2008 ANTITRUST YEAR IN REVIEW

ABA SECTION OF INTERNATIONAL LAW
International Antitrust Law Committee

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Edited by

DAVIES WARD PHILLIPS & VINEBERG LLP

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The views and opinions expressed herein are those of the authors of each respective contribution. The 2008 Year in Review is not, and should not be relied upon as, legal advice.

MESSAGE FROM THE COMMITTEE CHAIRS

The past decade has witnessed dramatic growth in the global breadth and scope of the practice of competition law. There are currently more than 100 countries with significant competition legislation and that number seems to be increasing every year. Many nations, including Australia, Canada, China, France, Spain, Sweden and others are making or proposing major amendments to their competition laws.

The goal of the International Antitrust Law Committee is to reflect and promote this globalization trend. The Committee is comprised of members from around the world, making up an international network of competition/antitrust practitioners and government officials. We take a leading role in policy development, routinely forming working groups to draft submissions to assist competition agencies and government officials worldwide in the formulation and enforcement of their competition laws.

One of our Committee's principal functions is to keep both our own members, and the membership of the ABA's Section of International Law, informed about major international competition law developments. We do this through regular reports on our Committee listserv, monthly teleconferences and in-person sessions at the Section's Spring and Fall meetings.

The other major component of our outreach effort is the annual compilation of key developments on a jurisdiction-by-jurisdiction basis. We do this through two vehicles: the International Section's comprehensive "Year in Review" publication and through our Committee's own Year in Review monograph, the 2008 edition of which you are now reading.

The "year in review" process requires substantial effort on the part of the contributors and editors. We wish to thank the 2008 editors – Mark Katz, Elisa Kearney and Jim Dinning – and all of the authors for the time that they have devoted to this project.

Given the way these things work, we are already thinking about the 2009 edition. This year's edition of the Year in Review contains contributions from close to 40 jurisdictions. Our goal is to increase that level of participation even further. We would encourage all those who might be interested in contributing to this process to please get involved by contacting us. You can also visit the International Antitrust Law Committee's website at http://www.abanet.org for more information about this and other of our activities.

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EDITORS' NOTE

The 2008 edition of the International Antitrust Law Committee's Year in Review was coordinated and edited by Mark Katz, Elisa Kearney and Jim Dinning of Davies Ward Phillips & Vineberg LLP, Toronto, Canada, with the invaluable assistance of an editorial team consisting of Corinne Lester, MaryAnne Kneif, Leeanne Garland and Graham Ross.

The contributions in this edition of the Year in Review summarize key competition law developments that occurred in 2008. In certain cases, where appropriate, reference is also made to developments that took place in other years.

Unless otherwise noted, conversions from local currencies to US$ are based on exchange rates as of January 2, 2009.

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ARGENTINA

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A. Legislative Developments

On August 7, 2008, the Argentine President issued Decree No. 1310/2008[1] appointing a new President of the Argentine Antitrust Commission ("AAC"). The AAC is comprised of a President and four members (two lawyers and two economists) who are responsible for the investigation of competition cases and the preparation of the Technical Opinions upon which final Resolutions of the Secretary of Domestic Trade are based.[2]

B. Mergers

1. Abrasivos

On October 21, 2008, the Secretary of Domestic Trade issued Resolution No. 183 with respect to the proposed acquisition by Saint-Gobain Abrasivos Ltda. ("SG") of 100% of the shares in Abrasivos Argentinos S.A. ("AA").[3] SG is a Brazilian-based company engaged in the production and marketing of abrasive products, mostly solids (discs and stones); AA is engaged in the production and marketing of a wide range of abrasive products, mainly flexible products (sandpaper) and masking tape.

Following a 19-month investigation, the AAC expressed concerns about the impact of the transaction in the flexible abrasive product market where the merged party would hold a 59.46% share of sales; AA accounts for 95% of domestic production; and consumer loyalty creates significant barriers to entry. The transaction was ultimately authorized subject to conditions requiring the purchaser to divest the assets and trademarks relating to the Abralox, No Past and Gold 24K products.

2. Alpargatas

On October 23, 2008, the Secretary of Domestic Trade issued Resolution No. 189 authorizing Sao Paulo Alpargatas S.A.'s acquisition of control of Alpargatas S.A. through the purchase of 34.4994% of the latter's outstanding shares.[4] The two companies manufacture products such as cotton plain fabrics, work apparel and flip flops.

After analyzing the vertical and horizontal relationships among the companies, the AAC expressed concerns about the impact of the proposed merger on the work apparel market where the two companies are close competitors (#1 and #2) and would have had a 43.28% post-merger market share. Because of these concerns, the AAC approved the transaction but required the merged entity to assign the "Pampero" trademark (and related assets) to another competitor (the "Pampero" brand of work apparel is considered to be of the highest quality).

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1 *Available at* http://www.boletinoficial.gov.ar/bora.portal/PrimeraSecci%C3%B3n/BusquedaRapida/tabid/81/Default.aspx.

2 Antitrust Law No. 25,156, which has been in force since 1999, provides for the creation of the Argentine Antitrust Tribunal (*Tribunal Nacional de Defensa de la Competencia* or "Tribunal"), with the authority to apply and enforce Argentine competition law. The Tribunal is to be an independent entity reporting to the Argentine Ministry of Economy, Public Works and Utilities. Notwithstanding the foregoing, the Tribunal has not yet been organized. Accordingly, all competition proceedings continue to be heard by the AAC, in accordance with the provisions of the previous law (No. 22,262).

3 Dossier No. S01:0098017/2007 (Conc. No. 625) Resolution SC No. 183, "SAINT-GOBAIN ABRASIVOS and MR. DAVISON in re NOTICE, SECTION 8 LAW 25,156", *available at* http://www.mecon.gov.ar/AAC/dictamenes/saint_gobain_abrasivosa_argentinos.pdf.

4 Dossier No. S01:0401242/2007 (Conc. No. 658), Resolution No. 189, "SAO PAULO ALPARGATAS S.A. ET AL in re. NOTICE, SECTION 8 LAW 25,156", *available at* http://www.mecon.gov.ar/AAC/dictamenes/sao_paulo_alpargatas_alaprgatas_argentina.pdf.

C. Court Decisions

1. Argentine Supreme Court of Justice

On April 16, 2008, the Argentine Supreme Court of Justice (the "CSJN") ruled that the AAC and the Secretary of Domestic Trade are the competent authorities to enforce Antitrust Law No. 25,156, until the Argentine Antitrust Tribunal (*Tribunal Nacional de Defensa de la Competencia*) is created pursuant to that law.[5] The CSJN confirmed that the AAC should hear cases and investigate and prepare opinions, while the Secretary of Domestic Trade should issue the final Resolution. The ruling reversed the judgment of the Argentine Court of Appeals in Civil and Commercial Matters, which had held that the AAC, as the entity created by the repealed Law No. 22,262, should investigate and decide the cases submitted to it for consideration, independently of the Secretary of Domestic Trade.

2. Court of Appeals

(i) Grupo Martinez

The Court of Appeals confirmed the AAC's imposition of a fine of $288,000 (approximately US$82,000) on Grupo Martinez Sanpedro and Codere S.A. for filing a merger notification 144 days after the expiration of the statutory deadline.[6] The Court of Appeals agreed that, at the time of execution of the agreement, the shares of the target company had been effectively transferred and a change in control had occurred. The Court of Appeals also considered the amount of the fine to be reasonable, taking into account the aggregate value of the transaction (approximately US$468 million) and the 144-day delay in giving notice. Finally, the Court of Appeals held that failure to give notice of the transaction in other jurisdictions was not relevant as this would not operate as a waiver of notice in Argentina.

(ii) Monsanto

In September 2008, the Court of Appeals reversed the AAC's decision to investigate Monsanto Technology LLC and Monsanto Argentina S.A. (collectively "Monsanto") for allegedly hindering trade in soybean flour and other by-products exported from Argentina.[7]

The AAC had decided that certain requests for precautionary measures filed by Monsanto abroad to enforce its patent rights over soybean products from Argentina could potentially restrict competition in Argentina. In an extensive judgment overruling the AAC, the Court of Appeals held that there was insufficient evidence to support the AAC's allegations. The Court found that Monsanto's actions were legitimately designed to protect its intellectual property rights, especially considering the constitutional right in Argentina to file petitions with the authorities.[8] The Court of Appeals also concluded that the AAC had failed to demonstrate that Monsanto's actions would restrict competition in Argentina.

(iii) Shell Gas/Total Gas

The Federal Court of Appeals in the City of Posadas reversed the AAC's resolution imposing a penalty on two suppliers of natural gas accused of entering into market sharing arrangements.[9] The Court held that the AAC's analysis was inadequate and that anticompetitive harm could not be demonstrated.

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5 Judgment rendered by the Argentine Supreme Court of Justice dated April 16, 2008, "Belmonte Manuel and Asociación Ruralista General Alvear v. Argentine Government – Executive Branch – Ministry of Economy and Production – Secretariat of Technical Coordination – Argentine Antitrust Commission", *available at* http://www.csjn.gov.ar/documentos/cfal3/toc_fallos.jsp.

6 CNACyCF Dossier No. 9039, April 17, 2008, Grupo Martinez Sanpedro y Codere S.A. in re Appeal from Resolution issued by the Argentine Antitrust Commission. For the AAC's decisions, *see* Res. SC. No. 98/2007, Don Jesús F. Muñoz, Empresa Maspe Holding B.V., *available at* http://www.mecon.gov.ar/AAC/sanciones.pdf.

7 CNACyCF Dossier No. 638, September 30, 2008, Monsanto Argentina S.A. in re Appeal from Resolution issued by the Argentine Antitrust Commission.

8 This is analogous to the U.S. "Noerr-Pennington" doctrine.

9 CDef in Posadas – Dossier No. 9986/07, May 30, 2008, Shell Gas S.A., Total Gas Argentina S.A in re Appeal. For the AAC's decision, *see* Resolution No. 32, October 23, 2006, (C.665) Filing of Compliant, *available at* http://www.mecon.gov.ar/AAC/dictamenes/dictamen_mayol_shell.pdf.

For example, the AAC had not defined the relevant market; the evidence it gathered was insufficient to make its case; and the AAC only gave partial consideration to the witness testimony gathered.

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A. Legislative and Administrative Developments

On December 3, 2008, the Federal government introduced legislation for consideration by Parliament to criminalize cartel conduct under the Trade Practices Act 1974 (Cth) (the "TPA"), the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 (the "Bill").[1] The Bill also creates a parallel civil prohibition which replicates the criminal offence. The Bill is currently before Parliament and, if passed, the Bill is likely to come into effect in early 2009.

The Bill specifies that the relevant fault element to be applied to the criminal cartel offence is "knowledge or belief".[2] That is, did the defendant know or believe that the relevant contract, arrangement or understanding contained a cartel provision?

Contravention of the criminal cartel offence can entail imprisonment for up to 10 years[3] and/or fines of up to AUD$220,000 (approximately US$156,000) for individuals, and fines for corporations up to the greater of: (i) AUD$10 million (approximately US$7.1 million); (ii) three times the value of the benefit attributable to the cartel as a whole; or (iii) where the value cannot be determined, 10% of the corporation's annual turnover.[4] Contravention of the civil cartel prohibition will carry the same pecuniary penalty for corporations as described above and a penalty of up to AUD$500,000 (approximately US$350,000) for individuals.[5]

The Bill also proposes significant amendments to the TPA which impact the application of the TPA's cartel provisions. Some of the key issues addressed are:

- Concurrent operation – the Bill does not repeal the existing civil prohibition against exclusionary provisions (which covers market sharing and collective boycott conduct). Therefore, the proposed criminal cartel offence, the civil cartel prohibition and the existing civil prohibition on exclusionary provisions will operate concurrently.

- Exemptions – the TPA currently contains a number of "anti-overlap" exemptions that ensure vertical supply arrangements containing exclusivity clauses are subject only to a substantial lessening of competition test and are not caught by the strict (or *per se*) prohibitions on price fixing and exclusionary provisions. A number of other exemptions are also present, for example, a collective acquisition exemption to the prohibition on price fixing. The initial exposure bill failed to extend all of these exemptions to the new criminal cartel offence and civil cartel prohibition, however the Bill now carries over the existing civil exceptions to the new criminal cartel offence and civil cartel prohibition.

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1 Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008, *available at* http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/0/2C7D2D20ECD53A5FCA2575140076C9EE/$file/R4027B.pdf. The release of the Bill follows the release of an initial exposure bill by the Federal government in January 2008 and a subsequent exposure bill in October 2008. The initial exposure bill was accompanied by a brief discussion paper issued by the government and a draft memorandum of understanding between the Australian Competition and Consumer Commission and the Commonwealth Director of Public Prosecutions to facilitate arrangements between them. Submissions on this initial exposure bill were sought as part of the Government's consultation process.

2 The Bill, Schedule 1, item 18 § 44ZZRF.

3 This is an increase from the five-year maximum term of imprisonment imposed in the initial exposure bill.

4 The Bill, Schedule 1, item 18 §§ 44ZZRF and 44ZZRG.

5 *Id*. at Schedule 1, item 18 §§ 44ZZRJ and 44ZZRK.

- Joint ventures – while the Bill introduces a new joint venture defence to both the criminal cartel offence and civil cartel prohibition, the Bill repeals the existing joint venture defence to price fixing.[6] The new defence is narrower as it will only apply in respect of joint ventures for the production and/or supply of goods and services but will not apply to the acquisition of goods or services. The existing joint venture defence applying to exclusionary provisions will remain.

In anticipation of the passing of the Bill, the Australian Competition and Consumer Commission ("ACCC") and the Commonwealth Director of Public Prosecutions ("CDPP") have issued:

- a memorandum of understanding setting out the arrangements between the agencies and the respective roles in relation to investigation, referral and prosecution of cartel conduct and the granting of immunity in respect of such conduct;[7]

- a revised ACCC Immunity Policy (and related Interpretation Guidelines)[8] outlining the ACCC's policy in considering applications for immunity in respect of civil proceedings for cartel conduct;[9] and

- an annexure issued by the CDPP to its Prosecutions Policy of the Commonwealth, outlining its policy in considering applications for immunity in respect of criminal proceedings.[10]

On November 21, 2008, the Federal Parliament passed legislation to clarify and strengthen the misuse of market power provisions in the TPA.[11] The amendments seek to clarify the operation of the general prohibition against misuse of market power under section 46 and the specific prohibition against anticompetitive predatory (or "below-cost") pricing in section 46(1AA). The amendments follow criticisms of the ability of section 46(1AA) to effectively control predatory pricing, and the uncertainty created by its concurrent operation with the general prohibition in section 46.

On September 1, 2008, the Government released a discussion paper on its proposal to introduce into the TPA a specific prohibition against "creeping acquisitions" for public comment.[12] Currently the TPA prohibits acquisitions of shares or assets that have the likely effect of "substantially lessening competition" in a national, state or regional market, but does not specifically legislate against any anticompetitive effect of incremental acquisitions. Submissions were due in early October 2008. The Government has not yet published its views or issued draft legislation further to the discussion paper.

Finally, the ACCC released the final version of its revised merger guidelines on November 26, 2008.[13]

6 *Id*. at Schedule 1, item 18 § 44ZZRO.

7 Memorandum of understanding between the Commonwealth Director of Public Prosecutions and the Australian Competition and Consumer Commission regarding Serious Cartel Conduct, *available at* http://www.accc.gov.au/content/item.phtml?itemId=706268&nodeId=353cdd807d07c920e807e65c172e1086&fn=ACCC_CDPP_MOU.pdf.

8 Australian Competition and Consumer Commission, Immunity policy for cartel conduct, *available at* http://www.accc.gov.au/content/item.phtml?itemId=706268&nodeId=85a1bffafb0bea81ef1b0ea9090e5a1d&fn=Revised_Interpretation_Guidelines.pdf.

9 Australian Competition and Consumer Commission, Immunity policy interpretation guidelines, *available at* http://www.accc.gov.au/content/item.phtml?itemId=706268&nodeId=35422adbba2322f18c994c164eb5d180&fn=Revised_Immunity_Policy.pdf.

10 Annexure to the Prosecution Policy of the Commonwealth for Immunity from Prosecution in Serious Cartel Offences, *available at* http://www.accc.gov.au/content/item.phtml?itemId=706268&nodeId=61c7d4cb94576d547850282858b2b027&fn=Annexure.pdf.

11 Trade Practices Amendment Act 2008 (Cth), *available at* http://www.comlaw.gov.au/comlaw/Legislation/Act1.nsf/0/6C1C80E9540F5CB7CA25750B00775E66/$file/1162008.pdf.

12 Creeping Acquisitions – Discussion Paper, *available at* http://www.treasury.gov.au/documents/1409/PDF/Discussion%20Paper%20-%20Creeping%20Acquisitions.pdf.

13 *See* Australian Competition and Consumer Commission, MERGER GUIDELINES, November 2008, *available at* http://www.accc.gov.au/content/item.phtml?itemId=809866&nodeId=7cfe08f3df2fe6090df7b6239c47d063&fn=Merger%20guidelines%202008.pdf.

The revised guidelines modernize the previous guidelines which have been in place since 1999 by adopting the key theoretical frameworks developed in Europe and the United States.

B. Cartels

Several significant fines were agreed to and ordered against participants in price fixing cartels, including in the supply of: corrugated fibreboard packaging (AUD$36 million/approximately US$25 million);[14] international air cargo services (AUD$25 million/approximately US$18 million);[15] wood preservatives (AUD$2.5 million/approximately US$1.8 million);[16] and educational services (AUD$125,000/approximately US$89,000).[17] The ACCC also commenced civil proceedings against a company alleged to have participated in a price fixing cartel in the supply of international air cargo services[18] and commenced criminal proceedings against a person for allegedly providing false or misleading evidence in the course of its investigation into the corrugated fibreboard packaging cartel.[19]

C. Court Decisions

Following an epic court battle, the ACCC finally succeeded in securing a judgment against Baxter Healthcare Pty Ltd ("Baxter") for breaches of section 46 (misuse of market power) and section 47 (exclusive dealing) of the TPA in relation to bundled offers in the tender process for contracts entered into by Baxter and State government health purchasing authorities between 1998 and 2005.[20]

In March 2008, the High Court handed down its much anticipated judgment on a constitutional challenge to parts of the telecommunication service access regime in the TPA.[21] The challenge was brought by Telstra, Australia's incumbent telephony provider, which argued that the TPA provisions that allow the ACCC to set prices for compulsory third party unbundled access to Telstra's copper wire network constitute a compulsory seizure of its property other than "on just terms", within the meaning of section 51(xxxi) of the Australian Constitution. In a unanimous judgment, the High Court concluded that the legislative provisions for the exercise of access rights by other carriers "effect no acquisition of Telstra's property in the local loops".

14 Australian Competition and Consumer Commission v. Visy Industries Holdings Pty Ltd (No 3), [2007] FCA 1617, *available at* http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2007/1617.html.

15 Australian Competition and Consumer Commission v. Qantas Airways Limited, [2008] FCA 1976, *available at* http://www.austli.edu.au/au/cases/cth/FCA/2008/1976.html; Australian Competition and Consumer Commission v. British Airways PLC, [2008] FCA 1977, *available at* http://www.austlii.edu.au/au/cases/cth/FCA/2008/1977.html.

16 Australian Competition & Consumer Commission v. FChem (Aust) Ltd, [2008] FCA 344, *available at* http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2008/344.html.

17 Australian Competition & Consumer Commission v. Kokos International Pty Ltd (No 2), [2008] FCA 5 *available at* http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2008/5.html.

18 The ACCC has commenced civil proceedings against Singapore Airlines Cargo Pte Ltd for alleged involvement in an alleged price fixing cartel in the air cargo industry. *See* Press Release, ACCC institutes proceedings against Singapore Airlines Cargo Pte Ltd for alleged price-fixing (December 22, 2008) *available at* http://www.accc.gov.au/content/index.phtml/itemId/854765.

19 The ACCC has commenced criminal prosecution against Richard Pratt for allegedly providing false or misleading evidence in the course of an ACCC investigation. *See* Press Release, ACCC begins criminal prosecution against Richard Pratt for allegedly providing false or misleading evidence (June 20, 2008), *available at* http://www.accc.gov.au/content/index.phtml/itemId/832393/fromItemId/631281.

20 Australian Competition and Consumer Commission v. Baxter Healthcare Pty Ltd., [2008] FCAFC 141 (August 11, 2008), *available at* http://www.austlii.edu.au/au/cases/cth/FCAFC/2008/141.html.

21 Telstra Corporation Limited v. The Commonwealth, [2008] HCA 7 (March 6, 2008), *available at* http://www.austlii.edu.au/au/cases/cth/HCA/2008/7.html.

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A. Legislative Developments

Unlike most European states, the decision-making power in Austrian antitrust and merger cases rests with a specialised court (the Cartel Court), with the Federal Competition Authority (the "FCA") being limited to an investigative role. A proposal by the Austrian Ministry of Economics to bring the Austrian system into line with the European model by granting the FCA decision-making power failed to gain sufficient political support in 2008.[1]

B. Mergers

275 merger filings were submitted to the FCA in 2008, with nine going to Phase II review.[2]

The only substantive merger decision by the Cartel Court in 2008 related to a transaction between two Austrian press companies, Styria and Moser, that contributed their respective regional free newspapers to a joint venture.[3] The transaction did not result in any significant geographic market overlaps. The proceedings therefore mainly focused on the proposed joint venture's conglomerate effects, i.e., whether the combination of the companies' portfolios of regional free weeklies would disadvantage competitors that operate in only one region. The Cartel Court's investigation revealed that this was unlikely to happen. The Cartel Court also found that the efficiencies resulting from the combination would make the joint venture more competitive for national advertising campaigns, which, for the most part, can only currently be placed in a single national newspaper, the *Kronen Zeitung*. The FCA appealed the Cartel Court's decision, alleging various substantive and procedural errors;[4] however, the Supreme Court rejected the appeal in December 2008.[5] This case demonstrates that, in line with the European Commission's approach, the Austrian competition authorities will also take into account conglomerate theories of harm.

C. Cartels

In October 2008, the Supreme Court confirmed the Cartel Court's record fine of EURO 75.4 million (approximately US$105 million) imposed in 2007 against a cartel in the elevators and escalators market.[6] The Supreme Court ruled that the Cartel Court was correct in focussing on an "overall cartel" which did not have to be broken up into single violations (of which some could have benefited from the statute of limitations). The Supreme Court also explicitly approved the Cartel Court's method for setting fines, which was consistent with the European Commission's 2006 guidelines. The judgment also clarified that the Supreme Court, even when ruling on cartel fines, did not have to deviate from its established practice of only accepting legal pleas (and not reviewing the Cartel Court's assessment of the facts of the case).

The Supreme Court also affirmed the Cartel Court's decision against the claimants in a related civil damages case.[7] As Austrian civil procedure does not provide for pre-trial discovery, private litigants may find it difficult to prove that they suffered damages as a consequence of a cartel. In an attempt to overcome this problem, a number of customers

1 Act on the Reorganisation of Competition Authorities 2008 (Proposal), 224/ME (XXIII. GP).

2 As published on the FCA website, *available at* http://www.bwb.gv.at.

3 Austrian Cartel Court, Decision of August 20, 2008, 26 Kt 8, 9/08, (unpublished).

4 As published on the FCA's website, *available at* http://www.bwb.gv.at.

5 Austrian Supreme Court, Decision of December 17, 2008, 16 Ok 15/08, *available at* http://www.ris2.bka.gv.at.

6 Austrian Supreme Court, Decision of October 8, 2008, 16 Ok 5/08, *available at* http://www.ris2.bka.gv.at.

7 Austrian Supreme Court, Decision of October 8, 2008, 16 Ok 8/08, *available at* http://www.ris2.bka.gv.at.

allegedly affected by the elevators and escalators cartel brought an application in the Cartel Court for a declaratory judgment against the cartel participants. The Supreme Court upheld the Cartel Court's dismissal of the application, on the grounds that the Cartel Court does not have the jurisdiction to issue declaratory judgments merely for the purpose of supporting a private damages claim.

On November 5, 2008, the Austrian Cartel Court imposed a fine of EURO 1.9 million (approximately US$2.6 million) against Donau Chemie AG and Danauchem GmbH, both a part of the Donau Chemie Group, for their participation in a regional cartel affecting the supply of industrial chemicals.[8] The decision has been appealed. The proceedings were initiated in December 2006 following a leniency application by a third company that also participated in the cartel. The "whistleblower" was granted immunity under the Austrian leniency policy, as governed by section 11(3) of the Competition Act.

D. Anticompetitive Practices

There was only one decision in 2008 requiring an undertaking to cease abusing its dominant position.[9] That case involved a vertically integrated film distributor/theatre operator that was ordered to provide a local theatre operator with a copy of the film "Asterix at the Olympic Games" because of its revenue-earning potential. The Court granted the order even though the distributor only had a 10% share of the film distribution market in Austria, based on the likely "grave harm" to the theatre operator's business if it did not get the film.

In a July 2008 decision, the Supreme Court held that the provision prohibiting discrimination against "resellers" in the Act on Local Supplies *(Nahversorgungsgesetz)* also extends to companies that process goods prior to their "resale" (such as sawmills), and not just to the resale of goods at retail. Although the Act on Local Supplies applies to non-dominant parties, a similar provision in the Austrian Competition Act prohibits dominant parties from discriminating against "resellers". As a result, the prohibition against discrimination may now be broad enough to apply to any wholesale supplier of goods (dominant or not), irrespective of whether its customers process the goods purchased prior to resale.[10] Following the Supreme Court's decision, the Cartel Court adopted an interim injunction prohibiting the defendant from engaging in discriminatory pricing in relation to its customers (various sawmills). The defendant's appeal against this decision was still pending at the end of 2008.

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8 *See* the FCA's press release, *available at* http://www.bwb.gv.at/BWB/Aktuell/kg_industriechemikalien_05112008.htm.

9 Austrian Supreme Court, Decision of July 16, 2008, 16 Ok 6/08, *available at* http://www.ris2.bka.gv.at.

10 Austrian Supreme Court, Decision of July 16, 2008, 16 Ok 3/08, *available at* http://www.ris2.bka.gv.at.

BELGIUM

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A. Cartels

The Belgium Competition Council issued three important cartel decisions in 2008, consistent with its objective of spending less time on merger review and more resources on cartel enforcement.[1]

1. VEBIC

On January 25, 2008, the Council imposed its first cartel fine under the new Competition Act of 2006 against VEBIC, the Flemish bakers trade association.[2] VEBIC was fined a total of EURO 29,000 (approximately US$40,000) for having created and sent to its members a detailed cost scheme and bread price index, which induced the bakers to increase their prices. In its decision, the Council acknowledged that a trade association may provide information to its members to help them better assess their own cost structures and independently determine their selling prices. However, the Council found that the system that VEBIC had established was designed to induce its members to increase their prices.

In setting the amount of the fine, the Council held that the 2004 Fining Guidelines adopted under the previous Competition Act no longer applied (new fining guidelines are expected to be adopted shortly). The Council emphasized, however, that the basic principles of these Guidelines remain applicable and relied upon them to determine the basic amount of the fine, i.e., the gravity and the duration of the infringement, aggravating and mitigating circumstances, and the principles of proportionality and deterrence. This is the first time that the Council imposed a fine on an association of undertakings, which is now authorized under the new Competition Act of 2006.

