ECN Brief

ECN Brief 01/2013

Welcome to the February 2013 issue of the ECN Brief

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Dear Reader,

Having closed 2012 with an Extended Issue on the 10th anniversary of Regulation 1/2003, we are happy to open the fourth year of publication with news from November 2012 to February 2013. The ECN Brief is a publication from the European Competition Network (ECN): it aims to inform you about the activities of the ECN and its members and to reflect the richness of enforcement actions and advocacy in the Network. It focuses on news of major interest about EU competition law and policy.

The present edition reports on enforcement actions from the ECN members in a large variety of sectors. In addition, a range of legislative developments are taking place in the Member States, mostly adjusting and strengthening procedures for the enforcement of competition law. Newly restructured competition authorities have started operating in some Member States.

More news about the activities of the ECN and its members will be published in May 2013. In the meantime, we wish you interesting reading!

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These amendments constitute the first major amendment to the Austrian competition regime since 2005 and include a new set of substantive rules which enhances the effective enforcement of competition law and strengthens the investigative powers of the Federal Competition Authority.

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Czech Republic: Amendment to Competition Act

On 1 December 2012, several amendments in the legal framework for competition proceedings in the Czech Republic entered into force. They concern namely the leniency programme, settlement procedure, inspections and sanctions. Prioritization which, among others, helps save public resources, has also been newly implemented.

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The revised competition act enters into force on 1 March 2013. It amends the legal framework for sanctioning infringements of the Danish Competition Act and introduces a number of key procedural changes.

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The 12th Annual Conference of the International Competition Network (ICN) will be held in Warsaw, Poland, from 23 to 26 April 2013. The Polish Office of Competition and Consumer Protection (UOKiK) will, for the first time, organize this worldwide event which is expected to gather over 500 representatives of antitrust agencies.

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Annual Reports

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Link to the Annual Reports of all ECN Members

Spain: Anniversary of the Spanish Competition Act

The year 2013 marks the 50th anniversary of the enactment of the Spanish Act 110/63 of 20 July 1963 which was the first special Act to defend free competition in Spain. This anniversary will be marked by an event in May with the participation of Mr Joaquín Almunia, Vice-President of the European Commission.

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ENFORCEMENT & CASES

AUTHORITIES

- **Finland: The Competition Authority proposes Fines for Abuse of Dominant Position in Fresh Milk Market**

On 20 December 2012, the Finnish Competition Authority (FCA), now the Finnish Competition and Consumer Authority (FCCA), proposed to the Market Court to impose on Valio Oy (Valio) a € 70 000 000 penalty payment for an abuse of dominant position in the production and wholesale market of fresh milk, infringing the Finnish competition rules as well as Article 102 TFEU. The FCA has also ordered Valio to cease its antitrust infringement which has continued for almost three years.

The FCA's investigation and evidence show that Valio's top management made a strategic decision in February 2010 aiming to foreclose competition on the Finnish fresh milk market. To achieve this goal, Valio dropped the wholesale prices of its fresh milk considerably below costs as of 1 March 2010. The purpose of the under-pricing was to achieve a position in the market close to a monopoly and thereafter to raise prices back to the level that existed before Arla Ingman, subsidiary of the global dairy company Arla Foods, entered the market.

The FCA found that Valio committed a serious antitrust violation, with the aim of harming consumers. Valio's strategy has been to prevent Arla Ingman from competing on the Finnish fresh milk market. The conduct has also significantly impeded the possibilities of small dairies to operate on the market.

In determining the amount of the penalty payment, the FCA considered the gravity and duration of the conduct, the size of the fresh milk market, Valio's considerable turnover and the fact that Valio has once before been found guilty of abuse of dominance (SAC:1998:65 (in Finnish)).

See the public version of the FCA's decision and Market Court proposal at kkv.fi.

- **France: The Autorité de la Concurrence fines national incumbent Railway Operator SNCF for Unilateral Practices and imposes Injunction**

On 18 December 2012 the Autorité de la concurrence (the Autorité) imposed on SNCF, the national incumbent railway operator, a fine of € 60 900 000 as well as an injunction for having implemented several practices that have hindered or delayed the entrance of new operators in the railway freight sector in France.

Following the opening of ex officio proceedings in 2008 and a complaint filed by a competitor in 2009, the Autorité found that SNCF had abused its dominant position (77% in the full-train-load market segment in 2009) and distorted competition in the specific context of the railway freight sector's effective opening to competition from 31 March 2006 onwards.

Two practices have led to the imposition of a fine and another practice has been the subject of an injunction.

First, the Autorité found that as Delegated Infrastructure Manager in charge, via a specific branch, of the traffic management and the technical and safety maintenance of the network infrastructure, SNCF had gathered sensitive and confidential information on the strategy and business behaviour of its competitors and used it in its own commercial interest.

Second, the Autorité found that SNCF had been preventing its competitors from accessing rail capacities that were essential to their business by hindering access to freight yards (SNCF is both user and manager of many of these infrastructures) and overbooking train paths and specific wagons that are used for large tonnages transportation.

A third practice consisted in pricing below cost to selected clients and traffic, by which SNCF aimed to artificially delay competition in the market. The analysis of this practice follows the Post Danmark judgment of the European Court of Justice (Case C-209/10 - Post Danmark A/S v Konkurrencerådet, 27 March 2012). Those prices were below the average total cost but above SNCF's average incremental costs. The practice was likely to prevent competitors as efficient as SNCF from entering the market or make their entry more difficult.

The Autorité took into account the fact that no evidence in the case pointed towards a global strategy or a comprehensive plan drawn up by the SNCF. The total fine imposed amounted to € 60 900 000.

With regard to the third practice, the Autorité issued an injunction against SNCF obliging it to set up, within 18 months, an analytical accounting system which shall enable a precise identification of the costs incurred by its full-train-load freight business. Moreover, the Autorité enjoined that that the prices for full-train-load services, proposed to shippers, cover average avoidable costs related to this specific activity within three years. This change in SNCF's business and accounting model will ensure that competition rules will be followed in the future.

See press release (in English):
http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=418&id_article=2016
and decision (in French): http://www.autoritedelaconcurrence.fr/pdf/avis/12d25.pdf

• European Commission accepts Commitments in E-Books Case

On 12 December 2012, the European Commission (Commission) accepted formally binding commitments from four international publishers (Simon & Schusters (CBS Corp., USA), HarperCollins (News Corp., USA), Hachette Livre (Lagardère Publishing, France) Verlagsgruppe von Holtzbrinck (Germany; owner of inter alia Macmillan)) and Apple for the sale of e-books in the European Economic Area (EEA). The following day the Commission announced that it was in separate discussions on similar commitments with Pearson (UK; owner of inter alia Penguin).

The Commission agreed to close proceedings against these four publishers after they had agreed to terminate all agency agreements in the EEA, to ban retail price, wholesale price and agency commission Most Favoured Nation (MFN) clauses for a five-year period and allow retailers to discount e-books for a two-year period. Similarly Apple agreed to terminate its agency agreements with five major publishers and ban retail price MFNs for a five-year period. The Commission found that these commitments would cease the alleged infringements and would help to restore and maintain retail price competition for the sale of e-books in the EEA.

At the heart of the case was the retail price MFN clause. This clause ensured that in case a competitor to Apple would sell e-books for a lower retail price than set by the publishers in the iBookstore, the publishers would have to match this price on the iBookstore, regardless of whether that other retailer was operating on a wholesale or agency model. Due to the construction of the contracts this would have serious financial implications for publishers. The Commission's preliminary view was both Apple and publishers understood that this clause would ensure that the publishers would compel all retailers to switch to the agency model on similar terms as those agreed with Apple, and that the switch would occur at approximately the same time. Evidence also indicated that retailers were told that either they moved to the agency model or they might no longer be supplied with e-books from these major international publishers.

The Commission opened proceedings in December 2011 against these five companies as well as Pearson, as it had serious concerns about the joint switch by these companies from a wholesale model, where the retail price of e-books is determined by the retailer, to agency contracts on the same key terms - including an unusual retail price MFN clause, maximum retail price grids and the same 30% commission. The Commission was concerned that the switch to the agency model was coordinated between the publishers and Apple, as part of a common global strategy aimed at raising retail prices for e-books or preventing the introduction of lower retail prices for e-books on a global scale.

The Commission's investigation started with unannounced inspections in March 2011 (see MEMO/11/126).

The Commission opened proceedings in December 2011 against five international publishers (Simon & Schuster, Harper Collins, Hachette, Holtzbrinck, and Penguin) and Apple (see IP/11/1509). In September 2012, the Commission consulted stakeholders on draft commitments offered by four publishers and Apple to remedy the Commission's preliminary concerns (see IP/12/986).

More information on the case is available on the competition website, in the Commission's public case register under the case number 39847.

- **Belgium: Fine for Abuse of Dominance in Postal Sector**

On 10 December 2012, the Competition Council (the Council) imposed on bpost (formerly called La Poste – De Post), the Belgian postal incumbent, a fine of € 37 399 786 for a rebate scheme called "model per sender" which was applied from January 2010 until July 2011 and infringed Belgian and EU competition rules. The Council found that bpost gave rebates in the context of the contracts it entered into with large clients (such as for example banks or companies active in sales by correspondence) and with intermediaries. The rebates awarded were either based on the volume of the mail (quantitative rebates) or on the degree to which the mail was prepared for further treatment by bpost. The decision concerns mainly the quantitative rebates. Some of these rebates were considerable, going up to 50% of the basic tariff for a specific type of mail.

Intermediaries are companies who offer a variety of services to the senders of mail such as the preparation (putting into envelopes for example), collecting, sorting and transporting of the mail to the distribution point of bpost. The main issue was that the "model per sender" scheme did not allow intermediaries to consolidate the mail they treated for their clients, thereby not permitting them to benefit from the rebates based on volume. Consolidation was only allowed if they identified their clients; in such a case they could obtain the same rebates as the larger clients working directly with bpost, however they were granted only retroactively, whereas for the direct clients the rebates were applied immediately.

The Council found that the treatment of intermediaries raised competition concerns. The rebate scheme could have for example as a consequence that intermediaries are barred from offering attractive prices to larger clients. In a market which has only been liberalised recently, intermediaries are one of the few actors that exercise competitive pressure on bpost, according to the decision. The rebate scheme, as applied by bpost, could have exclusionary effects for the intermediaries themselves, as well as fidelity effects which prevent large clients from working with the intermediaries. Access to large clients is considered crucial for any company wishing to develop on the postal market.

In July 2011, the IBPT (Belgian postal and telecom regulator) had already decided that the rebate scheme was incompatible with postal regulations. After this decision, bpost put an end to the scheme. bpost also appealed the regulator's decision.

Where the fine is concerned, the Council took the turnover of bpost for Direct Mail (mail with an identical content such as publicity folders) as a starting point. It appeared that the impact of the rebate scheme was the most important for this type of mail. The abuse of dominant position which lasted from January 2010 until July 2011 is considered to be a serious infringement. The Council took into account as mitigating circumstance that similar rebate schemes were in force in other Member States such as in France, even though the French scheme to which bpost referred, showed some important differences.
Since the decision of the telecom regulator IBPT concerned the same rebate scheme, even though it was based on postal regulations, the Council decided to deduct the fine already imposed by the regulator (€ 2 300 000) from its own fine.

