenir, primarily active in the press sector, and it advertising branch, l'Avenir Advertising.[10] Remedies were imposed to address the BCA's concern that Nethys would access information on the advertising campaigns of its competitors.

The Auditorate found that Nethys did not respect the confidentiality obligations included in the commitments. In particular, Nethys did not provide the BCA in due time with a list of employees responsible for the publication of advertisements in Editions de l'Avenir's publications and with the non-disclosure agreements entered into by the latter. The Auditorate also questioned whether Nethys had respected its commitment not to advance the deadline for the submission of promotional materials to be published in Editions de l'Avenir. The Auditorate pointed out that compliance with this commitment could not be inferred from the sole fact that third parties had not complained,. Also, Nethys did not send its annual independent third-party audit report on time—it was five months late.

In determining the fine, the College took into account two attenuating circumstances: (i) the lack of any restrictive effect on competition; and (ii) the immediate recognition by Nethys of its failure to comply with its commitments.

9 BCA, decision No. ABC-2016-I/O-18 of June 13, 2016, Case CONC-I/O-15/0025.

10 BCA, decision No. ABC-2014-C/C-03 of March 26, 2014, Case CONC-I/O-15/0025.

FINLAND

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

Horizontal Agreements

Courts Rule on Time-Barring and Causality in Antitrust Damages Cases

Finnish courts have recently issued judgments in two major antitrust damages cases. First, on March 31, 2016, the Court of Appeal affirmed the District Court's decision to dismiss a competitor's €35 million damages claim against five defendants in the car spare parts cartel case.[11] Three months later, on June 22, the District Court dismissed the Finnish government's €159 million damages claim against three pulp and paper companies in the timber cartel case.[12]

The car spare parts cartel case is a follow-on action where Atoy Oy ("Atoy") claimed €35 million in damages for loss of profit and opportunity. The case follows a 2012 SAC decision. The SAC found the five defendants to have exchanged information concerning their future market behavior following the announcement of a new cooperation agreement between Atoy and a car spare parts retail chain. The information exchange consisted of one meeting. Atoy claimed the information exchange resulted in the other wholesalers boycotting Atoy's new retail chain partner, causing Atoy's business plans to fail.

The Court of Appeal ruled on the evidential value of the SAC’s infringement decision. The Court of Appeal concluded that a prior administrative decision is not formally binding in subsequent damages proceedings, but the evidential value of such a decision can be so significant as to be binding in practice, as it was in this case. The Court of Appeal thus took the SAC infringement decision as the basis of the damages judgment. However, the claimant was still required to prove a causal link to its loss.

The Court of Appeal ruled that Atoy had failed to prove a causal link between its loss and the defendants' anticompetitive conduct. The Court of Appeal found that the failure of Atoy's business plan was caused by other reasons, such as Atoy's own lack of preparation.

Moreover, the Court of Appeal found that some of Atoy's claims were time-barred. The Court of Appeal applied the Supreme Court precedent KKO 2016:11 issued earlier this year. The precedent clarifies when a limitation period that is based on the claimant's knowledge of the harm begins to run. Atoy was found to have known about some of its alleged losses very soon after the infringement, and had waited too long to claim damages. Consequently, the appeal was dismissed.

Limitation periods and the evidential value of a prior infringement decision were also part of the timber cartel judgment, in which the District Court rejected the government’s Forest Administration's claim for damages. The Forest Administration, as a seller of timber, claimed to have suffered loss due to underpricing caused by the defendants' timber purchase cartel in 1997–2004.

The District Court also applied the aforementioned Supreme Court precedent to limitation periods, and found the claims based on some of the earliest timber sales agreements to be time-barred. The limitation period had begun to run when the FCCA issued its proposal that the Market Court fine the defendants. The fining proposal was found to have contained sufficient information concerning the defendants' anticompetitive behavior for the claimant to assess whether it had suffered loss. Sales agreements that were entered into after October 1, 1998 were not time-barred. On October 1, 1998, a specific antitrust damages provision with its own statute of limitations entered into force. Sales agreements that were entered into before October 1, 1998, however, were assessed under the general Limitations Act, which contains different limitation periods and were found to be time-barred.

[11] Helsinki Court of Appeal, judgment 533, March 31, 2016.

[12] Helsinki District Court, judgment 16/29441, June 22, 2016.

As regards the evidential value of a prior infringement decision, the District Court adopted a different interpretation compared to the Court of Appeal's reasoning in the car spare parts cartel judgment. The District Court held that a prior infringement decision had a binding effect concerning the existence of an infringement and the parties responsible. The binding effect of the infringement decision did not, however, extend to the leniency recipient, because it had not been party to the infringement proceedings. However, the evidential value of the infringement decision was sufficient to prove the infringement with regard to the immunity recipient as well.

For the parts of the claim that were not time-barred, the District Court dismissed the claim because the Forest Administration was not able to prove that it had received a lower price for its timber sales. The District Court's ruling was to a large extent based on evidence concerning trading practices as well as a large amount of economic expert evidence.

These latest antitrust damages judgments show that establishing sufficient proof of harm and a causal connection is not a trivial task despite the existence of a prior infringement decision. The burden of proving causality between the anticompetitive conduct and harm rest upon the claimant. It is sufficient for a defendant to offer a plausible alternative explanation. Given the typically complex nature of antitrust damages matters and the multiple factors affecting markets, the standard of proof required by courts in the various Member States will be of crucial importance for the future of antitrust damages actions.

It will be interesting to see if the implementation of the Antitrust Damages Directive,[13] with its rebuttable presumption of harm in cartel cases, will affect the established threshold of required proof. Even after the implementation of the directive, these judgments may still have value as they could offer guidance on what is required to rebut the presumption of harm.

Mergers and Acquisitions

FCCA Approves Unusual Obligations in Food Retail Merger

On April 11, 2016, the FCCA approved the acquisition by Kesko Food Ltd ("Kesko") of Suomen Lähikauppa Oy ("Suomen Lähikauppa").[14] Both undertakings operate nationwide in the Finnish food retail industry. The Finnish food retail sector is highly concentrated as there are only two major actors in the market (Kesko and Suomen Osuuskauppojen Keskuskunta), which have a combined market share of up to 80%.

The parties claimed that Suomen Lähikauppa would have exited the market regardless of the acquisition due to its financial situation (“failing firm” defense), despite the fact that Suomen Lähikauppa was owned by a private equity investor. Additionally, no other party was interested in purchasing Suomen Lähikauppa.

The FCCA performed an extensive econometric analysis regarding the effects on competition, which resulted in the identification of 60 local markets in which the merger was likely to have a negative impact on competition. Kesko was, therefore, obligated to sell a store in all of these 60 areas. However, there were no measures stipulated in the event Kesko failed to sell the stores, so the merger would still be complete even if no suitable buyers were found. In particular, no forced auction phase was included in the selling procedure, which deviates from normal practice.

Furthermore, the FCCA was concerned that the acquisition may have an effect on competition in the wholesale sector, as Suomen Lähikauppa and Kesko were using different suppliers. The FCCA ordered Kesko to make its purchases from the same supplier that Suomen Lähikauppa was using prior to the acquisition. Transfers of purchases were to be done only in a gradual manner. The FCCA reasoned that

[13] Directive 2014/104/EU of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ 2014 L 349/1 (“Antitrust Damages Directive”).

[14] Finnish Competition and Consumer Authority, case KKV/1575/14.00.10/2015, April 11, 2016.

this would allow the supplier to adjust its business in a controlled manner.

Policy and Procedure

No Further Food Sector Exceptions Recommended in the Finnish Competition Act

In May 2016, a committee set by the Ministry of Economic Affairs and Employment published its interim report regarding the reform of the Finnish Competition Act (948/2011).[15] This is the first part of the two-fold assignment the committee was given in August 2015.

This is part of a government program aimed at improving the profitability of farming within the next four years. One of the actions taken to implement this goal was to review the Competition Act and to "take necessary action within the bounds of EU competition law."[16] In practice, the government seeks to use competition law to restrict the market power of other actors in the food production and distribution chain to the benefit of farmers.

Agricultural production already falls outside the Finnish Competition Act's scope of application, and a lower threshold for dominance has been prescribed for grocery retail. The main finding of the committee is that no more exceptions for the food sector should be implemented in the Finnish Competition Act.

Implementation of the Antitrust Damages Directive Moves to Parliament

On May 19, 2016, Finland became the first EU Member State to submit a legislative proposal to the national parliament to implement the Antitrust Damage Directive.[17] The proposal for a new Antitrust Damages Act contains provisions on a presumption of harm concerning cartels, the burden of proof concerning the passing-on of overcharges, rules on joint and several liability and liability for recovery regarding leniency recipients, as well as on the evidential value of prior infringement decisions, interest, presentation of evidence, limitation periods, and the effects of consensual dispute resolution.

The proposal envisages the provisions of the Antitrust Damages Directive to be implemented as they stand, albeit with certain specific determinations. First, the amount of interest shall be determined based on the European Central Bank ("ECB") reference rate from the date when the harm occurred until the obligation to pay interest begins. Therefore, the amount of interest for that period can be relatively low as long as the ECB's interest rates are near zero. Second, if there are multiple infringers, a claimant must bring an action against all of them to maintain joint and several liability, even if the claimant is primarily seeking damages from just one infringer.

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[15] Ministry of Economic Affairs and Employment's Report Series 20/2016, May 2, 2016.

[16] Government Program of Prime Minister Juha Sipilä, May 29, 2015, p. 25.

[17] Government Bill 83/2016.

FRANCE

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

Abuse

The FCA Imposes Interim Measures on Incumbent Natural Gas Supplier Engie Urging It to Stop Offers that Could Qualify as Predatory Prices

On May 2, 2016, the FCA ordered Engie to raise its natural gas prices for companies which, in some cases, appeared to be at a cost below real costs and were harming competitors.[18] This investigation followed a complaint by Direct Energie, arguing that Engie's pricing practices were anticompetitive, and requesting the order of interim measures.

Prior to the deregulation of the French gas supply sector, a sole provider, Engie, provided the gas supply in all the French territories. Presently, customers are free to choose their natural gas provider. France has a dual distribution system. Engie is required to sell gas to small consumers at prices set by the French Energy Regulator. Those prices are calculated based on cost recovery. However, Engie is permitted to sell gas at unregulated prices in competition with alternative suppliers to business customers and residential customers who opt out of the regulated system. Engie is likely dominant on both markets.

Direct Energie, a new entrant and the largest independent energy supplier in France, lodged several complaints with the FCA regarding Engie's commercial practices for customers subject to regulated prices, and argued that Engie's pricing was exclusionary.

[18] French Competition Authority, Decision No. 16-MC-01 of May 2, 2016, on urgent interim measures on Engie, available at: http://www.autoritedelaconcurrence.fr/pdf/avis/16mc01.pdf.

With respect to prices for individuals, the FCA noted that Engie appeared to be selling in the competitive market at a lower rate than its costs, and covered its losses by profits made in the regulated system that Engie monopolizes. Prices for consumers appeared to be below total average costs but above the average variable cost. The FCA therefore refused to impose interim measures for these customers.

With respect to prices for businesses, the FCA noted that Engie had apparently set the prices of its non-residential market offers below its profitability level. It appeared that Engie did not take into account the real costs (such as commercial costs and costs linked to energy certificates) in its prices, at the risk of establishing predatory or exclusionary prices.

The FCA only issues interim measures where a direct link exists between the alleged practices and the situation of the company, and where there is an urgency and serious damage to business interests. The FCA nonetheless imposed interim measures, even though it was unclear as to the actual level at which Engie should set its prices, and although the alleged practices had been ongoing for several years. The FCA notably considered that in a developing market, alternative suppliers that did not inherit the advantages of a former monopoly, as Engie did, are deprived of the development opportunity offered by the deregulation of the gas supply sector. These alternative suppliers cannot exert competitive pressure and risk being progressively pushed out of the market.

The FCA ordered Engie to raise the prices addressed to companies to take into account all the costs that it must bear in the short-term, including commercial costs and costs linked to energy certificates. Those interim measures will apply until the FCA reaches a final decision on the merits. Despite imposing these obligations, the FCA does not provide a method to satisfy its requirement that prices cover actual costs and does not define the actual level above which prices should be set.

The FCA Fines Umicore for Abusing its Dominant Position in the Zinc Sheets and Zinc Products for the Construction Industry Sectors

On June 23, 2016, the FCA fined Umicore France and its Belgian parent company €69 million for having implemented exclusive practices for nine years, while it had a dominant position on the product markets concerned in France.[19]

Following a lengthy investigation, the FCA found that Umicore had abused its dominant position on the French markets for coated zinc cladding and rainwater zinc products by implementing a contractual scheme designed to induce distributors to exclusively sell its products. The FCA set aside two other complaints that had been notified to Umicore, finding it unnecessary to assess the exclusivity practices under Article 101 of the Treaty on the Functioning of the European Union ("TFEU"), and considering that the restriction of parallel exports was not established.

In examining Umicore's commercial policy under Article 102 TFEU, the FCA relied on the well-established European case law relating to exclusive practices, noting that, in the absence of any explicit exclusivity clause, the FCA has to assess whether the contractual provisions at stake, taken together against their legal and economic background, can establish *de facto* exclusivity prone to restrict competition in the market.

In its analysis of the provisions contained in the 1999 and 2003 standard contracts entered into by Umicore and its distributors in France, the FCA found: (i) the promotion clause had been designed and interpreted so as to oblige distributors to sell Umicore's products only, to the exclusion of competitors' products; (ii) the rebate scheme, which included quantitative rebates based on sales achieved over the preceding year or trimester, aimed at inciting distributors to purchase increasing volumes of Umicore's products; and (iii) the minimal tonnage clause (replaced in 2003 by the obligation to provide a detailed sales forecast) together with the stock clause (which required distributors to keep a minimal stock of Umicore's products) had enabled Umicore to verify that distributors supplied only its products. Additionally, the FCA found that Umicore had retaliated against distributors that did not supply its products exclusively by suppressing rebates and excluding them from its distribution network.

To establish Umicore's dominant position, the FCA first carried out a lengthy market analysis, noting that the previous merger decisions issued by the European Commission ("Commission"), FCA, and *Bundeskartellamt* had not precisely defined the relevant markets. In particular, the FCA applied the SSNIP test and observed that the 2006 increase in the price of zinc had not led to a decrease in demand for zinc in favor of other materials (*e.g.*, aluminum, lead, copper, or stainless steel). It concluded that zinc was not substitutable with other materials and therefore that coated zinc cladding and rainwater zinc products constituted two separate markets. The FCA further considered that these product markets were national in scope due to the: (i) product specificities on the French market; and (ii) entry barriers into the French markets related to access to architects prescribing zinc products and to the distribution network.

Based on these market definitions, the FCA found that, over the infringement period, Umicore had constantly held a 70% market share in the market for coated zinc cladding and a market share exceeding 53% in the market for rainwater zinc products. The FCA noted further indications of Umicore's dominant position, such as Umicore's historical position in the French zinc markets and the distributors' weak negotiating power.

The FCA based its fine on Umicore's average yearly turnover between 1999 and 2007, as the turnover achieved during the infringement period was significantly higher than usual due to an increase of

[19] French Competition Authority, Decision No. 16-D-14 of June 23, 2016 regarding practices in the sector of zinc sheets and zinc products for the construction industry, available at: http://www.autoritedelaconcurrence.fr/pdf/avis/16d14.pdf.

the zinc price in 2006. The FCA set the basic amount at 10% of this average turnover.