2. FAB

On July 7, 2008, the Council fined another association, the Belgian Federation of Professional Driving Schools ("FAB"), for issuing recommendations designed to induce members to increase their prices.[3] The Council stated that a trade association may inform its members of market evolution and may provide members with advice to help them run their businesses, as long as the association does not, directly or indirectly, seek to restrict competition. The Council concluded that FAB intended not merely to inform its members but also to stimulate price increases and imposed a fine of EURO 6,990 (approximately US$9,700).[4]

3. The BBP Cartel

The third decision of note was rendered by the Council on April 4, 2008 in connection with a cartel in the Belgian market for Butyl Benzyl Phthalate, a

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1 This objective has been furthered by the increase in jurisdictional thresholds for merger control review in the new Competition Act of 2006 (Act of September 15, 2006 for the Protection of Economic Competition, Belgian Gazette of September 29, 2006), and by introducing a "simplified procedure" handled exclusively by the Auditors and not by the Council. The simplified procedure was revised on June 8, 2007 and allows parties, if certain conditions are satisfied, to file a much less detailed information form. Under certain conditions, the Auditor will confirm in a letter within 20 working days that the concentration does not raise competition concerns. This letter has the value of a decision of the Competition Council. It is interesting to note that only 20 concentrations were notified in 2007 whereas the Belgian competition authorities conducted 15 dawn raids and 17 investigations relating to suspected illegal cartel conduct.

2 Decision No. 2008-I/O-04, January 25, 2008, Vlaamse federatie van verenigingen van Brood- en Banketbakkers, Ijsbereiders en Chocoladebewerkers.

3 Decision No. 2008-P/K-43, July 7, 2008, ISC v. FAB and its members and Test-Achats v. driving schools of Belgium.

4 The low amount of the fine was explained by the particular circumstances of the case, notably the length of the proceedings (almost 10 years), FAB's cooperation and the significant decrease in FAB's membership over time (150 members in 1999 to 43 in 2008).

chemical substance mainly used as a plasticizer for PVC.[5] The Council found that Bayer, Ferro/Solutia and Lonza had conspired to fix prices, allocate market shares and customers, and exchange sensitive information. This is the first decision adopted under the Council's leniency program. Bayer, which was the first to submit decisive evidence to the Council, benefited from immunity. The others received reduced fines ranging from EURO 114,618 (approximately US$159,000) to EURO 175,594 (approximately US$244,000).

The decision is of particular relevance from a procedural point of view. The Council clarified that fines imposed in Belgium should be based exclusively on the Belgian turnover of the companies concerned, regardless of whether the companies also are fined for the same conduct in other jurisdictions.

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5 Decision No. 2008-I/O-13, April 4, 2008, Bayer AG - Ferro (Belgium) SPRL - Lonza S.p.A and Solutia Europe S.A.

BRAZIL

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A. Legislative Developments

Electronic filing of submissions to the Brazilian System of Competition Defense ("SBDC") is currently being tested.[1] The form of the filing is still being debated, although the Brazilian competition authorities aim to finalize it shortly.

A bill to restructure the SBDC is currently under consideration in the National Congress.[2] It is expected to be voted on by the Senate in 2009.

Also in 2008, the Administrative Council of Economic Defense's ("CADE") new president was appointed. Before becoming CADE's president, Arthur Badin occupied the position of CADE's Attorney General ("ProCADE") and before that, he worked at the Secretariat of Economic Law ("SDE").

B. Mergers

In 2008, Brazilian authorities required the unwinding of the Brazilian portion of Owens Corning's acquisition of fiber glass strengtheners manufacturer Compagnie de Saint Gobain.[3] This marked the first time in Brazilian antitrust history that an international transaction was ordered to be unwound. CADE based its decision on: (i) the high market concentration in certain relevant markets; (ii) the lack of installed capacity of competitors; (iii) the high barriers to entry; (iv) the strong likelihood of collusion after the acquisition; and (v) the lack of efficiencies resulting from the transaction. In order to comply with the decision, CADE ordered Owens Corning to: (i) sell the business units acquired in Brazil; (ii) hire, on CADE's approval, an independent company to evaluate the assets and conditions of payment; and (iii) hire, on CADE's approval, an independent company to monitor the selling process and identify potential purchasers.

Brazilian authorities also approved the acquisition of VRG Linhas Aéreas ("VRG"), a major Brazilian airline holding company, by GOL (GTI S.A.) ("GOL"), another major airline company.[4] CADE approved the transaction without any conditions, notwithstanding the high post-merger shares, because the parties had agreed not to limit VRG's level of activity after the closing of the transaction and also to maintain certain benefits for consumers (including the "Smiles" fidelity program).

Brazilian antitrust authorities also reviewed Inbev's acquisition of Anheuser-Busch Companies, Inc.[5] Although both companies are major international beer producers, the transaction was approved without conditions, since the acquisition would only increase Inbev's share in the Brazilian beer market by 1.8%.

Finally in 2008, the proposed acquisition of Oi by Brasil Telecom was notified. The acquisition will result in a high concentration in the market for Internet data transmission, a market in which competitor Embratel has been the major player since privatizations began in the market. The SBDC will analyze and rule on the merger in 2009.

C. Cartels

Brazilian authorities have announced that they intend to move forcefully against international cartels that may produce effects in Brazil. For

* The authors would like to thank Stefanie Schmitt for her contribution in the research for this article.

1 CADE, Resolution no. 49 (July 23, 2008).

2 *See* Legislative Bill no. 3934/2004. This bill was initially proposed in 2004 and was re-introduced this year by Congressman Ciro Gomes. The full text of the bill is *available at* http://www.camara.gov.br/sileg/Prop_Detalhe.asp?id=260404.

3 *See* Concentration Act no. 08012.001885/2007-11.

4 *See* Concentration Act no. 08012.003267/2007-14.

5 *See* Concentration Act no. 08012.008015/2008-54.

example, SDE has affirmed in recent cases that it will prosecute and impose fines on international companies as well as on their foreign managers (i.e., foreign individuals). Another measure involves including the names of foreign individuals on Interpol lists.

An international cartel was at the centre of the most discussed Brazilian competition law event of 2008, i.e., the signing of a Commitment to Cease Practices Under Investigation ("TCC") by one of the parties under investigation in Brazil for being part of the international cartel of maritime hose manufacturers.[6] The signed TCC differed from ones typically employed as the party seeking leniency had already confessed its participation in and the existence of the cartel and therefore could not benefit from full immunity. Instead, in order to have the TCC signed, the applicant acknowledged its participation in the cartel, paid a fine proportional to its participation (limited to the impact of the violation in Brazil) and committed itself to assist the authorities in the investigation.

Also in 2008, the SDE launched a program to inform executives and employees of the benefits of seeking leniency. For example, October 8, 2008 was prescribed as the "national day" to fight cartels and brochures were handed out in local airports by government officials who also explained the government's leniency policy.[7]

Finally, in December 2008, CADE condemned three companies in the sand extraction market and one consulting company for the formation of a cartel.[8] In 2005, the police started an investigation that included search and seizures and telephone wiretaps. The SDE initiated an investigation in 2006 and found that the producers were engaging in market allocation and fixing prices, while the consulting company had advised the producers on how best to carry out their conduct. CADE imposed fines on the producers ranging from 17.5% to 22.5% of their gross revenue and fined the consulting company 10% of its gross revenue, considering that it had only assisted the cartel and was not directly involved in the cartel's implementation.[9]

D. Judicial Cases

The Brazilian judiciary continues to confirm CADE's decisions. In one of the most relevant cases in 2008, the courts validated CADE's decision in the first cartel case initiated by a leniency agreement (involving a cartel of private security companies).[10]

Xerox do Brasil S.A. ("Xerox") was also condemned by the Brazilian courts for vexatious litigation against CADE.[11] This decision arose out of Xerox's repeated efforts to reverse CADE's decision that resulted in a R$47.5 million fine (approximately US$20.5 million) against Xerox for tying the acquisition of printers to other products, such as ink.

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6 *See* Administrative Proceeding no. 08012.010932/2007-18.

7 Approximately 15 leniency agreements have been signed since Brazil's Leniency Program was introduced in 2000 and approximately 10 leniency applications are currently being negotiated by the SDE.

8 *See* Administrative Proceeding no. 08012.000283/2006-66.

9 *See* vote issued by Commissioner Furquim in the Administrative Proceeding no. 08012.000283/2006-66.

10 *See* Administrative Proceeding no. 08012.00826/2003-10.

11 *See* Ordinary Proceeding no. 93.00.06161-5, 16th Circuit of the Federal Court, appealed under no. 2001.01.00.036742-5, in which Xerox was trying to revert the fine imposed by CADE regarding Administrative Proceeding no. 23/1991.

CANADA

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A. Legislative Developments

During Canada's October 2008 election, the Conservative party promised to introduce several far-reaching changes to Canada's *Competition Act* (the "Act"), including:

- a new criminal conspiracy offence focussed on "hard core" cartel conduct such as price fixing and market allocation, with other types of potentially anticompetitive agreements to be dealt with on a separate non-criminal track;
- new maximum penalties for cartels and bid-rigging of CDN$25 million (approximately US$20.5 million) in fines and 14 years in prison (up from the current maximum of CDN$10 million (approximately US$8.2 million) in fines and five years' imprisonment);
- new fines for abuse of dominance (up to CDN$10 million (approximately US$8.2 million) for initial offenders and CDN$15 million (approximately US$12.3 million) for repeat offenders); and
- repeal of the Act's criminal offences for price discrimination, promotional allowances and predatory pricing.

The Conservatives received a plurality of seats in the House of Commons following the October 2008 election and formed a minority government. In early 2009, as part of its budget legislation, the Conservative government introduced a variety of amendments to the Act,[1] including changes largely following those described in their election platform, but also other significant proposed amendments, such as:

- amending the merger notification process under the Act to mirror the U.S. *Hart-Scott-Rodino Antitrust Improvements Act* process;
- reducing to one year the three-year waiting period following closing within which the Commissioner currently may challenge a completed merger;
- increasing one of the thresholds for merger notification from CDN$50 million (approximately US$41 million) to CDN$70 million (approximately US$57 million) (the "size of transaction" test); and
- de-criminalization of the price maintenance offence.

The above proposed amendments largely follow the recommendations contained in a June 2008 report released by the Competition Policy Review Panel (the "Panel") on Canada's competition and investment policies.[2] The Panel was created in July 2007 by the federal government with the mandate of examining how to improve the domestic and international competitiveness of the Canadian economy.

B. Mergers

1. Production Orders

Among its various investigative powers, the Competition Bureau is entitled to apply *ex parte* to a judge for orders requiring the production of documents and other information. The use of these orders has been controversial, with the business and legal communities expressing concern over the Bureau's general unwillingness to consult with parties prior to seeking such orders, and the

[1] Bill C-10, *Budget Implementation Act, 2009*, 2nd Sess., 40th Parl., 2009.

[2] The Panel's report and related materials are *available at* http://www.ic.gc.ca/epic/site/cprp-gepmc.nsf/en/home.

tendency of such orders to be overbroad and poorly drafted.

On January 28, 2008, a Federal Court judge took the unusual step of setting aside two Bureau production orders obtained in the course of a merger investigation on the grounds that the Bureau's applications for the orders were "misleading, inaccurate and incomplete".[3] As a result of this criticism, the Minister of Industry ordered an investigation into the Bureau's processes and procedures for obtaining production orders. The report was publicly released on August 13, 2008.[4] Although largely refraining from finding fault with the Bureau, the report offered several helpful suggestions that could, if implemented, alleviate some of the concerns about the use of production orders. These recommendations include encouraging the Bureau to engage in pre-application dialogue with parties where feasible, limiting the number of custodians whose documents must be searched, discouraging production orders from being sought in furtherance of a criminal inquiry against a person who is a suspect at the time of the application and requiring the Commissioner of Competition to inform the court of any point of fact or law known to the Commissioner why a requested production order should not be granted.

2. Review of Transportation Mergers

In July 2008, the Department of Transport released draft *Guidelines for Mergers & Acquisitions involving Transportation Undertakings*[5] regarding the new merger review provisions of the *Canada Transportation Act* ("CTA") that came into force in June 2007.[6] Under the CTA merger review provisions, any proposed transaction that is required to be notified under the merger provisions of the *Competition Act* and which "involves" a federal "transportation undertaking" must also be notified to the Minister of Transport. If the Minister determines that the proposed transaction "raises issues with respect to the public interest as it relates to national transportation", then the transaction cannot be completed unless approved (potentially subject to modifications or conditions) by the federal Cabinet. If no public interest issues are raised, there is no further review under the CTA.

The draft guidelines set out a series of factors relevant to determining whether a proposed transaction raises public interest issues relating to national transportation. These include economic (e.g. the transaction's impact on prices and employment), social (e.g. the transaction's impact on low-income workers and Canadian sovereignty), environmental, security and safety factors. Many of the economic factors overlap with issues dealt with under the *Competition Act* (e.g. impact on prices, service quality and Canadian competitiveness). However, the draft guidelines do not clarify whether the Minister of Transport will refrain from reviewing a proposed merger where it raises only public interest issues that relate to competition.

C. Cartels

1. Enforcement

Charges were laid in June 2008 against 13 individuals and 11 companies accused of fixing gasoline prices in Quebec.[7] While many defendants have indicated their intent to vigorously contest the charges, certain individuals and companies have pleaded guilty and agreed to pay fines exceeding CDN$2 million (approximately US$1.6 million) in total.[8] One individual defendant pleaded guilty and agreed to be sentenced to 12 months' imprisonment

3 Canada (Commissioner of Competition) v. Labatt Brewing Co., 2008 FC 59.

4 Brian Gover, REVIEW OF SECTION 11 OF THE COMPETITION ACT (June 19, 2008), *available at* http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02709e.html.

5 Transport Canada, GUIDELINES FOR MERGERS & ACQUISITIONS INVOLVING TRANSPORTATION UNDERTAKINGS (June 2008), *available at* http://www.tc.gc.ca/pol/en/acg/acgb/mergers/guidelines-draft.htm.

6 *Canada Transportation Act*, S.C. 1996, c. 10, § 53.1.

7 Press Release, Competition Bureau, Competition Bureau Uncovers Gasoline Cartel in Quebec (June 12, 2008), *available at* http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02694e.html.

8 Press Release, Competition Bureau, Third Individual Pleads Guilty in Quebec Gasoline Cartel Case (October 31, 2008), *available at* http:// www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02744e.html.

to be served in the community.[9] Also of note is that the Bureau used wiretaps as part of its investigation.

In July 2008, the Bureau announced that two individuals had been extradited to the United States for their role in a deceptive telemarketing scheme involving American consumers and had been found guilty and sentenced to a combined 42 years in prison by the U.S. Federal Court in the Southern District of Illinois.[10] This is the first time that Canadian nationals have been extradited to a foreign jurisdiction for a competition-related offence.

On November 21, 2008, the Competition Bureau announced that Akzo Nobel Chemicals International BV had pleaded guilty to criminal charges for its role in an international cartel to fix the price of hydrogen peroxide sold in Canada.[11] Akzo agreed to pay a fine of CDN$3.15 million (approximately US$2.6 million). This case is yet another example of an international cartel investigation where the Bureau benefited from the cooperation of an immunity applicant.

2. Draft Leniency Bulletin

In April 2008, the Bureau released a Draft Information Bulletin on Sentencing and Leniency in Cartel Cases (the "Draft Bulletin").[12] The Draft Bulletin sets out the Bureau's suggested approach for recommending sentences in cartel cases, including when it will recommend that cartel participants that do not qualify for immunity may receive "lenient treatment" (i.e., a reduced penalty). For the most part, the Draft Bulletin's description of the Bureau's approach to sentencing recommendations reflects current practice. The key factor that the Bureau will consider in recommending a sentence in a cartel matter is the overall economic harm that was caused.

The leniency aspect of the Draft Bulletin is intended to complement the Bureau's information bulletin on its immunity program ("Immunity Bulletin").[13] The Immunity Bulletin describes the circumstances in which the Bureau will recommend that persons be granted complete immunity from prosecution under the Act's criminal provisions. The Draft Bulletin, on the other hand, covers situations in which full immunity is not available, but where parties may still qualify for some sort of leniency.

According to the Draft Bulletin, the Bureau will recommend leniency where (i) the Director of Public Prosecutions has not yet filed criminal charges against the party, and (ii) where the party has terminated its participation in the illegal activity, cooperates with the Bureau's investigation and any subsequent prosecution, and admits guilt. The timeliness of the party's cooperation and the value of the evidence offered will also be considered. The first party eligible for a leniency recommendation will generally receive a reduction of up to 50% of the fine that otherwise would have been recommended and subsequent applicants will receive up to 30%.

A new version of the Bulletin is expected to be released in 2009.

D. Abuse of Dominance

In June 2008, the Bureau released its Information Bulletin on the Abuse of Dominance Provisions as Applied to the Telecommunications Industry.[14]

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9 *Id.*

10 Press Release, Competition Bureau, Canadian Scammers Extradited to the U.S. Receive Lengthy Prison Sentences (July 30, 2008), *available at* http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02717e.html.

11 Press Release, Competition Bureau, Akzo Nobel Chemicals International BV Fined $3.15 Million for its Role in an International Cartel (November 21, 2008), *available at* http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02750.html.

12 Competition Bureau Canada, DRAFT INFORMATION BULLETIN ON SENTENCING AND LENIENCY IN CARTEL CASES (April 2008), *available at* http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02663e.html.

13 Competition Bureau Canada, IMMUNITY PROGRAM UNDER THE COMPETITION ACT (September 2000), *available at* http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/01752e.html.

14 Competition Bureau, INFORMATION BULLETIN ON THE ABUSE OF DOMINANCE GUIDELINES AS APPLIED TO THE TELECOMMUNICATIONS INDUSTRY (June 2008), *available at* http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02690.html.

Although nothing in the Information Bulletin deviates from the Bureau's general enforcement approach, as described in the Draft Abuse Guidelines, the Bureau notes that unique characteristics of the telecommunications industry warrant particular consideration in determining whether abuse of dominance has occurred.[15] To that end, the Information Bulletin describes the Bureau's approach under the abuse of dominance provisions with respect to conduct in the telecommunications industry to the extent that the Canadian Radio-television and Telecommunications Commission, Canada's telecommunications regulator, has decided to forbear from regulating such conduct.

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[15] The Information Bulletin notes: "The telecommunications industry is a network industry with large sunk costs and significant economies of scale, density, and scope, implying that some firms are likely to have larger market shares than might be typical in non-network industries. Interconnection, both among competitors in the same market and across market boundaries (i.e., call termination), is widespread and in many respects necessary for firms to compete. Proper definition of the relevant market in the telecommunications industry poses particular challenges because the sector is dynamic, shaped by constant and rapid technological change. Finally, certain acts are more likely to be the subject of an abuse of dominance complaint in the telecommunications industry, given the nature of the sector." *Id.* § 1.4.

CHINA

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A. Legislative Developments

China's new Anti-Monopoly Law (the "AML") came into force on August 1, 2008 and is expected to have a significant impact on multinational companies doing business in China. The AML is administered and enforced by several authorities: the Anti-Monopoly Law Enforcement Authority (the "AMEA"), which is responsible for day-to-day enforcement, and the Anti-Monopoly Commission (the "AMC"), which formulates competition policy and coordinates enforcement activities. The functions of the AMEA are in turn shared by three existing government agencies: the Ministry of Commerce ("MOFCOM"), responsible for merger review and the day-to-day work of the AMC; the State Administration for Industry and Commerce ("SAIC"), responsible for abuses of dominance and administrative abuses; and the National Development and Reform Commission ("NDRC"), responsible for price-related conduct, mainly price-fixing cartels.

Due to its broad and ambiguous language, the AML leaves much room for discretionary enforcement. It has been reported that the AML enforcement authorities are drafting a wide range of implementing regulations and rules for the AML. So far, however, only one implementing regulation has been issued under the new AML: the Regulation on Notification Thresholds for Concentrations of Undertakings (the "Notification Thresholds Regulation") issued by the Chinese State Council on August 3, 2008.[1] MOFCOM has published four draft merger-related implementing regulations and Guidelines on the Definition of Relevant Markets for public comment, but it is not known when these drafts will be adopted as law.[2] Without the benefit of detailed implementing regulations or precedents, the AML presents serious compliance challenges and risks for foreign and Chinese companies alike.

B. Mergers

Transactions covered under article 20 of the AML include mergers, share and asset purchases and other transactions whereby one party gains "decisive influence" over another. At present, there is no definition of "control" beyond the reference to "decisive influence" in the AML itself. It is not clear whether joint venture formations are covered, although MOFCOM has taken the position that they are.

Prior notification and approval is required before closing for transactions meeting either of the following thresholds specified by the Notification Thresholds Regulation:

- the combined worldwide turnover of all undertakings involved in the last fiscal year exceeds RMB 10 billion (approximately US$1.47 billion), and the China-wide turnover of each of at least two undertakings exceeds RMB 400 million (approximately US$58.7 million); or

- the combined China-wide turnover of all undertakings involved in the last fiscal year exceeds RMB 2 billion **(**approximately US$293 million**)**, and the China-wide turnover of each of at least two undertakings exceeds RMB 400 million (approximately US$58.7 million).

In addition, MOFCOM has the power to initiate investigations into concentrations not meeting these thresholds if there is evidence that they are likely to

[1] Regulation on Notification Thresholds for Concentrations of Undertakings promulgated by the State Council, *available at* http://www.gov.cn/zwgk/2008-08/04/content_1063769.htm (in Chinese).

[2] Draft MOFCOM Regulations for public comment are *available at* http://fldj.mofcom.gov.cn/.

have the effect of restricting or eliminating competition.

According to the AML, the first stage review may take up to 30 days from the time that MOFCOM accepts the filing as "complete". The standard for "completeness" is subjective and parties may be asked to supplement their filing before the 30-day waiting period begins. A potential second stage review may take up to 90 additional days (extendable for an extra 60 days), if MOFCOM has concerns about the competitive effects of the proposed transaction.

After its review, MOFCOM may approve or prohibit the transaction or attach conditions to its approval. Decisions to prohibit transactions or attach conditions must be published. In the first three months since the new AML came into effect on August 1, 2008, MOFCOM has received more than a dozen antitrust notifications.

The first decision of conditional approval under the AML involved Inbev's acquisition of Anheuser-Busch. MOFCOM conditioned its approval of the transaction on a commitment by Inbev that it will not seek to acquire shares in two major domestic competitors nor to increase the parties' existing shareholdings in two others.[3]

This landmark decision provides a window into MOFCOM's developing merger review practices and procedures. The parties first submitted their filing on September 10, 2008 and supplemented it twice in response to MOFCOM's requests for additional information. The filing was finally accepted on October 27, 2008 and publicly declared as approved on November 18, 2008. In other words, the pre-filing stage took more than seven weeks, while the actual decision was released only two weeks after formal "acceptance". As for the remedy imposed, it appears that MOFCOM may have been more concerned about the effects of potential future transactions than the impact of this specific proposed transaction.

C. Anticompetitive Practices

The AML prohibits various types of anticompetitive practices, including horizontal cartels, vertical resale price maintenance and restrictive practices by dominant firms. The AML provides extensive investigatory powers to the AMEA, including the power to conduct dawn raids, seize documents, compel testimony, and discover bank records, all without the requirement of a court order. No substantive violations of the AML currently are designated as criminal offenses, but obstruction of investigations may be subject to criminal sanction. The AML also includes a general leniency provision, but the specifics of its application are not yet known.

As of the writing of this article, no formal government enforcement actions against anticompetitive practices had yet been reported, although complaints were apparently received that Microsoft has abused its dominant market position by tying and charging monopoly (i.e., "unfairly high") prices.[4]

In the meantime, however, private litigants have seized the opportunity to bring lawsuits under the new AML. Several case filings have been reported in the press, including suits against: (i) state-owned telecom companies in Beijing for abuse of dominance; (ii) the Chongqing Insurance Association for price fixing; and (iii) the General Administration of Quality Supervision, Inspection and Quarantine ("AQSIQ", a department of the central government) for administrative monopoly.

The case against AQSIQ was dismissed on statute of limitations grounds, even though the cause of action did not exist before the AML became effective in August 2008. The case against the Chongqing Insurance Association was withdrawn by the plaintiff after the defendant immediately adopted revised articles of association addressing

[3] Announcement No. [2008] 95, MOFCOM (November 18, 2008), *available at* http://fldj.mofcom.gov.cn/aarticle/ztxx/200811/20081105899216.html (in Chinese). *See also* Press Release, China Daily, MOFCOM approves InBev, AB merger (November 19, 2008), *available at* http://www.chinadaily.com.cn/bizchina/2008-11/19/content_7219360.htm (in English).

[4] Press Release, Caijing Magazine, Microsoft Faces an Antitrust Investigation (August 26, 2008), *available at* http://english.caijing.com.cn/2008-08-26/100077444.html.

the AML issues raised by the complaint. Although those cases did not result in judgments that could provide insight into the courts' interpretation of the AML's substantive provisions, they can be seen as fulfilling the statute's goals in that the defendants voluntarily abandoned their allegedly anticompetitive conduct after being sued. Litigation against the telecom company in Beijing is still pending in the Beijing No. 2 Intermediate Court.

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A. Competition Policy under Review

On December 16, 2008, the Expert Working Group established by the Danish Government to consider recommendations for amending the Danish merger rules, published its report. One of the recommendations in the report was to lower the merger filing thresholds in the Danish Competition Act. The current merger control provisions in the Competition Act apply to mergers where the requirements in one of the following two tests are met:

1. the aggregate annual turnover in Denmark of all the merging companies involved is at least DKK 3.8 billion (approximately US$712 million) (the "upper threshold") and the aggregate annual turnover in Denmark of each of at least two of the merging companies is at least DKK 300 million (approximately US$56 million) (the "lower threshold"); or

2. the aggregate annual turnover in Denmark of at least one of the merging companies is more than DKK 3.8 billion (approximately US$712 million) and the aggregate annual worldwide turnover of at least one of the other merging companies is more than DKK 3.8 billion (approximately US$712 million).

The Working Group proposed to lower the first test's upper threshold to DKK 900 million (approximately US$169 million) and the lower threshold to DKK 100 million (approximately US$19 million). The Working Group did not propose to amend the second test.

The Working Group also proposed: (i) to adopt a simplified procedure for non-problematic mergers based on the European Commission's simplified procedure; (ii) to extend the time limits for the Danish Competition Council's (the "Council") review of mergers, so that the time limits more closely align with the European Commission's time limits for reviewing mergers; and (iii) that the Council should issue a statement of objections to the merging companies in cases where the Council finds that the merger may create competition issues.

Any amendments to the merger rules implemented as a result of the Working Group's recommendations would likely enter into force in January 2010.

B. Mergers

On May 14, 2008, the Council blocked the proposed merger between two Danish companies, J-F. Lemvig-Müller Holding A/S and Brdr. A & O Johansen A/S.[1] This marked the first time that the Council opposed a merger under the Danish merger regulation. The companies are both active in, *inter alia*, the wholesale market for plumbing and heating materials and the wholesale market for electricity materials to professional customers. Applying the framework set out by the European Court of First Instance in the Airtours judgment,[2] the Council found that the merger would impede competition significantly in the above mentioned relevant markets owing to an increased risk of coordinated effects. The conclusions of the Council are based on a number of findings, including:

- in the market for plumbing and heating materials, the merger would reduce the

[1] *See* http://www.ks.dk/en/competition/decisions/decisions-2008/konkurrenceraadets-moede-den-14-maj-2008/the-danish-competition-council-blocks-merger-in-building-materials.