See Decision of the Belgian Competition Council (in French)

- **France: The Autorité de la concurrence fines two Telecom Operators in Mobile Telephony Sector**

On 13 December 2012, following a complaint by Bouygues Télécom, a mobile phone operator, the Autorité de la concurrence (the Autorité) fined the two leading mobile phone operators, Orange and

SFR a total of € 183 100 000 for applying unjustified rate differentiation practices between "on-net" calls (made within their own network) and "off-net" calls (to a rival network). The Autorité established that they abused the dominant position each of them held in their respective call termination markets (i.e. in the interconnection service they offered other operators by "terminating" calls on their networks).

From 2005 to 2008, the two operators offered unlimited calls to their subscribers for "on-net" calls. In a context where Orange and SFR held in this period respectively 47% and 36% of the mobile telephony market for household customers in France, those offers artificially enhanced "tribe" effects (i.e. the propensity for close relatives to regroup under the same operator), by chilling incentives for consumers to switch operators. This "tribe" effect played a great role as this factor was, above price, the main incentive for subscriptions (70% of a subscriber's consumption was used for its three favourite interlocutors). Once the "tribes" were formed, these offers "locked" consumers in durably with their operator by significantly raising the exit costs incurred by the subscribers of "on-net" unlimited offers as well as by their relatives who wished to subscribe to a new offers with a competing operator.

This differentiation between "on-net" and "off-net" calls therefore consequently damaged the fluidity of the retail market by hampering customers' migration towards another existing operator, in particular the third operator in the French mobile telephony sector, Bouygues Télécom, who was the latest entrant at the time of the facts and who filed the complaint towards the Autorité.

In view of the small size of its subscriber base, Bouygues Télécom (17% of all subscribers) could not make its own unlimited "on-net" offer. It launched in 2006 an unlimited "cross-net" call offer (i.e. allowing its customers to make unlimited calls to their interlocutors, whatever their network). This strategy was costly as it involved particularly high termination charges to Orange and SFR. Those practices have therefore affected Bouygues Telecom's and the mobile virtual network operator (MVNO)'s capacity to exert competitive pressure on Orange and SFR for three years.

The anticompetitive practices ceased when the defendants also launched "cross-net" offers in 2008. From this date, consumers benefited from more attractive offers and the club effect was no longer artificially enhanced by their commercial strategy.

Orange and SFR did not demonstrate that the rate differentiation between "on-net" and "off-net" calls were objectively justified, i.e. by a difference between the costs borne for the supply of the two types of calls. They could not either demonstrate that it would be indispensable to the achievement of efficiency gains which would prevail over the anticompetitive effects of their practices, particularly since both operators could have marketed "cross-net" offers, in which there is no differentiation between both types of call.

On basis of the above, the Autorité imposed the following fines: € 78 279 000 jointly and severally on Orange France, the wholly-owned subsidiary of France Telecom and France Telecom; € 39 140 000 on France Telecom, and € 65 708000 on SFR.

Rate differentiation practices in the mobile telephony sector have already been examined by the Autorité (see decision 02-D-69 of 26 November 2002, relative to the referrals and the requests of interim measures by the company Bouygues Télécom, and two consumer associations, Union fédérale des consommateurs Que Choisir and Confédération de la consommation, du logement et du cadre de vie, decision 09-D-15 "Unik", decision 09-D-36 of 9 December 2009 relative to Telephony in Guadeloupe, Martinique and Guyana, decision 12-D-05 of 24 January 2012 on SRR's partial inobservance of the injunction imposed by decision 09-MC-02 of 16 September 2009 (see ECN Brief 1/2012)).

See Decision of 13 December 2012 (in French)

- **Germany: The Bundeskartellamt imposes Fines on Pro7Sat1 and RTL on account of Agreements on basic Encryption of TV Programmes and secures unencrypted SD TV**

On 28 December 2012 the Bundeskartellamt (BKartA) imposed fines totalling approximately € 55 000 000 on the two major German TV broadcasting groups Pro7Sat1 and RTL as well as on two individuals involved in the infringement. The companies were found to have entered into anticompetitive agreements when

they introduced the encryption of their digital free TV programmes. The two broadcasting groups have undertaken to offer their major programmes broadcast in standard definition (SD) and unencrypted for a period of ten years. This commitment covers the cable, satellite and Internet Protocol TV (IPTV) transmission paths. It does not include the encryption of programmes broadcast in high definition (HD).

The BKartA found that the two broadcasting groups agreed in 2005/2006 that, as of then, they would broadcast their SD digital free TV programmes only in encrypted form and charge an additional fee for decryption. The broadcasting groups also planned to make use of technical measures such as anti-ad blockers and copy protection functions to restrict the TV viewers' options for using the programme signals. The agreements covered the cable, satellite and IPTV transmission paths. They were applied at least until the BKartA carried out inspections at the broadcasters' premises in May 2010, and in many networks even longer.

The orders imposing the fines are not yet final and can be appealed to the Düsseldorf Higher Regional Court. However, all the parties have agreed to have the proceedings terminated by settlement.

In addition, both broadcasters have committed themselves to stop the basic encryption of their free TV programmes broadcast in SD throughout Germany from 2013, in order to remedy the effects of the anti-competitive agreements. The two groups will maintain their unencrypted broadcasting in SD for a minimum period of ten years. The commitment to maintain unencrypted SD broadcasts enables TV viewers to continue to receive digital free TV in the next few years without signal protection restrictions and without any additional charges.

See press release (in English)

• Germany: Lufthansa changes anticompetitive Clauses in Corporate Client Programme

On 20 December 2012 the Bundeskartellamt (BKartA) declared commitments of Lufthansa binding regarding specific issues with Lufthansa's data tracking methods.

The proceedings against Lufthansa were triggered by complaints from corporate clients of Lufthansa from across the German business community as well as from the travel office of the German government. According to the complaints, as part of its corporate client programme (by way of contractual clauses) and in order to calculate its incentive services, Lufthansa obliged its clients to transmit all sales data for the flights bought within a certain calculation period. This also included flights which the corporate clients booked with Lufthansa´s competitors. Furthermore, to benefit from incentives, corporate clients had to agree to the transmission of their booking data (MIDT Data) through the Computer Reservation System (CRS).

Through these clauses Lufthansa gained access to sensitive information of rival companies. In a preliminary assessment, the BKartA found that these contractual clauses constitute a possible violation of Sect. 1 ARC and Article 101 TFEU.

Lufthansa offered in its commitments to remove the clauses in question from the contract with their clients. The BKartA declared those commitments binding.

See press release (in English)

• Italy: The Competition Authority opens Formal Proceedings against four Insurance Companies for alleged Bid-Rigging

At the end of November 2012, the Italian competition authority (ICA) conducted inspections at the headquarters of four insurance companies on suspicion of possible anti-competitive practices involving collusive bidding and bid-rigging agreements in more than 45 public procurement proceedings concerning compulsory bus liability insurance. Those public tenders were held from 2005 until at least February 2013 by different companies operating Local Public Transport services spread on various national areas including: AMTAB Bari, CSTP Salerno, APS Padova, Autoservizi Irpini Avellino, Società Trasporti Pubblici di

Terra d'Otranto, CTP Napoli, GTT Torino and AMT Catania.

Unannounced inspections were carried out as a preliminary step in the infringement proceedings opened against Assicurazioni Generali S.p.A., INA Assitalia S.p.A., Unipol Assicurazioni S.p.A. and Fondiaria SAI S.p.A., which involve alleged conduct of the kind prohibited by Article 101 of the TFEU, relating to the coordination of strategic behaviour directed at distorting competitive tenders and limiting the entrance of foreign competitors.

The investigation was initiated in light of complaints filed by public transport companies and of further information collected by the ICA showing that in 35 out of 45 tenders no bids were submitted while in 10 only the previous insurance provider participated. As a result, in most cases the compulsory insurance service has allegedly been awarded through private allocation to the benefit of the incumbent's insurance provider and with a substantial increase in the offer prices over the years.

The conclusion of the investigation is due by 16 December 2013. Bid-rigging is considered one of the most serious forms of anticompetitive infringements, which could draw a fine of up to 10% of the aggregate turnover of the infringing companies in the financial year immediately preceding the year the fine is levied.

See press release (in Italian)

- **Lithuania: The Competition Council imposes Fines on Cash Handling Services Provider and three Banks for Restricting Competition in Cash Handling and Cash in Transit Services**

On 20 December 2012, the Lithuanian Competition Council (CC) imposed fines exceeding LTL 57 000 000 (approximately € 16 000 000) on the provider of cash handling services G4S Lietuva (G4S), and three major banks in Lithuania: AB DNB bank, AB SEB bank and Swedbank (together the "Banks") for anti-competitive agreements between G4S and the Banks in cash-in-transit (CIT) and cash handling services' markets.

The CC concluded that as the Banks committed themselves to buying all cash handling services exclusively from G4S, the ability of other service providers to compete has been significantly restricted. For the duration of the agreements, the Banks could not use cash handling services provided by the competitors of G4S even if the former were to make better offers. The cash handling costs incurred by banks are eventually covered by consumers when paying banks' cash withdrawal from ATMs, currency exchange or other cash handling related fees.

The CC found that the provision of cash handling services is closely related to provision of CIT services which are provided to the clients (companies) of the Banks. These circumstances led to the conclusion that the above mentioned agreements were harmful to the clients of the banks as well. Indeed, the clients of the Banks could not choose any other provider of CIT services but G4S.

After considering all the circumstances under investigation, the CC found that G4S and the Banks acted in breach of Article 5 of the Law on Competition prohibiting anticompetitive agreements. In addition, in view of the nature and the scope of the behaviour concerned, the agreements were found to also infringe Article 101 TFEU.

The fines have been imposed taking into consideration that G4S had a significant market share of CIT and cash handling services and that the infringements lasted for a long period of time (from 3 years and 2 months to 5 years and 3 months). The CC also took into account the fact that the Banks had limited the opportunities of their clients to choose providers of CIT and cash handling services and buy such services at competitive prices.

In relation to the anticompetitive agreements concerned, the following fines have been imposed: G4S – LTL 9 437 800 (approximately € 2 735 594), AB DNB bank – LTL 8 630 200 (approximately € 2 501 507), AB SEB bank – LTL 24 808 200 (approximately € 7 190 782) and Swedbank – LTL 14 243 600 (approximately € 4 128 579).

Initially, the amount of the fine calculated for G4S was three times higher than the actual fine imposed, but the amount was reduced to 10 % of the undertaking's gross annual income, this being the maximum fine that can be issued for infringing the Law on Competition.

An order to terminate the anticompetitive actions has not been issued because the Banks and G4S had stopped these actions as the investigation was coming to a close.

The CC's decision has been appealed to the First Instance Court.

See Decision of the CC (in Lithuanian)

• Luxembourg: The Competition Council accepts Commitments in Press Distribution Sector

By its decision of 23 November 2012, the Competition Council has accepted commitments by Valora Luxembourg s.à.r.l. (Valora), the Luxembourgish subsidiary of Valora Holding SA (Switzerland), that address the Competition Council's competition concerns in the sector of national and international press distribution in Luxembourg. Valora is the main distributor of national and international press in the Luxembourgish wholesale and retail market.