Mergers and Acquisitions

The FCA Fines Altice/Numericable for Failure to Comply with Commitments in Acquisition of SFR

On April 19, 2016, the FCA fined Altice/Numericable €15 million for disregarding divestiture commitments taken in the course of its acquisition of SFR.[20]

In October 2014, the FCA had cleared Altice/Numericable's acquisition of exclusive control over SFR, subject to conditions. Altice/Numericable notably committed to divest its OMT mobile telephony activities in La Réunion and Mayotte.

Three operators exist on these markets: OMT (Altice/Numericable), SFR, and Orange. Absent such divestiture, only two competitors would have remained in the markets, *i.e.*, OMT/SFR and Orange. Furthermore, the group's market share would have amounted to 66% and 90% in those territories respectively. These two elements raised particular concerns as the FCA considered OMT to be a "maverick" competitor.

The divestiture commitments required the parties to preserve the viability, market value, competitiveness, business strategy of OMT. A clear separation between OMT and SFR also was to be respected until complete divestiture came into effect.

In its decision, the FCA found Altice/Numericable guilty of breaching these commitments by depriving them of their effectiveness. Altice/Numericable was accused of willfully increasing the prices of its main offers, between 17% to 60%, while granting customers the possibility to cancel their contracts early. According to the FCA, such a decision is "extremely rare" on the French mobile telephony market.

This was additionally suspect as OMT's strategy so far had been to challenge its competitor's prices in order to gain market shares. Sudden price increases therefore appeared to be a complete reversal of its positioning. The FCA construed this behavior as an attempt to diminish OMT's competitiveness. The fact that price increases should have applied to the very offers that were the subject of the FCA's concerns constituted further evidence of their anticompetitive purpose.

The FCA also considered the special role played by these offers. The most important price increases were inflicted on low cost offers. In La Réunion and Mayotte, where average incomes are lower than in metropolitan France, low cost offers have a social value. With access to the internet and telephone being a fundamental service, Altice's behavior did not only weaken competition in itself through OMT, but also caused direct and meaningful harm to the most vulnerable customers, and potentially impeded economic development in these areas.

The FCA found the harm to be twofold. First, this policy immediately reduced OMT's competitiveness as cancellation rates were three times higher than average after the implementation of new prices and conditions. Second, and more importantly, it damaged OMT's image, making it less competitive, and threatened its future ability to attract customers. As such, the commitment to ensure separation between OMT and SFR had been breached.

Consequently, for failing to preserve the competitiveness and business strategy of OMT, as well as the distinct leadership between SFR and OMT, the FCA fined Altice/Numericable €15 million on the grounds of commitment violation.

The infringement was aggravated by Altice/Numericable's failure to inform the FCA prior to implementing the price increases. This was mitigated by Altice/Numericable's readiness to terminate the increases on being informed of the

[20] French Competition Authority, Decision No. 16-D-07 of April 19, 2016 regarding compliance issues with the commitment taken by Altice Group to divest itself from its Outremer Telecom mobile telephony activities as a condition for clearing its acquisition of SFR, available at: http://www.autoritedelaconcurrence.fr/pdf/avis/16d07.pdf.

opening of proceedings, and by its willingness to offer partial refunds to customers.

The size of the fine, which is notable given the limited geographical scope and duration of the infraction, is expected to have a deterrent effect.

The FCA Refuses to Clear the Way for Exclusive Broadcasting of BeIN Sports' Premium Channels on CanalSat

On June 9, 2016, the FCA rejected Canal Plus's request to review one of the injunctions that were imposed to clear a previous merger, thus preventing Canal Plus from entering an exclusive distribution agreement with its main rival BeIN Sports.[21]

In 2006, Canal Plus acquired a quasi-monopoly in the market for pay-TV by acquiring its main competitor TPS. In 2011, the FCA decided to withdraw clearance of the acquisition of TPS by Canal Plus and Vivendi following Canal Plus's failure to comply with 10 of the commitments conditioning the clearance decision of 2006. After this unprecedented withdrawal, Canal Plus had to re-file a merger notification, which led to an assessment of the merger in the market for pay-TV in France. Subsequently, the FCA decided that Canal Plus had to comply with 33 injunctions aimed at restoring competition in mainly two pay-TV markets, namely the upstream market for the acquisition of broadcasting rights and the downstream market for the distribution of premium channels.

One of the 33 injunctions imposed on Canal Plus and Vivendi for a five-year period prevents Canal Plus from broadcasting premium channels on a non-exclusive basis. Canal Plus however planned to acquire exclusive broadcasting rights for the channels of BeIN Sports, its main competitor on the upstream market for the acquisition of sports broadcasting rights and one of the most successful rival pay-TV channels in France, to overcome its alleged financial difficulties.

[21] French Competition Authority, June 9, 2016, Pay-TV opinion press release, available at: http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=630&id_article=2785.

The clearance decision allowed Canal Plus to request an early review of the injunctions should the competitive landscape change enough to make them no longer relevant. Canal Plus took advantage of this opportunity to request clearance to enter into an exclusive broadcasting distribution agreement with premium channels specialized in sports.

The FCA consulted several operators active in the concerned markets and the French Broadcasting Regulator, which issued an opinion in April 2016. This regulator, whose opinion was not binding, was not favorable to such a modification. In line with the sectorial regulator, the FCA rejected Canal Plus's request.

The FCA considered that the post-merger situation that justified the injunction not to broadcast premium channels on an exclusive basis had not been sufficiently modified in such a way as to increase competition in pay-TV markets. Moreover, the draft agreement that Canal Plus submitted to the FCA risked annihilating the small beneficial effects that resulted from the injunctions. An agreement with BeIN Sports also risked increasing the incentives of collusion with Canal Plus in future calls for tenders concerning sports broadcasting rights.

In the upstream market of sports rights acquisitions, which is characterized by a duopoly structure between Canal Plus and BeIN Sports, Canal Plus's request to create a vertical relationship with BeIN Sports on an exclusive basis would not only reduce competitive pressure but also encourage collusion. In the downstream market of distribution of premium channels, Canal Plus maintains a dominant position with a market share between 70–80%. If Canal Plus acquired exclusive broadcasting rights on BeIn Sports' premium content, the attractiveness of its competitors' offer would be reduced.

The FCA also wanted to maintain the consistency and the efficiency of the remedies imposed in 2012. One injunction, namely the injunction that prohibits exclusive distribution rights on premium channels, could not be isolated from the other injunctions that were designed not only to preserve competition on the

editing and broadcasting rights markets of premium channels but also to enable consumers to have access to differentiated offers in terms of prices and contents in the downstream market. It concluded that the sole lifting of a specific injunction risks jeopardizing the beneficial effects that result from the 2012 decision.

Finally, the FCA announced that it would define a new set of injunctions for the 2017–2022 period, in accordance with the 2012 clearance decision, as existing remedies were not sufficient to avoid the dominance of Canal Plus on pay-TV markets.

Policy and Procedure

The FCA and the German Competition Authority Publish First Joint Study on the Role of Data in Competition Law

On May 10, 2016, the FCA and the German Competition Authority (the "GCA") published a joint paper on Big Data and identified several types of data-collection practices that could raise antitrust concerns by facilitating anticompetitive agreements and abuses of dominance.[22]

The FCA and GCA issued a joint study for the first time on the relationship between Big Data and competition law, in the context of an increasing focus on data collection companies. Big Data is often characterized by large amounts of different types of data, produced at a high-speed from multiple sources, the handling of which requires more powerful databases. For example, such data may cover information on geographic location, customers' behavior or preferences, as well as the turnover achieved by a company with certain business transactions.

According to this joint paper, the collection of a large amount of data may contribute to market power and facilitate market transparency, which could raise antitrust issues involving anticompetitive agreements and abuses of dominance.

First, the collection and exploitation of data may raise barriers to entry and create a dominant position in sectors where the availability of data is crucial to offering better services for a large customer base. Smaller companies or new entrants tend to collect less data on their current and prospective customers than larger companies, while their ability to purchase third party data from another company is limited. This is particularly the case for search engines or social networking companies where only a few operators already hold very high user shares.

The paper therefore argues that the ease of access to data by competitors constitutes a key parameter of competition. Competition authorities have considered that an increased access to data, in theory leading to a dominant position, did not necessarily raise competition concerns in practice when substantial amounts of data remained available to competitors. In particular, the use by customers of multiple websites offering similar services contributes to a greater availability of data for all competitors. However, the absence of competition concerns will also depend on whether the different types of data are substitutable and, absent substitutability, whether each category of data is available for collection.

The quality of the data collected may also be relevant to determine the existence of a dominant position based on data collection. The more detailed and accurate the data, the higher value that can be attributed to them.

Second, data collection may also reinforce market transparency, which has effects in the market. As a result of enhanced data collection, consumers are able to make more informed choices resulting in greater transparency and competition. Market transparency may however also facilitate anticompetitive agreements and price-fixing by making the detection of a deviation from an agreement easier. The availability of data contributes to collusive behavior if a company is able to analyze and anticipate its competitors' responses to current and future prices

[22] French Competition Authority and Bundeskartellamt, Joint study on Competition Law and Data, May 10, 2015, available at: http://www.autoritedelaconcurrence.fr/doc/reportcompetitionlawanddatafinal.pdf.

thanks to data drawn from past experiences of price variations. Further, the use of similar pricing algorithms, for instance if they are provided by the same company, may reduce uncertainty between competitors.

Third, several types of data-related conduct may raise competition concerns, such as exclusionary conducts and price discrimination. Companies may engage in exclusionary conduct by refusing access to data or by providing discriminatory access to strategic information.

Data collection may also facilitate price discrimination tied to customer profiles. From an economic standpoint, price discrimination may result in better social welfare by enabling consumers to afford a product at a lower price. On the other hand, there is also a risk that setting prices according to consumers' willingness to pay leads to certain customer groups paying higher prices for their purchases than before.

Finally, violation of privacy rules may have an effect on competition. Although protection of personal data is out of the scope of competition law, the paper argues that privacy policies of a dominant data collection company could be relevant for competition purposes. A violation of data privacy regulations may constitute further evidence of an abuse of dominance.

GERMANY

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

Horizontal Agreements

FCJ Confirms Validity of Trademark Delimitation Agreement Under Competition Law (Pelican/Pelikan)

Following its *Jette Joop* judgment,[23] on December 15, 2015, the FCJ further clarified the rules for the assessment of trademark delimitation agreements under competition law. The FCJ held that a trademark delimitation agreement between Pelikan, a German producer of stationary, and Pelican Products, Inc. ("Pelican"), an American producer of special safety and portable lighting systems and protective cases for various uses, was compatible with German and European competition law.[24]

Pelikan had registered the trademark "Pelikan" for various products, including "lighting devices and utensils" as well as "special containers." Following a series of injunction reliefs against Pelican, in 1994 the Parties entered into a delimitation agreement granting Pelican the exclusive use of the trademark "Peli" in exchange for refraining from the use or registration of "Pelican" and/or "Pelikan" or similar confusable names as a trademark.

Pelican later challenged the validity of this delimitation agreement alleging an infringement of competition law. The Higher Regional Court of Hamburg[25] declared the agreement partly void insofar as it went beyond the commitment not to use or not to legally protect the relevant names for lighting systems and protective cases. The FCJ, however, held that the delimitation agreement did not infringe competition law.

The FCJ clarified at the outset the obvious, namely that for the question of whether a delimitation agreement infringes competition law, one has to apply competition law standards. In particular, the assessment of actual or potential competition between the parties has to be based on the demand-side oriented market concept rather than the scope of protection for the relevant trademarks in question. The FCJ concluded—as opposed to the Higher Regional Court's judgment—that the mere fact of entering into a delimitation agreement does not allow the conclusion that Pelikan and Pelican were potential competitors. There were no concrete indications that one of the parties would enter any of the product markets where the other party was already active. Thus, there was no actual or potential competition between those two parties that could have been affected by the delimitation agreement.

The FCJ further held that there was no appreciable restriction of competition regarding Pelican's position vis-à-vis its competitors as there was no evidence that Pelican suffered economic disadvantages from switching to the similar brand name "Peli."

The FCJ therefore views delimitation agreements favorably as long as they ensure the parties' rights granted under trademark law and do not include clauses that have as their object or effect the restriction of competition, in particular by way of market segmentation.

[23] *See* FCJ judgment of December 7, 2010, case KZR 71/08.

[24] *See* FCJ judgment of December 15, 2015, case KZR 92/13.

[25] *See* Higher Regional Court of Hamburg judgment of June 20, 2013, case 3 U 64/11.

Abuse

Deutsche Post AG's Abuse Of Dominance Upheld by DCA with Further Investigations by Network Regulator

On April 6, 2016, the DCA upheld the FCO's decision[26] that rebates granted by Deutsche Post AG ("Deutsche Post") to several large customers on end-to-end postal services infringe competition law.[27]

End-to-end mail delivery is divided into two stages: (i) the upstream market for "preliminary services," where the letters are collected at the customers' offices, sorted by area, and delivered to the respective collecting centers in the area; and (ii) the downstream market for "partial services," which covers the necessary steps for the post to be delivered from the collecting centers to the final recipients. Deutsche Post is the largest provider of mail delivery services in Germany and is the only company with a nationwide mail delivery network. Regional competitors therefore depend on Deutsche Post's partial services to deliver letters to recipients outside of their respective region.

The DCA upheld that Deutsche Post had a dominant position in the downstream market for partial services, and the market for end-to-end mail delivery services due to its very high market shares in both national markets.

Deutsche Post had offered four large customers so-called "target prices" for end-to-end delivery, *i.e.*, for the entire service chain, in return for meeting volume targets, displaying adverts on the mail (*i.e.*, printing Deutsche Post's logo on the mail to be delivered), and for providing Deutsche Post with (undefined) "quality data." These prices were lower than the partial services fee Deutsche Post demanded from its competitors who depend on its distribution network.

In line with European case law,[28] the DCA held that this practice, known as margin squeeze, is abusive, as it prevents equally efficient competitors from acquiring new customers by undercutting the incumbent. The DCA also confirmed the FCO's stance that the loyalty rebates offered for delivering a large percentage of one's correspondence via Deutsche Post foreclosed the market and constituted a separate abuse of dominance.

Deutsche Post is further facing investigations by the Federal Network Agency (Bundesnetzagentur), the German regulator for energy, rail, and postal networks. Following the FCO's decision, Deutsche Post abolished its "target prices," but still remunerates large customers in return for printing Deutsche Post's logo on the mail to be delivered. So, while in theory Deutsche Post has implemented the FCO's decision, competitors allege that in practice nothing has changed. As the economic value of this marketing is questionable, the network regulator examines whether this alleged remuneration is in fact a rebate.

FCJ Specified the Requirements of an Objective Justification of an Abuse of Dominance (NetCologne)

On April 12, 2016, the FCJ ruled on the requirements of an objective justification in case of an abuse of dominance by applying dissimilar conditions to equivalent transactions.[29]

NetCologne, a regional cable network operator in the area of Cologne, requested feed-in fees from the public broadcaster ZDF for the transmission of ZDF's programs for the future and for the time between 2008 and 2012, in which ZDF paid feed-in fees to the four largest cable network operators but not to NetCologne. NetCologne argued that ZDF abused its dominant position without an objective justification for the different treatment. While NetCologne's claims were partly successful at first instance, the DCA rejected them on appeal.