[2] *Cf.* judgment of the Court of First Instance of June 6, 2002 in case T-342/99, Airtours plc v. the European Commission, published in ECR (2002) II-2585.

number of large nationwide wholesalers from four to three, with a combined market share above 80%;

- in the market for electricity materials, the merger would reduce the number of wholesalers with a nationwide network of outlets from three to two, with a combined market share above 85%; and

- the merger would increase the likelihood that the few remaining companies with significant market strength would raise prices and compete less vigorously for customers in both markets due to the high concentration, high level of transparency, expected retaliation if an aggressive pricing strategy were implemented by one of the companies and the fact that it is unlikely that actual competitors, potential competitors or customers would be able to jeopardize the outcome of the expected coordination.

C. Anticompetitive Practices

On January 30, 2008, the Council ruled that the association of regional banks, Lokale Pengeinstitutter ("LOPI"), had violated Danish competition law by urging its members to limit competition between members. Specifically, the board had on several occasions issued complaints against members because their advertisement to, as well as employment of, competitors' employees amounted to "lack of collegial behaviour" in violation of LOPI's bylaws. Additionally, the board had made announcements to its members, which directly or indirectly urged the members to curb internal competition, *inter alia*, by calling upon its members to abstain from headhunting employees from other members and to avoid using marketing strategies that could imply that their profits were low. LOPI has now changed its bylaws accordingly and the Council has not pursued the matter further.

This decision is of special interest since it specifies that non-solicitation clauses are subject to Danish competition law. The Council explicitly stated that non-solicitation clauses cannot be characterized as "pay and working conditions" to which the Danish Competition Act does not apply. Whether a non-solicitation clause infringes the prohibition against anticompetitive agreements is to be based on a case-by-case assessment.[3]

On April 15, 2008, the Danish Competition Authority announced that a case involving an agreement between seven local banks concerning, *inter alia*, information exchange and restrictions on the opening of branch offices and members' access to actively approaching each others' customers had been settled. The banks agreed to accept a fine of DKK 4 million (approximately US$749,000).[4]

The case was initially decided by the Council as a cartel case concerning market partitioning and illegal information exchange but was substantially altered on appeal before the Competition Appeals Tribunal (the "Appeals Tribunal"). Although the Appeals Tribunal found that the behaviour of the banks did infringe the prohibition against anticompetitive agreements in section 6 of the Danish Competition Act, it stressed that it did not agree with the Council's characterization of the banks' cooperation and the seriousness of the offence.

The Appeals Tribunal found that the agreement at issue had the purpose of restricting competition. However, it found that the Council was wrong in concluding that this amounted to a cartel. The exchange of information between the banks was not, as claimed by the Council, systematic, not all exchanged information was confidential, the banks did not intend to coordinate prices and no such coordination had occurred. Higher prices or inefficiency leading to higher costs did not result, as claimed by the Council. In other words, there was an illegal purpose, but no customers suffered harm and there were no other illegal effects related to the agreement. Further, it was not an agreement to partition markets (because the market was national and the banks had only 1% of this national market).

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3 *See* http://www.ks.dk/en/competition/decisions/decisions-2008/konkurrenceraadets-moede-den-30-januar-2008/the-association-of-local-banks-in-denmark-savings-banks-and-cooperative-banks-in-denmarks-illegal-dictation-of-its-members-behavior/.

4 *See* http://www.ks.dk/index.php?id=28275.

Following the decision of the Appeals Tribunal, the Danish Competition Authority nevertheless requested the Public Prosecutor for Serious Economic Crime to initiate criminal proceedings against the banks. The Public Prosecutor appears to have agreed with the Competition Appeals Tribunal, as he found the infringement to be of a less serious nature. The Public Prosecutor did not initiate criminal proceedings against the banks, as the fine of DKK 4 million (approximately US$749,000) was determined to be sufficient.

On April 21, 2008, the Danish Competition Authority announced that Nautisk Udstyr ApS, an organization whose members sell equipment for yachts, had accepted a fine of DKK 400,000 (approximately US$75,000) and that the director and the president of the organization each accepted individual fines of DKK 25,000 (approximately US$5,000).[5] By accepting the fine, the organization admitted that its members had entered into illegal agreements concerning their selling prices. Nautisk Udstyr ApS also admitted to having tried to cut off supplies to members who applied selling prices below the level set by the organization. The case illustrates a trend in Danish competition law towards an increased use of individual sanctions.

In a decision issued on April 23, 2008, the Council found that restrictions on individual dealers' Internet sales contained in the rules governing the Matas chain, a Danish chain of perfumeries and pharmacies, amounted to serious and appreciable anticompetitive restrictions under both Danish and European law.[6]

Matas has agreed to remove the prohibition and replace it with a set of guidelines related to Internet sales setting out certain qualitative standards for the websites of individual dealers. The guidelines also set out a number of requirements concerning the behaviour of the individual dealers in relation to sales via the Internet, including protection of image and loyalty to the chain, customer service and compatibility with marketing law.

On December 11, 2008, the Danish Competition Authority announced that the Danish flour producer Valsemøllen A/S and its CEO had accepted fines for imposing fixed resale prices on the company's wholesale distributor Hedegård & Christensen Eftf. A/S / L.C. Lauritzen A/S. According to the Competition Authority, this pricing behaviour was initiated in 2004. Valsemøllen A/S accepted a fine of DKK 1 million (approximately US$187,000), whereas its CEO accepted a fine of DKK 100,000 (approximately US$19,000), the highest personal fine ever for an infringement of the Danish Competition Act.

On December 17, 2008, the Council decided that Dansk Transport og Logistik ("DTL") had infringed the prohibition against anticompetitive agreements in section 6 of the Danish Competition Act, as it had exchanged illegal information with its members. DTL, which is the largest trade association for Danish transport companies transporting freight by road, evaluates and creates relevant trade information for its members. Some of this information is distributed directly to its members, whereas other information is published on DTL's website. Not all information on this website is available to non-members.

The Council found that DTL had infringed section 6 of the Competition Act by, *inter alia*:

- providing its members with a pre-completed cost calculating program for freight transport by road;
- stating a profit ratio of 10 and 15% percent in some pre-completed examples of the cost calculating program;

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5 *See* http://www.ks.dk/index.php?id=28276.

6 *See* http://www.ks.dk/en/competition/decisions/decisions-2008/individual-matas-dealers-shall-be-free-to-use-the-internet-to-advertise-or-to-sell-their-products/individual-matas-dealers-shall-be-free-to-use-the-internet-to-advertise-or-to-sell-their-products/. The prohibition was also found to be in conflict with the commitments given in connection with the Council's merger decision of January 31, 2007 concerning the CVC/Matas-merger (*see* http://www.ks.dk/en/competition/decisions/decisions-2007-and-earlier/national-decisions-2007/konkurrenceraadets-moede-den-31-januar-2007/cvc-s-acquisition-of-the-retail-chain-matas/), according to which the individual dealers should be free to make their own arrangements in relation to purchase and sale.

- indicating the expected percent increase of the costs for freight transport by road;

- providing its members with an electronic calculating program for the price of diesel oil, thereby indicating how its members should react to decreases in this price; and

- recommending that its members introduce a so-called "oil clause" in their transport contracts, in order to pass through price increases in diesel oil to their customers.

With regard to the cost calculating program, the Council concluded that the program could be used by the members to make offers to transport clients based on more or less completely coordinated prices. The Council reached this conclusion based on its finding that the cost calculating program was a model which, *inter alia*, computed costs per kilometer or per hour for a truck and where the only variables left for the members to fill in were time and distance. The Council ordered DTL to refrain from the above-mentioned types of information exchanges. However, the Council did not impose fines on DTL, as by the time the Council issued its decision, DTL had already ceased most of the illegal practices.

This decision illustrates the Council's trend towards pursuing information exchanges made via trade associations.

D. Abuse of a Dominant Position

On March 3, 2008, the Appeals Tribunal partially confirmed the Council's decision of June 20, 2007, finding that Elsam, a Danish producer of electricity (now part of the DONG Group), had abused its dominant position in the wholesale electricity market in Western Denmark by charging excessive prices.[7] The Council had found that Elsam had charged excessive wholesale prices for electricity in Western Denmark between January 1, 2005 and December 31, 2006. The Appeals Tribunal confirmed that Elsam's wholesale prices for electricity in Western Denmark from January 1, 2005 to June 30, 2006 to an extent constituted an abuse of its alleged dominant position. However, with respect to the second half of 2006, the Appeals Tribunal found that a violation of the competition rules was not adequately documented, largely because the Council had not adequately dealt with Elsam's allegation that it had priced according to its marginal production costs in this period and that the Council had not demonstrated how prices set at marginal costs could amount to an abuse. The Tribunal referred this part of the case back to the Council for re-trial. Elsam had already been subject to a similar investigation concerning the second half of 2003 through 2004.[8]

Both cases, concerning the periods in 2003/2004 and 2005/2006 (until June 30, 2006), have been appealed by Elsam and are currently pending before the Copenhagen Maritime and Commercial Court (the "Commercial Court").

On January 7, 2008, the Danish Supreme Court (the "Supreme Court") ruled that Schneider Electrics A/S (formerly Lauritz Knudsen A/S) had abused its dominant position in the market for electrical installations by applying a loyalty-enhancing and discriminatory rebate scheme.[9] The case was originally decided by the Council in December 2000.

E. Other

On February 1, 2008, the Supreme Court upheld the decision of the Eastern High Court (the "High Court") in Denmark in the Telia Telecom A/S case.[10] The case concerned an action for damages brought by Telia Telecom A/S alleging that the company had suffered losses as a result of an

7 *See* http://www.ks.dk/index.php?id=28052.

8 *See* http://www.ks.dk/en/competition/decisions/decisions-2007-and-earlier/national-decisions-2007/konkurrenceraadets-moede-den-20-juni-2007/elsam/.

9 *See* Judgment of the Danish Supreme Court of January 7, 2008 in case 532/2005. *See also* http://www.ks.dk/index.php?id=27994.

10 *See* Judgment of the Danish Supreme Court of February 1, 2008 in case 320/2206 (s*ee also* http://www.ks.dk/index.php?id=28043) and Judgment of the Eastern High Court in Denmark of June 22, 2006 in case B-2684-04. S*ee also* http://www.ks.dk/index.php?id=19760.

unlawful dawn raid carried out by the Danish Competition Authority at the premises of the company. The question at issue in the case was whether the Danish Competition Authority was entitled to carry out an inspection at the premises of Telia Telecom A/S on the basis of a search warrant containing incorrect information regarding the specific address of the company. The Supreme Court confirmed the finding of the High Court that the Danish Competition Authority was entitled to carry out its inspection visit at Telia Telecom's premises even if the address in the search warrant – for several specific reasons of this particular case – was not the same as the address where the inspection was actually carried out.

In a November 20, 2008 judgment, the Commercial Court ruled that it is not possible to appeal one of the grounds for a decision by the Appeals Tribunal without appealing the decision as a whole. In March 2006, the Council found that Viasat Broadcasting UK Ltd. ("Viasat") did not infringe the Danish Competition Act by requiring cable providers to offer Viasat's TV channels TV3 and TV3+ in certain packages. This decision was appealed to the Appeals Tribunal. The Tribunal annulled the decision and referred the case back to the Council for re-trial, partly on the basis that one of the general conditions in Viasat's agreements with cable providers had as its object a restriction on competition. Viasat appealed this statement to the Commercial Court, without appealing the decision as a whole. The Commercial Court rejected this appeal by holding that the statement by the Appeals Tribunal was one of the grounds for the final decision. Thus, the statement was not in itself a final and appealable decision. Viasat has announced that it will appeal this judgment to the Danish Supreme Court.

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A. Mergers

In July 2008, the European Court of Justice (the "ECJ") added another twist to the Sony BMG/Impala saga, setting aside the Court of First Instance's (the "CFI") 2006 annulment of the European Commission's 2004 approval of the Sony BMG merger.[1] The ECJ held that the CFI had erred as a matter of law in several ways, including by misconstruing the legal criteria applicable to a collective dominant position arising from tacit coordination. As the CFI had only examined two of Impala's five pleas in its annulment judgment, the ECJ referred the case back to the CFI.

The European Commission continued the revision and update process of the EC merger control legislation.[2] After their adoption at the end of 2007, the Commission's Non-horizontal Merger Guidelines[3] were put to their first serious tests in 2008. In three important non-horizontal merger cases, Google/DoubleClick,[4] Nokia/Navteq,[5] and TomTom/Tele Atlas,[6] the Commission undertook detailed Phase II reviews and issued extensive decisions, eventually clearing the transactions without any remedies.

In September 2008, the CFI rejected the application of MyTravel (Airtours) for damages resulting from the Commission's unlawful decision blocking its acquisition of First Choice.[7] The CFI found that the Commission did not commit a sufficiently serious infringement of a rule of law in its flawed collective dominance analysis or violate its duty of diligence when examining the commitments submitted by Airtours.

B. Cartels

The Commission's leniency program continued to produce results for the Commission's cartel unit. The seventh cartel case resolved in 2008, however, was uncovered by the Commission following a tip-off from an anonymous source. In this case concerning the car glass industry, the Commission imposed the highest ever cartel fines, both on a cartel as a whole (more than EURO 1.38 billion/approximately US$1.92 billion) as well as on an individual company, i.e., Saint-Gobain (EURO 896 million/approximately US$1.25

1 Case C-413/06 P, Bertelsmann and Sony Corporation of America v. Impala, [not yet reported in E.C.R.], *available at* http://curia.europa.eu/en/actu/communiques/cp08/aff/cp080049en.pdf.

2 The Commission has started a consultation process regarding the EC Merger Regulation, *see* Press Release, Europa, Antitrust: Mergers: Commission opens consultations on review of Merger Regulation (October 28, 2008), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1591 and has adopted a new Remedies Notice (October 22, 2008), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:267:0001:0027:EN:PDF.

3 European Commission, Commission Notice, Guidelines on the Assessment of Non-Horizontal Mergers under the Council Regulation on the Control of Concentrations Between Undertakings, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:265:0006:0025:EN:PDF.

4 COMP/M.4731, Google/DoubleClick (March 11, 2008), *available at* http://ec.europa.eu/comm/competition/mergers/cases/decisions/m4731_20080311_20682_en.pdf.

5 COMP/M.4942, NOKIA/NAVTEQ (July 2, 2008), *available at* http://ec.europa.eu/comm/competition/mergers/cases/decisions/m4942_20080702_20682_en.pdf.

6 COMP/M.4854, TomTom/Tele Atlas (May 14, 2008), *available at* http://ec.europa.eu/comm/competition/mergers/cases/decisions/m4854_20080514_20682_en.pdf.

7 Case T-212/03, MyTravel Group plc v. Comm'n, [not yet reported in E.C.R.], *available at* http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=T-212/03.

billion).[8] The case also showed the Commission's increased fining power under its revised fining guidelines[9] and brought the 2008 total to EURO 2.27 billion (approximately US$3.17 billion).

On June 30 2008, the European Commission introduced a new procedure designed to facilitate the early settlement of cartel cases.[10] Under this procedure, if a defendant voluntarily acknowledges its involvement in the cartel and its liability, the Commission will grant it a 10% reduction in the fine imposed. The system is designed to be used in clear-cut cases in order to alleviate some of the procedural burdens arising in a full administrative procedure. The Commission hopes that the new system will allow it to reduce its backlog of cartel cases and free up resources to investigate new cases.

The success of the European Commission's settlement system will depend to a significant degree on its ability to successfully defend its cartel decisions currently on appeal at the Community Courts. In 2008, it successfully defended its cartel decisions in seven of the nine appeals decided by the European Court of First Instance, with parties receiving net fine reductions of 14%[11] and 25%[12] in the remaining two cases. Meanwhile, on the contentious issue of when liability may be attributed to a parent undertaking, the Commission has won additional victories at the Court of First Instance,[13] with the issue yet to be resolved before the European Court of Justice.[14]

C. Abuse of a Dominant Position

After having earlier declared that Microsoft was in compliance with its obligations under the 2004 Commission decision requiring, in part, the licensing of interoperability information for Microsoft's work group servers, the European Commission imposed a non-compliance penalty of EURO 899 million (approximately US$1.25 billion) on February 27, 2008, arguing that Microsoft had charged unreasonable royalties for access to the interoperability information.[15] Earlier, in January

8 *See* Press Release, Europa, Antitrust: Commission fines car glass producers over EURO 1.3 billion for market sharing cartel, *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1685.

9 *See* Press Release, Europa, Competition: Revised Commission Guidelines for Setting Fines in Antitrust Cases – Frequently Asked Questions (June 28, 2006), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/256.

10 The Commission's settlement package consists essentially of an implementing regulation, Commission Regulation (EC) No 622/2008 of June 30, 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases, the Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Articles 7 and 23 of Council Regulation (EC) No 1/2003 in cartel cases, the FAQ document, Antitrust: Commission introduces settlement procedure for cartels – frequently asked questions, and a press release, Antitrust: Commission introduces settlement procedure for cartels, all *available at* http://ec.europa.eu/comm/competition/cartels/legislation/settlements.html.

11 Case T-53/03, BPB SA v. Comm'n [not yet reported in E.C.R.], *available at* http://curia.europa.eu/en/actu/communiques/cp08/aff/cp080045en.pdf.

12 Case T-410/03, Hoechst AG v. Comm'n [not yet reported in E.C.R.], *available at* http://curia.europa.eu/en/actu/communiques/cp08/aff/cp080038en.pdf.

13 Case T-69/04, Schunk GmbH and Schunk Kohlenstofftechnik GmbH v. Comm'n, ¶¶53-76 [not yet reported in E.C.R], *available at* http://curia.europa.eu/en/actu/communiques/cp08/aff/cp080066en.pdf and Case T-85/06, General Química (and Others) v. Comm'n [not yet reported in E.C.R], *available at* http://curia.europa.eu/en/content/juris/index.htm (French and Spanish only).

14 Case C-97/08, Akzo Nobel NV (and Others) v. Comm'n, [not yet reported in E.C.R], *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:128:0022:0022:EN:PDF and Case C-509/06, Akzo Nobel NV v. Comm'n, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:056:0015:0015:EN:PDF.

15 Press Release, Europa, Antitrust: Commission imposes €899 million penalty on Microsoft for non-compliance with March 2004 Decision (February 27, 2008), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/318. Microsoft has appealed this decision. *See* Case T-167/08, Microsoft Corp v. Comm'n, *available at* http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=T-167/08.

2008, the Commission had announced the commencement of two further formal investigations against Microsoft for alleged abuses of its dominant market position through the tying of various software products and refusing to disclose interoperability information across a broad range of products.[16]

In a long-awaited judgment, *Sot. Lélos kai Sia, et al.* v. *GlaxoSmithKline AEVE*,[17] the ECJ preserved the limited right of a pharmaceutical company in a dominant position to refuse to supply orders from wholesalers that engage in parallel trade where such orders are not "ordinary". The Court referred to two factors by reference to which a national court can assess whether an order is "ordinary": first, the size of the order "in relation to the requirements of the market in the first Member State"; and, second, "the previous business relations between that undertaking and the wholesalers concerned".

D. Anticompetitive Practices

On November 28, 2008, the Commission published its preliminary report on the sector inquiry launched into the pharmaceuticals industry earlier in the year.[18] The Commission's report highlights evidence that pharmaceutical companies have acted with the objective of delaying or blocking market entry of competing medicines through practices including patent clusters, patent settlements, interventions in regulatory proceedings, and other disputes and litigation. As with previous sector inquiries, the Commission will likely initiate individual infringement investigations following its final report, due out in Spring 2009.[19]

Of the industries that were subject to previous sector investigations, the energy sector has seen the most enforcement action in 2008.[20] In January 2008, the Commission gave a clear signal that it follows a zero-tolerance policy with regard to perceived obstructions of its investigations by imposing a fine of EURO 38 million (approximately US$53 million) on the German energy giant E.ON for breaking a seal after an unannounced inspection.[21]

In its effort to boost private enforcement, the European Commission published its white paper on private damages actions by victims of competition law violations on April 2, 2008.[22] Following the subsequent consultation period, the Commission is currently considering concrete measures to implement its recommendations, which include that victims should be able to act jointly through recognized consumer groups, should receive single (not multiple) damages, should receive relevant

16 Press Release, Europa, Competition: Commission initiates formal investigations against Microsoft in two cases of suspected abuse of dominant market position (January 14, 2008), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/19.

17 Joined Cases C-468/06 to C-478/06, [not yet reported in E.C.R.], *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006J0468:EN:HTML.

18 *See* Europa, Competition, Sector Inquiry – Pharmaceuticals, *available at* http://ec.europa.eu/comm/competition/sectors/pharmaceuticals/inquiry/index.html.

19 The Commission has already opened proceedings for an alleged abuse of the patent system against Boehringer in February 2007, *see* http://ec.europa.eu/comm/competition/antitrust/cases/decisions/39246/initiations.pdf.

20 Most noteworthy are maybe the proposals by RWE and E.ON to sell their electricity and gas transmission system networks in Germany to meet the Commission's concerns. *See* Press Release, Europa, Antitrust: Commission market tests commitments proposed by E.ON concerning German electricity markets (June 12, 2008), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/396 and Press Release, Europa, Antitrust: Commission market tests commitments proposed by RWE concerning German gas market (December 5, 2008), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/768.

21 Press Release, Europa, Antitrust: Commission imposes €38 million fine on E.ON for breach of a seal during an inspection (January 30, 2008), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/108.

22 Links to White Paper, Commission Staff Working Paper and comments submitted by interested parties are *available at* http://ec.europa.eu/comm/competition/antitrust/actionsdamages/index.html.

evidence (but not have an unlimited right to discovery), and should be able to rely on infringement decisions of the Commission and national competition authorities as sufficient proof of the infringement.[23]

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[23] Press Release, Europa, Antitrust: Commission presents policy paper on compensating consumer and business victims of competition breaches (April 3, 2008), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/515.

FRANCE

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A. Legislative Developments

The new Law for the Modernization of the Economy was adopted on August 4, 2008[1] and its implementing regulation was adopted on November 13, 2008.[2] This is the most important change to French competition law since the New Economic Regulations Act 2001. Most notably, the law created a new Competition Authority ("*Autorité de la Concurrence*") which was formally established on January 13, 2009.

1. Merger Reforms

For example, the merger review powers exercised by the Ministry of the Economy (the "Ministry") have been transferred to the new Competition Authority. However, the Ministry retains a rather controversial "evocation" power, enabling it to compel an in-depth investigation of a transaction cleared by the Competition Authority in Phase I and reverse a Phase II clearance or prohibition decision on public interest grounds.[3]

A "stop the clock" mechanism was also introduced whereby the parties (in Phase I and Phase II) and the Competition Authority (only in Phase II) can require the suspension of the merger examination period where this proves necessary (for instance if the parties submit undertakings).[4] This time extension is limited to 15 working days in Phase I and 20 working days in Phase II.

Finally, the new law introduces lower notification thresholds for mergers in the retail sector.[5]

2. Process Reform

The Ministry's powers to investigate anticompetitive practices were also transferred to the Competition Authority. Appeal rights against dawn raids also have been improved in order to address concerns regarding the conformity of France's antitrust investigations with the European Convention on Human Rights.[6] In particular, investigated companies now have a right to appeal judicial orders authorizing dawn raids before the First President of the relevant Court of Appeal, whereas previously only matters of form and procedure could be disputed directly before the French Civil Supreme Court.

There will now also be a hearing officer, whose function is to ensure that the legal rights of

1 Law No. 2008-776 of August 4, 2008, for the Modernization of the Economy, published in the Official Journal of the French Republic of August 5, 2008, *available at* http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=?cidTexte=JORFTEXT000019283050.

2 Ordinance No. 2008-1161 of November 13, 2008 on the Modernization of the Regulation of Competition, published in the Official Journal of the French Republic of November 14, 2008, *available at* http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000019758031.

3 Article L. 430-7-1 of the French Commercial Code, as created by Law No. 2008-776 of August 4, 2008, *available at* http://www.legifrance.gouv.fr.

4 Article L. 430-5-II of the French Commercial Code, as modified by Law No. 2008-776 of August 4, 2008, *available at* http://www.legifrance.gouv.fr.

5 A merger between companies owning and managing retail outlets will be notifiable if the aggregate global turnover of the parties to the transaction exceeds EURO 75 million (approximately US$105 million) (as opposed to the usual EURO 150/US$209 million threshold), and at least two of the parties have a turnover in France in excess of EURO 15 million (approximately US$21 million) (as opposed to the usual EURO 50 million/US$70 million threshold).

6 FR Eur. Ct. H.R. (2008), Case of Ravon and others v. France (February 21, 2008), *available at* http://cmiskp.echr.coe.int////tkp197/viewhbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=68558&sessionId=15231671&skin=hudoc-en&attachment=true.

companies involved in procedures before the Competition Authority are safeguarded (whether in merger control or an antitrust infringement investigation).[7]

B. Mergers

120 clearance decisions were issued in 2008, six of which were subject to undertakings, including one following an in-depth investigation (Phase II).

In the only Phase II case, the Ministry assessed the conglomerate effects of a transaction in the market for components of rolling shutters.[8] The Ministry found that the transaction would give the merged entity the incentive and ability to foreclose the market through tying and bundling strategies. However, the Ministry cleared the transaction subject to behavioral remedies, including that the parties refrain from: (i) offering rebates for the simultaneous purchase of their products; and (ii) changing the technical characteristics of their products so as to make them incompatible with rival products.

The Ministry also condemned two failures to submit filings for notifiable transactions pursuant to Article L. 430-8 of the French Commercial Code.

In the first case, dated January 28, 2008,[9] SNCF Participations ("SNCF P"), a subsidiary of the French national railway company, had first raised its shareholding in Novatrans from approximately 38% to 49% and then subsequently to approximately 53%. However, it only notified the second transaction. The Ministry found that SNCF P had acquired *de facto* control over Novatrans immediately after the first transaction due to the wide dispersion of Novatrans' remaining shares. Yet, as SNCF P's failure to notify the first transaction was not deliberate and SNCF P subsequently reduced its shareholding in the target back to its initial level, the Ministry imposed a moderate fine of EURO 250,000 (approximately US$348,000), which represented less than 0.0014% of SNCF P's turnover.

In the second case, dated May 7, 2008,[10] the fine was limited to EURO 60,000 (approximately US$84,000) because the failure to notify was due to the urgency of the transaction (the target being in a winding-up process) and the acquiror eventually filed a complete notification voluntarily.

C. Anticompetitive Practices

1. Resale Price Maintenance

On December 20, 2007, the Competition Council fined five toy suppliers (Chicco, Goliath, Hasbro, Lego and Megabrands) and three retailers (Carrefour, Maxi Toys and EPSE-Joué Club) for fixing resale prices during the holiday periods from 2001 to 2003.[11] The Council found that there was sufficient evidence to establish that the toy suppliers had agreed with their retailers to fix a single retail price for each of their products in order to eliminate price competition among the retail outlets. Indeed, the investigation revealed that: (i) minimum resale prices had been discussed between the suppliers and distributors; (ii) the suppliers had implemented a monitoring system to restrain distributors from deviating from the pricing policy; and (iii) the minimum retail prices discussed by the parties were largely implemented by the retailers. A total fine of

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7 Article L. 461-4 of the French Commercial Code, as created by Law No. 2008-776 of August 4, 2008, *available at* http://www.legifrance.gouv.fr. This is meant to follow the EU example.