In January 2011, two complaints were lodged at the former Competition Inspectorate against Valora by some newspaper shops. Following the entry into force of the new competition act on 1 February 2012 (see ECN Brief 5/2011), the appointed counsel established a series of antitrust concerns against Valora which were addressed in the statement of objections sent on 3 August 2013. The competition concerns raised are as follows:

> The contracts between Valora and newspaper agents contain a series of clauses that may amount to an abuse of dominant position by Valora. These include exclusive supply clauses and a number of obligations for newspaper agents. Accordingly, each agent is required to display 1000 titles distributed by Valora, to install at its own costs specific Valora neon signs and presentation shelves and to comply with strict shop opening hours. Each agent is also bound to limit unsold goods and to pay a commission on any quantities taken back by Valora. It is worth noting that some agents complained about the introduction of a new electronic system set up by Valora that would not allow them to track deliveries on a daily basis anymore.

Although Valora disputed these allegations, it has nevertheless brought forward commitments designed to address the competition concerns. First of all, it offered to eliminate all the potentially abusive clauses mentioned above by renewing the contracts with the newspaper agents. Also, Valora offered to consider the introduction of a new IT-based daily compilation of deliveries to allow the agent to monitor its deliveries on a daily basis. With the exception of the latter commitment that will be re-examined by the Competition Council after a period of 7 months starting from the notification of the commitments decision, all contract-related commitments will have to be executed by 1 May 2013, at the latest. The Competition Council will monitor the execution of commitments. It may also decide to invite all retailers to express the competition concerns they consider to be still in place on the market after 1 May 2013.

The Competition Council underlines that this decision is the first of its kind adopted since the existence of the competition law in Luxembourg. The decision can be consulted at www.concurrence.lu.

The time limit to appeal against the decision before the administrative tribunal is 3 months after notification of the decision to the parties.

• The Netherlands: The Competition Authority fines Onion Sets Cartel

On 18 December 2012, the Netherlands Competition Authority (NMa) imposed fines of more than € 4 000 000 on seven growers and processors of first year onion sets for having reduced their harvest in order to push prices up, thereby infringing Article 6 of the Dutch Competition Act and Article 101 TFEU. First year onion sets are used for growing second year onions, which are suitable for consumption.

Fines were imposed on the undertakings concerned as follows: TOP: € 1 824 000; M. Maas Kruiningen: € 600 000; Handelmaatschappij Kesselaar: € 595 000; A.C. Mosselman: € 398 000; Steketee Yerseke: € 334 000; Agpro Onions: € 260 000 and Rijk onion sets: € 141 000.

Approximately fifty thousand tons of first year onion sets are produced annually in the Netherlands. The Dutch undertakings involved in this cartel represent a combined production volume of 80% of Dutch-grown onion sets. Annual sales of Dutch onion sets in the EU are roughly € 20 000 000. The undertakings concerned generate 60% of their combined turnover within the European Union and the fines have been based on this turnover figure.

In 2010, the cartel activities were brought to the attention of the NMa, which conducted inspections in several undertakings in the Netherlands. This lead to a statement of objections, released in December 2011 and January 2012.

On the basis of the evidence collected in the investigation, the NMa established that in 2009 the aforementioned undertakings engaged in an agreement and/or concerted practice having as its object to jointly restrict supply/reduce capacity on the market for first year onion sets in order to push prices up, thus distorting competition. The purpose of the agreement was to create scarcity in the market to earn a higher price for the first year onion sets. In 2008, the sector had struggled to offload a surplus, which led to low prices. At the end of that year the undertakings had to discard some of their harvest. The growers and processors of onion sets feared a similar scenario for 2009 and decided to limit their joint supply by destroying already sown acreage. In order to establish the agreement and to monitor its compliance, the undertakings exchanged commercially sensitive information. Consequently, they were able to restrict supply and influence the price of onion sets so that they could ask a higher price than would be possible without the agreement.

Following the collusion for 2009, several growers and processors decided to continue communicating, this time to attempt to fix a maximum area of land to sow for 2010. As to this behaviour, the NMa concluded that an infringement of Article 6 of the Dutch Competition Act and Article 101 TFEU could not be established.

According to the NMa, no exceptions apply to the infringement. The specific criteria for the exceptions in the Dutch Competition Act and the TFEU are not fulfilled; and the Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organization of agricultural markets and on specific provisions for certain agricultural products does not limit the application of the competition rules to the behaviour in question.

Press spokesperson: Barbara van der Rest-Roest at +31-70-330-3362 or +31-6-22793063 (outside office hours). Alternatively, you can send an email to the NMa press office at pers@nma.nl.

• The Netherlands and Germany: Joint Solution to cross-border Inability to Pay Claim in Flour Cartel Cases

At the end of January 2013, the Bundeskartellamt (BKartA) and the Netherlands Competition Authority (NMa) coordinated their fining with regard to a German flour mill (the undertaking). The undertaking had claimed inability to pay fines imposed by the competition authorities in both countries. The assessment and consequences of this claim for the fines in the Netherlands and Germany were coordinated by the NMa and the BKartA. In the process, the undertaking has offered to cease litigation in both countries.

In January 2008, the BKartA initiated an investigation into anticompetitive practices in the flour industry in Germany. In the course of that investigation, several German mills applied for leniency in – amongst others – Germany and the Netherlands. The NMa adopted a decision imposing fines in December 2010 (see ECN Brief 1/2011).

One of the undertakings that was fined by the NMa claimed before the BKartA that, together with the fine as envisaged by the latter, the total burden on it and on its subsidiaries would exceed the ability to pay of the group. Hence, it could not continue the settlement talks that were initiated with the BKartA. The BKartA and the NMa jointly assessed this claim. They found that the envisaged combined fines would

indeed exceed its ability to pay.

Following up on the joint assessment, the NMa was willing to lower its fine, provided that the combined fines for the undertaking concerned would be in line with the jointly assessed ability to pay of this undertaking. The NMa modified its decision in order to lower the fine and in parallel, the BKartA proceeded with the imposition of a fine on the undertaking taking into account the joint assessment of the inability to pay. The undertaking, given the certainty that the fine would not exceed its ability to pay, announced that it would not appeal the fine by the BKartA and it withdrew its appeal against the previously imposed fine in the Netherlands.

The NMa and the BKartA are happy with their cooperation on inability to pay in their parallel proceedings involving the same undertaking. This transnational cooperation, complex though as it was, proved efficient for the undertakings involved and for the competition authorities.

See Bundeskartellamt press release (in German) of 19.02.2013 and NMa decision (in Dutch) of 12.02.2013

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• Spain: The Comisión Nacional de la Competencia fines ALTC, COTRAPORT and Barcelona Port Authority in Road Transport of Containers Case

In its resolution of 10 January 2013, the Comisión Nacional de la Competencia (CNC) Council found that between January 2006 and March 2011, an agreement had been in place to fix prices and trading conditions (payment periods and methods), limit or control production and share out the market for the road transport of containers originating from or destined for the port of Barcelona.

The cartel was organised by means of an agreement between the Asociación Logística de Transporte de Contenedores (Container Transport Logistics Association - ALTC) and the Asociación de Auto-patronos y Empresarios de Transportes de Contendores y Afines por Carretera de la Provincia de Barcelona (Association of Self-Employed Operators and Companies Engaged in the Road Transport of Containers and Similar of the Province of Barcelona - TRANSCONT) to jointly draw up rates and establish prices, payment methods and periods, and volume rebates for the road transport of containers at the port of Barcelona. In order to control supply of container transport services at the port of Barcelona, each association had a register of lorries and their members had to apply to their respective association for permission to increase their fleet. The association would then convene a meeting to decide on such an increase based on a proposal from its managing board. Lorries with authorisation to operate within the enclosure of the port of Barcelona displayed a visible sign identifying them as members of TRANSCONT or ALTC.

To eliminate competition between carriers, whether self-employed sole operators or companies, service conditions were imposed on end-customers. To that end, ALTC — with the agreement of TRANSCONT — established what was known as the “costs observatory”, which comprised a price list essentially based on a series of stretches of road and other variables. In addition, the associations agreed to increase these rates by reference to the annual updates of the CPI (Consumer Price Index) or to quarterly or bi-monthly increases in fuel prices. These rates were sent to end-customers’ intermediaries, such as freight forwarders, consignees or customs agents, so that the members of these other user groups would be aware that those were the rates of ALTC, in order to promote them as the standard port rates and ensure that they were uncontested.

The CNC Council found that these conducts distorted the competitive elements that could have existed in the market for the supply of container transport services at the port of Barcelona. The cartel comprising self-employed sole operators and companies modified the competition conditions that existed in the market in question, altering competition between self-employed sole operators when offering their services to transport companies, between self-employed sole operators and transport companies when trying to attract end-customers, and between transport companies. With respect to the liability of Barcelona Port Authority, it was proven that, at least since 2007, it had participated in the organisation and operation of the costs observatory, initially by subcontracting the service and then by internally

preparing the reference documents used to calculate transport costs. There is evidence that it was involved throughout the period under examination, largely concerning contacts between ALTC and TRANSCONT, especially with respect to the costs observatory.

Accordingly, the Council of the CNC decided to impose the following fines: € 15 210 253 on ALTC, € 5 258 876 on COTRAPORT (the successor of TRANSCONT), and € 100 000 on the Barcelona Port Authority. In addition, in its Resolution the CNC Council recalled that the practices had already been proven in the past in its Resolution of 1 April 2008 handed down in case 623/07 TRANSPORTE de BARCELONA, which was confirmed by the National Court in its judgments of 19 January 2012 and 17 October 2012.

On 14 June 2011, the Investigations Division of the CNC had opened formal proceedings S/0293/10 for possible anti-competitive practices in the market for the road transport of containers originating from or destined for the port of Barcelona. Previously, on 23 March 2011, inspections had been carried out at the head offices of various associations active in the sector.

See proceedings S/0293/10 (in Spanish).

• Spain: The Comisión Nacional de la Competencia fines Telefónica, Vodafone and Orange for abusing their Dominant Position in Wholesale Telephone Short Messaging Markets

In its resolution of 19 December 2012, the Comisión Nacional de la Competencia (CNC) Council found that the three mobile network operators Telefónica Móviles de España, S.A.U. (TME), Vodafone España, S.A.U. (VODAFONE) and France Telecom España, S.A. (ORANGE) committed an exploitative abuse of their individual dominant positions in the wholesale markets for termination of short messages and multimedia message (SMS and MMs) in their respective networks, thereby infringing the Spanish and EU competition rules.

Consequently, the CNC Council imposed a fine of € 46 490 000 on TME, € 43 525 000 on VODAFONE and € 29 950 000 on ORANGE. The CNC Council, however, did not consider it appropriate to impose regulatory measures on the parties as had been recommended by the Investigations Division, in view of two considerations: (i) the conduct has only been proven through the year 2009 and (ii) the CNC Council believes the Spanish Telecommunications Market Commission (CMT) is better positioned to design the ex-ante regulation of these markets.

In January 2011, the Investigations Division of the CNC opened infringement proceedings against the above mentioned companies based on indicia of abusive practices prohibited by Article 2 of the Spanish Competition Act 15/2007 of 3 July 2007 and Article 102 TFEU in relation to short text and multimedia messages (SMS and MMS) sent via mobile telephones. The CNC Investigations Division based its investigations on data requested from the companies by the CMT, including the regulatory costs accounting the operators must file with their regulator.