Upon appeal, the FJC held that NetCologne's claims might be based on an abuse of dominance. However, due to the lack of factual findings, the FCJ referred the

[26] *See* FCO decision of July 2, 2015, case B9-128/12.

[27] *See* DCA judgment of April 6, 2016, case VI-Kart 9/15 (V).

[28] *See Konkurrensverket v. TeliaSonera Sverige AB* (Case C-52/09) EU:C:2011:83, paragraph 62.

[29] *See* FCJ judgment of April 12, 2016, case KZR 30/14.

case back to the DCA for further investigation, providing the following guidance.

ZDF has a dominant position in the market for feed-in capacities as it does not face competition from public nor non-public broadcasters because network operators are obliged to reserve free capacities for public broadcasters only ("must carry") and there is enough broadband capacity for the remaining public broadcasters.

Further, the FCJ confirmed its findings in two 2015 cases stating that cable network operators are obliged to broadcast public broadcasting programs and that the cable network operators are under no general obligation to pay feed-in fees for this.[30]

In relation to the claim for future feed-in fees by the cable network operator, the FCJ held that both parties perform economically valuable services: NetCologne broadcasts ZDF's program, which increases the number of ZDF's viewers and advertising revenues. In return, ZDF gives NetCologne the possibility to merchandise its program. To determine whether there is an abuse of dominance, and therefore a claim for feed-in fees, the DCA must compare the value of both services in detail.

The claim for feed-in fees between 2008 and 2012 depends also on the question of whether there is an objective justification for the different treatment of NetCologne compared to the four largest cable network operators, to whom ZDF had paid feed-in fees. The FCJ confirmed its ruling that a balanced weighting of all relevant interests is required and stated additional principles: in general, the fulfillment of a service without payment is the exception rather than the rule in commercial transactions. On the other hand, it is not prohibited to seek favorable conditions. Section 20(1) GWB (old version)[31] does not include a most-favored-customer clause (*i.e.*, the obligation to grant the same favorable conditions to all other customers). In fact, even the dominant undertaking is allowed to differentiate in its reaction to all possible market situations. The background and the extent of the different treatment is decisive and has to be considered by the DCA.

FCO Accepts Commitments Proposed by Deutsche Bahn AG and Terminates Proceedings Concerning the Sale of Rail Passenger Tickets

On May 24, 2016, the FCO terminated antitrust proceedings against Deutsche Bahn AG ("DB"), accepting DB's proposed commitments for the sale of passenger tickets and declaring them binding pursuant to Section 32(b) GWB.[32]

The proceedings, initiated in early 2014,[33] concerned DB's practices of selling its own rail passenger tickets as well as those of competitors. While the FCO left the exact market definition open, it concluded that due in particular to their strong position on vertically related markets, DB and its affiliates would hold a dominant position on any conceivable distribution market. According to the FCO's preliminary assessment, several of DB's practices infringe Section 19 GWB and Article 102 TFEU. The commitments DB offered, however, are sufficient to resolve these competition concerns.

Under Section 12 of the General Railway Act, railway undertakings are statutorily required to work together to unify train fares. In the past, DB conditioned its tariff-setting cooperation on the signing of extensive sales cooperation agreements. According to the FCO's preliminary assessment, this practice further served to secure DB's market position regarding the sale of tickets. DB has committed to stop coupling this statutory obligation with the signing of extensive sales cooperation agreements.

Under the cooperation agreements, commission rates were not reciprocal. DB charged its competitors more than it paid itself to use competitors' distribution

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30 *See* FCJ judgments of June 16, 2015, cases KZR 3/14 and KZR 83/13.

31 Corresponds to Section 19(2)(No. 1) GWB and is comparable to Article 102(c) TFEU.

32 *See* FCO decision of May 24, 2016, case B9-136/13.

33 *See* FCO press release of January 30, 2014, available in German and English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2014/30_01_2014_Fahrkartenvertrieb_DB.html.

networks. The FCO found that only DB's market power had made this discrepancy possible. Further, the FCO held that DB acted abusively by requesting, without an objective reason, less commission from its affiliates than from its competitors, which had no alternatives to cooperating with DB. DB now will standardize commissions for distributing local transportation tickets.

Moreover, the FCO found that DB's refusal to grant competitors access to its distribution system for long distance train tickets violated Section 19 GWB and Article 102 TFEU. The FCO deviated from the principle that dominant undertakings do not have to include third party providers in their distribution system, because railway undertakings providing local passenger transportation are obliged to accept long distance tickets. Following DB's commitments, these undertakings will now be able to participate in the sales of these tickets. This additionally benefits travelers who have not been able to buy long-distance rail tickets at stations where DB no longer stops.

Finally, the FCO held that DB had hindered competitors with clauses in its leases with railway station shops prohibiting the sale of competitors' tickets. DB committed to modify these agreements, which will open up new low-cost distribution channels for competitors, who are no longer required to set up their own ticket shops.

FCJ Rules on the Validity of Arbitration Agreements

On June 7, 2016, the FCJ found an arbitration agreement between Claudia Pechstein, a five-time Olympic gold medalist in ice speed skating, and the International Skating Union ("ISU") leading to the exclusive jurisdiction of the Court of Arbitration for Sport ("CAS") in Lausanne to be valid. It thus rejected Pechstein's action for damages brought before a civil court against the ISU following a two-year suspension for doping as inadmissible.[34]

Before the start of the 2009 World Championship in Hamar, Norway, where irregularities in Pechstein's blood were detected, she had signed an application form (requiring, *inter alia*, the athlete's compliance with the ISU's anti-doping rules), which also included the arbitration agreement. In the proceedings before the FCJ, Pechstein claimed that the arbitration agreement was invalid because the ISU had abused its dominant position. Given that the ISU is the sole organizer of international competitions in ice speed skating, Pechstein alleged that she was required to sign the agreement to be admitted to the competition. Further, Pechstein argued that the list of arbitrators of the CAS, from which prospective parties must each select an arbitrator, was not prepared in an impartial manner given that its drawing up was dominated by the sports federations.

The FCJ dismissed Pechstein's case and found her damages action to be inadmissible due to the prevailing arbitration agreement. Although, in the FCJ's view, the ISU is dominant in the market for the organization of international ice speed skating competitions, it did not abuse its dominant position by requiring the athletes to enter into the arbitration agreement. CAS tribunals are independent arbitration tribunals in the sense of the German Code of Civil Procedure. The mere fact that the drawing up of the arbitrators list is dominated by sports federations and Olympic committees does not suffice to assume a structural imbalance between the individual athletes and the sports federations. Rather to the contrary, it must be assumed that with regards to the fight against doping, the athletes' and the sports federations' interests are supposed to be parallel and not opposing. Further, the sports federations' role in drawing up the list is counterbalanced by the CAS's Procedural Rules, which provide for an adequate protection of every individual athlete's rights. In particular, athletes can freely pick one arbitrator out of more than 200 and the CAS's Procedural Rules require any arbitrator to act impartially and neutrally. Moreover, if suspected of bias, any one of the tribunal's members can be challenged by the parties. Finally, to a significant extent, CAS tribunal decisions can be subject to judicial review by the Swiss Federal Supreme Court.

[34] FCJ judgment of June 7, 2016, case KZR 6/15.

Vertical Agreements

Higher Regional Court of Celle Rules on Criterion of Appreciability for Hardcore Restrictions of Competition

On April 7, 2016, the Higher Regional Court of Celle (the "Celle Court") ruled that restrictions of competition by object also require an appreciable effect on competition to constitute a violation of competition law.[35] With its judgment, the Celle Court overturned the first-instance decision of the Regional Court of Hannover (the "Hannover Court").[36]

The defendant, Almased Wellness GmbH ("Almased"), a manufacturer of weight loss products, had agreed with pharmacies at what price they would resell one of Almased's weight loss drinks. Almased had offered a special discount of 30% on the product's purchase price if the pharmacies agreed to present the weight loss drinks in a proper way and not to undercut a price of €15.95 per box. The offer was limited to a single purchase of up to 90 units and available from February 2014 until the end of 2014.

In its first instance judgment, the Hannover Court had upheld the action brought by a German trade association committed to the protection of fair competition and had found that the agreement was an illegal vertical restriction of competition pursuant to Section 1(1) GWB and Article 101(1) TFEU. The Hannover Court had ruled that despite the purchase limit of 90 units per pharmacy, the agreement's effect on competition was appreciable because it targeted all pharmacies in Germany (and hence, a whole distribution channel).

While the Celle Court did not question that an agreement on a minimum resale price constituted an illegal vertical hardcore restriction of competition pursuant to Section 1(1) GWB and Article 101(1) TFEU, it found that these provisions require that the restriction has an appreciable effect on competition. Contrary to the Hannover Court's judgment, this condition is not obsolete when one contract party has a market share of 20% or more on the relevant market nor when the agreement constitutes a conduct that was generally considered as a hardcore restriction of competition.

The Celle Court found that, regardless of the parties' market share, to establish an appreciable effect one needs to assess all relevant factors, namely the market structure, the parties' importance, the purpose of the agreement, and nature of the restriction. The Celle Court held that the existence of a restriction of competition by object (such as the resale price maintenance agreement at hand), does not *per se* lead to an appreciable effect. The Celle Court referred to the FCJ's case law, according to which an agreement on resale prices does not violate Article 101(1) TFEU if it only affects the market for a short period of time without an appreciable effect.[37] Considering the limitation of Almased's offer in terms of time and quantity, the Celle Court found that the agreement did not have an appreciable effect on competition.

FCO Approves Tender Model with "No Single Buyer" Rule for Media Rights of Bundesliga Matches

On April 11, 2016, the FCO approved several commitments made by the German League Association ("Ligaverband") and the German Football League ("DFL") regarding the awarding of media rights for first and second football league games.[38] The new tender model for the 2017–2018 to 2020–2021 seasons includes, *inter alia*, a so-called "no single buyer" rule to strengthen innovative competition, especially from internet-based providers.

In particular, the FCO was concerned that the previous tender model prevented potential competitors from entering the market. Due to agreements with all 36 Bundesliga football clubs, DFL exclusively awards the media rights for all first and second football league games. The media rights are bundled in packages

[35] Higher Regional Court of Celle judgment of April 7, 2016, case 13 U 124/15 (Kart).

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

[37] FCJ judgment of April 8, 2003, case KZR 3/02.

[38] *See* FCO decision of April 11, 2016, case B6-32/15.

covering 30 to 176 matches. In the past, Sky Deutschland GmbH was the only entity to buy the live media rights.

The FCO found that, in general, the sale of all relevant media rights combined through DFL violates German and European competition law as it constitutes a restriction of competition pursuant to Section 1(1) GWB and Article 101(1) TFEU. However, if an anticompetitive agreement benefits customers, it can be exempted under Article 101(3) TFEU and section 2(1) GWB. According to the FCO, the joint coordination and selling of media rights grants high-quality packages that are beneficial for purchasers and consumers. Furthermore, because of the parties' commitments, the new tender model ensures competition. No single purchaser will be able to buy all live media rights.

FCJ Holds Agreed Termination of Contracts on Feed-In Fees for Broadcasting Services Anticompetitive

On April 12, 2016, the FCJ[39] quashed a judgment of the DCA[40] deciding upon terminations of broadcasting contracts between a cable network operator and several public broadcasters. The agreements dealt with the feed-in of broadcasting programs into the network of the operator. After the broadcasters had converted their program signals to digital signals, they discussed their intention to terminate the agreement. Subsequently, each of the broadcasters terminated their agreement on the same date.

The FCJ found that the broadcasters had not abused their dominant position by not entering into a new contract. The network operator had not been able to demonstrate that market conditions were different from those that would have prevailed in the absence of a dominant position. Further, the court did not see abusive behavior in the fact that the broadcasters denied to enter into a contract on similar conditions under which they had previously entered into contracts.

However, the FCJ found that the concerted terminations infringed Section 1 GWB. The fact that broadcasters had previously informed their competitors about the intention to terminate the agreement and to discontinue the payments had led to all broadcasters terminating their contract simultaneously. In line with the ECJ's case law, the FCJ argued that there is a presumption that information exchanged among competitors affect their later market conduct and the broadcasters were not able to provide sufficient evidence to refute this presumption.

While referring the case back to the DCA for procedural grounds, the FCJ indicated that broadcasters that jointly produce programs ("*Gemeinschaftsprogramme*") are not prevented from making a joint decision on whether to pay the feed-in fees. An infringement of competition law is given though, if third parties which do not offer "*Gemeinschafsprogramme*" participate in this decision.

Higher Regional Court of Frankfurt Refers Questions Concerning Legal Aspects of Cosmetics Producer Coty's Selective Distribution System to ECJ

On April 19, 2016, the Higher Regional Court of Frankfurt decided to refer questions concerning specific aspects of selective distributions systems to the ECJ.[41]

Coty had initially filed an action for injunction against a long-standing German distributor to stop it from selling certain Coty products via third-party online sales platform amazon.de. The Frankfurt Regional Court rejected Coty's action, which was primarily based on clauses in the selective distribution agreement between Coty and its distributor, because it

[39] *See* FCJ, decision of April 12, 2016, case KZR 31/14. This decision essentially deals with similar topics like the FCJ's decisions in cases KZR 3/14 and KZR 83/13 of June 16, 2015, where the court referred the cases back to the DCA to assess whether the terminations were void, *see* NCR Q3 2015, p. 7.

[40] *See* DCA, decision of May 21, 2014, case –VI-U (Kart) 16/13.

[41] Higher Regional Court of Frankfurt order of April 19, 2016, case 11U 96/14 (Kart).

considered the contractual obligations prohibiting the distributor from selling via amazon.de incompatible with Section 1 GWB and Article 101 TFEU. The Frankfurt Regional Court explicitly stated that a manufacturer's objective to maintain a prestigious product image may not justify the introduction of a selective distribution system.

The questions that the Higher Regional Court of Frankfurt now referred to the ECJ concern specifically this aspect and the legal interpretation of the Commission's Guidelines on Vertical Restraints. In particular, the Higher Regional Court asked whether selective distribution systems concerning luxury products, which have as their prime objective the maintenance of the products' prestigious image, may be compatible with Article 101 TFEU at all and whether it is legally possible to ban all sales via third-party online sales platforms as a part of such a selective distribution system.

Interestingly, the Higher Regional Court of Frankfurt recently found a clause in backpack manufacturer Deuter's selective distribution system that prohibited sales via third-party online platforms, such as amazon.de, to be lawful and did not consider it necessary to acquire a preliminary ruling from the ECJ.

FCO Fines Further Retailers for Resale Price Maintenance in Beer Sector

On May 9, 2016, the FCO announced that it had imposed further fines totaling €90.5 million on retailers in the grocery sector.[42] After having imposed substantial fines on manufacturers and retailers in several segments of the grocery sector in December 2014 and June 2015,[43] the FCO's latest fining decisions concerned the beer segment. The brewery Anheuser Busch InBev Germany Holding GmbH ("AB InBev") and several retailers had agreed on resale prices for beer between 2006 and 2009. While the FCO's leniency notice did not apply as it only covers horizontal agreements, AB InBev and REWE–Zentral-Aktiengesellschaft ("Rewe") received full immunity from fines because they fully cooperated with the FCO. All other companies involved, namely METRO AG ("Metro"), NETTO Marken-Discount AG & Co. KG ("Netto"), Kaufland Warenhandel GmbH & Co. KG ("Kaufland"), and several EDEKA retailers, settled the case with the FCO.