8 *See* Decision of the Ministry of the Economy, Bulletin Officiel de la Concurrence, de la Consommation et de la Répression des Fraudes (No. 6, July 24, 2008), re. Case C2007-171 Somfy/Zurflüh-Feller, *available at* http://www.dgccrf.bercy.gouv.fr/boccrf/2008/08_06bis/c2007_171_somfy_zurfluhfeller.pdf.

9 *See* Decision of the Ministry of Economy, Bulletin Officiel de la Concurrence, de la Consommation et de la Répression des Fraudes (No. 2, February 28, 2008) re. Novatrans/SNCF Participations, *available at* http://www.dgccrf.bercy.gouv.fr/boccrf/2008/08_02bis/c2007_99_arrete_sncfparticipations_novatrans.pdf.

10 *See* Decision of the Ministry of Economy, Bulletin Officiel de la Concurrence, de la Consommation et de la Répression des Fraudes (No. 7, September 25, 2008) re. Case C2007-174 Arcadie Centre Est/Groupe Bigard, *available at* http://www.dgccrf.bercy.gouv.fr/boccrf/2008/08_07bis/c2007_174_arrete_bigard_actifsarcadiefranceest.pdf.

11 Decision of the Conseil de la Concurrence, No. 07-D-50, Relative to Practices Implemented in the Sector of Toy Distribution (December 20, 2007), *available at* http://www.conseil-concurrence.fr/pdf/avis/07d50.pdf.

EURO 37.5 million (approximately US$52.3 million) was imposed upon the eight companies.

2. Predatory Pricing

On April 8, 2008, the Paris Court of Appeal[12] reversed the Competition Council's *Glaxo* decision of March 14, 2007.[13] In that decision, the Council, for the first time, had imposed a fine on a firm for engaging in predatory pricing, specifically a practice known as "predation by reputation".

According to the Council, GlaxoSmithKline France ("GSK") had tried to protect its dominant position in the market for injectable acyclovir (Zovirax) by engaging in predatory pricing in the neighbouring market for sodic cefuroxime (Zinnat injectable), where it did not hold a dominant position. The Council found that Glaxo's rationale for engaging in predatory pricing in a small market in which it was not dominant was to build up – at low cost – a reputation as a predator in order to deter or delay the entry by potential competitors into the wider market for injectable acyclovir.[14]

The Paris Court of Appeal rejected the Council's application of the predation by reputation theory. First, the Court of Appeal found that it was very doubtful that the two markets were connected. Second, the Court of Appeal held that the Council had not proven that actual or potential suppliers in the market for injectable acyclovir were able to interpret clearly the "signal" allegedly sent out by GSK in the market for sodic cefuroxime.

3. Exclusive Dealing

On December 17, 2008, the French Competition Council, following a complaint from Bouygues Télécom, ordered Orange (owned by France Télécom, the incumbent telecommunications operator) and Apple to suspend provisionally Orange's five-year exclusivity for the distribution and network operation of the iPhone in France. The Competition Council considered that Orange's exclusive deal to distribute the iPhone was likely to restrict competition in a sector which already lacks competition based on the following factors: (i) the mobile phone market is characterized by weak competition owing to the small number of mobile network operators and high switching costs; (ii) Orange's exclusivity would add yet another barrier to customers switching operators; (iii) the cumulative development of these types of exclusive cooperation agreements would have the effect of further reducing competition on prices or the quality of networks, infrastructures and customer services, with operators focusing their differentiation efforts on the terminals they are able to offer; and (iv) exclusivity for the iPhone's distribution might allow Orange to increase its already high market share (approximately 44%) in the mobile phone telecommunications market.

Interim measures have been ordered to enable other operators to market the iPhone. Orange appealed the Competition Council's decision before the Paris Court of Appeal, which upheld the Competition Council's decision and analysis. This decision has been criticized because the potential threats to competition are not fully supported in the Competition Council's analysis and because, more generally, the decision calls into question exclusive cooperation agreements between mobile phone manufacturers and telecom operators.

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12 Cour d'appel [regional court of appeal] Paris, 1e ch., April 8, 2008, R.G. no. 2007/07008, *available at* http://www.conseil-concurrence.fr/doc/ca07d09_ glaxo.pdf (Fr.).

13 Decision of the Conseil de la Concurrence, 07-D-09, Relative to Practices Implemented by GlaxoSmithKline France Laboratory (February 24, 2007), *available at* http://www.conseil-concurrence.fr/pdf/avis/07d09.pdf.

14 This is an "AKZO-type" strategy. *See* the European Commission's decision in AKZO v Commission (Case C-62/86, July 3, 1991, *available at* http://eur-lex.europa.eu/smartapi/cgi/ sga_doc?smartapi!celexplus! prod!CELEXnumdoc&lg=en&numdoc=61986J0062). In that case, AKZO charged "abusively" low prices in a market in which it was not dominant, in order to deter a competitor in this market from entering the neighboring market in which AKZO was dominant.

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A. Mergers

Transactions in which the parties have combined global revenues of more than EURO 500 million (approximately US$697 million) can trigger German merger review if one of the parties has revenues greater than EURO 25 million (approximately US$35 million) in Germany, provided the other party has some (even if very minimal) nexus to Germany. A legislative proposal is likely to be enacted in early 2009 that will introduce a EURO 5 million (approximately US$7 million) domestic revenue threshold for the second party in a transaction. It is expected that this change will significantly reduce the number of German merger notifications.[1]

The Federal Cartel Office ("FCO") also published a notice in which it clarified that transactions closed without a clearance will not be reviewed within the standard merger review procedure but will instead be subject to a "dissolution proceeding".[2] If the result would otherwise have been a clearance, the proceeding will be completed by way of an informal or formal "no action letter". If there would not have been a clearance, a dissolution order may be issued. The main consequence is that the strict merger review timeline does not apply and therefore reviews can take significantly longer. The new practice has also created a level of uncertainty as to the civil validity of acts of closing performed without the necessary FCO clearance, even if the FCO ultimately decides to take "no action". Fines for violating the stand-still obligation are applied increasingly. In one recent example, on December 15, 2008, the FCO imposed a fine of EURO 4.5 million (approximately US$6.28 million) on Mars, Inc., which is the highest fine ever for the violation of the stand-still obligation. Mars had acquired shares in Nutro Products, Inc. after obtaining clearance for the transaction in the US but while the FCO investigation was still pending. The fine was calculated based on the 2006 Fining Guidelines. The FCO considered this a blatant violation of the law.

In one of the most notable cases of 2008, the FCO prohibited the acquisition of a 13% shareholding by A-Tec in competitor Norddeutsche Affinerie. The FCO concluded that the acquisition would give A-Tec a "competitively significant influence"[3] in Norddeutsche because A-Tec would have a blocking minority of 25% of the votes at Norddeutsche's annual meeting. This decision is very relevant to publicly listed companies, where shareholder presence at annual meetings is often below 50%, since it was held that a shareholding below 25% could still result in a *de facto* blocking minority.[4]

Other notable transactions reviewed by the FCO in 2008 include a major supermarket merger (cleared subject to a condition precedent), a planned merger between two producers of locking systems (prohibited) and an acquisition by a major cable operator of additional cable assets (cleared).[5]

Interesting procedural consequences may arise out of a recent decision by the Higher Regional Court

1 Draft *available at* http://www.bmwi.de (search: "MEG III"). The remaining merger thresholds will remain unchanged.

2 *See* FCO website, Section containing Notices ("Merkblaetter"), *available at* http://www.bundeskartellamt.de (only in German).

3 *See* Section 37 para. 1, no. 4 Act Against Restraints on Competition.

4 A-Tec/Norddeutsche Affinerie, Case B5 – 198/07, Decision of February 27, 2008 (appealed), *available at* http://www.bundeskartellamt.de.

5 Edeka/Tengelmann, B2-333/07 (June 30, 2008); Assa Abloy/SimonsVoss AG, B5-25/08 (November 5, 2008); KDG/Orion, B7-200/07 (April 3, 2008), *available at* http://www.bundeskartellamt.de.

Duesseldorf.[6] Currently, the FCO must decide within one month after receiving a complete notification to clear the transaction or to open a phase 2 investigation. In some cases, as the end of the one-month period approaches, the FCO and the parties realize that additional information may be required. In the past, it has been a fairly common practice to avoid a phase 2 investigation by withdrawing and re-filing an amended notification. In its decision, the Higher Regional Court declared this practice illegal. The implications are somewhat unclear as usually the practice is done at the request of and, in any event, only with the consent of the parties. That said, this decision will likely cause the FCO to be more reluctant to agree to a withdrawal and re-filing. This is because once the one-month time limit has expired, a transaction is deemed cleared. The FCO will want to avoid parties utilizing this case to claim that the withdrawal was invalid and that the one-month timeline continued to run and had expired.

B. Abuse of a Dominant Position

The FCO focused a significant portion of its efforts in 2008 on the energy sector. For example, the FCO created a new unit to deal with investigations of abuse of dominance in the energy sector. It also obtained commitments from 29 of 33 gas suppliers under investigation for excessive pricing to refund EURO 127 million (approximately US$177 million) to consumers.[7]

Finally, the Higher Regional Court in Duesseldorf confirmed the FCO's rules for gas supply contracts. Pursuant to these rules, contracts where the gas supplier fills more than 80% of a customer's requirements may not exceed two years in duration, and contracts that cover between 50% to 80% of the customer's requirements may not exceed four years in duration.[8]

C. Other Enforcement Actions

In 2008, significant fines for cartel activity were imposed in a number of sectors, including liquid gas, luxury cosmetics, branded drugstore products, pharma companies and pharmacies, decor paper productions, road salt production and clay tiles.[9] In a highly publicized and controversial move, the FCO also ruled against the planned central marketing of broadcasting rights for Bundesliga soccer matches. The planned system would have provided Pay TV with exclusive rights on late Saturday afternoons and evenings. The FCO found that this arrangement did not sufficiently benefit consumers.[10]

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6 *See* Higher Regional Court Duesseldorf, Decision of 26 November 2008, Case VI-Kart 8/0/ (V), *available at* http://www.justiz.nrw.de.

7 *See* FCO Press Release (December 1, 2008), *available at* http://www.bundeskartellamt.de.

8 Higher Regional Court Duesseldorf, Decision of October 4, 2007, VI-Kart 1/06 (V) – E.ON Ruhrgas (appealed), *available at* http://www.justiz.nrw.de.

9 FCO Press Releases: Liquid Gas (December 19, 2007); Luxury Cosmetics (July 10, 2008); Branded Drug Store Products (February 20, 2008); Pharma Companies and Pharmacies (January 8, 2008) and another independent matter (May 28, 2008); Decor Paper (February 5, 2008); Road Salt (November 12, 2008); and Clay Tiles (December 12, 2008), all *available at* http://www.bundeskartellamt.de.

10 *See* FCO Press Release (July 24, 2008), *available at* http://www.bundeskartellamt.de.

HUNGARY

KORNELIA NAGY-KOPPANY
K&P ATTORNEYS
NAGY-KOPPANY VARGA AND PARTNERS

A. Legislative and Administrative Developments

The Hungarian Parliament passed a Bill in June 2008[1] to amend Hungary's Competition Act.[2] However, the Bill is not yet in force because the President of the Republic of Hungary has sent the text to Hungary's Constitutional Court for review, on the grounds that certain of its provisions would violate the constitutional principles protecting the "presumption of innocence" and the "right to judicial review".[3]

The proposed amendments in the Bill deal with the following areas: (i) sanctions against cartels; (ii) consequences for violating certain other provisions of the Competition Act; and (iii) the Economic Competition Office (the "ECO"), Hungary's competition authority.

With respect to cartels, the Bill extends the range of possible sanctions by providing that an executive officer implicated in a price fixing cartel will be prohibited from serving as an executive officer of another business association for a period of two years from the date of the final decision of the Competition Council or, in the case of an appeal, from the date of the decision of the Appellate Court.

The Bill also proposes to establish a legal presumption of harm applicable to civil damage claims in relation to cartels violating Article 81 of the EC Treaty or Section 11 of the Competition Act. This presumption, applicable only in the case of "hard core" cartels, would provide that the economic harm resulting from the cartel should be deemed to be an overcharge equivalent to 10% of the price of the product, unless the defendant proves otherwise. The objective of this presumption is to lift the burden of proof from plaintiffs (unless they wish to claim that damages were higher than 10% of the actual price).

The Bill also codifies the main points of the ECO's leniency policy, including: (i) the types of violations that may be subject to an application for leniency; (ii) the conditions for receiving leniency; (iii) the consequences of compliance and non-compliance with these conditions; and (iv) the main procedural rules concerning petitions for leniency. In addition, the ECO retains the right to issue further directives concerning the leniency policy pursuant to section 36(6) of the Competition Act.[4]

With respect to other provisions of the Competition Act, the most important modification in the Bill is the introduction of the "SLC" ("substantial lessening of competition") or "SIEC" ("significant impediment to effective competition") test for

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1 *See* Bill T/5657, *available at* http://www.parlament.hu/irom38/05657/05657.pdf) (in Hungarian).

2 Act LVII of 1996 on the Prohibition of Unfair Trade Practices and Unfair Competition. The English text of the Competition Act is *available at* http://www.gvh.hu/domain2/files/modules/module25/5723964C09A66629.pdf.

3 In Decision No. 666/A/2008 published under AB Decision No. 19/2009 (II.25.), *available at* http://www.alkotmanybirosag.hu/hu/frisshat.htm (Hungarian only), the Constitutional Court found that Section 15 of the Bill was unconstitutional and returned the Bill to Parliament to eliminate or revise the unconstitutional provision and resubmit it thereafter for final approval.

4 The ECO's leniency policy is currently set forth in Joint Directive No. 3/2003 of the President of the ECO and the President of the Competition Council. The consolidated version of the Directive's English text is *available at* http://www.gvh.hu/domain2/files/modules/module25/pdf/print_4212_h.pdf. Since the Directive is non-binding, the Bill's purpose is to codify its main elements in order to comply with the principles of legal certainty and the undertaking of the ECO within the framework of the European Competition Network.

assessing concentrations (which is consistent with the standard used by the European Commission). The SLC/SIEC test replaces the former "dominant position" test. In addition, the maximum daily fine imposed for failure to submit a mandatory pre-merger filing is increased from HUF 50,000 to HUF 200,000 (approximately US$260 to US$1,050).

The Bill also extends the ECO's authority in several respects, including giving it jurisdiction over violations of the recently enacted prohibitions against unfair commercial practices and deceptive and comparative advertising.[5]

B. Cases and Proceedings

In 2008, the ECO continued with investigations of the banking sector[6] and the retail sector (specifically the relationship between larger retail networks and their suppliers).[7]

In June 2008, the Metropolitan Chartered Court of Appeal confirmed the judgment of the Metropolitan Court against three companies for collusion in the bidding phase of a public tender for road reconstruction work in violation of Section 11 of the Competition Act.[8] The companies were fined between HUF 52 million (approximately US$272,000) and HUF 137 million (approximately US$718,000).[9]

At the European level, in April 2008 the European Commission prohibited a Hungarian regional investment of EURO 9.6 million (approximately US$13.3 million) in a Hungarian limited liability company engaged in the production of substrates for diesel particulate filters.[10] The Commission's investigation revealed that the project was not in accordance with the requirements of the EU rules on regional aid – and in particular with the 2002 Multisectoral Framework on regional aid – because the company's market share was in excess of the applicable 25% threshold.[11]

The European Commission also imposed fines totalling EURO 676 million (approximately US$943 million) on nine companies – including MOL, the Hungarian Oil and Gas Company – for violating Article 81 of the EC Treaty by participating in a cartel for paraffin wax in the European Economic Area that lasted from 1992 to 2005.[12]

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5 Act XCVII of 2008 (the "UCP Act") deals with unfair commercial practices. The UCP Act came into effect on September 1, 2008. The Hungarian text is *available at* http://www.gvh.hu/domain2/files/modules/module25/5350079F73EC50C8.pdf. Act XLVIII of 2008 on Essential Conditions of and Certain Limitations to Business Advertising, 24. § (2)-(3); the English text is *available at* http://www.gvh.hu/domain2/files/modules/module25/5946837CDBA9C919.pdf. The ECO has entered into a cooperation agreement with the National Consumer Protection Authority and the Hungarian Financial Supervisory Authority, which are responsible for prosecuting violations of the UCP.

6 Published on September 26, 2008, the manuscript was dated April 28, 2008, *available at* http://www.gvh.hu/domain2/files/modules/module25/60783C124E3D9611.pdf.

7 Published on June 19, 2008, dated June 9, 2008, *available at* http://www.gvh.hu/domain2/files/modules/module25/476789A146BC0AC7.pdf.

8 The ECO decision was published on March 18, 2004; the Hungarian text is *available at* http://www.gvh.hu/gvh/alpha?do=2&pg=11&st=1&m5_doc=3757.

9 Judgment in case Nr. 2.Kf.27.052/2007 dated June 11, 2008 – one of the largest fines ever imposed on Hungarian road construction companies; the Hungarian text is *available at* http://www.gvh.hu/domain2/files/modules/module25/5021847AD6ACD66A.pdf.

10 Press release *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/670&type=HTML&aged=0&language=EN&guiLanguage=fr.

11 *See* IP/02/242, *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/02/242&format=HTML&aged=1&language=EN&guiLanguage=en.

12 Press release *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1434&format=HTML&aged=0&language=EN.

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INDONESIA

WIDYAWAN AND PONCO PRAWOKO
WIDYAWAN & PARTNERS

A. Legislative and Administrative Developments

In 2008, the Supervisory Commission on Business Competition (the "KPPU") issued guidelines on the implementation of Article 50(a) of the Indonesian Law on Prohibition of Monopolistic Practice and Unfair Business Competition ("Law 5/1999").[1] Article 50(a) establishes an exemption from the prohibition against anticompetitive conduct and agreements in Law 5/1999.[2] Conduct or agreements can be exempted pursuant to Article 50(a) if they are authorized by law or implementing regulation and the agent engaging in the conduct or entering into the agreement is an agent formed or appointed by the Indonesian government. Draft guidelines were also introduced on the implementation of Article 50(b), which note that any anticompetitive franchise agreement is not exempted from Law 5/1999.[3]

Draft guidelines on the implementation of Article 51 of Law 5/1999 were also introduced in 2008. Article 51 protects the public from abuse of dominance in certain key sectors by state-owned companies and entities or institutions formed and appointed by the Indonesian government.[4]

The KPPU also issued guidelines on the implementation of Article 47 of Law 5/1999 regarding administrative sanctions.[5] The guidelines address, *inter alia*, the payment of damages to injured parties and the imposition of fines, which can range from IDR 1 billion to IDR 25 billion (approximately US$92,000 to US$2.3 million). Additionally, the KPPU introduced draft guidelines on the implementation of Article 19 of Law 5/1999 on market dominance.[6] The draft guidelines include examples of monopolistic conduct and unfair competitive behavior and provide that fines for monopolistic or unfair conduct can range from IDR 1 billion to IDR 100 billion (approximately US$92,000 to US$9.2 million). Finally, the KPPU issued a new regulation authorizing the KPPU Secretariat to handle certain conspiracy cases having a value of not more than IDR 10 billion (approximately US$920,000), or any other case with the approval of the KPPU.[7]

B. Anticompetitive Practices

In the *Manulife* case,[8] the KPPU determined that there was no conspiracy in the auctioning of 40% of the shares owned by the bankrupt PT Dharmala Sakti Sejahtera in PT Asuransi Jiwa Manulife Indonesia ("AJMI"). The KPPU noted that although the auction had only one bidder (The Manufacturers Life Insurance Company, which is an AJMI shareholder), it was carried out to implement that shareholder's pre-emptive right as set out in AJMI's articles of association. Therefore, the auction was in compliance with Indonesian company and bankruptcy laws.

1 Indonesian Law No.5 of 1999 (effective March 5, 2000).

2 *See* KPPU Decision, Case No.253/KPPU/Kep/VII/2008 (July 31, 2008), *available at* http://www.kppu.go.id/docs/Pedoman/pasal_50a.pdf.

3 *See* http://www.kppu.go.id/docs/pedoman_pasal_50b.pdf.

4 *See* http://www.kppu.go.id/docs/pedoman_pasal_51.pdf.

5 *See* KPPU Decision, Case No.252/KPPU/Kep/VII/2008 (July 31, 2008), *available at* http://www.kppu.go.id/docs/Pedoman/pasal_47.pdf.

6 Indonesian Legal Brief, General Corporate Issue No.826 (April 22, 2008), *available at* http://www.hukumonline.com.

7 *See* KPPU Regulation No.2 (2008) entered into effect on February 12, 2008, *available at* http://www.kppu.go.id/docs/SK/SK_02_2008.pdf.

8 *See* KPPU Decision, Case No.17/KPPU-L/2007 (April 10, 2008), *available at* http://www.kppu.go.id/docs/Putusan/putusan_manulife.pdf.

In the *EMI* case,[9] the KPPU found a conspiracy among EMI Music South East Asia ("EMISEA"), PT EMI Indonesia, two individuals and a popular Indonesian band in relation to the band changing record labels from PT Aquarius Musikindo to EMISEA. Confidential information (*e.g.*, royalty rates, advances and penalties) in the agreement between PT Aquarius Musikindo and the band was found to have been shared amongst the accused. EMISEA and PT EMI Indonesia were fined IDR 1 billion (approximately US$92,000) and ordered to pay damages of approximately IDR 3.8 billion (approximately US$349,000) to PT Aquarius Musikindo.

In the *Makassar Cargo* case,[10] the KPPU decided that a State-owned enterprise, PT Angkasa Pura I (Persero) ("API"), had engaged in monopolistic practices in relation to its cargo terminal and warehousing services at Hasanuddin Airport through its Speed & Secure Warehousing unit. API had imposed excessive tariffs which burdened air cargo companies using API's services at the airport. API was ordered to recalculate the tariff and fined IDR 1 billion (approximately US$92,000).

In the *Short Message Service* ("SMS") case,[11] an interconnection agreement entered into by mobile telephone operators (XL, Telkomsel, Telkom, Bakrie, Mobile-8 and Smart) was found to fix prices for SMS messages. Fines imposed by the KPPU varied from IDR 4 billion (for Bakrie) to IDR 25 billion (for XL and Telkomsel, respectively) (approximately US$367,000 to US$2.3 million).[12] Smart was not fined as it was a new entrant with little bargaining power.

In the *Batam Taxi* case,[13] certain taxi companies operating at seven seaports and an airport in Batam were found to have infringed Law 5/1999 by engaging in price fixing, market allocation and monopolistic behaviour, as well as by preventing competitors from operating at certain locations. The relevant taxi operators and a Batam Center seaport operator were jointly and severally fined IDR 1 billion (approximately US$92,000).

In the *Subsidized Fertilizer Distribution* case,[14] the KPPU did not find any discriminatory practice implemented by a State-owned enterprise, PT Petrokimia Gresik (Persero) ("PTPG"), in the appointment of distributors of subsidized fertilizer produced by PTPG. However, the KPPU noted that the Indonesian Trade Ministry, through its regulations, has granted substantial authority to PTPG to appoint distributors, which could affect competition and disturb the distribution of subsidized fertilizers to farmers.

In the *Outdoor Advertisement* case,[15] a State-owned enterprise, API, applied differing rental rates to advertising operators for outdoor advertisement rights at Juanda International Airport. The KPPU found that competition among advertising operators was impaired due to lower rates in the tollgate area and its surroundings than in other outdoor areas (*e.g.* parking lots). The KPPU ordered API to renegotiate new prices with the incumbent tollgate location operator for the remaining period of its management right.

Finally, in the *Clean Water Management* case,[16] the KPPU held that PT Adhy Tirta Batam ("ATB") had

9 *See* KPPU Decision, Case No.19/KPPU-L/2007 (April 24, 2008), *available at* http://www.kppu.go.id/docs/Putusan/putusan_EMI.pdf.

10 *See* KPPU Decision, Case No.22/KPPU-L/2007 (May 22, 2008), *available at* http://www.kppu.go.id/docs/Putusan/putusan_Cargo_Makassar.pdf.

11 *See* KPPU Decision, Case No.26/KPPU-L/2007 (June 18, 2008), *available at* http://www.kppu.go.id/docs/Putusan/putusan_SMS.pdf.

12 Fines of IDR 5 billion and IDR 18 billion were levied against Mobile-8 and Telkom, respectively.

13 *See* KPPU Decision, Case No. 28/KPPU-I/2007 (June 18, 2008), *available at* http://www.kppu.go.id/docs/Putusan/putusan_Taksi_Batam.pdf.

14 *See* KPPU Decision, Case No. 10/KPPU-L/2008 (August 19, 2008), *available at* http://www.kppu.go.id/docs/Putusan/putusan_Petrokimia.pdf.

15 *See* KPPU Decision, Case No. 02/KPPU-L/2008 (August 19, 2008), *available at* http://www.kppu.go.id/docs/Putusan/putusan_Reklame.pdf.

16 See KPPU Decision, Case No.11/KPPU-L/2008 (October 13, 2008), *available at* http://www.kppu.go.id/docs/Putusan/putusan_ATB.pdf.

engaged in a monopolistic practice by discontinuing new water meter installations within the Batam Islands. The KPPU stated that ATB's policy could not be justified under the Concession Agreement entered into by ATB and the Batam Authority Body which granted ATB the exclusive right to utilize raw water and supply clean water to consumers on the Batam Islands. The KPPU fined ATB IDR 2 billion (approximately US$183,000).

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IRELAND

PHILIP ANDREWS, GERALD FITZGERALD AND ÚNA BUTLER
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A. Legislative and Administrative Developments

1. Credit Institutions: New Merger Regime

The Irish government introduced emergency legislation on October 2, 2008 in response to ongoing turmoil in global inter-bank credit markets. The new legislation, the Credit Institutions (Financial Support) Act 2008 (the "Act"),[1] has two principal functions. First, it allows the Minister for Finance (the "Minister") to provide financial support (including guarantees) in respect of deposits in, and borrowings by, any credit institution designated by the Minister under the Act. Second, the Act modifies the Irish merger control rules applicable to any merger or acquisition involving an Irish-licensed credit institution (whether or not that institution has received or is receiving financial support from the State). In that regard, if the Minister is of the opinion that a proposed merger involving an Irish-licensed credit institution is necessary to maintain the stability of the Irish financial system and that there would be a serious threat to the stability of that system if the merger did not proceed, then the power to review the transaction will lie with the Minister rather than with the Competition Authority (the "Authority").[2]

2. Consultation on Amendment of Competition Act 2002

In November 2007, the Minister for Enterprise, Trade and Employment announced a public consultation on the operation and implementation of the Competition Act 2002 (the "Competition Act"). In January 2008, the Authority published a detailed response to that consultation, setting out a number of proposals to improve the effectiveness of Irish competition law.[3] The results of the public consultation have not yet been published and it is not yet known when any amending legislation will be introduced.

3. Amalgamation of Competition Authority and National Consumer Agency

In October 2008, the Minister set out the Irish government's budgetary targets for the coming year. As part of wide-ranging measures designed to restore order and stability in the public finances, the Minister announced that the government had decided to amalgamate the Authority and the National Consumer Agency (the "NCA").[4] The NCA is the statutory body responsible for defending consumer interests and enforcing consumer legislation in Ireland. No further details of the amalgamation have been announced yet.