The CNC Council has found that each of the three mobile network operators holds a monopoly position in SMS and MMS termination services in their respective networks. Contrary to the situation for wholesale termination services for voice calls, the markets for the wholesale short messaging termination services provided by each of these operators were not regulated during the period examined (2000-2009). This allowed the three mobile network operators to freely price the termination of short messages at very high levels throughout the reference period. Given that termination is a cost that is passed on to retail prices, the overpriced termination services allowed them to maintain higher retail prices for users of SMS and MMS services. This was compounded by the fact that the three operators, to whom the CNC Council attributes a collective dominant position in the wholesale markets for access and origination services, applied a pricing policy in these markets for access and origination services consistent with the policy in the termination markets; that is, the high origination and access wholesale prices contributed to keeping retail prices for short messages higher and to generating larger barriers to entry and expansion for virtual mobile operators.

See proceedings S/0248/10 (in Spanish)

- **European Commission: Spanish and Portuguese incumbent Telecommunications Operators fined for non-compete Agreement**

On 23 January 2013, the European Commission (the Commission) adopted a decision imposing fines of € 66 894 000 on Telefónica and of € 12 290 000 on Portugal Telecom for agreeing not to compete with each other on the Iberian telecommunications markets, in breach of Article 101 TFEU.

The decision concerns a non-compete clause, which was included in the stock purchase agreement of 28 July 2010 concluded by Telefónica and Portugal Telecom, which gave Telefónica sole control over the Brazilian mobile operator Vivo, previously jointly owned by the parties (the 'Vivo transaction'). The non-compete clause reads as follows:

"To the extent permitted by law, each party shall refrain from engaging or investing, directly or indirectly through any affiliate, in any project in the telecommunication business (…) that can be deemed to be in competition with the other within the Iberian market for a period starting on the date of Closing [27 September 2010] until December 31, 2011."

The decision finds that the clause amounts to a market-sharing agreement and an infringement by object of Article 101(1) TFEU, and that Telefónica and Portugal Telecom deliberately agreed to exclude or limit competition on each other's home markets. The decision rebuts the parties' allegations that the clause would merely provide for an obligation to self-assess the legality and scope of a non-compete agreement, which would be ancillary to the Vivo transaction.

The above finding is based on the wording of the clause (clear non-compete obligation), the economic and legal context of which it forms part (e.g., the electronic communications markets which are liberalized), and the actual conduct and behaviour of the parties (for example, the fact that they only removed the clause on 4 February 2011 via an agreement which contained the reasons for the removal of the clause but which did not mention any self-assessment exercise or obligation).

Moreover, the decision also establishes that the clause cannot be considered a restraint ancillary to the Vivo transaction, as a non-compete clause covering the Iberian Peninsula cannot be considered in any manner directly related or necessary for the implementation of the stock purchase agreement that was concluded to allow the acquisition of Vivo in Brazil.

The infringement lasted from 27 September 2010, when the parties closed the Vivo transaction, until 4 February 2011, when the parties agreed to remove the non-compete clause, after the opening of proceedings by the Commission on 19 January 2011.

The calculation of the fines is based on the 2006 Guidelines on Fines. As regards gravity, the decision takes due account of the fact that the non-compete clause was not kept secret by the parties, who published the clause in several ways and also notified it to the Brazilian regulators. In view of the specific circumstances of the case, the decision finds that to achieve deterrence it is proportionate and sufficient to take into account a low proportion of the value of sales.

In addition, the decision recognises as an attenuating circumstance the fact that the parties terminated the infringement rapidly. Indeed, the removal of the non-compete clause by the parties on 4 February 2011 took place only 16 days after the opening of proceedings by the Commission.

The clause was detected in September 2010 by the Spanish Competition Authority, which informed the Commission and the Portuguese Competition Authority of its existence.

More information on this case will be available under the case number AT.39839 in the Commission's competition website, once confidentiality issues have been dealt with.

• Germany: The Federal Constitutional Court confirms Constitutionality of Provision on Interest charged on Antitrust Fines

In a ruling of 19 December 2012, the Federal Constitutional Court has decided that the statutory imposition of interest on antitrust fines is in accordance with the Basic Law (the German constitution). In the past, the possibility existed for companies to make substantial interest gains by appealing a Bundeskartellamt (BKartA) decision imposing a fine for an antitrust infringement and withdrawing their appeal shortly before the court issued its judgment (a fine is not payable under German law until the fining decision is final). Since 2005, the Act against Restraints of Competition (GWB) has therefore contained a provision according to which interest is charged on fines for competition law infringements from two weeks after the BKartA's fining decision is issued. In case the appeal against a fine is rejected, the fined company thus owes the amount of the fine plus interest. The constitutionality of this provision has now been confirmed by the Federal Constitutional Court.

The case originated from cartel proceedings that the BKartA conducted against industrial insurers (see BKartA press release (in English) of 17 June 2009). A number of companies had initially appealed the authority's decision before the court and later withdrew their appeals. The BKartA had subsequently ordered the companies to pay interest on the fines. The companies had appealed the order and contended that the above-discussed provision of the GWB violated constitutional law. The appeal court referred the question to the Federal Constitutional Court, which has now decided that the provision on interest payments contravenes neither the principle of equality nor the guarantee of effective legal protection.

See the court ruling and respective press release of the Federal Constitutional Court (in German)
See also BKartA press release on this case (in English)

• Lithuania: The Supreme Administrative Court upholds Competition Council's Decision finding Abuse of Dominant Position in Fuel Sector

On 21 January 2013, the Supreme Administrative Court of Lithuania (the Supreme Court) issued a final ruling stating that the Competition Council (CC) by its decision of 2010 has legally imposed a fine of nearly € 2 300 000 upon AB Orlen Lietuva (AB Orlen). AB Orlen was found to have abused its dominant position with the aim of restricting the import of fuels into the territory of Lithuania.

Already in 2005, the CC fined AB Orlen for the abuse of its dominant position: however by its judgment of 2008 the Supreme Court had overturned this decision and obliged the CC to carry out a further investigation.

After a new in-depth investigation, the CC found in 2010 that AB Orlen abused its dominant position in the market of fuel (petrol and diesel) sales in Lithuania. By applying a discriminative pricing policy and obliging its customers to purchase from it a fixed amount of fuel, AB Orlen sought to "tie" its customers, thereby restricting the import of petrol and diesel into the territory of Lithuania. The CC found that the fuel market in Lithuania was practically closed for other producers, therefore competition was limited significantly. This resulted in the loss of possibility for consumers to take advantage of the benefits of competition.

Having examined the case a second time, the Supreme Court acknowledged that the CC's arguments, on which the infringements of Article 7 of the Law on Competition and Article 102 TFEU were based, were well-founded. The Supreme Court also affirmed that the CC had adequately qualified the infringement as severe when deciding on the amount of the fine as well as the fact that AB Orlen committed the infringement repeatedly. The Supreme Court however decreased the fine imposed by the CC by 5%, from € 2 383 862 to € 2 261 133 EUR, since it considered that the CC failed to prove one of the elements of the infringement (i.e. price fixing for diesel sold for ships, as the CC did not evaluate the legal regulation in force properly).

Pursuant to the CC's decision of 2010, AB Orlen was obliged to stop anti-competitive practices. To the knowledge of the CC, it has fulfilled this obligation.

See the Decision of the CC of 16 December 2010 and the Supreme Court ruling (both in Lithuanian)

• Sweden: Market Court's Decision in Automobile Sports Federation Case

On 20 December 2012, the Swedish Market Court (the Court) adopted a decision stating that the Swedish Automobile Sports Federation (the Federation) cannot apply its loyalty rules in the future.

In May 2011, the SCA issued a decision ordering the Federation to change its loyalty rules. The rules contained a total ban on participating in races outside the Federation, for drivers and officials carrying a license from the Federation. The Authority found that the loyalty rules were far too categorical, that they limited the possibilities for independent organizers to arrange motor races in competition with the Federation´s member clubs and restricted competition in the market for organizing auto racing events. The rules therefore constituted an infringement of Article 101 TFEU and its equivalent in the Swedish Competition Act (See ECN Brief 3/2011).

The Federation appealed the SCA´s decision. In December 2012, the Court reached a decision ordering the Federation not to apply the contested loyalty rules in the future. In its decision the Court took into consideration the specificity of sport, and found that the Federation's rules had been too stringent and resulted in unjustified restrictions on competition, hindering the development of automobile sports in Sweden. Further, the Court found that activities outside the Federation can contribute to making the sport more accessible to a broader group of participants and audience.

The decision of the Court, which cannot be appealed and which enters into immediate effect, will open up the market to more diversity and the development of new forms of automobile races and hence the sport should become more accessible for both participants and spectators. It is hoped that the Court's decision will also lead to reflection among other Swedish sport federations.

See press release (in English)

• Sweden: The Competition Authority's Interim Order prohibiting Hockeyligan from boycotting NHL Players annulled by Swedish Market Court

On 18 December 2012, the Swedish Market Court (the Court) has annulled the Swedish Competition Authority's (SCA) interim order prohibiting the Swedish ice hockey league association, Svenska Hockeyligan AB (Hockeyligan), from boycotting players from North America's National Hockey League (NHL). The Court considered that Hockeyligan's decision to prohibit its member clubs from entering into short-term contracts with NHL players was part of a general prohibition of short-term contracts, which was justified with regard to the specificity of sport.

On 15 September 2012, negotiations between the NHL and the NHL Players' Association on a new collective bargaining agreement broke down, resulting in the immediate lock-out by the NHL clubs of their players. As a result, the locked-out NHL players became available to clubs competing in other ice hockey leagues. However, in anticipation of the NHL lockout, Hockeyligan, a league association comprising the 12 clubs competing in Sweden's elite ice hockey league, decided already on 21 August 2012 that no club would be allowed to engage locked-out players on short-term contracts during the NHL conflict.

Following a decision to open an ex-officio investigation into Hockeyligan's conduct, the SCA issued an interim order on 20 September 2012 prohibiting Hockeyligan from applying its decision while the SCA's investigation was pending (See ECN Brief 5/2012). Hockeyligan appealed the interim order to the Court.

On 12 October 2012, the Court rejected Hockeyligan's request for a stay of the SCA's interim order while the appeal was being heard.

In its decision of 18 December 2012, the Court held that, as an association of undertakings, competition law applies to Hockeyligan as well as to its owner clubs individually. The Court also rejected Hockeyligan's contention that the decision should be exempt from competition law as it constituted an agreement between employers regarding terms of employment.

However, the Court considered that Hockeyligan's decision to prohibit the engagement of locked-out NHL-players on short-term contracts was part of a general prohibition on short-term contracts adopted by Hockeyligan in 2006. Accordingly, the Court found that Hockeyligan's decision of 21 August 2012 did not amount to a boycott of NHL players wishing to play in the Swedish ice hockey league in the event of a lock-out, but merely a reminder that the general prohibition on short-term contracts applies also to them.

The Court found that the prohibition is justified by sporting objectives, and that any resultant anti-competitive effects of the rule are proportionate to those objectives. Consequently, the Court annulled the SCA´s interim order.

Mid-January 2013, a new collective agreement was reached in the NHL and the NHL season was finally launched, meaning that the previously locked-out NHL players are no longer available to play in Sweden. The SCA found therefore that there were no longer grounds to pursue its investigation into the matter and closed its investigation on 21 January 2013.

See the Market Court decision (in Swedish) and the Swedish Competition Authority's decision to close the case (in Swedish)

LEGISLATION & POLICY

• Austria: Competition Law Amendments to be in force from 1 March 2013

The Austrian parliament has enacted several proposals for amendments to the current competition regime law taking effect from 1 March 2013. The objective thereof is to enhance the efficiency of the enforcement of competition law in Austria and of the investigative powers of the Federal Competition Authority (FCA).