The FCO found that the retailers committed to AB InBev to maintain a certain minimum resale price level, *i.e.*, to implement AB InBev's "desired prices" (these prices were slightly below AB InBev's recommended resale prices). In turn, AB InBev agreed to coordinate competitors' resale prices by means of so-called "price-care"-measures to avoid a "price war" amongst retailers. First, it coordinated simultaneous resale price increases by constantly informing retailers of the exact date and amount of their competitors' price adjustments. Second, AB InBev granted financial incentives for implementing the "desired prices", such as reimbursements, rebates, or delayed effectiveness of purchase price increases. The agreement concerned both regular in-shop prices and promotional prices of AB InBev's premium beer brands Beck's, Franziskaner, and Hasseröder.

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

With these latest fining decisions, the FCO largely concluded its complex investigation into the grocery sector.

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42 FCO, press release of May 9, 2016, available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/09_05_2016_Bier.html;jsessionid=7EC8989E6C343A814E8FFC82DDDA17BF.1_cid371?nn=3591568; case summary, only available in German at: http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2016/B10-20-15.pdf?__blob=publicationFile&v=2.

43 *See* National Competition Report, April–June 2015, pp. 12–13.

Merger and Acquisitions

FCO Clears Planned Merger of Semiconductor Equipment Producers Lam Research Corporation and KLA-Tencor Corporation

On May 5, 2016, the FCO announced the clearance[44] of the planned merger between Lam Research Corporation ("Lam") and KLA-Tencor Corporation ("KLA"). Both parties have a strong market position in the production of equipment for the manufacturing of semiconductors ("chips"). With this decision, the FCO has approved a second merger in this particular industry following the 2014 transaction between the then leading producer of chip manufacture equipment, Applied Materials, and the then fourth strongest company in the sector, Tokyo Electron.[45]

The FCO found that the concentration does not create a significant impediment to effective competition.

In particular, the FCO ruled out the possibility of horizontal effects in the markets concerned. Because Lam and KLA produce equipment that is required in different stages of the chip manufacturing process, each constituting a separate product market, there is no direct competition between the merging entities. Therefore, given the lack of a significant market share addition, the transaction would not—despite the companies' strong positions on the overall chips' equipment market—create or strengthen a dominant position.

The FCO further took into account that the parties customers exert significant buyer-power and that strong competitors such as Applied Materials exist. Because of this, the FCO found no possible conglomerate effects.

In addition, due to the sector's dynamic and constantly developing character, the FCO did not expect the concentration to have an impeding effect on innovation on the affected markets.

Policy and Procedure

District Court of Bonn Rules on the Scope of Access to Files by Potential Cartel Victims

On November 6, 2014, May 15, 2015, and January 8, 2016, the District Court of Bonn rendered a series of decisions by which it clarified the standards applicable to requests for access to the FCO's files by potential cartel victims.[46]

In the first case, the District Court of Bonn confirmed the FCO's decision to grant potential cartel victims access to its fining decision (in which business secrets and personal data need to be redacted), but ruled against access to any other documents in the file. Given that, according to the FCO's findings, the applicants requesting access were customers of cartel-related goods and the cartel presumably led to incremental earnings for the cartel participants, they qualified as potential victims. In the Court's view, the potential victims' intention to launch a follow-on damages action constitutes a legitimate interest, which outweighs the cartel participants' interests to avoid redress. As regards the scope of the access to the fining decision, the Court reiterated that even a leniency applicant can only claim the redaction of: (i) the names and functions of individuals involved in the cartel infringement; (ii) information regarding the leniency statement, settlement talks, and related documents contained in the list of proof; (iii) data related to the annual turnover of the cartel participant; (iv) information regarding the economic situation of the cartel participant; and (v) information in relation to other cartel participants which were not addressees of the fining decision for whatever reason. Granting access to the remainder of the fining decision does not conflict with the presumption of innocence given that

[44] *See* FCO press release of May 2, 2016, available in English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/02_05_2016_Halbleiter.html?nn=3599398.

[45] *See* FCO decision of November 12, 2014, case B5-138/13.

[46] District Court of Bonn, decision of November 6, 2014, case 52 Gs 127/14, available only in German; District Court of Bonn, decision of May 15, 2015, case 52 Gs 112/14, available only in German; District Court of Bonn, decision of January 8, 2016, case 52 OWi 126/15 [b], available only in German.

adequate grounds for suspicion are not required for the bringing of a civil damages action.

In the second case, the District Court of Bonn denied access to files beyond the fining decision to which access was granted within the limits described above. For its reasoning, the Court referred to the CJEU's *EnBW* decision,[47] according to which there is no need for every document relating to a cartel proceeding to be disclosed to a potential claimant on the ground that that party is intending to bring an action for damages. It is highly unlikely that the action for damages will need to be based on all the evidence in the files. In the case at hand, the applicant for access failed in establishing that it was necessary for it to be granted access to further documents in the FCO's files.

In the third case, the District Court of Bonn again confirmed the FCO's initial decision to grant access to the fining decision. However, unlike in the first case, the Court held that such access should not exclude the names and functions of individuals involved in the cartel infringement. A potential cartel victim might bring damages actions not only against the undertakings which participated in the cartel, but also against individuals which were personally involved in the misconduct. Moreover, the Court held that the potential cartel victims also have a legitimate interest to get access to minutes of hearings conducted by the FCO. While this might lead to a disclosure of the interviewees' private addresses, such disclosure is required in order to enable the potential victims to name these individuals as witnesses in civil proceedings.

FCJ Judgment on Determination of Market Shares

On January 26, 2016, the FCJ[48] confirmed a judgment of the DCA[49] concerning the criteria applied to determine the market shares pursuant to Article 3 of the EU's Vertical Restraints Block Exemption Regulation ("BER").[50] In response to alleged antitrust infringements, Merck KGaA ("Merck"), a chemicals producer, argued that the relevant agreements were exempted under the BER, and that Merck's market share was below 30%.

The FCJ found that the market share is determined by the turnover generated with distributors only, not including sales that are made directly to end consumers. Based on this finding, Merck's market share exceeded 30%.

The FCJ strictly distinguished between the distributor market and end consumer market. The court found that products that are only sold in direct supply are not available to distributors and therefore are not substitutable from a demand-side perspective. Furthermore, the FCJ did not find any potential competition, arguing that it would be unlikely that other producers shift their supply model from end consumers to distributors. The FCJ also rejected Merck's argumentation that sales to integrated distributors should have been taken into account in calculating its market share.

FCO Publishes New Information Leaflet on Settlement Procedure

In February 2016, the FCO published a new information leaflet on the settlement procedure applicable in all proceedings (including horizontal and vertical cartel cases) in which the FCO intends to impose a fine.[51] The information leaflet provides a summary of the following points.

A settlement is a negotiated agreement between the FCO and an investigated party to terminate proceedings. It usually significantly shortens the

[47] *Commission v. EnBW* (Case C-365/12 P) ECLI:EU:C:2014:112, paras. 106-107.

[48] *See* FCJ judgment of January 26, 2016, case – KVR 11/15.

[49] *See* DCA judgment of November 13, 2013, case VI – Kart 5/09 (v).

[50] Commission Regulation No. 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ 2010 L 102/1.

[51] FCO information leaflet, available in German at: http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Merkbl%C3%A4tter/Merkblatt-Settlement.pdf. The only changes to the previous version from December 2013 are clarifications regarding access to file.

proceedings. A settlement is not conditional upon all the persons or companies concerned agreeing to a settlement, *i.e.*, so-called hybrid settlements are possible.

A settlement agreement requires a statement of confession by the person or company concerned. The confession must not only include a description of the offence but also information on the circumstances that are relevant for setting the fine. The confession must include a so-called settlement declaration in which the person or company acknowledges the facts of the infringement and accepts the fine up to the amount announced. A waiver of the right to appeal is not part of a settlement declaration.

A settlement declaration is considered a mitigating circumstance, which results in a fine reduction. In the case of horizontal cartels, the fine can be reduced by a maximum of 10%. A settlement can be achieved irrespective of whether an application for leniency has been filed. If a party benefits from a leniency discount, the settlement reduction is deducted from the fine that has already been reduced following the leniency application.

There are no fixed rules regarding the timeframe for initiating a settlement procedure. Settlement discussions can be proposed by the FCO or the parties concerned at any time, *i.e.*, before or after a statement of objections has been issued. If there is a general willingness to settle, the FCO informs the respective party orally or in writing of the facts of the infringement and generally grants at least partial access to file. Full access to file cannot be granted if investigations against other parties are still on-going. The FCO will propose a settlement declaration and state the maximum fine that will be imposed in case of settlement. The actual settlement declaration can be submitted orally or in writing.

After a settlement has been reached the proceeding is concluded by way of a so-called short decision, which only contains very limited information. It does not include a detailed description of the infringement. In case of an appeal the FCO will withdraw the short decision and issue a detailed decision.

FCO and French Competition Authority Publish a Joint Paper on Competition Law and Data

On May 10, 2016, the FCO and the French Competition Authority (together, the "Authorities") published, for the first time, a joint paper analyzing the collection and use of (big) data from the perspective of competition law.[52]

The paper first presents the various types of data. It shows that using data is not a recent phenomenon, but that the technological changes of the digital economy have revolutionized the possibilities to collect, process, and commercially use data. The Authorities recognize that data helps to improve products and services, increase economic efficiency, and can serve as the basis for innovative business models.

The paper then discusses the role of data in competitive analyses. The Authorities note that data may raise barriers to entry and can be a source of market power as new entrants may be unable to collect or obtain access to the necessary data. Data collection and data use may also lead to increased market transparency, which is positive for consumers but could also facilitate collusion among companies. Access to or having particular data can also confer a competitive advantage that competition authorities should assess in a merger control procedure. The paper analyzes certain possible abusive data-related anticompetitive conducts, such as a dominant undertaking treating its customers differently when it comes to access to data. The Authorities note that privacy policies may only be considered from a competition standpoint when these policies affect competition.

In the Authorities' view, data can confer market power if a company is able to sustain a "data trove" unmatched by its competitors. When assessing whether a company has market power, competition authorities need to take features specific to online markets into account, such as network effects, multi-homing, and market dynamics.

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[52] *See* FCO/FCA joint paper "Competition Law and Data," May 10, 2015. *See also* Chapter III *France*, Policy and Procedure section.

The Authorities also highlight two aspects that should be given particular consideration: (i) whether data is scarce or easily replicable; and (ii) whether the scale and scope of data is crucial to the case at hand.

Data as such is, according to the report, "non-rivalrous," *i.e.*, every service provider can, in principle, generate or obtain the same data. However, companies may sometimes only access this data after having built a sufficiently large customer base—this depends on the extent to which network effects as well as scale economies constitute barriers to entry. Sourcing the necessary data from third parties (such as data brokers) to obtain access to data may not always be an option under national privacy laws. The Authorities, moreover, do not consider the fact that "data are everywhere" to imply that all types of data are substitutable (*e.g.*, data obtained by search engines vs. data obtained by social networks).

If certain data confers a competitive advantage only if it is collected at a large scale, competition authorities need to analyze whether competitors are capable of easily generating data at a similar scale and thus benefitting from a similar advantage. The paper points out that the volume level at which big data has economic benefits, as well as the level beyond which returns will diminish, varies from one case to another.

FCO Publishes Report on Digital Markets

On June 9, 2016, the FCO published a report on market power of platforms and networks,[53] presenting its thoughts on how antitrust issues in digital markets should be analyzed.[54] In particular, the report takes a close look at market definition and market power.

For the purposes of defining the relevant market, the FCO holds the view that at least matching platforms (such as dating platforms where the connection of two user groups is the actual service the platform offers) should be considered to constitute a single market. Traffic-providing platforms (such as search engines), however, require a separate consideration of the two sides—even if services are provided free of charge. While German courts have consistently held that a relevant market can only be found for a service that was rendered in return for payment,[55] the FCO no longer considers this approach to cover today's online business models adequately and therefore suggests to follow the Commission's decisional practice, according to which there can be markets for payment-free services.

In the FCO's view, digital markets' dynamics do not necessarily ensure that online service providers are under sufficient competitive pressure. Therefore, the dynamics of online markets should not be seen as a reason to generally alter the thresholds for intervention. The FCO will assess on a case-by-case basis whether intervention is warranted.

For the assessment of whether a digital platform or network is dominant, the FCO suggests giving particular consideration to the specifics of these markets. As examples for such specifics the FCO mentions relevance of direct and indirect network effects, economies of scale, the prevailing types of use on the opposite market side (single-homing/multi-homing), the degree of differentiation, access to data, and innovation potential. Market shares, however, should not be seen as the most relevant proxy.

In general, the FCO deems the instruments already available to competition authorities sufficient to ensure competition among online platforms. However, the FCO suggests the following amendments to the GWB: (i) an additional merger filing threshold based on the transaction value (purchase price); (ii) new criteria/indications to determine market power; and

[53] The report, a summary, and the FCO's recommendations are available in English at http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/09_06_2016_ThinkTank.html?nn=3591568.

[54] In 2015, the FCO had launched a "Think Tank Internet" that is responsible for developing concepts for how to deal with the digital economy. The Think Tank includes staff members notably from the FCO's 6th Division.

[55] *See, e.g.*, DCA judgment of January 9, 2015, case VI - Kart 1/14 (V) – *HRS*.

(iii) a clarification that a market does not presuppose the exchange of goods or services against payment.

The German Ministry of Economics had already stated in its May 2016 green paper "Digital Platforms" that these issues would be addressed in the forthcoming legislative proposal for a "Ninth GWB Amendment." Indeed, the current draft of the proposal implements all the suggestions the FCO made.[56] Under the new additional merger control threshold, a transaction value exceeding €400 million may trigger a filing obligation in Germany. In a recent newspaper interview, FCO President Mundt highlighted that Germany would be the first country to have statutory competition rules tailored specifically to the digital economy.[57]

FCO Publishes Annual Report 2015

On June 22, 2016, the FCO published its Annual Report for 2015, which provides an overview of the FCO's activities in 2015.[58] The main activities are summarized below.

The FCO currently focuses on the so-called digital economy. Over the last few years it has dealt with a number of internet cases. For example, it prohibited Amazon and well-known hotel booking portals such as HRS and Booking.com from using so-called "best price clauses," which obliged retailers or hotels not to offer products or services cheaper elsewhere. Internet related merger control proceedings dealt with platforms for real estate and dating agency portals. Furthermore, the FCO has opened proceedings against Facebook under a novel approach. The FCO is analyzing whether Facebook is abusing its possibly dominant position in the market for social networks by violating data protection laws.

The FCO imposed approximately €208 million in fines in 11 horizontal and vertical cartel cases in 2015. The fines were imposed on 45 companies and 24 individuals. The proceedings concerned various sectors, such as automotive part manufacturers, mattress manufacturers, providers of container transport services, manufacturers of prefabricated garages, and food retail. .

The FCO reviewed 1,169 mergers, 13 of which were decided after an in-depth investigation, *i.e.*, in Phase II. One merger in the area of food retail was prohibited (Edeka/Kaiser's Tengelmann) and another one in the area of car spare parts cleared subject to conditions.