4. Competition Authority Notices

Legislation adopted in 2007 gave new competition law enforcement powers to the Irish Commission for Communications Regulation ("ComReg").[5] In July 2008, the Authority and ComReg entered into a cooperation agreement designed to facilitate the exercise by the two authorities of their concurrent

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1 Credit Institutions (Financial Support) Act, 2008 (Act No. 18/2008) (Ir.), *available at* http://www.oireachtas.ie/documents/bills28/acts/2008/a1808.pdf.

2 *See* Credit Institutions (Financial Support) Act 2008 (Act No. 18/2008) (Ir.), section 7, *available at* http://www.oireachtas.ie/documents/bills28/acts/2008/a1808.pdf.

3 *See* Press Release, The Competition Authority, Competition Authority calls for tough new penalties under Competition Law (January 14, 2008), *available at* http://www.tca.ie/NewsPublications/NewsReleases/NewsReleases.aspx?selected_item=207.

4 *See* Department of Finance, Budget 2009, Annex D (Rationalisation of State Agencies) (October 14, 2008), *available at* http://www.budget.gov.ie/2009/downloads/AnnexDRationalisationOfStateAgencies.pdf.

5 Communications Regulation (Amendment) Act, 2007 (Act No. 22/2007), *available at* http://www.oireachtas.ie/documents/bills28/acts/2007/a2207.pdf.

competition powers, to avoid duplication of activities and to ensure consistency between decisions taken by both bodies.[6]

5. Sectoral Reports

The Authority issued sectoral reports in 2008 with respect to: groceries;[7] veterinarians;[8] and pharmaceutical products and services.[9] The Authority also welcomed the decision of the Irish Dental Council to review advertising restrictions on dentists, further to the Authority's recommendation in 2007.[10]

B. Mergers

The Authority received 38 merger notifications in 2008. It prohibited one of these transactions, the proposed acquisition by Kerry Group plc of Breeo Foods Limited and Breeo Brands Limited.[11] The parties are two of Ireland's leading food companies, active in the distribution of many of the country's household names in consumer foods. The Authority found that the merger would substantially lessen competition in three markets: (i) rashers (i.e., uncooked bacon), (ii) non-poultry cooked meats, and (iii) processed cheese. This is only the third occasion on which the Authority has blocked a proposed merger since the entry into effect of the current Irish merger control legislation in January 2003. Kerry Group plc has lodged an appeal to the High Court against the Authority's decision.[12]

The Authority also launched a full Phase 2 investigation in respect of the acquisition by Heineken NV of Beamish & Crawford plc ("B&C"), one of the businesses operated by Scottish & Newcastle plc ("S&N"). In February 2008, Heineken notified the European Commission of its proposed acquisition of certain businesses operated by S&N, including the B&C business in Ireland. In April 2008, following a request from the Authority, the European Commission made a partial referral of the notification to the Authority insofar as Heineken's acquisition of B&C was concerned.[13] This was the first time since the Authority assumed

6 *See* Press Release, The Competition Authority, Competition Authority and ComReg Announce Co-operation Agreement (July 1, 2008), *available at* http://www.tca.ie/NewsPublications/NewsReleases/NewsReleases.aspx?selected_item=219.

7 *See* Press Release, The Competition Authority, Competition Authority Publishes Study of the Grocery Sector (April 9, 2008), *available at* http://www.tca.ie/NewsPublications/NewsReleases/NewsReleases.aspx?selected_item=212; News Release, The Competition Authority, Competition Authority Report Finds Competition between Grocers is Limited by the Retail Planning System (September 10, 2008), *available at* http://www.tca.ie/NewsPublications/NewsReleases/NewsReleases.aspx?selected_item=225; and The Competition Authority, The Retail Planning System as Applied to the Grocery Sector: 2001 to 2007, Grocery Monitor: Report No. 3, Executive Summary at 4, *available at* http://www.tca.ie/NewsPublications/NewsReleases/NewsReleases.aspx?selected_item=225.

8 *See* Press Release, The Competition Authority, Competition Authority Finds Room for Improvement in Competition Between Vets (June 19, 2008), *available at* http://www.tca.ie/NewsPublications/NewsReleases/NewsReleases.aspx?selected_item=217.

9 Competition Authority, Enforcement Decision, Alleged anticompetitive conduct by the Health Service Executive relating to the administration of the Community Drugs Schemes (ED/01/008) (October 10, 2008), *available at* http://www.tca.ie/NewsPublications/NewsReleases/NewsReleases.aspx?selected_item=228.

10 *See* Press Release, The Competition Authority, Competition Authority finds a lack of competition in dental services is pushing up prices in Ireland (October 3, 2007), *available at* http://www.tca.ie/NewsPublications/NewsReleases/NewsReleases.aspx?selected_item=203; The Competition Authority, News Release, Competition Authority Welcomes New Rules on Dentists Advertising (August 6, 2008), *available at* http://www.tca.ie/NewsPublications/NewsReleases/NewsReleases.aspx?selected_item=223.

11 Determination in Merger No. M/08/009 - Kerry/Breeo, Competition Authority (August 28, 2008), *available at* http://www.tca.ie/MergersAcquisitions/MergerNotifications.aspx?selected_item=399.

12 *See* The Irish Times, *Kerry to appeal Competition Authority ruling on Breeo sale* (September 30, 2008), *available at* http://www.irishtimes.com/newspaper/finance/2008/0930/1222724571685.html.

13 *See* Press Release, European Commission, Mergers: Commission approves Heineken's acquisition of Scottish & Newcastle assets in Belgium, Finland, Portugal and UK; refers acquisition of Irish assets to Irish Competition Authority (April 3, 2008), *available at* http://ec.europa.eu/comm/competition/mergers/cases/decisions/m4999_20080403_20230_en.pdf.

responsibility in January 2003 for assessing mergers under the Competition Act that part of a merger notified to the European Commission was referred back to the Authority for assessment. In October 2008, the Authority announced that it had approved Heineken's acquisition of B&C.[14]

C. Cartels

Several prosecutions were concluded in 2008 in relation to a price-fixing cartel run by the Citroen Dealers Association.[15] In May 2008, a Citroen car dealer based in the north-east of Ireland received a three-month suspended sentence and the company of which he was a director was fined EURO 12,000 (approximately US$17,000) by the Circuit Criminal Court. In October 2008, another Citroen dealer based in the north-east of Ireland received a three-month suspended sentence and the company of which he was a director was fined EURO 20,000 (approximately US$28,000) by the same Court.[16] Several other prosecutions remain pending.

D. Abuse of a Dominant Position

In April 2008, the Irish High Court began hearing a damages action brought by the sugar importer ASI Sugar Limited ("ASI") against Greencore Group plc (formerly the State-owned sugar company Irish Sugar plc ("Irish Sugar")) for abusing its dominant position in the Irish sugar market.[17] The case represented the first "follow-on" antitrust private damages action in Ireland resulting from an enforcement decision of the European Commission. The proceedings were settled prior to the conclusion of the hearing, but the terms of the settlement have not been made public.

E. Anticompetitive Practices

In January 2008, the Authority closed its inquiry into a complaint by the publisher of the free newspaper Metro, regarding the refusal of the Joint National Readership Survey ("JNRS") to include the publication in the JNRS's readership survey. The Authority took the view that free newspapers such as Metro would be unable to compete effectively for national brand advertising against major daily newspapers unless they were in a position to provide independent verifiable readership statistics such as those provided by the JNRS survey. The inquiry was concluded after JNRS amended its admission criteria to permit free newspapers such as Metro to be included in its survey.[18]

In November 2008, the European Court of Justice (the "ECJ") ruled that an agreement concluded between the ten principal beef and veal processors in Ireland, which required, among other things, a reduction in the order of 25% in processing capacity, had as its object the prevention, restriction or distortion of competition within the meaning of Article 81(1) of the EC Treaty.[19] The matter had been referred to the ECJ by the Irish Supreme Court, which must now decide whether the agreement fulfils any of the conditions for exemption under Article 81(3) of the EC Treaty.[20]

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14 Determination in Merger No. M/08/011-Heineken/Scottish & Newcastle, Competition Authority, October 3, 2008, *available at* http://www.tca.ie/NewsPublications/NewsReleases/NewsReleases.aspx?selected_item=227.

15 *See* The Irish Times, *Ex-car dealer fined for fixing prices* (May 9, 2008), *available at* http://www.irishtimes.com/newspaper/finance/2008/0509/1210284926634.html.

16 *See* The Irish Times, *Suspended sentence and fine for fixing prices of Citroen cars* (October 29, 2008), *available at* http://www.irishtimes.com/newspaper/ireland/2008/1029/1225197273487.html.

17 ASI Sugar Ltd v. Greencore Group plc & Ors (Record No. 1996/8200P).

18 *See* Press Release, The Competition Authority, The Competition Authority welcomes the inclusion of free newspapers in the Joint National Readership Survey (January 30, 2008), *available at* http://www.tca.ie/NewsPublications/NewsReleases/NewsReleases.aspx?selected_item=209.

19 Case C-209/07, Competition Authority v. Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd. (November 20, 2008), *available at* http://curia.europa.eu/.

20 *See* Press Release, The Competition Authority, Supreme Court refers question in Beef Industry case to ECJ (April 19, 2007), *available at* http://www.tca.ie/NewsPublications/NewsReleases/NewsReleases.aspx?selected_item=193.

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ISRAEL

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A. Legislative Developments

A proposed amendment to the Israeli Restrictive Trade Practices Law, 5748 - 1988 (the "Antitrust Law")[1] was introduced on June 19, 2008,[2] aimed at changing the regulation of concentrated (oligopolistic) markets. Currently, the substantive analysis of concentrations is set out in the same chapter of the Antitrust Law which regulates monopolies. Where the Commissioner declares the existence of a "concentration group", that concentration is deemed to be a monopoly and is subject to the same provisions in the Antitrust Law which apply to monopolies. While a monopoly is defined as the concentration of more than half of the assets or services in a market in the hands of one person, the Antitrust Law defines a "concentration group" as a small group of persons (two or more) holding an aggregate market share higher than 50%, between whom there is limited or no competition.

The proposed amendment is founded on two fundamental principles. The first is the recognition that the Antitrust Law's current definition of a "concentration group" is problematic in that it seeks to rely on the measure of competition between firms in a market, for which there exist no real empirical measures. It is proposed to revise the definition of "concentration group" so that the focus of analysis will be on whether conditions exist in the market that facilitate or stifle effective competition, such as barriers to entry or cross-ownership structures. The second principle is the recognition that analyses of monopolies and oligopolies are fundamentally distinct. The economics, commercial incentives and commercial behaviour of a monopoly are different to that of an oligopoly, thus oligopolies should be evaluated independently and in light of factors and competitive analysis relevant to oligopolistic market behaviour.

The proposed amendment also seeks to broaden the scope of section 50 of the Antitrust Law. Currently, section 50 provides that a breach of the provisions of the Antitrust Law will constitute a tort for the purposes of civil liability. The proposed amendment provides that a breach of the instructions of the Director General or of the Antitrust Tribunal also will constitute torts for this purpose.

B. Mergers

The Director General's Guidelines Regarding the Process of Reporting and the Assessment of Mergers in Terms of the Antitrust Law, 1988 (the "Guidelines") were enacted in 2008.[3] The Guidelines address in detail many aspects of merger reporting and assessment, including: what will be considered to be an early implementation of a merger, i.e., implementation of a merger without the required regulatory approval; when the Director General will regard control as having been *de facto* acquired; various issues related to the timing of notification of a merger; what will be considered to be an internal reorganization as opposed to a merger; the Director General's approach to an acquisition of the assets of a company as a merger; and what kinds of legal persons, such as individuals and foreign companies, will be considered to be "acquiring companies" for the purposes of merger control.

C. Cartels

In *In the Matter of the Organization for Private Hospitals for Chronic Patients in Israel* (the "Organization"),[4] the Commissioner determined that

1 1258 Official Gazette 128 (published July 26, 1988) (Isr.).

2 Proposed Amendment to the Antitrust Law, No. 11 (2008), *available at* http://www.archive.antitrust.gov.il, Publication No. 5000968.

3 *Available at* http://www.antitrust.gov.il/Antitrust/he-IL/Merger_Guidelines.

4 Determination according to Paragraph 43(a)(2) of the Restrictive Trade Practices Law, 1988, Course of Action of the Organization of Private Hospitals for Chronic

a course of action recommended by the Organization, an association of approximately 65 hospitals, constituted a restrictive arrangement, prohibited under section 5 of the Antitrust Law. While there are publicly provided hospital facilities in Israel, the overwhelming majority of hospital services are provided by some 300 private institutions. As part of their efforts to adopt uniform standards and tariffs between the various hospitalization institutions, the Ministries of Health and Finance elected to amend the method by which the Ministry of Health contracted with hospitals for the provision of services. Up until that time, including with respect to the Organization's member institutions, the Ministry had contracted, through the Organization, for the purchase of its members' services at individually agreed tariffs. A pilot public tender was issued by the Ministries of Health and Finance on December 24, 2006 for the purchase of geriatric hospitalization services in the Petach-Tikva region. The Organization elected to fight this new method of purchase and, in response to the tender, held an emergency meeting at which its management as well as representatives of its member institutions were present. The result was an effective boycott of the tender. It was clear from the evidence before the Commissioner that the motivating concern of the Organization and its members was that the tender would lead to lower prices for the hospital services bought by the Ministry of Health. The Commissioner held that the conduct of the Organization constituted "a course of action effected or recommended by an organization which was liable to reduce competition between its members", in contravention of section 5 of the Antitrust Law. The Commissioner referred to the U.S. Noerr-Pennington doctrine and distinguished between legal petitioning of government actions by professional associations and illegal abuse of government processes in order to restrict trade, into which category this case fell. The Organization's attempts to justify its actions as a legitimate defense against an alleged monopsonist were rejected by the Commissioner.

In November 2008, the District Court of Jerusalem convicted the CEO of Tambour, a domestic paint manufacturer, under the executive liability provision of the Antitrust Law.[5] This conviction follows the 2002 conviction by plea bargain of the company itself for cartel offences occurring between 1994 and 1998. Tambour, a monopolist in the paint market, engaged in a series of minimum resale price maintenance arrangements with Do it Yourself chains, in order to protect small retail distributors from price wars. *Inter alia*, Tambour had succeeded in this by promising each party that its competitors would not sell below the fixed price. The Court determined that these resale price maintenance arrangements, which were the outcome of recommended prices by Tambour, had a clear horizontal impact on the market. The Court noted that the CEO's lack of knowledge of the offence was not a valid defence. The fact that he did not take reasonable steps to enforce the Antitrust Law was sufficient for conviction.

D. Abuse of a Dominant Position

In a notable case, *In the Matter of Bezeq, the Israeli Communications Company Ltd,*[6] the Commissioner found that Bezeq, the dominant supplier of various telecommunications services in Israel and, until recently, a state-owned monopoly, had abused its monopoly in the wired telephony market in contravention of section 29A of the Antitrust Law. The case involved an illegal strike by Bezeq workers in 2006, as a result of which the reciprocal connection between Bezeq and HOT Telecom ("HOT"), a small, upstart wired telephony provider, was disconnected for approximately 34 hours. During this time, HOT customers could not be connected with Bezeq customers. The strike was the outcome of Bezeq employees' dissatisfaction with the provision of licences to new competitors and with the expanding inter-connectivity services provided by Bezeq to its competitors. The Commissioner found that, in the weeks leading up to the illegal strike, Bezeq management had ignored indications that its employees had devised a strategy

Patients In Israel as a Restrictive Practice, given on December 31, 2007, Publication No. 5000740.

5 CF (Jerusalem) 1142/01 The State of Israel v. Reuven Shulshtein, given on November 2, 2008, *published in* Nevo.

6 Determination according to Paragraph 43(a)(5) of the Restrictive Trade Practices Law, 1988, Bezeq, the Israeli Communications Company Ltd – abuse of position in the market, given on December 12, 2007, Publication No. 5000727.

to further their grievances against the company by harming Bezeq's new competitors. Specifically, the Commissioner found that Bezeq had abused its monopoly position in contravention of section 29A(a) of the Antitrust Law. Further, the Commissioner found that Bezeq's actions constituted a "reduction… in the… scope of services offered by the Monopolist, not within the context of fair competitive activity" in contravention of section 29A(b)(2) of the Antitrust Law. The legislation deems such conduct an abuse of monopoly. Bezeq has appealed the Commissioner's decision.

E. Other

In early 2008, under the newly introduced Class Actions Law, 2006,[7] one of the largest class actions to date was brought and approved before the District Court in Tel Aviv in *Sharnoa Computerised Machines Tel Aviv Ltd* v. *Bank Hapoalim Ltd, Bank Leumi Israel Ltd and Bank Discount Ltd*.[8] While the Israeli Antitrust Authority ("IAA") continued to investigate criminal price fixing by the largest Israeli banks in respect of bank commissions, this private claim was brought on behalf of bank customers for damages caused by the alleged anticompetitive conduct of the banks. The plaintiff alleged that between 1998 and 2005 various interest rates charged to clients as well as bank commissions were fixed by the respondent banks. The plaintiffs alleged that this conduct prevented or lessened competition in contravention of the Antitrust Law and caused economic injury to the plaintiffs. Despite the absence of any economic reports or other "hard evidence", the Court rejected the banks' defense of innocent parallel pricing in and ruled that logic dictated that where the rates of interest charged were almost identical over such an extended period of time, changing in close unison with any announced changes in the interest rates charged by the Bank of Israel, it was difficult to conclude other than that there was illegal price fixing/coordination between the respondent banks. The Court therefore approved the class action against the respondent banks for the maximum amount of NIS 7 billion (approximately US$1.8 billion). The banks have appealed the District Court's ruling.[9]

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7 2054 Official Gazette 264 (published March 12, 2006) (Isr.).

8 CC (TA) 19230/06, Sharnoa Computerised Machines Tel Aviv Ltd v. Bank Hapoalim Ltd, Bank Leumi Israel Ltd and Bank Discount Ltd., [2008], Nevo.

9 CA 3313/08 Bank Leumi Israel Ltd v. Sharnoa Computerised Machines Tel Aviv Ltd et al.; CA 3432/08 Bank Hapoalim Ltd v. Sharnoa Computerised Machines Tel Aviv Ltd et al.; and CA 3498/08, Bank Discount Ltd v. Sharnoa Computerised Machines Tel Aviv Ltd et al.

ITALY

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A. Legislative Developments

On November 15 2007, the Italian Competition Authority (the "ICA") issued two Resolutions[1] establishing procedural rules governing proceedings for unfair commercial practices and misleading and unlawful comparative advertising.[2] Among other things, proceedings must last no more than 120 days and there is no requirement for a "market test" phase if parties offer up commitments to resolve a matter.

On August 28, 2008, the Italian Competition Act was amended by Decree-Law No. 134/2008 (converted into Law of 27 October 2008 No. 166). The Decree Law introduced an exception to the application of the general merger control rules for concentrations concerning undertakings under "special administration" (equivalent to bankruptcy). In such a scenario, while a pre-closing notification is still mandatory, the ICA's authorization of the concentration is not necessary due to the existence of a public interest in its realization. The first concentration scrutinized by the ICA under the new regime was the acquisition of Alitalia by CAI.[3]

B. Mergers

In December 2007, the ICA authorized the merger between AEM S.p.A. ("AEM") and ASM Brescia S.p.A. ("ASM"). The transaction involved several markets: the production and supply of electrical energy and gas; waste management; heat management; facility management; and integrated water systems. The ICA cleared the merger after ASM undertook to terminate the structural links existing between itself and a major company in the market for the wholesale of electrical energy.[4]

In January 2008, the ICA cleared the merger between Intesa SanPaolo and Cassa di Risparmio Firenze, subject to a number of conditions, including: (i) the divestiture of 29 retail bank branches to an unrelated third party; and (ii) the unwinding of a joint venture in the consumer credit sector. According to the ICA, the divestitures described under (i) above were necessary to maintain competition in the retail bank, asset management, financial services, savings management and insurance markets, while the unwinding of the joint venture would prevent the creation of a dominant position in the consumer credit market.[5]

In May 2008, the ICA cleared a merger between Monte dei Paschi di Siena and Banca Antonveneta. The clearance was subject to several conditions, including: (i) the divestiture by Monte dei Paschi di Siena of several retail bank branches (mainly located in Tuscany); (ii) the termination of relationships with major groups in the insurance sector through the unwinding of existing joint ventures and the termination of bank insurance agreements; and (iii) a commitment not to appoint anyone to the merged entity's Board of Directors or Supervisory Committee who also holds the same positions with a competing bank.[6]

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1 ICA Resolution No. 17589, *published in* Italian Official Journal No. 283 (December 5, 2007), sets out the procedural rules for unfair commercial practices proceedings and ICA Resolution No. 17590, *published in* Italian Official Journal No. 283 (December 5, 2007), sets out the procedural rules for misleading and unlawful comparative advertising.

2 The relevant substantive provisions are found in Legislative Decrees No. 145/2007 and No. 146/2007, both *published in* Italian Official Journal No. 207 (September 6, 2007).

3 ICA Decision No. 19248 in case C9812, Compagnia Aerea Italiana/Alitalia Linee Aeree Italiane – Airone.

4 ICA Decision No. 17723, in case C8835, AEM/ASM Brescia.

5 ICA Decision No. 17859, in case C8939, Intesa SanPaolo/Cassa di Risparmio di Firenze.

6 ICA Decision No. 18327, in case C9182, Banca Monte dei Paschi di Siena/Banca Antonveneta.

C. Cartels

In September 2007, the ICA fined four companies active in the pharmaceutical distribution sector EURO 24,915 (approximately US$35,000) for their collective refusal to supply over-the-counter ("OTC") drugs to the so-called "*parafarmacie*" (i.e., shops that sell non-prescription drugs).[7] The conduct led to a general scarcity of supply to *parafarmacie* in Italy. The ICA also took into account that the agreement undermined legislation that had been enacted to liberalize the sale of pharmaceuticals in Italy by providing for the sale of OTC drugs out of chemists' shops.[8] In May 2008, the ICA sanctioned an agreement in the same sector carried out by the Teramo association of pharmacists that was aimed at setting the maximum level of discounts for OTC drugs. The association was fined EURO 11,200 (approximately US$16,000).[9]

In October 2007, the ICA imposed a fine of approximately EURO 10 million (approximately US$14 million) on fifteen major operators in local public transport markets. The ICA found that the operators coordinated their behaviour in responding to public bids for the assignment of public transport services. This conduct was designed mainly to divide up markets in order to preserve the position of incumbent operators and to raise barriers to entry for new competitors. Similar to the pharmaceutical cases, the ICA found that the conduct here resulted in serious prejudice to the ongoing liberalization of public transport markets.[10]

In June 2008, the ICA fined the Association of Bread Producers of Rome and of the Province of Rome EURO 4,430 (approximately US$6,200) for price fixing. This cartel was implemented through the setting and publication of "recommended" price lists that contained specific prices for the two most popular kinds of bread sold in the Province of Rome and recommended price increases for other types of bread.[11]

D. Abuse of a Dominant Position

In October 2008, the ICA fined Aeroporti di Roma S.p.A. ("ADR") EURO 1.6 million (approximately US$2.2 million) for abuse of a dominant position.[12] ADR is the exclusive manager of the main commercial airports of Rome (Fiumicino and Ciampino). The conduct sanctioned by the ICA included the charging of "abusive" prices for refuelling services, the leasing of space (at almost twice the market rate) and for certain services (like handling) in the "Fiumicino cargo city" (the area of the airport dedicated to the transport of goods). In other instances, however, the ICA found that ADR's charges were not abusive, e.g., with respect to fees for security and catering services.[13]

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7 ICA Decision No. 17362, in case I678, Distribuzione di farmaci senza obbligo di ricetta alle parafarmacie.

8 Legislative Decree No. 223/06, *published in* Italian Official Journal No. 153 (July 4, 2006).

9 ICA Decision No. 18421, in case I684, Federfarma Teramo – Sconti sui prezzi al pubblico.

10 ICA Decision No. 17550, in case I657, Servizi aggiuntivi di trasporto pubblico nel comune di Roma.

11 ICA Decision No. 18443, in case I695, Listino Prezzi del Pane.

12 ICA Decision in case A376, Aeroporti di Roma – Tariffe Aeroportuali.

13 *Id.*

JAPAN

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A. Legislative Developments

On October 16, 2007, the Japan Fair Trade Commission ("JFTC") announced that it intended to prepare a number of important amendments to the Anti-Monopoly Act ("AMA").[1] These prospective amendments were subsequently included in an amendment bill to the AMA, which was submitted to the Diet by the Cabinet in March 2008.[2] However, the draft bill was abandoned in late 2008 due to recent political developments in Japan.[3] As of February 2009, the JFTC is preparing a new draft amendment bill to the AMA that is based upon the previous draft bill with some modifications.

B. Mergers

In March 2007, new merger guidelines came into effect, which reflected the new way that the JFTC would analyze merger transactions subject to its review.[4] One of the most important features was to clarify that the JFTC could, where appropriate, expand the definition of the relevant geographic market beyond that of Japan when considering the possible effect of a proposed merger.

Following implementation of the new guidelines, there have been several JFTC merger decisions where the JFTC defined the relevant geographic market to extend beyond Japan. One example involved TDK Corporation's acquisition from Alps Electric Co., Ltd. of assets used for the manufacturing of magnetic heads (the "TDK case").[5] The JFTC ultimately determined under Article 16 of the AMA that the proposed merger "would not substantially restrain competition in any particular field of trade". This decision was reached on the basis of a number of factors, including that TDK would not be able to control prices because of the presence in the relevant market of a number of other significant competitors with excess supply capacity. Significantly, the JFTC decided that the relevant market consisted of the global market for magnetic heads, based on its finding that magnetic head manufacturers sell their products at similar prices regardless of geographic origin.[6]

Another significant development was the JFTC's issuance of an order requiring BHP Billiton to produce information relevant to BHP's proposed takeover of Rio Tinto. The JFTC opened a formal investigation into the proposed acquisition at the end of July 2008 on the grounds that the proposed acquisition, if implemented, would substantially restrain competition in some sectors where iron ore and coking/metallurgical coal are supplied by seaborne trade.

This case is noteworthy because, in the past, the JFTC had not commenced its investigations of share acquisitions until after the closing of the transaction. The JFTC has consistently stated that it has the power to review any merger which could substantially restrain competition in a particular

* The author would like to express his sincere appreciation to Vassili Moussis, a foreign counsel at the firm, for his substantial contribution in the drafting of this article.

1 Press Release, Japan Fair Trade Commission, The JFTC made public "Prospective Amendments to AMA" (October 16, 2007), *available at* http://www.jftc.go.jp/e-page/pressreleases/2007/October/taikou.pdf.

2 Press Release, Japan Fair Trade Commission, The JFTC made public the "Submission of the Anti-Monopoly Act Amendment Bill to the Diet" (March 2008), *available at* http://www.jftc.go.jp/e-page/pressreleases/index08.html.

3 Nikkei Shinbun (December 14, 2008), *available at* http://bizplus.nikkei.co.jp/genre/soumu/index.cfm?i=2008121309118b3.

4 *See* Amendment to the Merger Guidelines (Japan Fair Trade Commission), March 28, 2007, *available at* http://www.jftc.go.jp/e-page/legislation/ama/MApriorconsultation.pdf.