This first major amendment to the Austrian competition regime since 2005 has been prepared on the basis of a detailed evaluation of the existing system and comprehensive discussions with stakeholders and the institutions involved (in more detail see ECN Brief 2/2012).

The new set of substantive rules enhances the effective enforcement of competition law, mainly by correcting shortfalls of the pre-existing legal framework as revealed by case law or by enforcement action:

- a new rule for de minimis cartels in Austria excluding hard core cartels (in line with the European Commission's 'de minimis notice' 2001/C 368/07, para 11);
- the alignment of the legal provisions on leniency with the ECN Model Leniency Programme;
- a set of rules promoting antitrust enforcement, including:
  - additional legal presumptions of collective dominance (derived from § 19 para 2 German GWB),

- a more detailed definition of unfair purchase or selling prices and their establishment in antitrust cases (e.g. by the concept of comparing markets);

- amendment of the merger procedure: introduction of 'stop the clock' options;

- a new legal basis for antitrust damages actions;

- a new legal basis to create the possibility to make a finding - upon initiation of the FCA or the Federal Cartel Prosecutor- that the immunity applicant participated in a cartel;

- more detailed criteria for the measurement of fines by the Cartel Court;

- obligation to elaborate on certain substantive matters in applications for fines to the Cartel Court.

The amendment also strengthens - in line with the actual government programme - the investigative powers of the FCA. It includes:

- the power to request information by way of administrative decision and the possibility to enforce the decision by imposing fines;

- clarification of powers during inspections such as the power to seal premises and to ask questions;

- a legal basis for police assistance with forensic IT during inspections and for exchanging information derived from criminal prosecution by police, public prosecutor or criminal courts when relevant for competition law enforcement.

In the future, the transparency of judicial practice will be improved due to the new obligation to publish final decisions of the Cartel Court, including the names of the parties and the main findings.

See text of the amendment (in German)

• Czech Republic: Competition Act amended

On 1 December 2012, the revised Act No. 143/2001 Coll. on the Protection of Competition and on the Amendment of Certain Acts (the Act) entered into force. It amends the legal framework for competition proceedings in the Czech Republic.

The most significant change to the Act concerns the leniency programme. The Office for the Protection of Competition (the Office) has been applying a leniency programme since 2001. Until the amendments to the Act the rules for the application of this tool were included in soft law instruments. The main goal of this amendment is to strengthen legal certainty for leniency applicants and to encourage companies to use it.

Another procedural tool which the Office has been using for many years without being included in national legislation is the settlement procedure. The Act now provides that the sanction imposed on the undertaking(s) which plead(s) guilty to its participation in anticompetitive conduct will be reduced by 20 %. Thus, the administrative proceedings can be concluded more easily, saving human and financial resources of the Office.

Furthermore, prioritization, which, among others, helps save public resources, has been newly implemented. The Office may, in certain cases, decide not to pursue the case but will take into consideration the type of anticompetitive conduct, the way the conduct is implemented, the number of affected consumers and the significance of relevant market.

With respect to inspections of business premises, the Act foresees that the Office´s representatives are entitled to act only on the basis of written authorization of the chairman or another entitled person, pursuant to the Act and to the internal rules of the Office. This new rule formalises the continuous practice of the Office.

The amendment also introduces more precise rules on the examination of documentation or the obligation of public authorities, natural and legal persons who are not competitors, to provide the Office with information.

The Act includes new provisions regarding sanctions. It foresees that a three year prohibition on participating in public procurement procedures and concession contracts may be imposed on members of bid rigging cartels. However, leniency applicants will be granted immunity from this ban.

Last but not least, the Act also foresees a new competence of the Office which provides for the possibility to impose a fine up to CZK 10 000 000 (approximately € 400 000) on public authorities for distortion of competition.

The English version of the Act will be available on the Office´s website soon.

• Denmark: Competition Act amended

On 19 December 2012, a revised competition act was adopted. The amendments that come into force on 1 March 2013 are compiled in the Consolidated Act No. 23 of 17 January 2013. The legal framework for sanctioning infringements of the Danish competition act is amended as follows:

- Imprisonment for up to 18 months for participating in a cartel, provided the infringement was committed intentionally and is of a grave nature, particularly as a result of the scope of the infringement or its likely damaging effects. Under particularly aggravating circumstances, a sanction of up to six years imprisonment may be imposed. Such circumstances could for instance be that the cartel is of a substantial scope or has substantial harmful effects.

- The level of fines imposed on natural persons and undertakings is increased considerably, by increasing the basic amounts for the gravity of an infringement.

  The fines currently imposed have been quite low. The average fines imposed on undertakings have amounted to approximately DKK 500 000 (€ 67 000) and the fines imposed on natural persons have not exceeded DKK 25 000 (€ 3 300).

  In relation to undertakings and as from 1 March 2013, the basic amount for a minor infringement can be up to DKK 4 000 000 (€ 536 500); the basic amount for a serious infringement is set between DKK 4 000 000 and DKK 20 000 000 (€ 2 700 000) and the basic amount for a very serious infringement is from DKK 20 000 000 and upwards.

  For natural persons the basic amount will be at least DKK 50 000 (€ 6 700), DKK 100 000 (€ 13 400) or DKK 200 000 (€ 26 800) depending on the nature of the infringement.

- The leniency rules will also apply to imprisonment, however, only for the first applicant who can obtain withdrawal of the charge (i.e. the immunity applicant). For subsequent applicants it is for the courts to decide on a possible reduction of sentences in accordance with the general rules of the Danish Penal Code.

Furthermore, Law 1385 introduces a number of other key procedural changes as follows:

- Interim measures: The Competition Council's decision shall be brought before the Competition Appeals Tribunal within ten working days and needs to be upheld by the Tribunal before it becomes effective.

- Introduction of a preliminary statement of objections at a very early stage in the proceedings and with a time limit of two weeks for the parties to reply. After the conclusion of the investigation, a statement of objections will be sent to the parties with a time limit of six weeks to reply. A third consultation of the parties may take place if the draft decision contains new information resulting in an assessment different from the one presented in the statement of objections.

See Act No. 23 (in English)

• Italy: The Competition Authority publishes Results of Inquiry into national Fuel Retail Sector

In December 2012, the Italian Competition Authority (ICA) published the findings of its inquiry into the national fuel retail sector. The inquiry covers the period 2010-2012.

It reveals that the liberalisation process, started some years ago and boosted in 2012 by the elimination of some administrative barriers to entry has increased the number of active un-branded fuel distribution networks. According to the inquiry, this is one of the main causes for the move from the previous oligopolistic structure and the emergence of a new competitive equilibrium in the fuel retail sector in Italy. Another stimulus for a more competitive market was also due to commitments from the main branded fuel companies following the ICA's 2007 investigation (case n. I681: Fuel Prices) aimed at fostering self-service devices to promote retail prices reductions and encouraging new un-branded initiatives especially from large food distributors. Finally, the 2012 summer's pricing campaign launched by ENI (incumbent operator), although limited in time, has triggered some price reactions by its competitors.

According to the inquiry, the Italian fuel retail market is in 2012 still dominated by seven branded networks controlling 22 000 fuel stations, compared to the 2 000 independent distributors and the 82 retailing stations owned by large food distributors. Despite the fact that there are less un-branded stations, they have recorded in 2010-2011 an average throughput about 4-5 times larger than competing branded networks.

Retailing price analysis, conducted for the period 2010-2011, has confirmed that branded networks, which are all vertically integrated but substantially dissimilar in their refinery, logistics and fuel stations endowments, differed in their pricing strategies only marginally (2% maximum). The dominant operators (ENI and ESSO) accommodated their less efficient competitors with relative high retail pricing policies. On the contrary un-branded networks were shown to have charged prices 9-13 cents lower, scattered by region (a higher pricing pressure is recorded in the north-east).

According to the findings of the sector inquiry, entry of aggressive and efficient operators, such as un-branded networks, in a sufficient scale could break the collusive outcome sustained by the oligopolistic structure of gasoline retail markets which are dominated by the seven branded firms.

The ICA's main recommendations in order to stimulate effective price competition on a national basis are as follows: i) the promotion of market entry, namely in the centre-southern areas where un-branded networks still exert too weak competitive pressures as well as the development of independent large food distributors' fuel stations (but avoiding co-branding that has proved to be less effective for competition); ii) fostering wholesale fuel transactions and independent operators in logistics to favour a liquid market, non-discriminatory access to logistic facilities and competitive supply conditions for independent fuel distributors; and iii) the implementation of a data base for retail prices at a national level to increase consumer information, transparency and the possibility to make an informed choice.

See press release (in Italian)

• Portugal: The Competition Authority publishes new Leniency Regulation and Guidelines

On 29 November 2012, the Competition Authority (PCA) approved a new Leniency Regulation 1/2003 and explanatory Guidelines. The new Leniency Regulation entered into force on 3 January 2013, upon its publication in the Official Journal of the Portuguese Parliament. This new Regulation and its explanatory Guidelines aim at ensuring that the Portuguese leniency programme is both predictable and attracts applicants.

Following the entry into force on 7 July 2012 of the new Competition Act, which contains the rules on the Leniency programme, the PCA held a public consultation on the draft procedural rules for presenting leniency applications from July to September 2012. After assessing the comments received during the public consultation, the PCA approved the new Regulation on procedural rules for leniency applications, as well as a set of explanatory guidelines.

The newly approved Regulation contains rules on the submission of requests for immunity or reduction of the fine, by written or oral form. Moreover, the Regulation deals with the submission of summary applications, which may now be presented by written or oral form, in Portuguese or English, in accordance with the template annexed to the ECN Model Leniency Programme. The new Regulation also foresees clear rules on the marker system for leniency applications, as well as the treatment of incomplete or rejected applications.

The Regulation and Guidelines have been strongly influenced by the work within the ECN on leniency issues and is strongly convergent with the ECN Model Leniency Programme, as recently revised in 2012.

See Leniency Regulation (in Portuguese) and Explanatory Guidelines (in Portuguese)

- **Bulgaria: The Commission on Protection of Competition adopts Guidelines on Corporate Competition Compliance Programmes and Guidelines on Advocacy**

On 20 December 2012, the Commission on Protection of Competition (CPC) adopted Guidelines on the Corporate Competition Compliance Programmes and Guidelines on Advocacy.

By Decision No 1553/20.12.2012, the CPC adopted Guidelines on the Corporate Competition Compliance Programmes. They are part of the CPC's competition advocacy activities aimed at raising the competition culture of business. The document is a result of research done by CPC experts into similar guidelines adopted and published by the competition authorities of several countries like the UK, Ireland, France, etc., as well as by DG Competition of the European Commission.

The Guidelines are intended to encourage undertakings to draft and adopt such programmes, with SMEs being the main target group. The Guidelines draw the attention of companies to the main stages of drafting, adopting and implementing individual corporate competition compliance programmes and point out that it is for the individual company to take this step.

The Guidelines on Advocacy (Decision No 1554/20.12.2012) aim to analyze and summarize the different methods that can be used in the CPC's advocacy activities in a broad sense – opinions on draft legal acts and legal acts in force, guidelines, seminars, conferences, the different methods for relations with media, internet, publications, videos, etc. The Guidelines conceptualize and systematize the CPC's advocacy activities with a view to improving the authority's communication with different stakeholders – state authorities, business, media, consumers and the public as whole, and to convince them of the importance of the competition rules and the benefits of competition.