FCO Reports on the Large Price Differences of Public Drinking Water in Germany

On June 30, 2016, the FCO published a report on the framework conditions of drinking water supplies and the control of fees charged by water suppliers in Germany.[59] The report is based, *inter alia*, on the FCO's proceedings against individual suppliers for charging abusively high prices between 2007 and 2013.

According to the FCO, there are significant differences between net earnings of the water suppliers in Germany's 38 largest cities. While these discrepancies can to some extent be explained by diverging conditions, the FCO concluded that efficient regulatory control is necessary to avoid suppliers' use of their monopoly position to the detriment of consumers.

The report also focuses on the control of water prices under competition law and the effects of the eighth amendment to the GWB in 2013. The amendment controversially excludes water charges levied by public legal entities from abuse control under competition law. As a result, charges are supervised by the municipal authorities of individual states only,

[56] The latest proposal is available in German at: https://www.bmwi.de/Redaktion/DE/Artikel/Wirtschaft/gwb-novelle.html.

[57] *See* "Facebook darf seine Marktmacht nicht ausnutzen," Der Tagesspiegel, June 19, 2016.

[58] FCO Annual Report, available in German at: http://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2016/22_06_2016_Jahresbericht2015.html. The press release is also available in English.

[59] FCO report "Bericht über die großstädtische Trinkwasserversorgung in Deutschland," available in German at: http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Wasserbericht-2016.pdf?__blob=publicationFile&v=3.

which is less stringent than price abuse control under competition law. While the FCO generally applies the comparable market concept to determine whether water prices are abusively high, the supervisory authorities are restricted to legal supervision excluding efficiency considerations. Subsequently, several water suppliers have changed their legal form and switched from water prices to charges to avoid price abuse control.[60]

The FCO report closes with a list of recommendations. According to the FCO, control of water fees should be increased.[61] Because this would constitute a bureaucratic burden—there are roughly 6,000 suppliers in Germany—the FCO recommends ex-post abuse control.[62] This would enable uniform control of charges and prices and disincentivize suppliers' switching from water prices to charges to avoid price abuse control. The report also recommends improving the efficiency consciousness of water suppliers to prevent excessive prices in the first place. Developing and implementing benchmarks could inform water suppliers about their relative ranking among other suppliers, identify cost saving possibilities, and trigger improvements.[63]

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60 *See* FCO press release of June 30, 2016, available in German and English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2016/30_06_2016_Wasserbericht.html.

61 *See* FCO report, *supra*, p. 108.

62 *See* FCO report, *supra*, p. 110.

63 *See* FCO press release of June 30, 2016, available in German and English at: http://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2012/09_05_2012_Agronovita.html.

GREECE

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

Policy and Procedure

The HCC Adopts a Settlement Procedure in Cartel Cases

In July 2016, the HCC announced the introduction of a settlement procedure in cartel cases.[64] The purpose of this procedure is to simplify and accelerate the issuance of decisions by the HCC, as well as to limit the appeals filed against HCC decisions before the Court of Appeals.

The settlement procedure requires that undertakings or associations of undertakings acknowledge in clear and unequivocal terms their participation in the infringement and their associated liability. They must also waive their right to request full access to the case's administrative file and to be heard at a hearing before the HCC. The fulfillment of these conditions will result in a fine reduction.

The decision underlines that the efficiency benefits of the settlement procedure require that undertakings express their interest at an early stage of the investigation and before the statement of objections is notified to the parties. In any event, the HCC retains a broad margin of discretion to determine which cartel cases are suitable.

The undertaking must express its interest in the settlement procedure by contacting the General Directorate for Competition ("GDC") before the appointment of a case handler, or directly contacting the case handler once one is appointed. If an undertaking expresses interest, the GDC or the case handler may inform all undertakings concerned and invite them, within a time frame of at least 10 days, to also express their interest in writing.

The decision to initiate (or interrupt) a settlement procedure remains with the HCC. Upon the initiation of a settlement procedure, the HCC will prioritize the case and appoint a case handler, in the event one was not already appointed. The case handler is authorized to conduct bilateral contact with the settlement candidates.

During the bilateral contact, each undertaking is informed of the most important elements of the case. These elements are:

- The facts under investigation and their legal characterization;
- The gravity and duration of the cartel;
- The participation and attribution of liability to the specific undertaking;
- The main evidence; and
- The estimation of the range of the likely fine to the specific undertaking.

Within the framework of bilateral contact, the HCC will not negotiate with the undertakings under investigation on the existence of the infringement and the imposition of fines.

In the event a statement of objections has already been notified and the HCC nonetheless decides to proceed with a settlement procedure, bilateral contacts will take place between the undertakings and the HCC, which may lead to the submission of a formal request to settle.

If the appointed case handler determines that sufficient and essential progress has been achieved during the bilateral contacts, the undertakings concerned are briefly informed of the results and are invited to submit a formal request to settle in the form of a settlement submission, taking into account the results.

The requests submitted by each undertaking should include:

- An unreserved acknowledgment in clear and unequivocal terms of the undertaking's participation in the infringement as well as of its liability;

[64] HCC, decision No. 628/2016.

— An acceptance of the maximum fine that may be imposed by the HCC within the framework of the settlement procedure;

— A confirmation that the undertaking has been sufficiently informed about the infringement and that it has been given a sufficient opportunity to present legal and factual arguments;

— A waiver of the right of the undertaking concerned to request full access to the administrative file and of the right to be heard in an oral hearing before the HCC; and

— A statement waiving the right to challenge the competency of the HCC and the validity of the procedure.

Provided the requests of the undertakings to settle reflect the results of the bilateral contact, the case handler will issue a statement of objections. Thereafter, the undertakings are invited to confirm their commitment to settle by way of a final settlement declaration. The HCC will issue a decision through a simplified procedure, by virtue of which the infringement and the facts of the settlement will be established and the relevant fines will be imposed.

Participation in the settlement procedure can lead to a 15% fine reduction. The reduction is calculated on the basis of the fine to be imposed in accordance with the provisions of Article 25 of Law 3959/2011 and of the HCC Notice on fines dated May 12, 2006. The decision of the HCC is subject to judicial review.

It is important to note that according to the decision, the undertakings' statements expressing their interest to settle, the technical reports that may be submitted by them during the bilateral contacts, the minutes of the contacts, the summons by the competent case handler to the extent it reproduces the results of the bilateral contact, the requests to settle, and the declarations to settle, are considered confidential information that is not disclosed to third parties, including complainants. Access to the above is only granted to those undertakings that have not requested a settlement, provided they commit to ensure that the information obtained will be used only for the purposes of the related proceedings.

ITALY

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

Horizontal Agreements

The ICA Fines the Main Competitors in the Vending Market for Market-Sharing, Customer Allocation, and Price-Fixing in Breach of Article 101 TFEU

On June 8, 2016, the ICA fined the main competitors in the market for the distribution and management of automatic food and beverage vending machines (vending machines) and office coffee system (OCS) machines a total of over €103 million.[65]

According to the ICA, the undertakings, and—only with regard to the price-fixing agreement—their trade association CONFIDA participated in a single and continuous infringement of Article 101 of the Treaty on the Functioning of the European Union ("TFEU"), which took the form of market-sharing, client allocation, and price-fixing, aimed at keeping prices high and the sector profitable. Overall, the infringement lasted from 2007 to 2015.

The ICA found that the market-sharing and client allocation agreement was a "non-aggression agreement," under which the parties undertook to refrain from soliciting their respective customers and also rigged public and private bids (in some calls for tenders, the parties allegedly refrained from participating or submitted artificially high bids to favor the agreed winner; in others, they shared the award through joint participation and/or subcontracting).

Moreover, the parties set up a "compensation mechanism" whereby, in the event that a party took customers away from another party in breach of the non-aggression agreement, the infringing party owed equally profitable customers to the affected party. Compensation could also take the form of sales of business divisions.

According to the ICA, the trade association CONFIDA was involved in the infringement through three types of conduct: (i) in connection with a VAT increase from 4 to 10% pursuant to Legislative Decree No. 63/2013, CONFIDA adopted initiatives aimed at inducing its members not to use the increase as leverage to compete on price, but rather to pass it on to consumers, and increase prices in excess of 6%; (ii) CONFIDA ran media campaigns and organized meetings, asking its members to adhere to a "virtuous agreement" not to decrease prices; and (iii) CONFIDA coordinated the drafting of standard tender rules, which were then sent to schools and public bodies, aimed at minimizing the impact of price competition in bid assessments.

According to the ICA, with respect to the VAT increase, CONFIDA went beyond the mere provision of technical information to its associates: CONFIDA told vending operators how to run their commercial strategies with clients, and suggested they present the passing of the VAT on to consumers as a legal obligation.

As regards CONFIDA's initiatives to raise prices, the ICA decision notes that, faced with an increase in the cost of raw materials, CONFIDA launched a national press campaign to announce possible price increases. The ICA regarded this as market signaling to favor collusion among market operators.

With regard to CONFIDA's standard tender rules, according to the ICA, the parties, together with the association, aimed at discouraging price competition in calls for tenders. According to the ICA, this effort could not be justified by genuine concerns to preserve product or service quality, which could be met through less restrictive means.

As regards anticompetitive effects, the decision notes that the parties maintained their market shares at least from 2010 to 2014 and that, despite the economic crisis that hit the sector, the price of products sold from 2008 to 2014 increased disproportionately with respect to costs.

[65] ICA, decision of June 8, 2016, *Accordo tra operatori del settore vending* (*vending machines*) (Case I783).

The ICA rejected the parties' argument that, because subcontracting was indispensable to serve clients' premises located in areas where the contractor was not active, it could not reflect a market-sharing and customer allocation cartel. The ICA concluded that "in a significant number of cases" subcontracting was a means for sharing the market, allocating customers, and compensating competitors, due to the following reasons: (i) evidence showed that subcontracting was associated with debit/credit positions; (ii) in some instances, the contractor was in fact capable of serving all clients' premises; (iii) in the absence of barriers to entry, subcontracting prevented the parties from expanding their activity in new areas; and (iv) in some instances, subcontracts included non-compete clauses, which could not be justified by investments in the clients' premises, as they were born by the subcontractor.

The Relevance of a Decrease in Market Shares and Prices in "By Object" Restrictions

On June 30, 2016, the Council of State confirmed the ruling of the TAR Lazio that upheld the ICA's infringement decision against four undertakings active in the sludge disposal sector.[66] However, due to decreases in prices and market shares, the Council of State reduced the fines imposed.[67]

According to the ICA, the undertakings participated in a single and continuous horizontal agreement that had the object of partitioning the market of the sludge disposal service in northwestern Italy from 2008 through 2013. More specifically, the undertakings coordinated their behavior in relation to several public tenders by sharing competitively sensitive information through formal structures (*i.e.*, a temporary association of companies, a consortium, and a framework agreement) and meetings. This permitted the undertakings to submit concerted bids in response to invitations to tender, and to allocate among themselves the tendered volumes of sludge for disposal. The undertakings' objective was to eliminate competition among them and to keep their market shares steady.

The judgment is of particular significance because the Council of State addresses the relevance of a decrease in market shares and prices notwithstanding the "by object" restrictions of competition. In particular, although the Council of State rejected all of the substantive arguments put forward by the undertakings, it reduced the fines imposed.

The undertakings argued that, during the time of the "by object" anticompetitive conduct, both their market shares and the market prices decreased. In their view, these circumstances proved the absence of anticompetitive effects and were incompatible with the finding of an infringement as well as with the imposition of fines.

The Council of State rejected the price decrease argument on substantive grounds, relying on the principle that, in order to establish an infringement of Article 101 TFEU, anticompetitive effects of "by object" restrictions need not be proven nor investigated. The Council of State clarified that a horizontal agreement could be aimed at "attenuating in a collusive way the decrease in prices in a context characterized by external factors such as the progressive crisis of a sector or the decrease in demand." Accordingly, the ICA considered that the market trend and structure were already conducive to lower prices, and found an infringement in light of the fact that without the agreement, the prices would have decreased even more.

Similarly, regarding the undertakings' claim that the ICA did not assess the decrease in market shares during the infringement period, according to the Council of State, mitigating a decrease in market shares can amount to a "by object" infringement just as much as mitigating a decrease in prices.

Nevertheless, the Council of State found that the ICA should have taken into account the decrease in market shares when assessing the gravity of the infringement and calculating the fine. The Council of State observed that paragraph 23 of the European

[66] ICA, decision of February 3, 2015, *Gare gestione fanghi in Lombardia e Piemonte* (Case I765).

[67] Council of State, judgment of June 30, 2016, *CRE SpA, Evegreen Italia Srl, Eco-Trass Srl, azienda agricola Allevi Srl v. ICA* (Judgment No.2947).

Commission ("Commission") Fining Guidelines[68] defines market-sharing agreements as "among the most harmful restrictions of competition, [for which] the proportion of the value of sales taken into account … will generally be set at the higher end of the scale." However, the Council of State emphasized that paragraph 23 is "a general provision" that, as such, allows exceptions. Therefore it concluded that while the actual effects of the conduct are irrelevant for the finding of a "by object" infringement, a decrease in prices, or the absence of evidence regarding competitive harm, should be taken into consideration when deciding the proportion of the value of sales to take into account when calculating the fine. Accordingly, the Council of State reduced the proportion of the value of sales to be taken into account from 15% to 5%.

Fining Policy

TAR Lazio Endorses ICA's Decision Against a Cartel Involving Eight Concrete Undertakings

On April 5, 2016, the TAR Lazio confirmed the ICA decision from March 25, 2015, concerning a cartel in the concrete industry.

Based on the evidence provided by a leniency applicant, the ICA held that from 2010 to 2014, eight undertakings implemented horizontal agreements aimed at fixing prices and allocating customers. As a result, the ICA fined the undertakings almost €12.5 million, equal to 10% of their respective turnovers (the maximum applicable fine threshold in Italy).

The TAR Lazio decision is of particular significance because the undertakings challenged the ICA's first application of the new guidelines on the method of setting antitrust fines relying, *inter alia*, on their classification as single-product companies.[69]

Under the ICA Guidelines, restrictions aimed at fixing prices and allocating customers are subject to a basic fine amount ranging from 15% to 30% of the sales of products to which the infringement is related.[70] The reason for this is the particularly serious and secret nature of these antitrust violations.

In this case, the ICA applied the minimum percentage (15%) applicable to these infringements. However, because the investigated undertakings were single-product companies (and hence, the value of the relevant sales coincided with their total turnover), even the application of this low percentage brought the fine above the statutory ceiling of 10% of the total annual turnover.[71] As a result, their fine was reduced accordingly.

The undertakings argued that the ICA's application of the guidelines to single-product companies automatically lead to the imposition of the highest applicable fine (10% of the total turnover), regardless of the severity of the infringement and any mitigating conditions. In the undertakings' view, due to their punitive nature, antitrust fines should be subject to the general principles of criminal law, namely they must be graduated to reflect the gravity of the offence and comply with the principle of legal certainty. Thus, the ICA's application of the guidelines was allegedly incompatible with Law No. 689/81 on administrative penalties, which provides additional criteria for evaluating undertakings' conduct, such as the severity of the infringement, the agent's attempts to remove or mitigate the infringement's consequences, the

[68] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003, OJ 2006 C 210/2. (the "Fining Guidelines"). In particular, paragraph 21 reads as follows: "[a]s a general rule, the proportion of the value of sales taken into account will be set at a level of up to 30% of the value of sales."