5 Press Release, Japan Fair Trade Commission, "Major M&A cases during the fiscal year 2007" (June 2008), *available at* http://www.jftc.go.jp/pressrelease/08.june/08061301.pdf at 39.

6 *Id*. at 39.

field of trade in Japan, but this is the first high profile case where it used that power in relation to a purely foreign-to-foreign merger. The Rio Tinto/BHP Billiton case therefore demonstrates that the JFTC is willing to take a more aggressive approach in asserting its jurisdiction to review mergers which it believes will have a substantial effect on competition in Japan.

C. Cartels

The JFTC continued to be very active in the area of cartel enforcement in 2008. An important element of this increased focus on enforcement has been the ongoing success of the JFTC's leniency program, which encourages cartel participants to voluntarily disclose to the JFTC their participation in cartel activities.[7] Companies that do so are able to receive discounted penalties in subsequent enforcement actions by the JFTC against the cartel members. During the 2007 fiscal year (which ended on March 31, 2008), the JFTC dealt with 74 leniency applications, meaning that a total of 179 leniency applications have been submitted to the JFTC since the leniency program was introduced through an amendment to the AMA in January 2006.[8]

On November 11, 2008, the JFTC filed criminal complaints with the public prosecutor general against three steel companies: Nippon Steel & Sumikin Coated Sheet Corp.; Nisshin Steel Co., Ltd; and Yodogawa Steel Works Ltd., alleging that they had formed a cartel to fix prices for the sale of galvanized steel.[9] JFE Galvanizing and Coating Co., Ltd was also allegedly involved in the cartel, but the JFTC decided against filing a criminal complaint against the company because it had handed over information on the cartel under the JFTC's leniency program before the JFTC launched its investigation. These were the first criminal charges filed by the JFTC in a price-fixing cartel case since 1991.

The JFTC has been particularly keen on pursuing enforcement against international cartels. During the 2007 fiscal year, the JFTC took action against an international cartel involving eight companies in the marine hose sector. On February 22, 2008, the JFTC investigation resulted in a cease-and-desist order being issued against one Japanese company and four foreign companies, as well as a surcharge payment order in the amount of ¥2,380,000 (approximately US$26,000) being imposed on one Japanese company.[10]

D. Unfair Trade Practices

On September 18, 2008, the JFTC issued a Hearing Decision against Microsoft Corporation ("Microsoft"), culminating a long investigative and hearing process.[11] The JFTC asserted that between 2001 and 2004, Microsoft had forced licensed personal computer manufacturers and sellers ("OEMs") to sign licence agreements that contained "non-assertion provisions" in relation to the products it was supplying. This meant that the OEMs were restricted from taking legal action against Microsoft, based upon their patents or intellectual property rights, if they incorporated patented features into the relevant PC operating system. The JFTC held that such practices "unjustly restricted" the business activities of the OEMs.[12] Further, this meant that Microsoft's licence agreements served to "affect the fair

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7 Kazuhiko Takeshima, Chairman of the Fair Trade Commission of Japan, Investigation Procedures and Techniques of Monopoly Cases, Speech at The International Symposium on Enforcement of Antimonopoly Law of the People's Republic of China (December 14, 2007), *available at* http://www.jftc.go.jp/e-page/policyupdates/speeches/SAICSymposium2007.pdf at 3-4. As to the leniency program, *see* Article 7-2, subsections 7 to 9 of the AMA, *available at* http://www.jftc.go.jp/e-page/legislation/index.html.

8 Japan Fair Trade Commission, Annual Report of FY 2007 (September 26, 2008), *available at* http://www.jftc.go.jp/e-page/index.html at 2.

9 Press Release, Japan Fair Trade Commission, *available at* http://www.jftc.go.jp/pressrelease/20index.html.

10 Press Release, Japan Fair Trade Commission, Cease and Desist Order and Surcharge Payment Order against Marine Hose Manufacturers (February 2008), *available at* http://www.jftc.go.jp/e-page/pressreleases/2008/February/080222.pdf.

11 Press Release, Japan Fair Trade Commission, Hearing Decision against Microsoft Corporation (Trading on Restrictive Terms Relating to Windows OEM Sales Agreements) (September 18, 2008), *available at* http://www.jftc.go.jp/e-page/pressreleases/2008/September/080918.pdf at 1.

12 *Id.* at 1.

competitive environment in the PC AV technology market" as well as "impede fair competition".[13]

The JFTC has also recently been very active in pursuing misrepresentation and misleading advertising cases. In fiscal 2007, the JFTC conducted investigations and issued cease-and-desist orders in 38 cases involving misleading representations.[14] The food industry has been an area of specific concern, particularly as a result of a number of cases where food being imported into Japan from China was contaminated. Misleading food advertisements have been deemed to contravene a number of Acts, including the Act Against Unjustifiable Premiums and Misleading Representations (the "Premiums and Representations Act"), which is the responsibility of the JFTC and the local prefectures. For example, 21 out of the 28 cases where prefectures issued instructions relating to misleading representations under the Premiums and Representations Act concerned food labeling.[15]

More generally, bills related to the establishment of a new Consumer Agency under the Premiums and Representations Act were submitted to the 170th Diet as part of a government initiative to establish a unified administrative framework for consumer affairs. If these bills are passed in the new Diet, the enforcement of the Premiums and Representations Act will be transferred to the new Consumer Agency.

E. International Cooperation

For a number of years, the JFTC has been active in cooperating and training other Asian competition agencies. For example, the JFTC held several training sessions for Chinese officials (from the Chinese Ministry of Commerce, the National Development and Reform Commission and the State Administration for Industry and Commerce) on competition law and policy, using the Japan International Cooperation Agency's scheme for technical assistance, following specific requests made by the Chinese Government. The purpose of the training program was for Chinese officials to obtain knowledge of Japan's AMA and its implementation, with the broader objective of contributing to the development of competition legislation and the proper and steady implementation of competition law and policy in China. As is widely known, a comprehensive Chinese competition law was adopted by the Chinese parliament and entered into force in August 2008.

In addition to the above activities, the JFTC hosted the 7th Annual International Competition Network ("ICN") Conference in Kyoto from April 14 to 16, 2008. More than 500 participants from over 70 countries attended the event, including public officials from competition agencies as well as academics and competition law practitioners. The Chairman of the JFTC, Mr. Takeshima, declared that hosting the ICN enhanced the JFTC's international presence and that the JFTC will make use of this experience to continue playing an active role in international efforts toward strengthening links and cooperation among competition authorities, including ICN activities.[16]

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13 *Id.* at 2.

14 Press Release, Japan Fair Trade Commission, Enforcement Status of the Act against Unjustifiable Premiums and Misleading Representations and Promotion of Proper Consumer Transactions in Fiscal 2007 (Summary) (May 7, 2008), *available at* http://www.jftc.go.jp/e-page/pressreleases/2008/May/080507.pdf at 1.

15 *Id.* at 2.

16 Press Release, Japan Fair Trade Commission (January 2009), *available at* http://www.jftc.go.jp/e-page/aboutjftc/message_from_chairman2009.html.

KOREA

SAI REE YUN, YOUNGJIN JUNG, SUNG MOO JUNG AND SUEJUNG ALEXA OH YULCHON

A. Legislative Developments

An amended Enforcement Decree to the Monopoly Regulation and Fair Trade Act (the "MRFTA") took effect on July 1, 2008.[1] The amended Enforcement Decree increases the threshold level of assets or sales of the larger merging party and its affiliates needed to trigger the merger notification requirement from KRW 100 billion (approximately US$83 million) to KRW 200 billion (approximately US$167 million).[2] The threshold level of assets or sales of the smaller merging party and its affiliates remains unchanged, at KRW 20 billion (approximately US$17 million). For mergers between two foreign companies or mergers that involve a domestic company acquiring a foreign company, notification is not required unless the turnover in Korea of each company and their respective affiliates exceeds KRW 20 billion (approximately US$17 million).[3]

The National Assembly is currently considering several additional proposals to amend the MRFTA, including removing certain restrictions on holding companies, abolishing restrictions on maximum investments in affiliated companies and introducing a U.S.-style consent order system.[4] The current requirement that a pre-merger notification, if required, be filed within 30 days of the execution of the merger agreement is also expected to be repealed and replaced by a requirement to file a notification at any time before a merger is consummated.[5]

B. Abuse of a Dominant Position

On June 4, 2008, the Korea Fair Trade Commissioner ("KFTC") concluded a three-year-long investigation by imposing corrective orders and imposing an administrative surcharge on Intel Corp., Intel Semiconductor Ltd. and Intel Korea ("Intel") for abuse of market dominance.[6] The KFTC found that Intel had abused its dominant market position in the CPU market by providing financial inducements to Samsung Electronics and Sambo Computer, the two largest companies in the Korean PC market, not to purchase CPUs from Advanced Micro Devices Inc. ("AMD"). The KFTC determined that these acts were designed to exclude AMD from the market and thus in violation of Article 3-2(1)5 of the MRFTA dealing with "exclusion of competing enterprises". The KFTC ordered Intel to cease all loyalty-inducing financial arrangements with local OEMs that were designed to exclude Intel's competitors or maintain Intel's share of OEMs' CPU purchases above a certain level. The KFTC also imposed a surcharge of approximately KRW 26 billion (approximately US$22 million).

C. Other

On November 1, 2007, the KFTC issued corrective orders and imposed administrative surcharges totalling approximately KRW 20 billion (approximately US$17 million) on ten

1 Enforcement Decree of the Monopoly Regulation and Fair Trade Law (Presidential Decree No. 10267 of April 1, 1981), last amended by Presidential Decree No. 20947 of July 29, 2008 (Korea).

2 Conversions into dollars are based on an exchange rate of KRW 1200 = US$1. *See* Enforcement Decree 2008, Art. 18.1, *available at* http://eng.ftc.go.kr/files/bbs/2008/MARFTA%20Enforcement%20Decree.doc.

3 *See* Enforcement Decree 2008, Art. 18.3, *available at* http://eng.ftc.go.kr/files/bbs/2008/MARFTA%20Enforcement%20Decree.doc.

4 *See* Proposed Draft Regulation No. 1800407, *available at* http://likms.assembly.go.kr/bill/jsp/BillDetail.jsp?bill_id=PRC_P0Q8A0B7M2I4P1L5E1S5M2B6Z6A4I9.

5 If any of the parties to a merger is a "large-scale company", a pre-merger filing is required. "Large-scale company" means a company whose total assets or sales revenue, including that of its affiliates, exceeds KRW 2 trillion.

6 Public version of the decision not yet available.

pharmaceutical companies for providing rebates to hospitals and clinics.[7] Pursuant to an investigation into their marketing practices, the KFTC found that several pharmaceutical companies had offered rebates totalling KRW 500 billion (approximately US$417 million) to hospitals, pharmacies and wholesalers in exchange for promises to prescribe and purchase the pharmaceutical companies' products. These rebates took many different forms. For example, there were instances where researchers or clinical nurses hired by pharmaceutical companies were sent to hospitals to work or sell medications. There they would extend payments to doctors under the title of "medical effects research". The investigation further revealed illegal marketing activities by pharmaceutical companies in the form of covering costs for seminars and conferences held in foreign countries and offering other gifts. Of the pharmaceutical companies that received fines, the five with the highest turnover were recommended for criminal charges.

The KFTC launched this investigation to enhance competition in the medical and pharmaceutical sector, which is one of Korea's mostly heavily regulated industries. While the first investigation of the aforementioned ten companies focused largely on domestic pharmaceutical companies, a second round of investigations took place with respect to multinational pharmaceutical companies. On January 14, 2009, the KTFC announced that the second round of investigations had resulted in seven additional pharmaceutical companies being issued corrective orders and having administrative surcharges imposed totalling approximately KRW 20.5 billion (approximately US$17.1 million). No criminal charges were recommended. According to an investigative summary of the KFTC, the second round of investigations revealed different types of illegal marketing practices that took place through informational events or seminars.

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[7] *See* 2007*kyungkyu*1859 for the decision against Samil Pharm Co., Ltd., 2007*kyungkyu*1862 for the decision against Choongwae Parma Corporation, 2007*kyungkyu*1865 for the decision against Dong-A Pharmaceutical, and 2007*kyungkyu*1871 for the decision against Hanall Pharmaceutical Inc.

MEXICO

LUCÍA OJEDA CÁRDENAS
SAI ABOGADOS

A. Legislative and Administrative Developments

At the end of 2007, a bill was introduced in Mexico's Congress to amend Article 35 of the Federal Law on Economic Competition (the "FLEC") to increase the fines that can be imposed by the Federal Competition Commission ("FCC") for monopolistic practices.[1] The FCC withdrew its initial support for the bill[2] after several amendments were added with which the FCC disagreed.[3]

The Mexican Congress has not passed the bill yet. Nevertheless, public statements by legislators from different parties indicate that there is support for a new bill that would not only include the proposed amendment to Article 35, but also amendments to other articles of the FLEC that would provide the FCC with enhanced tools to impose and enforce fines for monopolistic practices.

Another important bill was introduced in the Mexican Congress in February 2008. This bill would amend Article 17 of the Mexican Constitution to establish the obligation to legislate procedures for collective redress (i.e., class actions).[4] The FCC supports this proposal because it believes that allowing class actions would help deter anticompetitive conduct. The proposed amendment and implementing regulation are currently under discussion.

B. Mergers

In December 2007, the FCC granted conditional approval to the acquisition by Televisa, the most important media company in Latin America, of 49% of the capital stock of Cablemás, a cable company operating in several Mexican states.[5] Commissioner Miguel Flores issued a dissenting opinion with respect to the resolution adopted by the FCC, arguing that the transaction should not be approved.[6] The FCC's conditions for approval included the obligation of Televisa to: (i) offer its free (non-pay) TV channels on a non-discriminatory basis to all pay TV service providers in Mexico ("must offer"); and (ii) transmit, through its pay TV systems, the non-pay TV content of all other transmitters on a non-discriminatory basis ("must carry"). On May 12, 2008, the FCC determined that Televisa had fulfilled its "must offer" and "must carry" obligations and that the concentration with Cablemás could proceed.[7]

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1 Bill presented by Congressman Alejandro Sánchez Camacho, *available at* http://gaceta.diputados.gob.mx/.

2 FCC Opinion PRES-10-096-2007-171 (September 14, 2007), *available at* http://www.cfc.gob.mx/images/stories/resoluciones/extractos_de_resoluciones/opiniones/op.pdf.

3 FCC Opinion PRES-10-096-2008-048 (March 5, 2008), *available at* http://www.cfc.gob.mx/images/stories/resoluciones/extractos_de_resoluciones/opiniones/20080305_reserva%20art%2035.pdf. *See also* FCC Press Release 01-2008 (March 6, 2008), *available at* http://www.cfc.gob.mx/index.php?option=com_content&task=view&id=4581&Itemid=204.

4 *Available at* http://www.pri.senado.gob.mx/index.php?ido=4&opc=2&senador=Murillo%20Karam%20%20Jes%FAs&obj_id=1133&tabla_id=Iniciativa and http://gaceta.diputados.gob.mx/Gaceta/60/2008/feb/20080205-I.html#Ini20080205-5.

5 *See* FCC Files CNT-18-2007 and RA-26-2007, *available at* http://www.cfc.gob.mx/index.php?option=com_content&task=view&id=3773&Itemid=175.

6 *Available at* http://www.cfc.gob.mx/index.php?option=com_content&task=view&id=4809&Itemid=120.

7 FCC Press Release 02-2008 (May 13, 2008), *available at* http://www.cfc.gob.mx/index.php?option=com_content&task=view&id=4895&Itemid=204.
The obligations on Televisa are permanent and must continue to be complied with following closing.

C. Anticompetitive Practices

The FCC initiated five investigations in 2008 for alleged monopolistic practices. Three of these investigations were initiated on the basis of third party complaints and two *ex officio* by the FCC. The markets involved were: (i) the market for distributing and dealing in tickets to play in draw and gambling games;[8] (ii) the market for fixed internet interconnection services;[9] (iii) the market for inter-urban long distance commuted voice traffic;[10] (iv) the market for anesthesiology services within Mexico;[11] and (v) the market for real estate advisory services in Mazatlán, Sinaloa.[12]

In September 2008, the FCC decided to close its investigation of alleged monopolistic practices in the market for public notary services in Mexico. The FCC had initiated the investigation at the end of 2007. The FCC closed the investigation without any finding against the parties.[13]

D. Dominance

At the beginning of 2008, the FCC initiated six investigations in the following telecommunications markets: (i) the market for leasing local and long distance dedicated lines and circuits;[14] (ii) the market for local calls termination;[15] (iii) the market for local calls traffic origination;[16] (iv) the market for local calls transit;[17] (v) the market for local mobile calls termination;[18] and (vi) the market for local mobile telephony.[19]

On July 2008, the FCC issued its preliminary conclusions on competition in these markets. The FCC found, among other things, that: (i) Telmex, Mexico's principal local carrier, has substantial market power in the markets for local calls traffic origination, local transit, dedicated access, and local calls termination; (ii) every mobile telephony service provider has substantial market power in the mobile calls termination market; and (iii) every local telephone service provider has substantial market power in the local calls termination market.[20] In October 2008, the FCC issued another preliminary decision holding that Telcel, an affiliate of Telmex providing mobile telephone services, has substantial power in the market for mobile telephony.[21]

These preliminary declarations represent the beginning of an administrative procedure in which all affected parties will be invited to submit their positions. If the FCC determines that there are dominant providers in these markets, tariff regulations will be established for each such market.

E. Other

1. Opinions

The FCC issued an opinion in May 2008 on the effect of Mexico's trade regime on competitive conditions in Mexico.[22] This opinion was the product of more than eight months of investigation by the FCC. The FCC concluded that the existing regulations on international trade represent an obstacle to effective competition and efficient markets in Mexico. Accordingly, the FCC issued a series of recommendations, including: (i) to gradually reduce to zero all tariffs and customs duties; (ii) to reduce the amount of tariff items in order to simplify customs procedures; (iii) to

8 FCC File DE-17-2008.

9 FCC File DE-39-2007.

10 FCC File IO-02-2008.

11 FCC File DE-40-2007.

12 FCC File IO-01-2008.

13 FCC File IO-02-2007.

14 *See* FCC File DC-02-2007.

15 *See* FCC File DC-03-2007.

16 *See* FCC File DC-04-2007.

17 *See* FCC File DC-05-2007.

18 *See* FCC File DC-07-2007.

19 *See* FCC File DC-08-2007.

20 FCC Press Release 04-2008 (June 16, 2008), *available at* http://www.cfc.gob.mx/index.php?option=com_content&task=view&id=5121&Itemid=204 and FCC Press Release 05-2008 (July 25, 2008), *available at* http://www.cfc.gob.mx/index.php?option=com_content&task=blogcategory&id=55&Itemid=402.

21 *See* FCC File DC-08-2007.

22 FCC Press Release 03-2008 (May 18, 2008), *available at* http://www.cfc.gob.mx/index.php?option=com_content&task=view&id=4919&Itemid=204.

gradually simplify the customs clearance process, both for exports and imports; (iv) to eliminate all existing barriers to entry in order to offer representation services before customs (customs brokers);[23] and (v) to gradually eliminate exclusive customs.[24]

The Mexican *Secretaría de Economía* responded to the FCC opinion by announcing a program for the simplification of Mexico's tariff regime. The program is to be implemented in 2009.

2. Relationship between the FCC and the Federal Courts

In 2008, the Federal Courts upheld the FCC's decision that the Coca-Cola Export Corporation and 90 other bottling companies had engaged in anticompetitive practices involving exclusivity contracts with traditional retailers of carbonated beverages in closed containers. The Court also upheld the aggregate 10.5 million pesos fine (approximately US$761,000) imposed by the FCC.[25]

The *Coca-Cola* case established important precedents for the interpretation of various concepts and provisions of the FLEC, including: (i) the scope of the concept of "economic agent"; (ii) the use of indirect evidence to substantiate the existence of monopolistic practices; and (iii) the presumption of validity of decisions taken by the FCC.

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[23] According to the regulation legally in force, importation and exportation procedures can only be performed by authorized customs brokers. Such authorization is subject to restrictions that limit the number of authorizations than can be granted per customs facility.

[24] Some products may be imported only through specific customs facilities. This restriction results in additional costs for importers who have to choose the place of importation of their products based on other regulatory factors apart from considerations of possible savings in logistic costs.

[25] *See* File RA 478/2006.

NEPAL

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A. Introduction

On January 14, 2007, Nepal's long-awaited competition law, the Competition Promotion and Market Protection Act 2007 (the "Act"), came into force.[1] The Act is the first comprehensive law in Nepal that deals exclusively with anticompetitive activities, including multinational corporations doing business in Nepal. The Act governs a broad range of conduct, including mergers and acquisitions, anticompetitive agreements, abuse of a dominant position and other anticompetitive activities such as exclusive dealing, bid rigging, collusive bidding, market restriction and tied selling. The Act provides for the formation of a statutory competition authority, the Competition Promotion and Market Protection Board (the "Board"), to promote and protect competition in the country.[2]

B. Mergers

The Act restricts mergers or acquisitions that are designed solely to create a monopoly in the relevant market or to encourage restrictive practices in the relevant market.[3] A merger or acquisition that results in a greater than 40% share in the relevant market for the production or distribution of a product or service in the country is presumed to create a monopoly in the relevant market, and thus to encourage restrictive practices in the market.[4] Merger reviews are undertaken by the Office of the Company Registrar under the Companies Act and not by the Board.

C. Cartels

The Act prohibits forms of anticompetitive agreements - including market sharing agreements, pricing agreements, output restriction agreements, bid rigging and collusive bidding - which aim to restrict or limit competition for the production, supply and distribution of goods or services in a market.[5] All anticompetitive agreements contravening the Act are considered void.[6]

D. Abuse of a Dominant Position

The Act prohibits entities that hold a dominant position in a market from abusing that position by restricting competition in respect of the production or distribution of goods or services.[7] An entity is deemed to be in a "dominant position" if, acting solely or together with similar entities, it accounts for at least 40% of annual production or distribution in a relevant product market in Nepal or is otherwise in a position to act unilaterally in the market.[8] The Board publishes a list of entities holding a dominant position.

E. Enforcement

The Act empowers both Market Protection Officers and the Board to investigate anticompetitive activities. Charges under the Act are brought by the State as plaintiff. Entities found to have engaged in anticompetitive activities are subject to civil penalties. A person acting in-chief on behalf of an entity (e.g., a corporation) is deemed to be responsible for any such penalties. Private claimants are also entitled to seek damages from a person or entity engaged in anticompetitive activities.

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1 Competition Promotion and Market Protection Act (2007) No. 35, Nepali Official Gazette (January 14, 2007). A Nepali version of the Act is *available at* http://www.parliament.gov.np/Legislation.htm.

2 *Id.* §12.

3 *Id.* §5. The Act does not specifically define the term "market"; however, a relevant market will generally include a product market and a geographic market.

4 *Id*.

5 *Id*. §3.

6 *Id*.

7 *Id.* §4.

8 *Id*.

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NETHERLANDS

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A. Legislative and Administrative Developments

1. De minimis Safe Harbor

The present Dutch Competition Act contains a "safe harbor" for cartel infringements which do not significantly affect the Dutch market.[1] This "safe harbor" is applied if a turnover threshold or, alternatively, a market share threshold is met.[2] A legislative proposal now pending before Parliament aims to amend the market share threshold to require that the aggregate market share held by the parties not exceed 10% in any of the relevant markets affected by the agreement or concerted practice (the current threshold is 5%).[3] This is similar to the threshold in the *de minimis* Notice of the European Commission,[4] with one important difference: unlike the EC *de minimis* Notice, the Dutch Competition Act also allows "hard core" infringements to fall under the *de minimis* rule.

2. Rules of Conduct for Public Undertakings

Another pending amendment to the Competition Act is designed to remove competitive distortions between public and private undertakings in markets where both public and private undertakings offer goods and services (e.g., public transport or waste collection). The proposal would require public undertakings to sell their products in accordance with the "market economy investor principle", i.e., they should include direct and indirect costs in their sale prices unless this has a negative impact on public functions.[5] Public commercial undertakings would also be prohibited from using government information which is not accessible to third parties, unless it is obtained under market conditions; practising both public and commercial functions via the same legal or economic entity; and favouring other public commercial undertakings. The Dutch Competition Authority ("NMa") will be responsible for the enforcement of these rules. It remains to be seen whether this proposal will be effective in practice and what it will add to the existing state aid rules of the European Commission.

3. Restructuring of the NMa

As of June 1, 2008, the NMa's Cartel and Merger Departments have been combined into one department, called the "Competition Department" (*Directie Mededinging*), which also includes a leniency office. The sector-specific authorities connected to the NMa were also renamed the "Office of Energy Regulation" and the "Office of Transport Regulation".[6]

4. NMa Guidelines

The NMa issued new guidelines clarifying its policy for the issuance of simplified decisions in merger cases. The NMa will issue a simplified decision, *inter alia*, when: there is no need for a second phase or remedies; there is no conflicting advice on the merger from another regulator; and there are no third party complaints.[7] The NMa also published guidelines for mergers in the healthcare, agriculture,

1 Agreements or concerted practices which comply with the "safe harbor" criteria do not fall under the Competition Act's cartel prohibition. *See* Article 7 of the Competition Act.

2 The turnover threshold requires that the agreement or concerted practice (a) involve not more than eight undertakings, which (b) achieve an aggregate turnover of not more than EURO 5.5 million (approximately US$7.7 million) (if the activities of all parties concern mainly trade in goods) or EURO 1.1 million (approximately US$1.5 million) (for all other activities).

3 *See* TK 2007-2008, 31354, no. 2.

4 *See* Commission Notice on agreements of minor importance, O.J. C368/13 of 22.12.2001, para. 7(a).

5 *See* TK 2007-2008, 31531, no. 2.

6 Structure chart, *available at* http://www.nmanet.nl/engels/home/About_the_NMa/Organisation/Organisation_chart.asp.

7 Stcrt., September 5, 2008, no. 172/18.

postal and energy sectors[8] and guidelines on acceptable forms of cooperation between undertakings.[9]

B. Mergers

In 2008, the NMa again dealt with a considerable number of mergers in the hospital sector. The *Ziekenhuis Walcheren – Oosterscheldeziekenhuizen* case is of particular interest. This proposed merger of Ziekenhuis Walcheren and Oosterscheldeziekenhuizen would have resulted in a post-merger share of nearly 100% in the market for general hospital services in the south-west of the Netherlands. The parties argued that the merger would lead to efficiencies that benefited consumers, but the NMa was not convinced. The transaction is currently subject to a second phase investigation.[10]

In the *Evean Groep – Philadelphia – Woonzorg Nederland* case, the NMa considered a merger in the nursing home market. It allowed the merger to proceed, subject to the divestiture of 11 nursing homes.[11]

In a non-hospital sector merger, the *NDC – ThiemeMeulenhoff* case,[12] which involved the merger of two publishers, NDC received first phase clearance even though the transaction gave it shares in certain markets of between 40% - 100%. The NMa concluded, however, that the transaction would not give rise to competition concerns because: (i) two other substantial competitors remained in the relevant markets (the market for study books, scientific books and general books); and (ii) the high shares were in relatively small "submarkets", which were insignificant in the wider context of the transaction.