See Guidelines on the Corporate Competition Compliance Programmes (in Bulgarian)

- **Denmark: Guidelines on Fighting Bid Rigging in Public Procurement published**

The Danish Competition and Consumer Authority (DCCA) has published a set of guidelines on how to fight bid rigging cartels in public procurement on 29 November 2012. The guidelines also address the issues of monopolies and unnecessarily high transaction costs in public procurement. The guidelines target Danish municipalities.

The DCCA encourages municipalities to work strategically to ensure competition in relation to tendering and public procurement. The guidelines contain 11 recommendations on how municipalities can strengthen competition in public procurement procedures.

The guidelines address the issue of detecting bid rigging cartels in public procurement procedures while also giving advice on how to reduce the risk of bid rigging in the first place.

As part of the guidelines the DCCA has also published a checklist with 11 signs which indicate that companies may have formed a bid rigging cartel. The municipalities are advised to check for these signs as part of every procurement procedure.

The existence of monopolies and high transaction costs can further constrain effective competition. The municipalities are advised to challenge monopolies e.g. by planning their procurement procedures in a way that makes it possible for a wide field of bidders to participate. The municipalities are also advised to organize procurements in a way that reduces unnecessary transaction costs.

The guidelines have been prepared in cooperation with a number of municipalities in order to ensure usability and relevance.

In order to raise awareness about the issues of cartels, monopolies and unnecessary transaction costs in public procurement, the DCCA has given several courses around the country and secured press coverage of the initiative.

See the guidelines and checklist (in Danish)

• Denmark: Non-transparent Markets make Switch of Service Providers difficult

On 22 November 2012, the Danish Competition and Consumer Authority (DCCA) published a report on mobile phone subscribers and insurance customers' switching of service providers.

The main conclusions are:

- Every year, just over every third consumer switches mobile phone company, and almost every tenth consumer switches private household insurance providers.
- Consumers switch mobile phone subscription and insurance providers to save money. This applies to 44% of mobile customers and 68% of insurance customers.
- Price advertising inspires consumers to switch mobile phone subscriptions. The acquisition of new products or bad experiences also encourage consumers to switch both mobile phone subscription and insurance provider.
- Consumers are not involved or interested in their insurances. This reduces mobility in the insurance market.
- Consumers find it difficult to identify the right mobile phone subscription and insurance providers and find both markets non-transparent. This has several consequences:
  - Problems of gaining an overview of the solutions in the markets make every fourth consumer refrain from switching mobile phone subscription and insurance providers.
  - Of mobile phone subscription customers, 33% have considered switching providers without actually going through with it and the same applies to 43% of insurance customers.
  - Every second mobile phone subscribers and every third insurance customer have switched providers without first searching the market.
- Mobile phone subscription and insurance companies increase the lack of transparency by differentiating their products with a high degree of detail. However, consumers would rather have an overview of the products than the highly tailored products offered in the markets today.
- Consumers find the actual switching of mobile phone subscription and insurance providers easy.
- Benefits such as the possibility of phoning their friends and family free of charge or better prices on their insurance policies through their trade unions make consumers stay with their present mobile and insurance providers.

The analysis seems to show that there may be a potential for increasing the number of insurance customers who search the market and switch providers. By contrast, it is not expected that the proportion of mobile

phone subscription customers switching providers every year can increase substantially. In the mobile phone subscription market, the potential consists rather in making more consumers search the market before switching.

The DCCA wants to make it easier for consumers to switch providers on an informed basis. Based on the analysis the DCCA therefore recommends that:

- Transparency in the mobile phone subscription market be increased while giving consumers a better basis for clarifying their own needs.
- Transparency in the insurance market be increased while giving consumers a better basis for clarifying their own needs.
- Consumers should be encouraged to become more involved in their own insurance policies.

See summary (in English)

Press spokesperson: Hanne Arentoft, e-mail: har@kfst.dk

- **France: The Autorité de la concurrence reaffirms Importance of MVNOs in stimulating Competition on Mobile Telephony Markets**

On 21 January 2013 the Autorité de la concurrence (the Autorité) issued an opinion examining the market conditions for mobile virtual network operators (MVNOs) and the challenges posed by the current dramatic changes in the French mobile telephony markets (i.e. the arrival of a fourth MNO and the launch of 4G mobile high-speed broadband network). MVNOs are operators active on the retail mobile telephony market, which do not own a mobile network infrastructure but use instead another operator's network together with a range of wholesale services (call origination and termination, roaming, etc.). There are several types of MVNOs with different levels of dependence on their host operator (license-based MVNOs, light MVNOs, full MVNOs) which in turn affects their capacity to adjust their commercial offers.

The opinion, adopted on the basis of a referral by a trade association representing MVNOs' interests, follows a first opinion issued in 2008 (see press release and Opinion 08-A-16) which stressed that the restrictive financial, technical and legal terms imposed by mobile network operators (MNOs) on MVNOs to be hosted on their proprietary networks did not allow the latter to develop sustainable commercial offers. In particular, MVNOs were bound by long durations and exclusivities and were refused greater control on the roll-out of their services by becoming "full" MVNOs.

In the present opinion, the Autorité notes that following its 2008 recommendations, the conditions under which MVNOs operate have evolved and they provide today a significant contribution towards the diversification of offers and the exploration of new customer niches, with the MVNOs' overall share of the retail mobile telephony market rising from 5% to 13% in terms of subscribers. Market innovations brought by MVNOs include unlimited text message packages and the first range of subscriber tariff plans with no duration commitment. More recently, new MVNOs have been developing for instance an international call offer, specifically targeted at consumers calling family abroad (so-called "Community" packages).

The current structural changes in the market, caused by the arrival of a fourth MNO and the impending launch of mobile high-speed broadband offers, presents however new challenges for MVNOs.

The fourth MNO, Free Mobile, entered the market in 2012 with SIM-only offers (i.e. without subsidized handsets) at significantly lower prices, forcing the three incumbent MNOs (Orange, SFR, Bouygues Télécom) to follow suit. This market entrance was encouraged by the Autorité early on in its above mentioned 2008 opinion where it underlined the pro-competitive effects of awarding a fourth 3G license in stimulating the upstream market for hosting MVNOs. Further guidance was provided by the Autorité with regard to the need to maintain, on a transitional basis, asymmetric call termination charges (see press release and Opinion 11-A-19) to ensure a level-playing field for the new entrant while preserving its

incentives to increase its efficiency and invest in its own network. Indeed, on the one hand, termination charge asymmetry corrects the advantage incumbent operators derive from the initial traffic imbalance between them and the new entrant in the form of financial transfers to their benefit provided that what they charge for call termination on their network exceeds their long term incremental costs. While the optimal solution remains a reduction across the board of call termination charges, a default solution to restore competition is the above asymmetry. On the other hand, a new entrant should be encouraged to increase its efficiency and gain market share – and, in the case of a new MNO such as Free Mobile, to also invest in its own network – which means that the fee asymmetry should not lead it to adopt a strategy of maintaining rents rather than stimulating competition.

The Autorité has also insisted on the conclusion, by one of the three veteran MNOs, of a 3G roaming agreement with the new entrant which would allow it inter alia to replicate "convergence offers" (Internet + TV + mobile and fixed telephony) rolled out by its integrated competitors (see press release and Opinion 10-A-13). The Autorité has thus laid the grounds for the effective competitive pressure exerted by Free Mobile today.

The other market breakthrough consists of the launch of a 4G mobile high-speed broadband network by MNOs, which will enable high-end offers incorporating data exchange services (fast internet navigation, the receipt of images and HD voice communications, videoconferencing, etc.). The three incumbent operators have stated that they are considering a new price positioning for such packages in order to promote an innovative economic model based on both low cost and premium offers.

The recent market developments have affected MVNOs through a significant migration of their customer base – characterized by a profile of low consumption and subscription to mainly prepaid contracts – towards the new post-paid low-end offers offered by the four MNOs.

This is problematic as the pricing and technical conditions imposed on MVNOs by MNOs appear to restrict their ability to react and compete efficiently:

- As to the pricing conditions, the Autorité notes that, even though there is a viable economic space in the prepaid and standard contract segments, the MVNOs appear to be unable to compete, under conditions of minimum profitability, with the low cost post-paid offers, especially those at € 19.99 currently offered by the four MNOs;

- Moreover, some of the technical conditions in the contracts between MNOs and MVNOs do not permit the latter to replicate the high-end service offers that their host operators are currently launching by relying on the 4G (fast downloads, femtocells – which allow better local phone coverage by relying on the user's Internet access –, geo-location).

To counteract the risk that MVNOs will be marginalized and to maintain their role as competitive innovators, the Autorité stresses that the commitments made by MNOs to the ARCEP (national telecoms regulator) must be applied even before the launch of the first 4G commercial offers, in order to place MVNOs on an equal footing (see ARCEP's 4G frequency allocation). These commitments are ancillary to the assignment of frequencies by the ARCEP, in accordance with the Autorité's recommendations in its 2008 opinion on MVNOs and include, e.g., the duty of MNOs not to restrict the commercial freedom of the MVNOs they host, to welcome full MVNOs into their network, to respond favorably to any reasonable request for access and to impose reasonable charges. The immediate implementation of these commitments should allow MVNOs to make their offers within the same time-frame as the MNOs.

See press release on Opinion (in English) as well as press release (in English) on mobile telephony fining decision

• Germany: Preparations for Launch of Transparency Unit for Fuels

The Bundeskartellamt (BKartA) has appointed on 30 November 2012 a project team in order to set up the future transparency unit for fuels. The unit is envisaged to be operational in 2013.

Complaints against high fuel prices are constantly voiced in Germany, especially by consumers. Therefore

as a first step, the BKartA launched sector inquiries in the fuel market in order to uncover possible malfunctions in the market (see ECN Brief 3/2011 and 5/2012).

The legislator now intends to go one step further and will, with an upcoming regulation, provide the BKartA with a transparency unit for fuels. The regulation will be based on the new sect. 47k ARC. The aim of this unit is to enable consumers to access current, comprehensive and reliable information on prices at petrol stations in their immediate vicinity. The informed consumer will then be able to raise the competitive pressure on the petrol stations.

A specifically designated project team at the BKartA is now preparing the framework for the work of this upcoming unit. The project team is focusing on the optimisation of the processes necessary to the gathering and processing of price related information from fuel stations. An appropriate IT infrastructure and the definition of interfaces are crucial in developing a specially tailored application in order to provide all consumers with location-based or route related information on fuel prices.

At this stage it is still uncertain when fuel price information will be made available to consumers.

See further information in English and in German

• Hungary: New Law affecting Application of the Hungarian Competition Act

The Amendment to the Act CXXVIII of 2012 on agricultural associations and on the regulation of certain issues of the agricultural markets (the Act) entered into force on 28 November 2012. This amendment which concerns only agricultural products, includes the main following elements.

- The amendment exempts agricultural products from the prohibition of competition restrictive agreements under the Hungarian competition law if certain conditions set out in the Act are fulfilled.
- If competition proceedings have been initiated, the GVH (the Hungarian Competition Authority) must obtain the assessment by the Minister of Agriculture on whether the exemptions conditions set out in the Act are fulfilled, and the GVH shall act in accordance with the assessment.
- If the Competition Council (the decision-making body of the GVH) intends to impose a fine for an anticompetitive agreement, then, firstly, it has to call on the parties to bring their practices in line with competition rules within a certain period of time. A fine may only be imposed once this deadline has expired and the parties failed to comply.
- The new rules are to be applied retroactively also to on-going cases.