[69] *See* ICA Notice No. 25152, October 22, 2014, *Linee Guida sulla modalità di applicazione dei criteri di quantificazione delle sanzioni amministrative pecuniarie irrogate dall'Autorità in applicazione dell'articolo 15, comma 1, della legge n. 287/90* ("Guidelines on the method of setting fines imposed by the Authority pursuant to Article 15(1) of Law No. 287/90") ("ICA Guidelines").

[70] ICA Guidelines, paragraphs 11-14.

[71] *See* Article 15, Law No. 287/90.

characteristics specific to the agent, and the economic conditions.

The TAR Lazio upheld the ICA's decision, stating that antitrust fines should be graduated keeping in mind the deterrence goal of antitrust law and irrespective of the single-product nature of the undertakings involved. Pursuing deterrence of the most serious and secret antitrust violations though fines calculated using the 15–30% range is appropriate. Given that the ICA guidelines do not provide additional and different criteria for evaluating the conduct of single-product companies involved in a horizontal agreement, the ICA should not depart from the 15% minimum sanction only because single-product companies are involved. This means that, for the sanction to reflect the severity of the infringement, fines should be calculated as a percentage of the value of sales irrespective of the fact that the value of sales coincides with the total turnover. The TAR Lazio concluded that the automatic reduction of the maximum applicable fine to 10% of the overall turnover should be viewed as a particularly beneficial and incisive provision for single-product companies. The general coincidence between the relevant sales and total turnover will likely trigger, for this category of companies, a quasi-automatic reduction of the fine applicable down to 10% of the turnover.

Vertical Agreements

The ICA Fines the Italian Football League, its Advisor Infront and TV Broadcasters SKY and Mediaset for Sharing Serie A Championship TV Broadcasting Rights in Breach of Article 101 TFEU

On April 19, 2016,[72] the ICA found that the Italian football league (Lega Nazionale Professionisti Serie A – "Lega"), its advisor Infront Italy S.r.l. ("Infront"), and TV broadcasters Sky Italia S.r.l. ("SKY"), Reti Televisive Italiane S.p.A. and its subsidiary Mediaset Premium S.p.A. (jointly, "Mediaset") entered into an anticompetitive agreement in breach of Article 101 TFEU to alter the award of TV broadcasting rights for the Serie A matches of the 2015-2018 seasons ("TV Rights").

On May 19, 2014, Lega tendered out the TV Rights by means of a mixed sale model, *i.e.* "by platform" and "by product", and offered such rights in five different packages. Pursuant to Lega's guidelines and the invitation to tender, if the tenderers were not to submit, for each of the packages, offers at least matching the minimum tender price set for each package, Lega would have been entitled to launch a new tender procedure either for all packages or for the only package that did not receive a valid offer.

Upon completion of the tender procedure, SKY was the highest bidder for packages A and B, *i.e.*, those which included the rights related to the eight most relevant football teams of the Italian major league, to be broadcasted via, respectively, satellite and the digital terrestrial television. However, instead of awarding such packages to SKY, Lega and Infront held that, pursuant to the tender rules, no single operator could be awarded both packages A and B, and therefore awarded package A to SKY and package B to Mediaset. As for package D—which included exclusive "cross-platform" rights for matches played by the remaining (minor) football teams and one of the most relevant football teams—the Lega and Infront decided to award it to Mediaset, despite the fact that its bid for such a package was conditional and thus, pursuant to the tender procedure rules, should have been declared invalid.

Mediaset subsequently sub-licensed Package D to SKY, upon authorization granted by the ICA itself under Article 19(1) of Legislative Decree No. 9/2008 (*i.e.*, the act which sets out the legal framework under which broadcasting rights for live sport events must be offered in Italy – "Melandri Decree") on July 17, 2014 ("sub-license agreement").

The ICA found the outcome of the procedure flawed for various reasons. First of all, according to the ICA, on completion of the tender procedure, Lega ought to have awarded packages A and B to SKY. Indeed, SKY was the highest bidder and no explicit provision prohibiting the award of both packages to a single

[72] ICA, decision of April 19, 2016, case I790, *Vendita diritti televisivi serie A 2015-2018*.

operator was provided for by the Melandri Decree, the Lega's guidelines, or the invitation to tender.[73] The ICA also stated that the Lega should have launched a new tender procedure for package D, because the only bid received for such a package, Mediaset's, was invalid since it was a conditional bid.

According to the ICA, alternatively, if Lega did not want to award SKY both packages A and B, it could only have withdrawn the tender procedure and published a new invitation to tender, in which it could have inserted an explicit provision prohibiting the award of packages A and B to a single operator.

The ICA then found that the parties entered into a restrictive agreement aimed at altering the tender outcome, by awarding the packages in a different manner than that dictated by the operators' bids. The ICA further noted that the restrictive agreement was entered into once the bids had already been presented and before the final award. Such agreement was enforced, *inter alia*, through the sub-license agreement on package D.

More specifically, the restrictive agreement was promoted by Lega and Infront, and was mainly in favor of Mediaset. According to the ICA, the misapplication of the tender rules by Lega and Infront set the foundation for the competition law infringement. Moreover, Lega (and Infront) facilitated the implementation of the agreement by adopting a final decision that: (i) did not award the rights based on the outcome of the tender; and (ii) unduly approved the sub-license agreement. According to the ICA, the authorization of sub-license agreements could only be applied for following the award.

The ICA held that SKY initially adopted a competitive conduct and only eventually—induced also by the other parties' conduct—adhered to the restrictive agreement. SKY's marginal and defensive role, aimed at obtaining one of the two packages it was entitled to under the tender rules, justified the application of para. 34 of the Fining Guidelines, under which "*the particularities of a given case or the need to achieve deterrence in a particular case may justify departing from the application of the Fining Guidelines*"; the ICA thus imposed on SKY a fine totaling EUR 4 million (thus relatively low compared with that on Mediaset, *i.e.*, EUR 51 million).

The ICA concluded that the agreement was restrictive "by object", since it aimed at sharing a strategic input by altering the outcome of the tender procedure. The ICA noted that the agreement also entailed restrictive effects. In particular, it: (i) prevented newcomers, such as Eurosport, from participating in a competitive tender procedure; (ii) impaired dynamic competition also in the medium-long term by discrediting similar future tenders; and (iii) allowed SKY and Mediaset to maintain their market shares. Given the significant presence of SKY and Medisaet in the pay-TV and TV advertising markets, the agreement was found to be capable of affecting competition also in these downstream markets.

The ICA rejected the argument that the final allocation ensured the best economic result for the Serie A teams and gave rise to the best pro-competitive result on the market, as other solutions could generate higher revenues. Moreover, the indispensability of the restriction was not demonstrated, since other less restrictive solutions were available. Therefore, Article 101(3) TFEU requirements were not fulfilled.

The ICA also held that the parties could not rely on the principle of legitimate expectations. In particular, the ICA's approval of the sub-license agreement and the dismissal of a third party's complaint in this respect could not give rise to legitimate expectations since the restrictive agreement was entered into before these decisions were adopted.

[73] Article 9(4) of the Melandri Decree only prohibits a single operator from being awarded all packages concerning live events.

NETHERLANDS

This section reviews developments under the Competition Act of January 1, 1998 (the "Competition Act"),[74] *which is enforced by the Netherlands Authority for Consumers and Market (Autoriteit Consument & Markt, "ACM").*[75]

Horizontal Agreements

ACM Declares Commitments in Ready-Mix Concrete Case Binding

In 2012, the ACM launched an investigation into the Dutch building materials sector, including ready-mix concrete. While the ACM did not find an infringement, it did identify serious risks of unfair competition due to the collaboration structures within the ready-mix concrete sector. To eliminate the ACM's concerns, the seven largest ready-mix concrete companies offered extensive commitments. On June 29, 2016, the ACM declared these commitments binding.[76]

The ready-mix concrete sector is characterized by production collaboration, *i.e.*, various companies jointly use and manage production plants, giving rise to possible exchange of competitively sensitive information concerns. Where the collaborating companies have a market share of at least 40% in the region, the parties committed to end collaboration, including with competitors who did not offer commitments, within three years. Future collaboration is only possible if there is no other option, and requires the registration of all commercial contacts. When selling its properties and sites previously used for ready-mix concrete production, the parties committed to refrain from stipulating their future use to facilitate market entry through acquisition by potential competitors.

Fining Policy

Rotterdam District Court Reduces ACM Fines

In a series of judgments, the Rotterdam District Court lowered ACM fines imposed on companies and individuals, demonstrating the court's commitment to closely reviewing fines.

Auctions cartel. In 2011 and 2013, the ACM had fined 79 housing dealers approximately €6.4 million for manipulating execution auctions and profit sharing between 2000 and 2009. On April 7, 2016,[77] the Rotterdam District Court lowered the 2013 fines of three dealers[78] by 10%, acknowledging their severe financial impact and taking particular account of announced terminations of banking relationships by the dealers' banks. Additionally, the court further reduced the fines because the reasonable time period between the ACM's statement of objections in October 2011 and the Rotterdam District Court's judgment was exceeded by one year.

Industrial laundries cartel. In December 2011, the ACM fined four industrial laundries approximately €18 million for market-sharing between 1998 and 2009. Due to the long duration of the proceeding, the ACM lowered the fines to approximately €12.5 million on administrative appeal. On May 12, 2016, the Rotterdam District Court annulled one participant's fine of €159,000 as the ACM had not taken into account that the participant's cartel involvement had ended in 2003—when it shifted its activities from industrial laundry to personal laundry—leading to an expiration of the limitation period.[79]

Construction cartel. In October 2010, the ACM fined two construction companies, Janssen de Jong. and Aannemers- en Wegenbouwbedrijf Limburg €3 million and €100,000, respectively, for cover pricing, *i.e.*, submitting spoof bids in tenders. On June 23, 2016,

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

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

[76] Case 15.0959.29 (*Ready-mixed concrete*), ACM decision of June 29, 2016.

[77] Rotterdam District Court, Judgments of April 7, 2016, ECLI:NL:RBROT:2016:2211, ECLI:NL:RBROT:2016:2201, and ECLI:NL:RBROT:2016:2196.

[78] Total fines amounted to approximately €170,000.

[79] Rotterdam District Court, Judgment of May 12, 2016, ECLI:NL:RBROT:2016:3477.

following an appeal by Janssen de Jong, the Rotterdam District Court held that the ACM had erroneously applied a gravity multiplier for bid rigging, which is a higher multiplier.[80] The court therefore lowered the fine to €2.5 million.[81] In the same manner, on June 30, 2016, the Rotterdam District Court also lowered the fines imposed on two individuals for their involvement as *de facto* managers from €100,000 to €70,000 and from €250,000 to €175,000 respectively.[82]

ACM Increases Maximum Fines

As of July 1, 2016, new maximum fine levels for competition law infringements are applicable.[83] The changes are significant.

All maximum absolute fines have been doubled from €450,000 to €900,000. Maximum fines for cartel infringements may be even higher, as the fine cap will be multiplied by the duration of the cartel in years. Longer participation in a cartel will therefore result in a higher maximum fine. The multiplier is capped at four years. In the worst case scenario of an undertaking participating in a cartel for more than four years, the maximum fine would be 40% of the company's annual turnover. The new cap is significantly higher than the previous 10% cap on annual turnover, which is also applied by the Commission and national competition authorities in the U.K., Germany, and France.

Additionally, fines can be doubled in case of a repeated offence, *i.e.*, if within five years before the statement of objections, a prior fining decision for an infringement of the same or a similar legislative provision has become irrevocable.

The new maximum fines do not have retroactive effect, they only concern infringements occurring after July 1, 2016 and do not apply to infringements that started before that date.

Mergers and Acquisitions

Pre-Notification Documents Are Not "Relevant Documents" Pertaining to the Case

In October 2014, the ACM cleared the acquisition of Dutch optical fiber company Reggefiber Group B.V. by Koninklijke KPN N.V..[84] Competitor Vodafone Libertel B.V. ("Vodafone") appealed the clearance decision to the Rotterdam District Court, arguing that the ACM had failed to take account of all restrictions on competition arising from the merger.

During the procedure, the ACM requested that access to certain pre-notification documents be restricted to the Rotterdam District Court. Except for Vodafone, all parties to the proceedings also agreed with the court basing its judgments on the restricted documents. Ultimately, the Rotterdam District Court did not base its judgment on these documents.

Vodafone argued that the ACM did not submit all relevant, *i.e.*, pre-notification, documents to the Rotterdam District Court as required by Dutch administrative law.[85] The ACM argued that the pre-notification phase is an informal preliminary stage during which both the notifying parties and the ACM can freely exchange their views and thoughts. The Rotterdam District Court agreed that documents exchanged during pre-notification cannot be regarded as "relevant documents pertaining to the case," which the ACM must submit in appeal proceedings to the Rotterdam District Court and to which parties to the proceeding may obtain access. Subsequently, on May 12, 2016, the Rotterdam District Court concluded that

[80] Bid rigging concerns an advance agreement of which firm will win the bid.

[81] Rotterdam District Court, Judgment of June 23, 2016, ECLI:NL:RBROT:2016:4738. This is consistent with the Rotterdam District Court's related judgment of November 26, 2015, ECLI:NL:RBROT:2015:8610.

[82] Rotterdam District Court, Judgment of June 30, 2016, ECLI:NL:RBROT:2016:4858.

[83] ACM Press Release, ACM is now able to impose higher fines, July 1, 2016, available at: www.acm.nl/en/publications/publication/16056/ACM-is-now-able-to-impose-higher-fines/. Changes have led to an amendment of the 2014 ACM Fining Policy.

[84] Case 14.0672.24 (*KPN – Reggefiber*), ACM decision of October 31, 2014.

[85] Article 8:42 General Administrative Law Act (*Algeneme Wet Bestuursrecht*).

the ACM had not erred in assessing the merger, and dismissed the appeal.[86]

ACM Clears Pharmacy Merger Subject to Extensive Commitments

On June 14, 2016, the ACM cleared the acquisition of Mediq Apotheken Nederland and Mediq Pharma Logistics (together "Mediq") by Brocacef Groep N.V. ("Brocacef").[87] Both companies run pharmacies and wholesale operations with pharmaceutical products such as prescription drugs. The ACM identified two main concerns that were eliminated by the proposed commitments.

First, the ACM was concerned that the combined entity would own approximately 600 out of the almost 2,000 pharmacies in the Netherlands, resulting in less choice and higher prices. To ensure that the combined entity did not become too strong *vis-à-vis* health insurers and that consumers, who typically choose pharmacies in their neighborhood, would continue to have enough and affordable choice, the parties offered to divest 89 of their pharmacies. Second, regarding wholesale operations for the supply of hospitals, the transaction would result in a three-to-two merger. To address this concern, Mediq offered to divest its wholesale company Distrimed to a party that already owned a wholesale company but was not yet supplying hospitals.

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86 Rotterdam District Court, Judgment of May 12, 2016, ECLI:NL:RBROT:2016:3476.

87 Case 15.0849.24 (*Brocacef – Mediq*), ACM decision of June 14, 2016.

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").