In *European Directories – Truvo Nederland*, the NMa concluded an extensive first and second phase investigation before providing clearance.[13] Truvo and European Directories are publishers of digital and hard copy directory guides in the Netherlands. Income is generated mainly by selling advertising space, with the directories distributed free to end users. The NMa concluded that while a small group of advertisers might be affected negatively by the transaction, the overall anticompetitive effects would be marginal. The NMa took into account that: (i) few advertisers regard the parties' directories as direct competitors; (ii) switching behavior by advertisers is limited; and (iii) there is declining use of paper directories due to competition from alternative media sources. Finally, the parties committed to publishing only one guide after the transaction, which would benefit advertisers by increasing the number of consumers they could reach in a single publication while providing consumers access to more and better information.

C. Cartels

In 2008, the NMa decided the last remaining appeal cases involving cartels in the construction sector. In June 2008, for example, the NMa fined five suppliers of traffic lights and traffic management installations a total of EURO 400,000 (approximately US$558,000) for engaging in cartel activities (mainly bid rigging) between January 1998 and December 2003.[14]

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8 Leidraad voor zorginstellingen met fusie- of overnameplannen. *See* http://www.nmanet.nl/Images/Leidraad%20zorginstellingen_tcm16-113990.pdf (only available in Dutch).

9 *Available at* http://www.nmanet.nl/Images/Richtsnoeren%20Samenwerking%20Ondernemingen_april%202008_tcm16-75276.pdf (only available in Dutch).

10 NMa Decision, July 23, 2008, Ziekenhuis Walcheren – Oosterscheldeziekenhuizen, Case no. 6424. The same transaction had been investigated by the NMa in 2005. The NMa considered a second phase investigation necessary at that time. Although the notifying parties submitted an application for a licence (a second phase decision), they withdrew it just before the final decision came out and the merger did not proceed. The current review is based on a new first phase notification submitted by the parties on June 25, 2008.

11 NMa Decision, April 1, 2008, Evean Groep – Philadelphia – Woonzorg Netherland, Case no. 6141.

12 NMa Decision, August 8, 2008, NDC – ThiemeMeulenhoff, Case no. 6421.

13 NMa Decision, August 28, 2008, European Directories – Truvo Nederland, Case no. 6246.

14 NMa Decision, June 27, 2008, Verkeersregeltoestellen en verkeersregelinstallaties, Case no. 5697. This was the last cartel which qualified for the special simplified sanction procedure that was established to deal with cartels in the construction sector. Under this simplified

In September 2008, the NMa fined two cartels in the homecare sector a total of EURO 3 million (approximately US$4.2 million) and EURO 4.8 million (approximately US$6.7 million) respectively.[15] In both cases, homecare institutions had entered into market allocation agreements following enactment of the new Healthcare Act, which was designed to introduce greater competition in the healthcare sector. The NMa reduced the parties' fines by 25% because it did not want to prejudice their financial viability and also because budget and pricing restrictions meant that excessive pricing by the cartels was unlikely.

2008's most notable judicial decision was issued by the Trade and Industry Appeals Tribunal (the "Tribunal") in *Associations of Psychologists*.[16] In this case, the Tribunal overruled the NMa's finding that the associations had breached the cartel prohibition in Article 6 of the Competition Act by circulating price recommendations to members. The Tribunal held that the NMa had failed to take into account the specific market circumstances affecting psychologists, namely that price is not a relevant competitive factor because patients are referred to psychologists by their doctors based on expertise and quality rather than price. The Tribunal held that the NMa is obliged in cartel cases to investigate the effects of the agreement, including the relevant legal and economic context, even where the object of the agreement is anticompetitive.

In November 2008, the NMa fined a company for the first time for breaking a seal during an investigation. The NMa fined Sara Lee Household & Bodycare Nederland B.V. EURO 269,000 (approximately US$375,000) after the NMa discovered its seals were broken.[17] At the time, Sara Lee was subject to verification procedures by the NMa which had sealed a room with potential evidence overnight. When the inspectors arrived to continue the investigation the next morning, they discovered that the seals were broken.

Maximum fines for the breach of seals can be up to EURO 450,000 (approximately US$628,000) or 1% of the company's net turnover. The NMa systematically followed its fining guidelines when setting the amount of the fine against Sara Lee. Interestingly, the NMa considered it to be the responsibility of the company to make sure that NMa seals are not broken unless the company can prove that it was not liable for the breach. The NMa considers that only extraordinary events outside the responsibility of the undertaking can absolve a company's liability. This reverse of the burden of proof may infringe on the presumption of innocence as proclaimed by the European Court of Human Rights.

D. Abuse of a Dominant Position

In March 2008, the NMa issued a decision reducing the fine that it had imposed on CR Delta in 2003 for abusing its dominance in the breeding bull spermatozoid market.[18] The NMa had found that CR Delta's three rebate plans for customers (i.e. a value rebate plan, a fidelity rebate and a special discount plan) were anticompetitive in effect.

In July 2007, the Court of Rotterdam overruled the NMa's initial decision, holding that it had not sufficiently demonstrated that CR Delta's value rebate plan was abusive. Most notably, the NMa had relied on theoretical assumptions about the impact of the plan rather than investigating its actual effects in the market (such as whether the rebate gave a decisive incentive to purchase spermatozoids from CR Delta and whether competitors were unable to make competing offers).[19]

Rather than starting a new investigation into the volume rebate scheme, the NMa issued a new decision rescinding the fine it had imposed for that

procedure, parties agreed not to contest the facts and to waive the right to be heard individually. In addition, one alleged cartel participant represented all other alleged cartel members.

15 NMa Decision, September 19, 2008, Kennemerland, Case no. 6108 and NMa Decision, September 19, 2008, Thuiszorg 't Gooi, Case no. 5851.

16 Associations of psychologists c.s. [Trade and Industry Appeals Tribunal], October 6, 2008, LJN: BF8820.

17 NMa Decision, October 10, 2008, Zegelverbreking Sara Lee, Case no. 6432.

18 NMa Decision, March 6, 2008, CR Delta, Case no. 3353.

19 CRV Holding B.V./NMa [Court of Rotterdam], July 4, 2007, LJN:BA9164.

rebate. The fine was reduced accordingly from EURO 2.6 million (approximately US$3.6 million) to EURO 1.3 million (approximately US$1.8 million).

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NEW ZEALAND

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A. Legislative and Administrative Developments

In March 2008, the New Zealand Government released the Commerce Amendment Bill,[1] which proposes extensive reform of the regulatory control provisions of the Commerce Act 1986 (Parts 4, 4A and 5) that make up the key economic regulation of businesses that do not face competition or the threat of competition. In practice, this tends to be the core infrastructure sector. The amendments are designed to provide greater certainty on regulatory scope, in an effort to facilitate increased infrastructure investment by regulated businesses, while preventing the exercise of market power.

In July 2008, the Australian and New Zealand Governments signed a treaty on trans-Tasman Court Proceedings and Regulatory Enforcement.[2] This treaty will result in greater harmonization of Australasian competition law and will serve to increase the reach and effectiveness of Australian and New Zealand competition regulators. Its immediate practical effect will be to remove the bar against the New Zealand Commerce Commission (the "Commission") enforcing penalties against Australian companies and directors, and the Australian Competition and Consumer Commission enforcing penalties against New Zealand companies and directors. This treaty could also lead to legislative changes enabling the Commission to compel persons in Australia to provide information, documents or interviews (and *vice versa*).

In September 2008, Parliament introduced a bill to extend the scope of the Commission's powers of cooperation with other international competition regulators.[3] More specifically, it provides the Commission with the ability to provide investigative assistance and compulsorily acquired information to overseas regulators. The introduction of the Bill follows recently enacted Australian legislation,[4] which also seeks to facilitate increased cooperation between the Commission and the ACCC. The Bill is only at its First Reading stage and will not be considered by Parliament again until 2009.

B. Mergers

The Commission received 17 applications for voluntary merger clearances between January 1 to December 31, 2008, but no applications for authorization of mergers. Twelve of these mergers were cleared, two were declined, one was withdrawn and two await determination.[5]

The most high profile merger decision in 2008 was the Court of Appeal's judgment in *Commerce Commission* v. *Woolworths Limited & Ors*.[6] The

1 To see the full text of the Bill, *refer to* the New Zealand Parliament website, *available at* http://www.parliament.nz/en-NZ/PB/Legislation/Bills/d/0/4/00DBHOH_BILL8440_1-Commerce-Amendment-Bill.htm.

2 To view the current status of the treaty, *refer to* the New Zealand Ministry of Foreign Affairs and Trade's website, *available at* http://www.mfat.govt.nz/Treaties-and-International-Law/03-Treaty-making-process/International-Treaties-List/12-Private-International-Law.php.

3 Commerce Commission (International Corporation and Fees) Bill. To see the full text of the bill, *refer to* the New Zealand Parliament website, *available at* http://www.parliament.nz/en-NZ/PB/Legislation/Bills/c/8/2/00DBHOH_BILL8756_1-Commerce-Commission-International-Cooperation.htm.

4 Corporations (NZ Closer Economic Relations) and Other Legislation Amendment Act 2007, 2007 No. 85, 2007, *available at* http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/asmade%5Cbynumber/A5E7C2A70456ECE2CA2573070000058C?OpenDocument.

5 This data reflects merger clearance activity during the period January 1, 2008 to December 31, 2008. A full register of clearance applications received by the Commerce Commission is *available at* http://www.comcom.govt.nz/PublicRegisters/mergersacquisitions-clearances.aspx.

6 Commerce Commission v. Woolworths Limited & Ors, [2008] NZCA 276. The proposed acquirors were

Court of Appeal overruled the High Court's clearance of two separate proposed acquisitions of up to 100% of The Warehouse, a large general merchandise retailer and recent entrant into the grocery industry and effectively restored the Commission's determination. Notably, the Court of Appeal held that the High Court had misinterpreted the Commission's role in merger clearances. The High Court had interpreted the relevant statutory test as requiring the Commission to grant clearance unless satisfied that a substantial lessening of competition is likely. The Court of Appeal stated that this inverted the proper standard, and that the Commission should grant clearance only if it is satisfied that a substantial lessening of competition is not likely; in all other cases, clearance should be denied.[7]

The Court of Appeal's May 2008 decision in *Commerce Commission* v. *New Zealand Bus Ltd*.[8] was expected to provide guidance on the test for accessory liability in the merger context. Unfortunately, the decision offers two potentially inconsistent tests for when a vendor may be considered liable as an accessory for a business acquisition that contravenes the Act. While there must be knowledge of the essential facts, two inconsistent overlays were applied to this: "dishonest participation" and "knowledge of a real risk of contravention". Neither of these overlays is particularly certain in its application and parties should be careful to satisfy themselves that they do not attract liability under either test.

In July 2008, the Commission commenced a consultation process to seek feedback on draft process guidelines and a revised application form for businesses seeking clearance for a merger or acquisition.[9] The impetus for this consultation process stems largely from the lengthy timeframes for determination of clearance applications. Under the draft guidelines, the Commission will encourage merging parties to participate in informal and confidential pre-filing discussions with the Commission and businesses will be encouraged to submit a substantially developed draft application form before this pre-filing discussion meeting takes place.

C. Cartels

In late 2007, the Commission commenced proceedings against a New Zealand company, Visy Board (NZ) Limited, its Australian parent and four executives for alleged cartel behaviour in the New Zealand corrugated fibre packaging industry.[10] In July 2008, the Commission also filed proceedings against two pathology service providers, alleging that, starting in 2003, the companies had agreed not to compete to acquire clients from each other in a particular region pending a proposed merger of their operations, which never materialized.[11]

The release of the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008[12] by the Australian Government means that criminalization of cartel conduct in Australia moves a step closer to becoming reality. Given the harmonization of trans-Tasman business laws, it would be surprising if New Zealand did not ultimately follow Australia's lead and introduce criminal sanctions for hard core cartel conduct. The

Woolworths and Foodstuffs, both among New Zealand's leading supermarket chains.

7 *Id*. at 95, 107.

8 Commerce Commission v. New Zealand Bus Ltd., [2007] NZCA 502 (Hammond, Arnold and Wilson JJ).

9 To view the guidelines in full, *refer to* the Commission's website, *available at* http://www.comcom.govt.nz/BusinessCompetition/MergersAcquisitions/DraftProcessGuidelines/draftprocessguidelinesdocuments.aspx.

10 Press Release, Commerce Commission, Commerce Commission initiates legal action against alleged cartel (November 22, 2007), *available at* http://www.comcom.govt.nz/BusinessCompetition/Anti-competitivePractices/commercecommissioninitiateslegalac1.aspx.

11 Press Release, Commerce Commission, Commerce Commission files proceedings against Waikato pathology service providers (July 17, 2008), *available at* http://www.comcom.govt.nz/BusinessCompetition/Anti-competitivePractices/commercecommissionfilesproceedings.aspx.

12 To see the full text of the Bill, *refer to* the Australian Treasury website, *available at* http://www.treasury.gov.au/contentitem.asp?NavId=002&ContentID=1426.

Commission has made it clear that criminalization of cartel conduct is on its agenda.[13]

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13 Paula Rebstock, Speech to the New Zealand Institute of Management (March 21, 2007), in which she commented that "we [the Commission] have a great deal of interest in seeing moves on the other side of the Tasman to provide significant sanctions for cartel conduct.", *available at* http://www.comcom.govt.nz//MediaCentrea/Speeches/ContentFiles/Documents/PR%20NZIM%20speech%2021%20Mar%202007.pdf.

NORWAY

TRYGVE NORUM AND GAUTE SLETTEN
ADVOKATFIRMAET HAAVIND VISLIE AS

A. Legislative Developments

On June 20, 2008, the Norwegian Competition Act (the "Act") was amended to include a suspensory obligation for notifiable mergers and acquisitions. Effective from July 1, 2008, mergers and acquisitions that are required to be reported in accordance with the Act are prohibited from being implemented before they have been notified to and reviewed by the Norwegian Competition Authority (the "NCA").[1] Certain changes were also introduced to the information requirements for notifications.[2]

On October 17, 2008, the King-in-Council decided to extend the application of the Act to Svalbard (an archipelago in the northern Arctic and under Norwegian sovereignty). The Act will enter into force within the Svalbard territory on July 1, 2009 (with the exception of certain provisions regulating relations with the EEA Agreement).[3]

On December 12, 2008, the Ministry of Government Administration and Reform, which is responsible for competition policy, proposed changes to the leniency rules contained in the Act, as a means of boosting cartel enforcement. The proposal, if adopted into law, would enable employees (including board members) of a company engaged in anticompetitive behavior to obtain immunity from the individual criminal liability that may be imposed under Norwegian law and would ensure their anonymity. Additionally, certain documents used in applications would become privileged and could not be used as evidence in an action for damages.

B. Mergers

On February 1, 2008, the NCA approved the acquisition of specific assets of YX Energi Norge AS by AS Norske Shell, subject to the condition that Shell not acquire two YX gas stations in the southern part of Norway.[4] On May 30, 2008, the NCA approved the acquisition of Lidl Norge GmbH by the grocery chain REMA 1000 AS, on the condition that a retail store in Nordfjordeid be offered to a competitor, either in the form of a sale or in the form of a rental contract.[5] On July 5, 2008, the NCA gave its approval to the acquisition of Lantmännen Analycen AB by Eurofins Danmark A/S ("Eurofins") on the condition that Eurofins divest one of its subsidiaries, Labnett AS, in order to avoid any negative impact in the market for analysis of foodstuffs and corn.[6]

On October 21, 2008, the Commission of the European Union conditionally approved the acquisition of ConocoPhillips' network of "Jet" fuel stations in Scandinavia by the Norwegian oil and gas company StatoilHydro, following an in-depth investigation. In order to gain approval, StatoilHydro committed to carry out several remedies, including to divest all 40 "Jet" fuel stations in Norway.[7]

On December 4, 2008, the NCA prohibited Opplysningen Mobil AS's purchase of Aspiro Søk AS. Competition in the market for SMS directory enquiry services in Norway is significantly restricted and according to the NCA's assessment the concentration would enhance that restriction. Based on this assessment, the NCA refused to

1 *See* the Competition Act of 2004 (Nor.), § 18.

2 *See id.* §§ 18, 19, 20, 21, 26 and 27.

3 Press Release, The Norwegian Ministry of Government Administration and Reform, Svalbard får konkurranselov (October 17, 2008), *available at* http://www.regjeringen.no.

4 *See* NCA Case no. 2008/3.

5 *See* NCA Case no. 2008/10.

6 *See* NCA Case no. 2008/12.

7 Press Release, European Union, Mergers, Commission clears StatoilHydro's proposed acquisition of Jet Scandinavia, subject to conditions (October 21, 2008), *available at* http://europa.eu/rapid/press.

approve the acquisition.[8] The decision has since been appealed to the Ministry of Government Administration and Reform.

C. Anticompetitive Practices

On February 28, 2008, and then subsequently on March 14, 2008, the NCA imposed fines against Borregaard Industries Limited and Brenntag Nordic AS, respectively, for illegal market sharing in the market for technical acetic acid, lasting from October 2002 until at least April 2006.[9] Borregaard was fined NOK 1.6 million (approximately US$233,000) and Brenntag Nordic was fined NOK 1.3 million (approximately US$189,000).

On October 31, 2007, the NCA announced that it had initiated a review of the Norwegian television market. The review was conducted in connection with the future transition from analogue TV signals to satellite distribution, and concerned exclusive distribution of the commercial TV channel TV2 by the satellite distributor Canal Digital. After a period of negotiations conducted by the NCA, TV2 finally entered into non-exclusive distribution agreements with both Canal Digital and Viasat, the only two satellite distributors in Norway.[10]

On October 13, 2008, the Oslo District Court began hearings to review the fine of NOK 45 million (approximately US$6.5 million) that the NCA had imposed on TINE BA in 2007. The NCA concluded that TINE AB had abused its dominant position by negotiating (or attempting to negotiate) exclusive supply arrangements with Norwegian grocery chains for the supply of certain types of cheese. The NCA found that TINE had intended to exclude its main competitor in Norway, Synnøve Finden.[11] No decision on appeal had been rendered as of the writing of this article; judgment is expected in March 2009.

On October 17, 2008, the NCA announced that the Norwegian Public Roads Administration had settled a damages claim against the construction firms Selmer Skanska AS and Veidekke ASA. The Administration also started proceedings against two other firms operating in the market, NCC Construction AS and Reinertsen Anlegg AS. The Administration alleges that the four entrepreneurs engaged in market sharing and illegal tendering on public projects from 1994 through 2000.[12] The NCA stated that it regards private damages claims for alleged anticompetitive behaviour as a positive development in promoting strong competition and curbing cartel behavior.[13]

On November 20, 2008, the NCA imposed a NOK 500,000 (approximately US$73,000) administrative fine on Oslo VVS Service AS and a NOK 250,000 (approximately US$36,000) administrative fine on the plumbing company Håkonrune Rør AS for illegal bid rigging in connection with the submission of bids to renovate sheltered housing in the city of Oslo in autumn 2006.[14]

Finally, on December 17, 2008, the EFTA Surveillance Authority sent a Statement of Objections to Posten Norge AS. The Authority's preliminary view was that Posten Norge AS has infringed Article 54 of the EEA Agreement, concerning abuse of a dominant position, through its strategy and behaviour in relation to its Post-in-Shop (Post i Butikk) network in Norway. The Post-in-Shop network consists of retail outlets, such as grocery stores, from which postal services are provided. By replacing post offices with Post-in-Shops, Posten Norge AS has been able to reduce its costs substantially while increasing the availability of postal services to the public. However, the EFTA

8 *See* NCA Case No. 2008/22.

9 *See* NCA Cases No. 2008/4 and 2008/5.

10 Press Release, Norwegian Competition Authority, Increased Competition in the Norwegian TV Market (September 2, 2008), *available at* http://www.konkurransetilsynet.no.

11 *See* NCA Case no. 2007/2. *See also* Press Release, Norwegian Competition Authority, Konkurransetilsynet møter TINE i Oslo tingrett (October 13, 2008), *available at* http://www.konkurransetilsynet.no.

12 Press Release, Norwegian Competition Authority, Private damages claim in Norwegian cartel case (October 17, 2008), *available at* http://www.konkurransetilsynet.no.

13 Press Release, Norwegian Competition Authority, Private damages claim in Norwegian cartel case (October 17, 2008), *available at* http://www.konkurransetilsynet.no.

14 *See* NCA Case No. 2008/18.

Surveillance Authority has assessed that, in doing so, Posten Norge AS opted for an exclusivity strategy that prevents competing suppliers of parcel services from using certain retail chains and retail outlets as collection points for their parcels.[15]

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15 Press Release, EFTA Surveillance Authority, "Preliminary findings of the Authority suggest that Posten Norge AS has acted in breach of EEA competition rules" (December 17, 2008), *available at* http://www.eftasurv.int/information/pressreleases.

PERU

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A. Legislative and Administrative Developments

In order to implement the recent Free Trade Agreement entered into between Peru and the United States of America, the Executive Branch of the Peruvian Government was delegated the authority to legislate on diverse subject matters.[1] Pursuant to this authority, Peru's Executive Branch enacted two legislative decrees in June 2008 that govern anticompetitive conduct: (i) Legislative Decree 1034, the Law Against Anticompetitive Conduct;[2] and (ii) Legislative Decree 1044, the Law Against Unlawful Competition.[3] The purpose of both decrees is to promote economic efficiency and investment in Peru, by suppressing, prohibiting and sanctioning practices whose actual or potential effect is to hinder the proper operation of a competitive market.

1. The Law Against Anticompetitive Conduct

The Law Against Anticompetitive Conduct replaces the Law against Monopolistic, Controlling and Restrictive Practices of Free Competition, which had been in effect for 15 years. One of the most significant and novel measures introduced by the new legislation is the possibility of sanctioning extraterritorial conduct, provided that it has anticompetitive effects within Peru.

Furthermore, the new law also establishes the principle of "primacy of reality", which provides that the actual effects of market conduct must be given more weight than what the parties formally agreed to do (i.e., substance over form). Thus, if the parties have a formal agreement which differs from its practical effects, only the effects are to be considered.

The new law also establishes new powers for the Technical Secretariat of the Peruvian Competition Agency, which is an autonomous part of the National Institute for the Defense of Competition and Intellectual Property ("INDECOPI"). The Technical Secretariat is responsible for all administrative investigations, has authority to impose fines and other sanctions and issues opinions regarding the existence of anticompetitive acts. Concerns have been expressed that the new roles established for the Technical Secretariat will concentrate authority unduly in the hands of one person.

2. The Law Against Unlawful Competition

The Law Against Unlawful Competition unifies, in a single text, the provisions governing unlawful competition and commercial advertising, which were formerly governed by two separate laws. The integration of these regulatory provisions is significant in that improper commercial advertising is one of the more common forms of unlawful competition in Peru. This Law also offers the advantage of providing more detailed explanations of the various types of unlawful acts that it covers, rather than merely listing them as was the case in the previous law.

3. Changes to INDECOPI

The June 2008 series of decrees also included Legislative Decree 1033, which enacted various changes to the structure of INDECOPI.[4] One of the most important innovations is the addition of more courts to INDECOPI's organizational structure. This should improve the efficiency of INDECOPI's decision-making process.

* The author would like to thank Diego Harman for his assistance in writing this article.

1 Law 29157.

2 Official Gazette, El Peruano (June 25, 2008).

3 Official Gazette, El Peruano (June 26, 2008).

4 Official Gazette, El Peruano (June 25, 2008).

4. Developments in Telecommunications Competition

Important regulatory instruments were also issued in 2008 to promote greater competition among operators providing public telecommunications services. The goal is to benefit consumers and to generate incentives for private investment.

For example, pursuant to the Law for the Access to Infrastructure of Important Suppliers of Public Telecommunications Services, enacted in June 2008, telecommunications operators with significant market positions are now obliged to grant other operators reasonable and non-discriminatory access to their infrastructure.[5]

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[5] Approved through Legislative Decree No. 1019 and published in the Official Gazette, El Peruano (June 10, 2008). *See also* the Resolution of Board of Directors No. 020-2008-CD-OSIPTEL, through which the Supervisory Body of the Private Investment in Telecommunications – OSIPTEL, set forth complementary provisions to the aforementioned law.

PORTUGAL

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A. Legislative and Administrative Developments

1. New Sanctions

Decree-Law No. 18/2008 of January 29, 2008[1] amended the Competition Act[2] by establishing a new ancillary sanction. Under the new regime, the Portuguese Competition Authority (the "PCA") may, in addition to levying fines, deprive infringing undertakings of the right to participate in public tenders. This new ancillary sanction only applies to undertakings that have been found to breach competition rules within the scope of public tenders and has a maximum duration of two years.

2. New Board of the Competition Authority

As the term of office of the first appointed members of the Board of the PCA ended in early 2008, the Council of Ministers Resolution No. 14/2008 of April 24, 2008 appointed new members of the Board for a five-year term, effective March 25, 2008.[3] The PCA is now composed of Professor Manuel Ramos de Sousa Sebastião, as Chairman, and Mr. Jaime Andrez and Mr. João Espírito Santo Noronha, as members.

3. Amendment to the Jurisdiction for Appeals Brought against the Decisions of the PCA

Law No. 52/2008 of August 28, 2008[4] amended the Competition Act provisions concerning the proper jurisdiction for appeals of certain decisions of the PCA. Under the new regime, the exclusive appellate jurisdiction of the Lisbon Commercial Court has generally been replaced by the jurisdiction of the district commercial court deemed territorially competent. This amendment, currently only applicable to three Portuguese districts, is intended to be extended to the whole Portuguese territory as of September 1, 2010.

B. Mergers

On June 26, 2008, the PCA decided not to oppose the merger between Galp Energia Group and the Liquid Bulk Terminal of the Port of Sines.[5] This concentration raised two interesting issues: (i) the need to assess the competitive implications of the concentration at both upstream and downstream levels (i.e. competition between the bidders and the competitive assessment of the merger itself); and (ii) the need to take into account the governing regulatory framework.

C. Cartels

On May 21, 2008, the Lisbon Court of Commerce[6] overruled the PCA's decision of October 31, 2007[7] condemning Aeronorte and Helisul for having executed an agreement to fix prices and other commercial conditions in a public tender launched by the Civil Protection National Service in 2005. The judgment condemned the PCA's lack of evidence in support of its decision and underscored that, when assessing public tenders, the PCA must consider the scope and object of the tenders as well

1 Decree-Law No. 18/2008 (January 29, 2008), *available at* http://dre.pt/pdf1s/2008/01/02000/0075300852.pdf.

2 Law No. 18/2003 (June 11, 2003) (D.R. no. 28 (Series I-A), February 3, 2003), *available at* http://www.anacom.pt/render.jsp?contentId=106189.

3 Presidência do Conselho de Ministros, Conselho de Ministros, Resolução No. 14/2008, *available at* http://dre.pt/pdf2sdip/2008/04/081000000/1877918779.pdf.

4 Law No. 52/2008 (August 28, 2008), *available at* http://dre.pt/pdf1sdip/2008/08/16600/0608806124.pdf.

5 Autoridade Da Concorrência, Decision AC – I – Ccent. 78/2007 GALP/TGLS (June 26, 2008), *available at* http://www.concorrencia.pt/download/2007_78_final_net.pdf.