The GVH has expressed the view that, although the amendment aims to ensure fair incomes for farmers, it does not make any difference between agricultural producers and other market players such as big buyers, wholesalers, and retailers. Furthermore, it limits the application of both national and EU competition law, and also impedes the effectiveness of competition law enforcement. Consequently, the amendment opens the opportunity to give a large-scale exemption for any market player in case of price-fixing of agricultural products.

• Hungary: The Competition Authority provides Guidance on Competition Compliance Programmes

Most undertakings in Hungary are not aware of how to comply with competition rules: this emerged from extensive research carried out by the Gazdasági Versenyhivatal (GVH – Hungarian Competition Authority).

The GVH has therefore launched in December 2012 a comprehensive communication campaign to enhance competition law compliance and promote a competition culture. In order to facilitate the achievement of its aims, the GVH cooperates with several professional organisations and business interests representations.

A survey, commissioned from TNS Hoffmann by the GVH, showed that two-thirds of the Hungarian

business leaders consider the current economic competitive situation much weaker than ideal. Regardless of their size, undertakings experience much stronger competition on their selling market than on their purchasing market.

The information gained from this research is supplemented by a non-representative survey, conducted by Transparency International Hungary, which was specifically designed to focus on theoretical and practical questions relating to competition compliance. This survey shows that nearly two thirds of the undertakings asked do not have substantive knowledge of competition law (compliance) and of how to prevent possible violations. Furthermore, two out of three respondents are not aware that allocating the market between competitors is prohibited.

At the same time compliance with competition rules is not to be seen only as a regulatory issue, but as much as an attitude, a question of cultural approach – said the Secretary General, the head of the Competition Culture Centre, Dr. Annamária Südi Tevanné.

This is the reason why the GVH has launched an active and comprehensive information campaign to enhance the competition law compliance culture.

In doing so, the GVH relies on professional organisations of lawyers, accountants and business interests groups. Cooperation established with these entities is particularly important, because small business owners receive information about legal issues (including competition rules) and taxation changes from their lawyers and accountants.

The GVH also launched a dedicated website – www.megfeleles.hu – where information and materials are constantly being uploaded. Besides general information on competition rules and compliance, specific information on relevant regulations, cartel offenses, abuse of dominance cases, significant market power and protection of leniency applicants can also be found there.

In 2013, the GVH intends to organise forums, combined with educational events, where experts of the GVH and representatives of the chambers will disseminate knowledge on compliance issues to undertakings and members of professional organisations. In the first half of 2013, the GVH is planning to organise an international conference on competition law compliance matters with the participation of Hungarian and foreign experts.

- **Portugal: The Competition Authority publishes its annual Competition Policy Priorities for 2013 for first Time**

On 20 December 2012, the Portuguese Competition Authority (PCA) published its Competition Policy Priorities for 2013.

The policy priorities set out in the document were designed (i) to optimise the PCA's work on competition enforcement and advocacy; (ii) to contribute to the effective application of the new Portuguese Competition Act; and (iii) to bolster the PCA's capacity to act.

This is the first time the PCA publishes its priorities, following the approval and entering into force of the new Competition Act, Law 19/2012, of 8 May 2012. In article 7, paragraph 3, the Act sets out that 'During the last quarter of each year, the Competition Authority shall publish on its Internet site the competition policy priorities for the following year, though making no sectoral reference where its sanctioning powers are concerned.'

Further information on the new Portuguese Competition Act and other recent PCA Regulations may be found on the PCA website at www.concorrencia.pt.

- **Portugal: The Competition Authority publishes Market Study on Cork Sector**

In December 2012, the Portuguese Competition Authority (PCA) published an in-depth study into the cork market in Portugal.

The PCA carried out an analysis of the characteristics of the functioning of the cork market in Portugal, from the extraction of the raw material to the commercialisation of the various cork-based products, as well as its current regulatory environment. The market study includes consultation and exchange of information between the PCA and over 40 public and private entities, both on the national and international levels.

The report sets out a set of recommendations that aim to foster more efficient functioning of the sector, by way of the reduction of specific informational asymmetries between market operators, the establishment of a commodities exchange for raw materials and an eventual revision of the legislation regarding the sector.

This report follows some concerns expressed by market operators and a recommendation from the Portuguese National Parliament that the PCA should carry out an urgent and in-depth study of the cork sector. This sector is seen as important and strategic for the national economy, namely regarding imports and exports, and recommendations were called for that would contribute to the normal functioning of the market and the stability of the sector.

See Report (in Portuguese)

• United Kingdom: The Office of Fair Trading launches Workplace Pensions Market Study

On 17 January 2013, the Office of Fair Trading (OFT) launched a market study to examine whether defined contribution workplace pension schemes are set up to deliver the best value for money for savers.

The market for these pensions is going through a period of significant change which will see an expected rise in the value of annual contributions of around £ 11 000 000 000 (€ 13 000 000 000) by 2018.

At present around four million people in the UK are saving into a defined contribution pension scheme. In October 2012, the Government introduced automatic enrolment, an important initiative that requires employers to pay into a workplace pension scheme for all staff unless they opt out. Automatic enrolment is being staged in over the next six years, starting with larger employers last autumn, followed by medium sized then smaller employers, so that by 2018 an additional six to nine million workers will be enrolled in a scheme.

The OFT has decided to take a forward look now to see whether competition will work in the best interests of these savers to deliver low cost, high quality pension schemes. The market study will focus on value for money and the size of pension pot savers end up with at retirement. It will look at the following:

- How pension providers compete with one another and how the market may develop over time.
- Whether there is sufficient pressure on pension providers to keep charges low, and the extent to which information about charges is made available to savers.
- Whether smaller firms face difficulties in making pension decisions in the interests of their employees.
- Whether smaller firms receive appropriate help and advice in setting up and maintaining workplace pension schemes.
- Barriers to switching between schemes and a potential lack of ongoing employer engagement in setting up and managing pensions.

The OFT will be working closely with the Department of Work and Pensions, the Pensions Regulator, the Financial Services Authority and others during the course of its study. It will also seek input from other key players including the National Association of Pension Funds, the Association of British Insurers, pension providers, trade bodies and those that represent employers and employees. The OFT plans to complete the study by August 2013.

See Defined contribution workplace pensions market study

• United Kingdom: Office of Fair Trading Report points to Competition Working well in UK Road Fuel Sector

Rises in pump prices for petrol and diesel over the last 10 years have been caused largely by higher crude oil prices and increases in tax and duty and not a lack of competition, an Office of Fair Trading (OFT) report has found.

The evidence gathered by the OFT suggests that at national level competition is working well in the UK road fuel sector, although it has identified an absence of pricing information on motorways as a concern and does not rule out taking action in some local markets if there is persuasive evidence of anti-competitive behaviour.

The OFT launched a call for information on the UK road fuel sector in September 2012 to determine whether there are competition problems that need to be addressed. In addition to assessing the information submitted to it, the OFT has undertaken a detailed analysis of pricing data to investigate claims that the £ 47 000 000 000 (€ 54 000 000 000) market is not working well. The OFT's report was published on 30 January 2013.

The OFT found that, pre-tax, the UK has some of the cheapest road fuel prices in Europe. In the 10 years between 2003 and 2012 pump prices increased from 76 pence per litre (ppl) to 136ppl for petrol, and from 78ppl to 142ppl for diesel, caused largely by an increase of nearly 24ppl in tax and duty and 33ppl in the cost of crude oil.

A key feature of the road fuels sector over the past decade has been the growing influence of the big four supermarkets (Tesco, Sainsbury's, Asda and Morrisons). They increased their share of road fuel sold in the UK from 29% in 2004 to 39% in 2012. The supermarkets' high throughput per forecourt and greater buying power has allowed them to sell fuel more cheaply than other competitors. In August 2012, for example, the average price of petrol at supermarkets was 2ppl cheaper than the average at oil company owned sites and 4.3ppl cheaper than the average charged by independent dealers.

The OFT recognises that many independent dealers have found it difficult to compete in this sector, with a significant number exiting the market. Overall, the number of UK forecourts has fallen from 10 867 in 2004 to 8 677 in 2012, although the rate of decline appears to have slowed in the last three years. In the majority of areas where forecourts closed between November 2011 and August 2012 retail competition still appears to be strong.

The OFT has also found that fuel is often significantly more expensive at motorway service stations. In August 2012, for example, prices were on average 7.5ppl higher for petrol and 8.3ppl higher for diesel than at other UK forecourts. While these differences may be explained to some extent by the higher costs associated with running motorway forecourts, the OFT is concerned that drivers are not able to view prices until they have pulled into the service station. It has therefore asked the Department for Transport to consider introducing new road signs that would display service station petrol and diesel prices for motorway drivers.

See Call for information on the UK petrol and diesel fuels sector

• United Kingdom: New Help for Consumers and Businesses to take Action against Price-Fixing

Groups of consumers and companies will find it easier to take collective legal action against businesses acting in an anti-competitive way under new proposals announced by the Department for Business, Innovation and Skills on 29 January 2013. Included in the measures is a new fast-track regime that will help small businesses fight anti-competitive practices that stifle growth.

The changes include:

- making the Competition Appeal Tribunal (CAT) the main court for competition actions in the UK, including a fast track regime;

- introducing a new opt-out collective actions regime, with protections, for competition law;

- promoting alternative dispute resolution (ADR), to make sure that wherever possible any disputes are resolved without resorting to courts.

The changes were announced in the government response to the consultation on Private actions in competition law which proposed improving the way the UK helps individuals or businesses challenge anti-competitive practices in court.

Under the new opt-out collective regime, appropriate representative bodies will be able to take a group or collective action in court, and groups of consumers or businesses will automatically be included in the action. If they don't want to be part of the claim they will have to opt-out.

Businesses accused of anti-competitive behaviour will have several safeguards to make sure that the results are fair for them as well, including making sure that if they lose the case they only pay back what was lost by the consumer or other business and don't face excessive costs. During the consultation, the consumer group "Which?" highlighted that in systemic cases of mis-selling, a collective action can offer a better resolution.

Establishing the CAT as the main competition court will allow it to hear more cases and swiftly resolve disputes for consumers and businesses. Businesses will benefit from a new fast track system in the CAT, delivering cheap and quick results.

The changes will ensure that ADR is promoted and used wherever possible, saving time and money for those involved by avoiding lengthy cases and legal fees. As part of this, businesses that have had claims made against them will be able to propose collective settlements to the CAT, allowing them to nip the issue in the bud quickly and with reduced costs.

The majority of the proposed reforms will be subject to changes in primary legislation. Where this is the case, the reforms will be subject to Parliamentary timing and approval. The Government will work in parallel with the UK competition authorities and other stakeholders to implement those other reforms that do not require Parliamentary approval.

See the Consultation outcome on the OFT's website

OTHER ISSUES OF INTEREST

• Poland: 12th ICN Annual Conference to take place in Warsaw

The 12th Annual Conference of the International Competition Network (ICN) will be held in Warsaw, Poland, from 23 to 26 April 2013. The Polish Office of Competition and Consumer Protection (UOKiK) will, for the first time, organize this worldwide event which is expected to gather over 500 representatives of antitrust agencies.