Fining Policy

High Court Upholds Fine in Private Ambulance Cartel in Cuenca

On May 23, 2016, the High Court issued a judgment[88] dismissing appeals against a 2013 decision of the CNC[89] regarding private ambulance services in the province of Cuenca, Spain.

The CNC had fined 14 individuals a total of €66,176 for implementing a cartel in the market for private medical land transport services (ambulances) to individuals and insurance companies ("private ambulance services") in the province of Cuenca in violation of Article 1 LDC.

In 2008, 11 undertakings created a temporary joint venture that won a public contract for certain types of medical transport services in the province of Cuenca ("public ambulance services"), awarded by the region's health service through a public procurement procedure. Subsequently, the natural persons owning the undertakings set up a company (Transporte Sanitario Conquense, S.L. ("TSCSL")) to jointly provide private ambulance services in the same province.

The CNC found that the provision of private ambulance services through TSCSL amounted to a cartel, consisting of a market-sharing agreement between otherwise independent competitors in the market segment. The CNC characterized this as an infringement by object.

Ten of the individuals the CNC decision was addressed to appealed the decision before the High Court on the grounds that there had been no market-sharing agreement between existing competitors, but only the creation of a new entity to provide private ambulance services in the province.

The High Court confirmed the CNC's finding that the private medical transport services of TSCSL were *de facto* provided by its owners (incidentally, the members of the 2008 temporary joint venture), rather than a distinct organization. Evidence supporting this conclusion included the scarce resources and staff of TSCSL (6 ambulances and an average working staff of less than 2 people per year for its 350 clients), and the fact that the 2008 joint venture and TSCSL had a common manager, address, phone number, and fax, and were ultimately owned by the same individuals.

The High Court further concluded that TSCSL had been created as a mere formal appearance for disguising the continuing coordinated actions of its shareholders for anticompetitive purposes. This coordination had impeded competition among the undertakings involved in TSCSL, and effectively by any other undertakings in the province of Cuenca, given that TSCSL's owners collectively controlled 97% of all authorized ambulances in the area.

This case shows how cartel arrangements made under the cover of a newly established corporate entity may be investigated under Spanish law. In this case, the CNC effectively "pierced the corporate veil" of a corporate entity created to disguise the cartel, through arguments that were endorsed by the High Court. Similar arrangements may be caught by merger control laws, but, even if they escape merger control, they will still need to be carefully assessed in light of the prohibition of anticompetitive agreements.

[88] *See* Case 205/2016, judgment of the Spanish High Court of May 23, 2016.

[89] *Transporte Sanitario Conquense* (Expte. VS/0383/11), CNC decision of July 23, 2013.

Substantial Fines Imposed by the CNMC on Members of a Diaper Cartel and Their Executives

On May 26, 2016, the CNMC rendered a landmark decision fining nine undertakings €128.8M for their participation in a cartel in the production and distribution of diapers for adults with severe incontinence.[90] For the first time in the CNMC's history, the authority also imposed individual sanctions on four of the sanctioned companies' executives for their leading role in the design, coordination, and supervision of the cartel arrangements.

The CNMC considered that the diaper market for non-hospitalized adults was divided in two sub-segments: one for moderate losses and another for severe incontinence. While diapers for moderate losses can be freely purchased in most distribution outlets, diapers for severe incontinence require a medical prescription and can only be purchased at designated points of sale, such as pharmacies or nursing homes. In addition, the National Health Service partially subsidizes the purchase of severe incontinence diapers due to the chronic nature and gravity of this ailment. For hospitalized patients, the National Health Service procures the diapers through tenders, which is understood to result in substantial price savings.

The CNMC held that the nine undertakings, along with FENIN (a trade association for health care companies), had engaged in price-fixing practices affecting diapers for non-hospitalized adults with severe incontinence between 1996 and 2014. With the cartel covering up to 95% of the market, the organization was able to achieve a substantial profit in the non-hospitalized sector, with prices almost 100% higher than in the hospitalized category. The CNMC also found that the cartel had further obstructed competition through its coordinated efforts to oppose the inclusion of diapers for non-hospitalized patients in public tendering proceedings.

In calculating the fine, the CNMC noted that the infringement was a "very serious" restriction of competition and imposed a global uniform of 5.3% of the members' total turnover. The wide geographical and product scope of the cartel and the considerable waste of public resources resulting from subsidizing an artificially high price were considered aggravating factors.

The CNMC also fined two of the companies' executives and two of FENIN's directors. According to the CNMC, all four individuals acted autonomously on behalf of their companies (or the trade association) and played a prominent role in the design, coordination, and supervision of the cartel. The CNMC explicitly noted that fining executives did not breach the principle that no person can be held liable for the same conduct twice, as both individual and corporate sanctions can be imposed under Spanish competition law for serious and very serious infringements of the law. Specifically, the CNMC has the power to impose sanctions of up to €60,000 on the infringing companies' executives. The Supreme Court has recently highlighted the importance of applying the full range of deterrent measures foreseen in the national antitrust legislation.[91]

Finally, the CNMC held that one cartel participants and its executives could benefit from total immunity under the CNMC leniency program, as it had been the first company to report the existence of the cartel and had duly cooperated with the investigation.

This is a remarkable decision of the CNMC, due to the level of fines imposed on corporate entities and the imposition of sanctions on their directors. This decision also shows that, in spite of the ongoing uncertainty about the appropriate methodology for the calculation of fines in Spanish competition law, the CNMC is prepared to impose sizeable fines and to use other available sanctions in its "toolkit" to achieve deterrence.

[90] *AIO* (Expte. S/DC/0504/14), CNMC decision of May 26, 2016.

[91] Case 2872/2013, judgment of the Spanish Supreme Court of January 29, 2015.

Mergers and Acquisitions

Supreme Court Annuls Penalties for Infringements of Merger Commitments Decision

On June 17, 2016, the Supreme Court[92] partially annulled the December 17, 2012 decision of the CNC[93] fining Redsys Servicios de Procesamiento, S.L. ("REDSYS") €819,000 for breaching the commitments accepted by the CNC as a condition for the approval of REDSYS' merger with Redes y Procesos, S.A. ("REDY"). The CNC decision had been previously upheld by the High Court in 2013,[94] which the Supreme Court reversed in part.

In 2010, REDSYS, a payment processing company, agreed to merge with REDY, another payment processing company, to form the new REDSYS. Prior to the merger, REDSYS and REDY provided, respectively, payment processing services for Servired and 4B—two of Spain's largest bank card systems. The merger was cleared by the CNC on March 14, 2011, subject to certain commitments. The commitments aimed, *inter alia*, at removing the risks of coordination between the two systems and their respective shareholders (which includes most of Spain's major retail banks). The commitments imposed restrictions on the exchanges of competitively sensitive information regarding the bank card systems, and a strict separation between the management of REDSYS and the management of Servired and 4B.

On December 17, 2012, the CNC fined the merged entity €819.000 for failure to comply with the commitments. The decision was based on three alleged breaches.

First, the CNC claimed that REDSYS had failed to comply with the commitment that REDSYS' governing bodies not include any members or representatives of the governing bodies of the bank card systems. In particular, REDSYS had allowed shareholder representatives of companies belonging to Servired and 4B to attend meetings of the REDSYS' Board of Directors as external, non-voting guests. Both the CNC and the High Court concluded that this was a breach of REDSYS' commitment. The Supreme Court disagreed in this respect, noting that the participants in the meeting were not members or representatives of the *governing bodies* of either Servired or 4B. The interpretation adopted by the CNC was therefore unduly extensive.

Second, the CNC held that REDSYS should have notified any changes to the membership of its Board of Directors prior to the implementation of such changes. While there was no explicit commitment containing this obligation, the CNC argued that prior knowledge of certain changes to the management of REDSYS was necessary for the CNC to ensure compliance with the principle of independence between the management of REDSYS and the management of the bank card systems. Changes in the composition of the Board of Directors of REDSYS were only notified to the CNC through the annual report of a trustee in charge of monitoring compliance with the commitments, which was insufficient in the view of both the CNC and the High Court. The Supreme Court also disagreed in this respect, and again noted that the CNC was not entitled to adopt such an extensive interpretation of the commitments.

Third, the CNC ruled that REDSYS had failed to notify the individual members of its Board of Directors, in written form, of their restriction to access certain competitively sensitive information held by REDSYS (such as disaggregated customer information of the Servired and 4B systems). REDSYS argued that these restrictions had been mentioned orally at the first meeting of REDSYS' Board of Directors and recorded in the minutes of the meeting, which were subsequently circulated to the board members. The Supreme Court upheld the conclusion of the CNC and the High Court that those actions did not fulfill the obligation contained in the commitments.

The Supreme Court judgment sets out an important precedent regarding the interpretation of merger

92 *See* Case 2832/2016, judgment of the Spanish Supreme Court of June 17, 2016.

93 *REDSYS* (Expte. SNC/0025/12), CNC decision of December 17, 2012.

94 *See* Case 5674/2013, judgment of the Spanish High Court of December 17, 2013.

commitment decisions. The Supreme Court admits that there might have been good policy reasons to pursue the first and second alleged infringements discussed above. However, the Supreme Court also establishes that the CNC was not entitled to adopt a finalist interpretation of the commitments, going beyond the wording submitted by REDSYS and accepted by the CNC in its clearance decision. This judgment could discourage future attempts by the CNMC to impose penalties for infringements of merger commitments, unless the obligations that are being infringed are very precisely set in the merger approval decision. The CNMC may also require more precise and detailed commitments from merging parties in the future, so as to reduce the scope for discrepancies between the parties and the CNMC on the interpretation of the commitments.

Policy and Procedure

Supreme Court Upholds Parent-Subsidiary Liability Principle in the Context of Dawn Raids

On April 25, 2016, the Spanish Supreme Court[95] dismissed the appeal by Lactalis Puleva S.L., Puleva Food, S.L., and Lactalis Compras y Suministros S.L. against the High Court's judgment of November 29, 2013,[96] upholding the legality of certain dawn raids carried out by the CNC at the appellants' offices in the context of a cartel investigation in the market for the supply of raw cow milk.

All of the appellants belong to the Lactalis Iberia group and their sole shareholder is Lactalis Iberia S.A. In the proceedings, the appellants argued that the dawn raids infringed their right to inviolability of business premises enshrined in Article 18(2) of the Spanish Constitution, and should have been declared illegal by the High Court. Specifically, the appellants argued that the raids exceeded the scope of the judicial warrant authorizing an inspection, since such warrant referred to "Lactalis Iberia S.A.," which had no offices in the appellants' building where the raids took place. However, the High Court held that the raids had been carried out in accordance with the warrant, because all raided companies were subsidiaries of the Lactalis Iberia Group, and the seizure had been carried out in locations identified in the warrant.

While acknowledging that the warrant did not expressly refer to subsidiaries or parent companies of Lactalis Iberia, S.A., the Supreme Court noted that the warrant specifically identified a location corresponding to the appellants' premises. The Supreme Court then noted the undisputed fact that Lactalis Iberia, S.A. is the sole shareholder of the appellants. Those two facts combined led the Supreme Court to conclude that the raids were within the scope of the warrant.

Furthermore, the Supreme Court noted that the close economic links between Lactalis Iberia, S.A. and the appellants determined that the parent company and its subsidiaries constituted an economic and strategic unit, which enabled the Supreme Court to consider that the warrant, irrespective of its wording, comprised the investigated premises. To this end, the Supreme Court relied on the European Court of Justice's ("ECJ") judgment of January 20, 2011,[97] which established that the conduct of a subsidiary can be attributed to its parent company when, despite them being separate legal entities, the subsidiary does not determine its conduct independently from the parent, bearing in mind the economic, organizational, and legal connection between both undertakings. The Supreme Court also referred to ECJ's well-established doctrine that, if a subsidiary is 100% owned by its parent company, a rebuttable presumption of control of the subsidiary by the parent exists. The appellants failed to rebut this presumption in the proceedings.

This case provides an example of the Spanish courts' preparedness to back a non-formalistic interpretation of the competition authority's procedural requirements, and to rely on EU law principles of substantive assessment and liability attribution to interpret national rules of procedure where appropriate.

[95] Case 1846/2015, judgment of the Spanish Supreme Court of April 25, 2016.

[96] Case 5137/2013, judgment of the Spanish High Court of November 29, 2013.

[97] *General Química SA and Others v. European Commission* (C-90/09 P) EU:C:2011:21.

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 Swiss Supreme Court Confirms Fines Imposed by the FCC for Restrictions on Parallel Imports of Toothpaste

On June 28, 2016, in a landmark decision, the Swiss Supreme Court confirmed the FCC's 2009 fine of 4,820,580 CHF imposed on Gaba International AG ("Gaba") for preventing parallel imports of the red Elmex toothpaste product into Switzerland.[98] The Swiss Supreme Court found that an agreement by which Gebro Pharma GmbH ("Gebro")—the Austrian partner of Gaba—undertook not to export the products of Gaba outside of Austria constituted, in and of itself, an appreciable restriction on competition which, as it could not be justified by reasons of economic efficiency, was illicit under the Competition Act. The Swiss Supreme Court also confirmed the position of the Federal Administrative Court and the FCC that Swiss law allows fines to be imposed for agreements excluding passive sales in Switzerland, regardless of whether competition is, in fact, restricted. In other terms, agreements excluding passive sales are restrictions by object and, as under European law, may result in sanctions.

Agreements providing absolute territorial protection (that is to say agreements that allocate an exclusive territory to a given distributor whilst excluding passive sales by other distributors in said territory) fall under Article 5(4) of the Competition Act. This article provides that such agreements eliminate competition and are presumed illicit. The presumption can however be rebutted: the parties can establish that sufficient competition exists on the relevant market, notwithstanding the absolute territorial protection afforded by the agreement. The examination by the authorities does not end, however, with the finding that the presumption is rebutted; the authorities must still examine whether the agreement constitutes an appreciable restriction on competition as understood under Article 5(1) of the Competition Act and, in the affirmative, whether it is justified by reasons of economic efficiency as understood under Article 5(2) of the Competition Act. Traditionally, the FCC considers that the appreciable character of the restriction must be assessed by reference to qualitative and quantitative criteria, as part of an overall assessment. Whilst the qualitative criteria generally relates to the nature of the restriction, the quantitative criteria consists of examining whether the restriction has a significant effect in the market. In light of the effects-based approach of Swiss competition law, an agreement is inadmissible only if the FCC can prove that it leads to an actual, significant restriction on competition, regardless of the agreement's nature.

On November 30, 2009, the FCC fined Gaba 4,820,580 CHF and Gebro 10,000 CHF. The investigation was initiated following a complaint by Denner, the third largest competitor on the Swiss retail market. The FCC considered that even if the license given to Gaba fell under the presumption of Article 5(4) of the Competition Act, said presumption should be considered reversed in the case at hand. The intrabrand competition relating to red Elmex was deemed insufficient due to the fact that it consisted solely of a few sales by the distributor Spar (who succeeded in supplying itself on a parallel market) at a price below that of other retailers and a few promotional sales made by all retailers (such as Migros and Coop). However, the interbrand competition appeared sufficient to reverse the presumption, as Gaba regularly had special offers and some competition existed through quality and innovation. Regarding the examination of the matter pursuant to Article 5(1) of the Competition Act, the FCC considered that a restriction falling under Article 5(4) of the Competition Act constitutes a qualitatively appreciable restriction by nature. From a quantitative

[98] Swiss Supreme Court Summary, June 28, 2016, available in French at: http://www.bger.ch/fr/press-news-2c_180_2014-t.pdf.

point of view, the FCC considered that a restriction of parallel trade led to an appreciable effect on competition on the following basis: (i) the red Elmex product is known and well positioned in the market; (ii) the red Elmex product benefits from a market share of 10–20%, whereas the market share of Gaba is 20–30% (based on quantities sold) or 40–50% (based on turnover); (iii) the price difference between Austria and Switzerland for both sales by the supplier to the distributor and sales to end consumers is significant; and (iv) after Denner finally received supplies directly from Gaba and sold the red Elmex product at a lower price than Coop and Migros in Switzerland, Coop reduced its prices by 10%, therefore, the FCC deduced that supply from a parallel market would have had the same effect.