The ICN was established in 2001 in New York. It is currently composed of 123 competition authorities representing 108 antitrust jurisdictions from all over the world. Its mission is to advocate the adoption of best practices and procedures in competition enforcement and policy, formulate proposals for procedural

and substantive convergence, and seek to facilitate effective international cooperation to the benefit of member agencies, consumers and economies worldwide.

Following established tradition, the host country prepares a special project regarding competition, the results of which are presented during the annual ICN conference. This year, the focus will be on the issue of working with courts and judges. The main objective will be to seek ways of strengthening the relationship of competition authorities with the judiciary with the aim of promoting competition.

For more information on the conference and on the registration procedure, please consult the website of the conference at: http://icnwarsaw2013.org/

See also press release (in English)

• Slovenia: Competition Protection Agency commenced Operations on 1 January 2013

In 2012, some amendments to the competition law were adopted providing legislative grounds to transform the then existing Competition Protection Office (CPO) into the new Slovenian Competition Protection Agency (CPA), which was officially registered and started functioning on 1 January 2013.

The CPA is now the authority responsible for the enforcement of antitrust and merger control rules in Slovenia.

The CPA is organised as an independent public body led by a director and five council-members, all of which were appointed by the Parliament on the proposal of the government. The director of the CPA is, by default, a member of the Council and also the Chairman of the Council. In the administrative procedure, the decision-making body is a panel consisting of the members of the Council, led by the director of the CPA. In misdemeanour procedures, the decision-making body is a panel consisting of the members of the Council and employees of the CPA.

The administrative capacity of the institution was strengthened in October 2012 from 16 to 28 employees. Further amendments to competition law will be needed in order to clarify the financial indepence status of the CPA.

See consolidated version of the competition law (in Slovenian)

• Spain: Anniversary of the Spanish Competition Act

The year 2013 marks the fiftieth anniversary of the enactment of the first special Act in Spain to defend free competition: Act 110/63 of 20 July 1963 prohibiting Anti-Competitive Practices. Since its adoption, competition policy in Spain has undergone constant change, always moving forward — with increasingly stronger institutions, more effective and sophisticated instruments to combat anti-competitive conduct and, above all, enhanced social awareness of the need for healthy competition in our markets.

The first Act of 1963 was inspired by the principles enshrined in the 1957 Treaty of Rome and entrusted the enforcement of competition law to two bodies: the Competition Service (Servicio de Defensa de la Competencia or SDC) which was dependent on the Ministry of Trade, and the Competition Tribunal (Tribunal de Defensa de la Competencia or TDC), a quasi-judicial body whose members were appointed for life by the Government. The power to impose penalties lay with the Council of Ministers, acting on a proposal from the TDC, and the control of concentrations was limited to voluntary registrations on a Register Book. However, against a historical background characterised by strong State intervention in the economy, the activities of these fledgling competition institutions were not particularly intense.

Prospects changed in 1986 when Spain joined the European Economic Community (EEC) (now the European Union (EU)), in which competition policy was a key pillar, not only for strengthening competition in Europe but also for integration in the Single Market. Spain's accession to the EEC presented an ideal opportunity to drive forward and modernise the country's competition policy.

To that end, the SDC and TDC were given increased resources and better instruments to carry out their functions (new units, a separate budget, etc.) and Act 110/1963 was brought into operation. Competition enforcement from 1998 onwards was also strengthened by the opening of ex officio investigations and the proposal of penalties which were accepted and implemented by the Government in their entirety. In the meantime, work began on the adoption of a new competition act.

Competition Act 16/1989 of 16 July 1989 introduced a modern system of competition law enforcement in Spain. That Act, which was a direct result of Spain's accession to the ECC, equipped the TDC and the SDC with greater resources and more effective tools to carry out their duties. Moreover, it conferred, for the first time, the power to impose penalties (which had hitherto fallen to the Council of Ministers) on the TDC and established a system for the control of economic concentrations, which was voluntary until the legislative reform of 1999.

Legislative developments within the European Union (specifically the adoption of Regulation (EC) No 1/2003 on the implementation of Articles 81 and 82 of the EC Treaty (nowadays Articles 101 and 102 TFEU)), together with the need to endow the entire system with greater independence, opened a debate on the reform of the then existing system, the cornerstone of which would be an institutional reform.

This process which was launched in 2005 with the publication of a White Paper, culminated in the approval of the third special Competition Act in Spain, Act 15/2007 (currently in force) which created the country's antitrust authority, the Comisión Nacional de la Competencia (CNC).

This anniversary will be marked by an event in May with the participation of Mr Joaquín Almunia, Vice-President of the European Commission.

See further on the CNC website

• Finland: The Competition and Consumer Authority has commenced Operations

The Finnish Competition Authority and the Finnish Consumer Agency merged into the Finnish Competition and Consumer Authority (FCCA) with effect from 1 January 2013. The aim of the merger is to increase the societal significance of competition and consumer issues and to improve administrative efficiency. The statutory tasks of the two agencies remain unchanged in the reform (see also ECN Brief 5/2012 and press release of 17.09.2012).

Temporary management has been appointed for the FCCA for the period of 1 January – 31 March 2013. Juhani Jokinen, Master of Laws (trained on the bench), was appointed acting Director General; Timo Mattila, M.Sc. (Tech.), M.Soc.Sc, acting Director of the Competition Division and Päivi Hentunen, Master of Laws, acting Director of the Consumer Division and acting Consumer Ombudsman. An application procedure for the 7-year-posts of Director General and the two Directors has been launched.

The 2013 budget for the FCCA is € 11 000 000. There are approximately 150 employees at the agency. The FCCA is currently located at two different offices in Helsinki, but is hoping to find common premises in the near future.

• Latvia: The Competition Council launches new Webpage

In late 2012 the Competition Council (CC) launched the new webpage of the authority www.kp.gov.lv, ensuring new content as well as improved usability and design. In January 2013 the English version of the new site was completed (http://www.kp.gov.lv/en), providing information on competition policy in Latvia to international readers.

The new webpage provides more detailed information on the Latvian competition law and its implementation, explains the principles of cooperation with the CC during investigations as well as what information to submit when reporting an alleged infringement.

In the Latvian version of the site, separate sections have been devoted to information for consumers and public procurement organizers.

Among the most significant improvements is the new search engine of the decision database (http://www.kp.gov.lv/lv/konkurences-padomes-lemumi). All the CC decisions since 2002, and their related court decisions and administrative agreements are publicly available on the webpage of the authority. The new search function makes it possible to find documents quickly using selection criteria (such as date, type of decision, type of infringement, NACE codes, articles of the law etc.) or a search by keywords.

Another novelty is an interactive educational game that lets visitors imagine themselves in different situations and tests their ability to recognize infringements of the Latvian competition law.

Skaidrīte Ābrama, chairwoman of the Competition Council commented: 'We have created the new webpage as an e-guide that will make it easier to find and make use of the compiled information available on competition law practice including recent updates and will facilitate the communication with the Competition Council. We hope that the site will mark another step towards closer cooperation between the competition authority and market participants and thus also towards an enhanced competition culture in Latvian society."

PERSONALIA

• The Netherlands: New Board Member at the Competition Authority

The Dutch Council of Ministers has approved the nomination, by the Dutch Minister of Economic Affairs Henk Kamp, of Ms. Anita Vegter, LL.M. (1965) as Member of the Board of the Nederlandse Mededingingsautoriteit (NMa). The appointment has taken effect on 1 January 2013.

Ms. Vegter has been a senior judge of the District Court of Amsterdam since 2006, as well as sub-district-sector chairwoman since 2009. She serves as a member of the Governing Board of the District Court, and has been acting President of the District Court of Amsterdam since August 2011. She worked as a lawyer in private practice from 1990 until 2005. From 2002 until 2005, she was dean of the Dutch Bar Association in the city of Arnhem.

In 2011, the Dutch administration decided that the NMa, the Netherlands Independent Post and Telecommunications Authority (OPTA) and the Netherlands Consumer Authority (CA) should merge into the Netherlands Authority for Consumers and Markets (ACM) (see ECN Brief 1/2012). Chris Fonteijn, the current Chairman of the Board of the NMa, is the Chairman designate of the ACM. The merger of the three regulators is subject to the approval of the Dutch Senate. Both Mr. Don, Ph.D. (1954) and Ms. Vegter would become Members of the Board of the ACM. Mr. Don has been a Member of the Board of the NMa since October 2009.

Press spokesperson: Ms. Barbara van der Rest-Roest at +31-70-330-3362 or +31-6-22793063 (outside office hours). Alternatively, you can send an email to the NMa press office at pers@nmanet.nl

• Spain: Annual Report 2011/2012 published

In January 2013, the Comisión de la Competencia (CNC) published its Annual Report 2011-2012. The reporting period has been very intensive: many important events have taken place, some of which with important repercussions for the future of competition enforcement in Spain.

The first major institutional renewal of the CNC took place in autumn 2011 when the current President took office and two new Council members were appointed. Joaquín García took over from Luis Berenguer as President of the CNC and Luis Díez and Paloma Ávila were appointed to the Council (Ms Ávila resigned a few months later for personal reasons). The mandate of the remaining Council members expired in the course of 2012, however, in principle they will remain in office until the creation of the new National Markets and Competition Commission (Comisión Nacional de los Mercados y de la Competencia (CNMC)) by merging the current CNC with various regulatory and supervisory bodies that exist today. This will be a major change to the institutional architecture for competition enforcement in Spain. In March 2012, the CNC issued its mandatory report on the bill, underlining the need for Spain to have a strong competition authority with appropriate human and material resources in order to continue the work on combating anti-competitive conduct and competition advocacy (see ECN Brief 02/2012).

In this context of legislative and institutional uncertainty, the CNC has maintained its intense pace of work of the past years. With respect to competition enforcement, the best example is the greater number of proceedings completed by the CNC and the larger scale of affected markets, which has resulted in higher sanctions compared with previous years. These results were achieved because the instruments contained in Act 15/2007 to strengthen the fight against anti-competitive conduct (the Leniency Programme and on-site inspections) have become standard tools in February 2008 and September 2007 respectively. One of the cases in which the Leniency Programme was applied led to the dismantling of a cartel of shipping companies operating freights and passenger maritime transport lines joining the Spanish mainland and the Balearic Isles as well as those within the Balearic Isles. Also worth noting is the CNC Council's Resolution to fine 47 companies in the construction sector for reaching agreements to share markets and fix prices in tenders for public works to renovate roads.

In the period covered, the CNC has also worked intensely in the field of competition advocacy, considering that major structural reforms to the Spanish economy are on the agenda. Thus, the CNC has issued various reports for public authorities, emphasising the importance for such reforms to be pro-competitive and eliminating unnecessary restrictions that hinder business and economic growth. Some important examples of advocacy work include the studies on automotive fuel, professional associations and the relations between producers and distributors in the agrifood sector (see CNC Sectorial Studies). Furthermore, the CNC has prepared a series of mandatory reports on on-going legislative proposals, suggesting improvements to the authorities and recommendations to avoid unnecessary restrictions. (see CNC Regulation Reports). Reference should also be made to the impact of the third Report on State Aid, which examined agreements entered into by autonomous communities and certain airlines to promote regional airports.

Against a backdrop of budget cuts, the CNC has been able to make further progress in the application of new technologies to administrative procedures and, in particular, to the management of cases handled by the CNC in order to reduce the administrative burden for both the CNC and businesses and enable easier and more direct access to the content of case files for interested parties. The last step should be the electronic notification of all proceedings before the CNC.

See Annual Report 2011-2012 (in Spanish)