On December 19, 2013, the Federal Administrative Court confirmed the sanctions imposed on Gaba and Gebro. It considered that, when the presumption of Article 5(4) of the Competition Act is reversed, it is possible to impose a fine. It is sufficient for the agreement to represent an appreciable restriction on competition pursuant to Article 5(1) of the Competition Act that is not justified by reasons of economic efficiency as understood under Article 5(2) of the Competition Act. Concerning the appreciable character of the restriction, the Federal Administrative Court indicated that, on the one hand, an exclusion of passive sales is a qualitatively appreciable restriction and, on the other hand, when such a restriction is proven, it is not necessary to take into account quantitative criteria (such as companies' market shares). According to the Federal Administrative Court, given that Article 5(4) of the Competition Act establishes a presumption that an exclusion of passive sales eliminates competition, it must be admitted that such an exclusion is qualitatively appreciable as a matter of principle, independent of any quantitative criteria. The position of the Federal Administrative Court means that even when the presumption is overturned (because there is sufficient interbrand or intrabrand competition in the market) an agreement with a clause excluding passive sales is directly sanctionable under Swiss law if it cannot be justified by reasons of economic efficiency.

On June 28, 2016, the Swiss Supreme Court issued a final interpretation regarding Article 5 of the Competition Act in relation to absolute territorial protection agreements and other agreements falling within the scope of Articles 5(3) and 5(4) of the Competition Act (price-fixing and quantity limiting agreements), and whether it is possible to impose sanctions for agreements falling under Articles 5(3) and 5(4) of the Competition Act that are illicit pursuant to Articles 5(1) and 5(2) of the Competition Act:

— According to the Swiss Supreme Court, as a rule agreements on prices, quantities, and allocation of territories within the meaning of Article 5(3) and 5(4) significantly affect competition based on qualitative criteria, even if the presumption of removal of effective competition has been rebutted. This applies regardless of quantitative criteria, such as the proportion of the market share held by the relevant parties. The Swiss Supreme Court specified that quantitative elements such as market shares were of no importance. These agreements are illegal unless justified on grounds of economic efficiency. It is therefore correct that the export ban imposed on Gebro was an illegal vertical agreement significantly affecting competition in the market.

— The Swiss Supreme Court also confirmed the possibility of imposing direct sanctions not only for agreements eliminating effective competition, but also for illicit agreements in which the presumption of termination of effective competition has been reversed but competition is still significantly affected and there is no justification on grounds of economic efficiency. The Swiss Supreme Court found that only agreements that are unlawful pursuant to Article 5(1) of the Competition Act and do not contain price-fixing, quantity-limiting, and market-allocating provisions are exempt from direct sanctions. The court conceded, however, that the circumstances of a mere significant restraint of

competition instead of the complete elimination of effective competition must be taken into account in calculating the fine.

Abuse

The FCC Imposes Fines Swisscom For Abuse in Live Sports Broadcasting on Pay-TV

On May 24, 2016, the FCC fined Swisscom 71,818,517 CHF.[99] The Swisscom group with its subsidiaries CT Cinetrade AG and Teleclub AG hold a dominant position with respect to live broadcasting of Swiss football and ice hockey championship games on pay-TV. The FCC found that Swisscom has abused this position by restricting competing TV platform operators' access to content.

According to the FCC, Swisscom abused this dominant position in several respects. Swisscom refused to supply some competitors with broadcasts of live sports for their platforms and, for other competitors (such as Cablecom), Swisscom only granted access to a reduced range of sports content. Furthermore, the competitors, unlike Swisscom, could only offer their customers the sports content in combination with the basic package of Teleclub. Through these practices, Swisscom illegally gained an advantage against rival TV platform operators.

Vertical Agreements

The FCC Approves an Amicable Settlement in Connection with Restrictions on Direct Imports of GE Ultrasound Equipment

On March 10, 2015, following a leniency application by General Electric Company ("GE"), the FCC opened an investigation into certain agreements entered into by GE Healthcare (GE's German affiliate) and GE Medical Systems SA (GE's Swiss affiliate) for the distribution of GE ultrasound equipment. The investigation revealed that from April 2008 until April 2014, GE Healthcare and its distributors entered into agreements that conferred an absolute territorial protection, which was illicit in light of the Competition Act. Pursuant to the amicable settlement, the two GE subsidiaries have undertaken to abstain from entering into future agreements that would exclude passive sales of German traders to Swiss customers.[100] The FCC has demanded that all contracts with German dealers must be adapted accordingly, or their content must be clarified. No sanction was imposed, as the investigation was launched following a leniency application.

Policy and Procedure

The FCC Publishes its 2015 Annual Report

On April 14, 2016, the FCC published its 2015 annual report.[101]

2015 was marked by a number of important decisions and events. In several investigations, the FCC imposed sanctions on horizontal price cartels (tunnel cleaning, wholesalers of sanitary facilities, VW Partners Association, pianos and grand pianos). It also took action against vertical price-fixing agreements (stringed instruments), uncovered a further instance of abuse of dominance (Swisscom broadband internet), revised its Notice regarding the competition law treatment of vertical agreements in the motor vehicle trade as well as its own internal rules of procedure. The courts also issued the following judgments:

— In the case concerning off-list medicines, the Swiss Supreme Court upheld the appeal by the Federal Department of Economic Affairs, Education and Research and reversed the judgment of the Federal Administrative Court. The Swiss Supreme Court confirmed that the application of the Competition Act can only be excluded by express statutory provisions, and not by factual circumstances in a specific market.

[99] FCC press release, May 24, 2016, available in English at: https://www.weko.admin.ch/weko/en/home/latest-news/press-releases/nsb-news.msg-id-61823.html.

[100] FCC press release, June 7, 2016, available in French at: https://www.weko.admin.ch/weko/fr/home/actualites/communiques-de-presse/nsb-news.msg-id-62037.html.

[101] FCC Annual Report 2015, available in English at: https://www.weko.admin.ch/weko/en/home/documentation/annual-press-conference.html.

- In the cases concerning Swisscom ADSL and BMW, the Federal Administrative Court confirmed the substantive decisions of the FCC in their entirety and rejected the related appeals. In the case of Swisscom ADSL the court made a minor reduction to the FCC's fine by applying a different calculation method. In the case on alpine sports products, it upheld the appeal against the FCC ruling.
- In matters relating to the Internal Market Act, the Swiss Supreme Court upheld two appeals by the FCC in proceedings concerning public procurements.

Above all, the two Federal Administrative Court judgments in the Swisscom ADSL and BMW cases strengthen the FCC's hand. In the BMW case, the Federal Administrative Court comprehensively rejected the appeal filed by BMW against the FCC's decision of May 7, 2012. The FCC had fined BMW approximately 156 million CHF for unlawfully preventing parallel and direct imports. The Federal Administrative Court concluded in its judgment that the effects doctrine of the Competition Act applied to the circumstances concerned. To guarantee that Swiss law is effective, the FCC must also be able to act if circumstances arise abroad that have an effect within Switzerland. The Federal Administrative Court thus upheld the lower instance's reasoning that territorial agreements that prevent active and passive sales in a particular region are among the most harmful agreements in competition law terms. These absolute territorial agreements must, by their nature, be regarded as agreements that cause considerable damage to the quality of competition. They may be justified on the grounds of economic efficiency, but that did not apply in this case. The court also upheld the view of the lower instance court that these agreements fall under the sanction provisions of Article 49(a) of the Competition Act, according to which a company may be fined up to 10 percent of the turnover that it achieved in Switzerland in the previous three financial years. It therefore rejected BMW AG's appeal.

In the ADSL case, the Federal Administrative Court agreed with the FCC's arguments and assessments related to the existence of an unlawful "margin squeeze." The FCC considers that judgments of this kind are important because they confirm that the FCC has made the correct decisions in complex proceedings both in formal and substantive terms. In addition, the judgments create legal certainty—subject to the decision of the Federal Supreme Court—for the companies in their own specialist sectors.

UNITED KINGDOM

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

Horizontal Agreements

The CMA Fines Ultra Finishing Group £768,668 for Resale Price Maintenance in the Market for Bathroom Fittings

On May 10, 2016, the CMA found that Ultra Finishing Group Limited ("Ultra") had infringed the Chapter I prohibition of the Enterprise Act 2002, or Article 101 TFEU, by enforcing restrictions on maximum retail price discounts.[102]

The CMA found that during different periods between February 1, 2012 and August 28, 2014, Ultra had entered into agreements or concerted practices with three resellers of its *Hudson Reed* and *Home of Ultra* product lines.[103] The resellers agreed to an online trading policy that recommended a maximum discount of 20% of the product lines' recommended retail price.[104] However, the CMA's investigation revealed that Ultra would monitor resellers' pricing, and would punish discounting resellers by reducing wholesale terms of supply, withdrawing rights to use Ultra branding and imagery online, and temporarily or permanently cutting off supply. The CMA also found evidence of Ultra contacting noncompliant resellers and threatening retaliation if discounts did not comply with the policy.

The CMA found that the "recommendations" on discounting were treated by Ultra and its resellers as a concrete prohibition, and that the policy had resulted in a restriction of price competition. The CMA concluded that Ultra's circulation of the policy, along with its monitoring and retaliation against noncompliant resellers, constituted resale price maintenance. The CMA fined Ultra £768,668 after taking into account the seriousness of the infringement on the one hand and Ultra's relatively weak position in the affected market, cooperation and settlement with the CMA, and its efforts to implement a compliance program on the other.

The CMA Fines ITW £2.3 Million For Resale Price Maintenance in the Market for Commercial Refrigeration

On May 24, 2016, the CMA found that ITW Limited ("ITW") had infringed the Chapter I infringement of the Enterprise Act 2002, or Article 101 TFEU, by enforcing minimum advertised price obligations on its resellers.[105] The CMA's predecessor—the Office of Fair Trading ("OFT")—commenced the investigation in September 2013 following complaints from online resellers that ITW and its competitors were engaging in resale price maintenance.

From January 6, 2012 until December 31, 2014, ITW enforced a minimum advertised price policy requiring that resellers not price its commercial refrigeration products below a list price calculated with a formula. The policy was distributed to all of ITW's resellers and was introduced with an explanatory note stating that the policy "will help all of our dealers in the marketplace, by improving the margins available from selling the [ITW] range of products." The policy explicitly warned of sanctions for noncompliance, ranging from reductions in wholesale price terms up to termination of a reseller's account. The policy further warned that ITW "will monitor the internet and other

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102 *Online resale price maintenance in the bathroom fittings sector* (Case CE/9857-14), CMA decision of May 10, 2016.

103 The CMA's decision notes evidence that Ultra entered into similar arrangements with several more resellers. However, as with the investigation into commercial refrigerators, the CMA elected to select three representative resellers for the purposes of demonstrating the infringements.

104 The CMA decision notes that Ultra may have attempted to make its resellers enter into a separate agreement in 2009 that explicitly prohibited them from offering discounts. Ultra appeared to abandon the effort after three months. The CMA elected not to further investigate this conduct.

105 *Online resale price maintenance in the commercial refrigeration sector* (Case CE/9856-14), CMA decision of May 24, 2016.

sources … to ensure the new policy is being adhered by all dealers," and invited resellers to report noncompliance by their competitors.

The CMA's investigation found that the minimum advertised price policy had resulted in a restriction of price competition with at least three resellers,[106] and that the policy's principal rationale was to impose resale price maintenance across ITW's network. In doing so, the CMA concluded that ITW had entered into agreements—or at the very least concerted practices—that had the object of restricting competition. The CMA fined ITW £2.3 million after considering the seriousness of the infringement and ITW's considerable presence in the market on the one hand, and its cooperation and settlement with the CMA and efforts to implement a compliance program on the other.

Following its two recent resale price maintenance-related infringement decisions, the CMA issued an open letter to suppliers and retailers warning that any attempt to dictate resale prices—including by setting minimum advertising prices or by threatening discounting resellers with retaliatory measures—would be treated as serious competition law offences.[107]

Market Investigations

The CMA Publishes Final Report on its Energy Market Investigation

On June 24, 2016, the CMA published its final report on its Energy Market Investigation.[108] The report follows its provisional findings report of July 7, 2015, and its provisional remedies decision of March 17, 2016.

The provisional findings report identified likely adverse effects on competition in the following areas.

— The wholesale electricity market, due to the absence of locational pricing to account for the differing cost of electricity generation geographically and the lack of a competitive allocation process for contracts for difference.

— The retail gas and electricity energy markets, due to a lack of price transparency and a lack of customer engagement providing the six major suppliers of energy with market power over their customers.

— The U.K. energy markets' general regulatory framework, due to a lack of transparency and communication over decision-making, an overall lack of emphasis on regulators' ability to promote competition, and underdevelopment of industry codes.

The final report confirms these findings, concluding the existence of the adverse effects on competition identified in the provisional report. The CMA intends to address these adverse effects on competition with a range of remedies.

In the wholesale electricity market, the CMA intends to: (i) order the National Grid system operator to account for locational pricing differences in its charge scheme; and (ii) suggest that the U.K. Government consult and carry out impact assessments before awarding contracts for difference outside of a competitive tender process.

In the domestic retail markets, the CMA has proposed a number of measures, including: (i) the energy regulator, Ofgem, reformulating several rules and conditions to increase market transparency and lower switching costs; (ii) the creation of a database of "disengaged" customers allowing competing suppliers to target new tariffs and services at them; (iii) establishing advocacy programs to encourage customers—including SMEs—to engage with

[106] The policy was distributed to all ITW resellers; however the decision notes that there was evidence that its effects were broader. Due to limited resources, the CMA elected to select three representative resellers for the purposes of demonstrating the infringements

[107] CMA letter, Restricting resale prices: an open letter to suppliers and retailers, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/530570/rpm-open-letter-suppliers-retailers.pdf

[108] Energy Market Investigation, CMA Final Report of June 24, 2016, available at: https://assets.publishing.service.gov.uk/media/5773de34e5274a0da3000113/final-report-energy-market-investigation.pdf

competitors and consider switching; and (iv) imposing a temporary three-year price cap for certain types of residential customers.

To address the adverse effects on competition relating to regulatory issues, the CMA has recommended that: (i) the U.K Government and Ofgem increase transparency by publishing opinions on proposed policy changes and decision-making; and (ii) Ofgem take a more active role in helping the industry develop its codes, including proposed legislation allowing Ofgem to directly modify industry codes in exceptional circumstances. Furthermore, the CMA will require the six major energy firms to change their mandatory reporting obligations to provide more granular information on individual markets.

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