6 Lisbon Court of Commerce, Case No. 48/08.7TYLSB.

7 Autoridade Da Concorrência, Notice No. 19/2007 (October 31, 2007), *available at* http://www.concorrencia.pt/download/comunicado2007_19.pdf.

as the impact of potential competitors. Additionally, the Court stated that the PCA had failed to prove that the agreement had, as its object or effect, the prevention, restriction or distortion of competition. The agreement executed between the parties to submit a joint bid complied with the rules governing the public tender and nothing prevented other national and international undertakings from participating.

D. Abuse of a Dominant Position

On September 1, 2008, PT Comunicações, S.A. ("PTC"), the former national telecommunications operator, was fined EURO 2.1 million (approximately US$2.9 million) by the PCA for abuse of a dominant position in the wholesale markets for circuit leasing, in breach of both national and community competition laws.[8] The PCA found that PTC had breached Article 6 of the Portuguese Competition Act and Article 82 of the EC Treaty by applying a discriminatory discount system which favored the companies of the PTC Group and adversely affected its competitors. The effect was to limit production, distribution, technical development and investment by PTC Group's competitors.

The PCA's decision exemplifies the recent evolution of the telecommunications sector towards increased competition. This is further illustrated by the spin-off of PT Group in November 2007 and the enforcement of competition rules in this sector by the PCA (the first condemnation of PTC for abuse of a dominant position occurred in August 2007).[9]

E. Anticompetitive Practices

1. Coffee Distributors

In 2007, the Lisbon Court of Commerce overruled the PCA's decision to condemn Nestlé Portugal, S.A. for breaching national and community competition rules by including certain clauses in their standard agreements for the supply of coffee to hotels, restaurants, cafés and similar entities.[10] Further to this judgment, the PCA decided, on July 16, 2008, to conditionally discharge its various procedures opened against Nestlé Portugal, S.A. and other coffee distribution companies.[11]

The PCA based its termination decision upon the subject undertakings providing commitments to: (i) amend their standard agreements for the supply of coffee, in particular with regard to the period of validity and the exclusive purchase obligation; (ii) send a communication to clients whose agreements have been in force for more than five years; (iii) discontinue any legal actions based on breach of these clauses; and (iv) refrain from any similar litigation in the future.[12]

2. Petrol Prices

On June 2, 2008, the PCA delivered its final report on retail petrol prices. The Ministry of Economy and Innovation had asked the PCA to initiate an inquiry because of concerns that price increases in the market did not reflect the costs of production and resulted from collusion between major national fuel companies. The PCA reported that it had found no evidence of restrictive practices that could be imputed to one or more economic agents operating in the market for liquid fuel at the national level.[13]

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8 Autoridade Da Concorrência, Notice No. 15/2008 (September 1, 2008), *available at* http://www.concorrencia.pt/download/comunicado2008_15.pdf.

9 Autoridade Da Concorrência, Notice No. 13/2007 (August 2, 2008), *available at* http://www.autoridadedaconcorrencia.pt/download/comunicado2007_13.pdf. For further discussion, *see also* 2007 Antitrust Year-in-Review – Developments in Portugal.

10 Lisbon Court of Commerce, Case No. 766/06.4TYLSB. (February 15, 2007). For further discussion, *see also* 2007 Antitrust Year in Review – Developments in Portugal.

11 Autoridade Da Concorrência, Notice No. 13/2008 (July 16, 2008), *available at* http://www.concorrencia.pt/download/comunicado2008_13.pdf.

12 Autoridade Da Concorrência, Comunicado No. 13/2008, Autoridade Impõe alterações aos modelos contratuais de quarto empresas para distribuição de café ao canal HORECA (June 16, 2008), *available at* http://www.concorrencia.pt/download/comunicado2008_13.pdf.

13 *See* Report, Relatório da Autoridade da Concorrência sobre o Mercado dos Combustíveis em Portugal (June 2, 2008), *available at* http://www.concorrencia.pt/download/AdC_Relatorio_Petroliferas_02-06-2008.pdf; *see also* Notice No. 6/2008

The PCA continues to investigate the matter, however. In July 2008, the PCA requested that several entities active in the fuel market provide additional information to allow the PCA to undertake a more in-depth analysis of the liquid fuel market.[14]

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of the Authority (May 29, 2008), *available at* http://www.concorrencia.pt/download/comunicado2008_06.pdf; and Notice No. 8/2008 of the Authority (June 26, 2008), *available at* http://www.concorrencia.pt/download/comunicado2008_08.pdf.

14 Autoridade Da Concorrência, Notice No. 16/2008 (September 17, 2008), *available at* http://www.concorrencia.pt/download/comunicado2008_16.pdf.

SERBIA

OLGA CVETKOVIC

A. Legislative Developments

The Serbian Ministry of Trade and Services has produced a draft amendment (the "Draft Law") to the Serbian Law on Protection of Competition.[1] The Draft Law is to be publicly debated by the Government of the Republic of Serbia and should be adopted by the Serbian Parliament in 2009.[2] The Draft Law will be adopted as a part of the Action Plan for Harmonization of Serbian Legislation with the Legislation of the European Union.[3]

The Draft Law proposes significant amendments to Serbian competition law. These changes include clarifications to the language of the law and important changes to Serbian antitrust policy. The most important changes proposed are outlined below.[4]

1. Anticompetitive Agreements

The Draft Law prescribes that "small value" agreements ("sporazumi manje vrednosti") are not illegal. Small value agreements include:

- horizontal agreements between parties whose aggregate market share does not exceed 10% in a relevant market;
- vertical agreements between parties whose individual market shares do not exceed 15% in a relevant market;
- agreements with both horizontal and vertical elements between parties whose individual market shares do not exceed 10% in a relevant market; and
- agreements between parties that have similar effects in a market as other agreements between other parties, where the aggregate market share of all parties to the similar agreements does not exceed 30% and where the individual market shares of each party do not exceed 5% in a relevant market.

The Draft Law proscribes two types of exemptions for anticompetitive agreements: (i) individual exemptions and (ii) group exemptions. The Serbian Government will be granted the authority to regulate these exemptions.

2. Mergers

The Draft Law proposes new thresholds for merger notification. An undertaking will have to notify a merger if:

- the combined worldwide annual income of all parties exceeds EURO 100 million (approximately US$139 million) and the annual income in Serbia of at least one of the parties exceeds EURO 10 million (approximately US$13.9 million); or
- the total annual income in Serbia of at least two parties exceeds EURO 5 million (approximately US$7 million).

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1 Zakon o zaštiti konkurencije [ZZK] [Law on Protection of Competition] Službeni glasnik Republike Srbije, No. 79/05 (Serbia). The Law on Protection of Competition was enacted in 2005.

2 B92, Novi zakon o zastiti konkurenicje, (February 5, 2009), *available at* http://www.b92.net/info/vesti/index.php?yyyy=2009&mm=02 &dd=05&nav_id=343283.

3 Vlada Srbije - Kancelarija za Evropske integracije, Akcioni plan za usklađivanje zakona Republike Srbije sa propisima EU 2007, *available at* http://web.uzzpro.sr.gov.yu/kzpeu/harmonizacija/ap_2007.pdf at 1.

4 Draft Law on Protection of Competition (March 2, 2009), *available at* http://www.mtu.gov.rs/pdf/nacrtzakonaozastitikonkurencije.pdf.

3. Procedural Issues

The most extensive changes proposed by the Draft Law address the authority of the Commission for Protection of Competition (the "Commission"), the enforcement measures the Commission is entitled to adopt and the Commission's decision making process. Some of the most important amendments are:

- the introduction of an administrative measure enabling the Commission to order a merger unwound;
- the introduction of behavioral and structural remedies ("zaštitne i strukturne mere"), allowing the Commission to address the distortions created by prohibited anticompetitive behavior;
- granting the High Commercial Court ("Viši trgovinski sud") the final review of Commission decisions; and
- other changes that grant the Commission more investigative powers, speed up the Commission's decision making process and ensure the neutrality of the Commission's officers.

B. Mergers

One of the most significant problems with Serbia's current antitrust legislation is that the threshold for reviewable concentrations (mergers) is too low.[5] Concentrations that exceed this threshold must be approved by the Commission.[6] The low threshold has resulted in a large number of requests for approval submitted to the Commission, which has significantly slowed the Commission's decision making process since it does not possess sufficient personnel to review all of the submitted requests.[7]

One of the Commission's most significant merger decisions (delivered at the end of 2007) involved the controversial merger between Primer C d.o.o. and C market a.d., two grocery store chains that sought to merge in December 2005. The Commission did not approve the merger initially. However, the decision was appealed to the Supreme Court of Serbia, which ordered the Commission to re-examine its decision.[8] The Commission did so, and decided once again to deny approval.[9] This case has generated significant debate among competition professionals about the most appropriate way to determine market shares.[10] The case also has attracted considerable public attention.[11]

C. Anticompetitive Agreements

Five proceedings regarding restrictive agreements were brought to the Commission in 2008. Four proceedings are still ongoing and the Commission's decisions are pending. In the fifth proceeding, the Commission reached a decision condemning a pharmaceutical price-fixing cartel.[12]

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5 The current notification threshold is that the combined annual income in Serbia of all parties to the transaction exceeds an amount in CSD equivalent to EURO 10 million (approximately US$13.9 million), the combined worldwide income of the parties exceeds EURO 50 million (approximately US$69.7 million) and that at least one of the parties is registered in Serbia.

6 Zakon o zaštiti konkurencije [ZZK][Law on Protection of Competition] Službeni glasnik Republike Srbije, No. 79/05 Art. 23.

7 Komisija za zaštitu konkurencije, Godišnji izveštaj o radu komisije za zaštitu konkurenicje za 2007 godinu, *available at* http://www.kzk.org.yu/download/Izvestaj%20KZK%20%202007.pdf, at 1.

8 Vrhovni sud Srbije [VSS][Supreme Court of Serbia] November 13, 2007 U. 4466/06 (Serbia).

9 Komisija za zaštitu konkurencije [KZK][Commission for the Protection of Competition] (November 26, 2007), 6/0-02-138/07-15 (Serbia).

10 More about this issue in Prof. Miroljub Labus, Uporedna analiza relevantnog tržišta: koncept i primena, Ekonomika Preduzeća Jan.-Feb. 2008 also Prof. Dragan Đuričin, Dr Dragan Lončar, Dr Vesna Rajić, Merenje koncentracije tržišta: primer sektora prehrambene maloprodaje Beograda, Ekonomika Preduzeća, Jan.-Feb. 2008.

11 *See* The Anti-Corruption Council, Report on the Company C Market*, available at* http://www.antikorupcija-savet.sr.gov.yu/eng/view.jsp?articleId=579.

12 Telephone interview with a representative of the Commission for Protection of Competition in Serbia (November 13, 2008).

The case involved a group of pharmaceutical companies[13] that held over 80% of the market for pharmaceutical products in Serbia entering into agreements that set out the minimum prices for pharmaceutical products; prescribed maximum discounts available; and coordinated the parties' responses to public procurement procedures.

The companies also imposed vertical restraints on their distributors, not allowing them to produce any pharmaceutical products or to resell purchased products to other distributors (i.e., only distribution to final consumers was permitted). The distributors were also not allowed to change prices or participate in public procurement procedures without the consent of the respective companies.[14] The Commission declared that the agreements were null and void and referred the case to the administrative courts for sentencing.[15]

D. Abuse of a Dominant Position

The Commission issued one decision in 2008 holding that an undertaking was abusing its dominant position.[16] In this decision, the Commission concluded that the Danube Food Groups BV ("DFG") had abused its dominant position in the market for the purchase of raw milk by unfairly dictating terms to Serbian dairy farmers.

DFG, based in the Netherlands, is the majority shareholder in the three largest dairy processors in Serbia and purchases more than 47% of the raw milk produced in the country. The Commission found that farmers have no ability to negotiate or influence terms of agreement because of their lack of economic strength and alternative options. For example, the price schedule is set by DFG, can be changed at its sole discretion and had been changed in DFG's favour in the past. The Commission imposed several remedial measures on DFG, including requiring that prices be set according to certain criteria and that farmers receive notice of any price changes.

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[13] Hemofarm a.d., Galenika a.d., Zdravlje a.D., Jugomedia a.d., Habitfarm a.d., Srbolek a.d., Slavijamed d.o.o., Pharma Swiss d.o.o., Velefarm a.d., Vetfarm a.d., Farmalogist d.o.o., Jugohemija Farmacija d.o.o., Vetprom Hemikalije a.d., Farmanova Veleprodaja d.o.o. and Unihemkom d.o.o.

[14] Komisija za zaštitu konkurencije [KZK][Commission for the Protection of Competition] (December 12, 2008), 4/0-01-105/08-125 (Serbia), *available at* http://www.kzk.sr.gov.yu/download/Resenje%20KZK%2012.2008.pdf.

[15] SEEbiz, Komisija: Utvrđeno kartelno ponašanje u farmaceutskoj industriji (January 9, 2009), *available at* http://www.seebiz.eu/sr/kompanije/farmacija/komisija-utvrdeno-kartelno-ponasanje-u-farmaceutskoj-industriji,34498.html.

[16] Komisija za zaštitu konkurencije [KZK][Commission for the Protection of Competition] (January 25, 2008), *available at* http://www.kzk.org.yu/download/Resenje%20-%20Danube%20Foods%20Group.pdf at 2-3. The Commission is also currently reviewing another two abuse of dominance cases. Telephone interview with a representative of the Commission for Protection of Competition in Serbia (November 13, 2008).

SOUTHEAST ASIA
CAMBODIA/LAOS/VIETNAM

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DFDL MEKONG

A. Introduction

Each of Cambodia, Laos and Vietnam is at a different stage in the development of its competition law and policy. There is certainly a long way to go before any of these countries has a robust competition law regime. It must be recognized that each also faces significant other legal, economic and social challenges in its transition to a market economy; therefore, it is not surprising that competition law appears to be a fairly low priority in each country at this time. In fact, of the three countries, only Vietnam and Laos have enacted competition laws and only Vietnam has implemented its legislation. That said, the recent announcement of investigative activity related to price fixing in the Vietnamese steel industry, and the progress towards finalizing the Cambodian competition law, suggest that there is steady, if slow, movement towards implementation of active competition regimes.

B. Kingdom of Cambodia

No competition law is in effect or has been promulgated in Cambodia at this time. However, the Constitution of Cambodia contains various provisions relevant to competition law and enforcement and supports the enactment of such laws.[1] In addition, the Law on Marks, Trade Names and Acts of Unfair Competition has relevant provisions relating to unfair competitive practices.[2]

As part of its accession to the World Trade Organization, Cambodia committed to various reforms, including the enactment of a competition law. Based on these commitments, Cambodia was to have a competition law passed by both the National Assembly and Senate by January 1, 2006. As of this date, the draft is still being worked on by the Ministry of Commerce with technical assistance from UNCTAD and other international parties.

The most recently circulated English language draft of the Competition Law is the June 30, 2006 version.[3] The 2006 draft was unclear in many respects despite the fact that it included commentary. A revised draft was circulated for comment in Khmer and French in June 2007. A recent discussion with an official at the Ministry of Commerce has confirmed that this draft has been revised again and a translation into English is being finalized. The official has indicated that circulation is imminent.

The Ministry official also indicated that the current expectation is that the competition law will be submitted to the National Assembly in 2009. Of course, it is the Khmer language version of the law that will be effective and there is no assurance that the enacted version of the law will reflect any previously circulated draft.

C. Lao People's Democratic Republic

The Decree on Trade Competition was issued on February 4, 2004 and became effective on August 1, 2004.[4] The Decree is to be implemented by the

1 Constitution (1993) (Cambodia), as amended March 4, 1999, *available at* http://www.cambodia.gov.kh/unisql1/egov/english/organ.constitution.html. *See* Art. 56, "The Kingdom of Cambodia shall adopt market economy system. The preparation and process of this economic system shall be determined by law."

2 *See* Royal Decree No. NS/RKM/0202/06 (February 7, 2002), at Art. 22 and 23, *available at* http://www.globalcompetitionforum.org/regions/asia/Cambodia/02lw-TrademarCompet1.pdf.

3 No publicly circulated draft is currently available. The author's version is an unofficial translation from French circulated for discussion purposes.

4 Royal Decree No. 15/PMO (Laos), February 4, 2004.

Ministry of Industry and Commerce and the Trade Competition Commission. However, the Trade Competition Commission has not yet been appointed and the Ministry has confirmed that there have been no cases dealt with since the Decree was issued.

The Ministry has indicated that it is expecting a decree on consumer protection to be issued in 2010.

D. Socialist Republic of Vietnam

The Law on Competition was passed on December 3, 2004 and took effect on July 1, 2005.[5] The law is comprehensive and addresses economic concentrations and unfair practices, as well as practices in restraint of competition. In addition to the law itself, detailed implementation guidelines have been produced dealing with issues relating to the Competition Council, Competition Administration Department ("VCAD") and providing further details on the provisions of the Law on Competition. In broad terms, the Law on Competition establishes the Competition Council, which is responsible for adjudicating restrictive competition complaints, whereas VCAD is the investigatory branch with responsibilities over the review of economic concentrations, exemption applications and sanctioning of acts that are considered unfair competition.

Until recently, it appeared that the primary focus of VCAD was on capacity building, advocacy and consulting activities designed to increase awareness of competition law within Vietnam. VCAD and the Ministry of Industry and Trade have received considerable international support with capacity building activities. For example, a Letter of Intent relating to capacity building was signed with the Netherlands in 2008.[6]

On June 4, 2008, VCAD signed a Memorandum of Understanding with the Health Inspectors to enhance enforcement of competition law in the health sector in Hanoi. The main terms of the MOU are available on VCAD's website.[7]

VCAD has also recently been involved in "outreach" seminars dealing with issues related to control of economic concentrations in Hanoi and Ho Chi Minh City.[8]

VCAD faces considerable difficulties as Vietnam has not fully transitioned to a market economy and government agencies and industry groups still frequently take measures to protect against "unhealthy competition" and promote cooperative activities to support specific industrial sectors or the economy as a whole. Earlier this year, for example, the Vietnam Banking Association, the State Bank of Vietnam and even the Ministry of Industry and Trade were all involved in activities to regulate interest rates and promote programmes that raised competition law concerns.[9]

While VCAD has received competition complaints, it has provided no information with respect to investigations or remedies either on its website or in response to enquiries. Of particular interest is the possible opening by VCAD of an investigation into a reported agreement by members of the Vietnam Steel Association to fix prices. This has been widely reported in Vietnam-related news services,[10]

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5 Order No. 27/2004/QH11, December 3, 2004, *available at* http://www.adb.org/documents/others/ogc-toolkits/competition-law/documents/vn_order_23_2004.pdf.

6 *See* News Release, Vietnam Competition Administration Department, The Ministry of Industry and Trade of Vietnam and The Ministry of Foreign Affairs of The Netherlands Signing of Letter of Intent on Cooperation on Capacity Building in The Field of Competition Law (March 17, 2008), *available at* http://www.qlct.gov.vn/Web/Content.aspx?distid=676&lang=en-US.

7 *See* News Release, Vietnam Competition Administration Department, VCAD and Health Inspectors signing MoU on cooperation in enforcement of competition law in health sector (September 17, 2008), *available at* http://www.qlct.gov.vn/Web/Content.aspx?distid=970&lang=en-US.

8 *See* News Release, Vietnam Competition Administration Department, Seminar "Economic concentration - practices in Vietnam and international experience" in Hochiminh city (November 6, 2008), *available at* http://www.qlct.gov.vn/Web/Content.aspx?distid=1245&lang=en-US.

9 *See* News Release, VietNamNet Bridge, Banks Not Allowed to Offer Promotion Programmes (April 28, 2008), *available at* http://english.vietnamnet.vn/biz/2008/04/780558/.

10 *See* News Release, Thanhnien News, Steel Price Fix under Antitrust Probe (October 20, 2008), *available at*

although no information has been provided on VCAD's website as of the date of writing and VCAD declined to provide any information with respect to this matter other than to confirm that it was collecting information. It is possible that, despite the implication of the English language reports, VCAD has not yet actually begun a preliminary investigation as of the date of writing. For example, it appears that the Vietnamese-language *Vietnam Economic Times* reported that VCAD is only weighing the option of opening an investigation.[11] However, indications are that an investigation of some nature is taking place although official verification of this or a determination of the nature of the investigation cannot be attained.

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http://www.thanhniennews.com/business/?catid=2&newsid=42994.

[11] This reference was not available on the publication's English language website.

SPAIN

SUSANA CABRERA AND KONSTANTIN JÖRGENS
GARRIGUES

A. Legislative Developments

Regulation 261/2008 (the "Regulation") came into force on February 28, 2008.[1] The Regulation implements some of the most important features of the new Spanish Antitrust Law (Law 15/2007).[2]

1. Leniency Program

Of particular importance is the introduction of a leniency procedure in Spain which had been delayed until the Regulation came into force.[3] Under this procedure, the first party requesting leniency is entitled to full immunity provided that the information it supplies is sufficient to allow the CNC to open an investigation. Companies that have already received a statement of objections, and cartel ring leaders, cannot claim immunity. They can, however, request a reduced fine if they produce evidence that significantly helps the investigation. The granting of leniency is also subject to the requesting party's complete and ongoing cooperation with the CNC throughout the procedure. The requesting party also must end its involvement in the cartel immediately, except where the CNC considers it necessary for the requesting party's involvement to continue in order to ensure that the investigation is effective.

2. De minimis Conduct

In general, the Regulation follows the Community law approach to *de minimis* conduct.[4] Thus, it provides that the following types of conduct are not considered capable of affecting competition: (i) conduct between competitors, real or potential, where their joint market share does not exceed 10% in any relevant market; and (ii) conduct between non-competitors where the market share of each company does not exceed 15% in any relevant market. When it is not possible to determine whether the conduct involves competitors or non-competitors, a 10% market share threshold will be applied to each party in each relevant market.

The main difference between the Regulation and Community law is that the Regulation does not consider that there are any circumstances in which non-competition agreements with terms longer than five years can be *de minimis*. Further, certain types of conduct continue to be excluded from the definition of *de minimis*, namely conduct whose direct or indirect object is to: (i) fix the prices of products sold to third parties; (ii) limit production or sales; or (iii) share markets or clients, including bid rigging and/or restricting imports or exports. Vertical agreements which cannot be considered *de minimis* include: (i) the establishment of a fixed or minimum resale price by which the purchaser is bound; (ii) the restriction of active or passive sales to final users by members of a selective distribution network; and (iii) the restriction of reciprocal supplies between distributors.

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1 Boletín Oficial de Estado (Official Gazette) (B.O.E.) 2008, 50 (February 27, 2008), *available at* http://www.boe.es/boe/dias/2008/02/27/pdfs/A11575-11604.pdf.

2 Real Decreto – Ley, B.O.E. 2008, 50, *available at* http://www.boe.es/g/es/. *See also* Press Release, CNC, Approval of the Royal Decree that Implements the Competition Regulations (February 22, 2008), *available at* http://www.cncompetencia.es/pdfs/novedades/85ing.pdf.

3 Leniency applications are made to the Cartel Unit, which forms part of the Investigation Directorate of the National Competition Commission (*Comisión Nacional de la Competencia* or "CNC"). *See* Press Release, CNC, The CNC's Introduction of the Leniency Programme is a Success. The CNC Receives the First Applications on the First Day After it Comes Into Force (February 29, 2008), *available at* http://www.cncompetencia.es/pdfs/novedades/87ing.pdf.

4 The CNC may publish guidelines to develop and specify the criteria for defining *de minimis* conduct.

3. Simplified Notification Procedure

The other major element of the Regulation is its adoption of two model forms for merger notifications, one "full" and the other "short".[5] The "full" form is similar to the "Form CO" used for notifications to the European Commission. The "short" form requires considerably less information and is intended to be used for mergers that are unlikely to raise issues, e.g., where the parties do not compete in the same product and geographic markets.

Unlike the European Commission, whose authorization decision in a simplified procedure is limited to a very brief description of the parties, the CNC continues to publish complete case assessments even when the short form notification is used. This is one of the reasons why, in practice, the CNC usually asks the parties for additional information beyond what the short form requires. The fact that a report will be issued also requires the parties to submit a request for confidentiality in the same way as in the ordinary (full) notification procedure.

B. Mergers

85 transactions were notified to the antitrust authorities in 2008.[6] Only three of these transactions were referred to a "second phase" in-depth investigation (two of which were subsequently abandoned)[7] and one was approved in the "first phase" subject to commitments.[8]

The CNC made use in 2008 of its extended powers to suspend the maximum time periods to resolve merger cases. Under the Antitrust Law, the maximum periods for resolving a case may be suspended, *inter alia*, "when third parties or other public entities must be requested to disclose documents and other matters needed to decide the case".[9] In the first phase, the CNC now sometimes carries out market tests involving the parties' customers and suppliers. Third parties have 10 days within which to respond, but there are frequently delays. As a result, time periods have been suspended in a number of cases. Consequently, the first phase of review can last more than one month even in relatively straightforward cases if the authorities decide to undertake a market test.

Similarly, the mandatory involvement of sectoral regulators also may result in delays even in those cases which, in principle, would not give rise to competition problems. Under the Antitrust Law, the CNC must request the sectoral regulators to issue a non-binding report where the parties to the merger operate in a regulated sector. This may result in a suspension of up to three months. Since the notion of sectoral regulators is not defined, the application of this provision continues to create confusion. So far, however, the first phase approval process has not been delayed due to the intervention of sectoral regulators.

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5 Annex II and III of Regulation 261/2008.

6 *See* Merger Control Resolutions and Pending Cases under the new Act 15/2007 (Resoluciones y Expedientes en trámite Control de Concentraciones, Comisión Nacional de Competencia), *available at* http://www.cncompetencia.es/index.asp?m=50&p=47. *See also* http://www.cncompetencia.es/index.asp?m=41&p=11. This compares to 87 notifiable transactions over the same period in 2007.

7 The second phase decisions adopted so far in 2008 relate to Case C/0022/07 Repsol/BP Oil JV, which was notified last year and ultimately approved without conditions, *available at* http://www.cncompetencia.es/index.asp?pag=29&menu=0&m=50&p=47.

8 *See* Case C/0113/08 Supermercados Sabeco/Galerias Primero. Press Release CNC, The CNC has decided to make Supermercados Sabeco's takeover of Galerías Primero conditional on the fulfilment of certain commitments (December 10, 2008), *available at* http://www.cncompetencia.es/PDFs/novedades/128ing.pdf.

9 *See* Art.37.1(b) of the Spanish Competition Act 15/2007.

C. Cartels

The CNC has opened an investigation into whether Spanish insurance companies have colluded by offering uniform premiums in connection with ten-year construction defects insurance.[10] There was also an increased level of dawn raid activity in 2008, targeting companies in industries such as waste management,[11] Jerez sherry,[12] iron,[13] cosmetics[14] and road transit.[15] There were complaints about the manner in which some of these raids were conducted, but the CNC has defended its practices.

D. Anticompetitive Practices

In 2008, 86 resolutions were adopted in cases involving anticompetitive practices.[16] In one such case, the CNC ruled on an appeal filed by Gestevisión Telecinco ("T5") against the former Spanish Antitrust Service's (*Servicio de Defensa de la Competencia*) decision to close its file on T5's complaint that the tariffs charged by the entity managing the intellectual property rights of artists, interpreters and performers in Spain were abusive and discriminatory.[17] The CNC Council upheld T5's appeal and ordered that the investigation be re-opened. The CNC also imposed fines on companies in 2008 for anticompetitive practices in a variety of sectors, including: electricity;[18] container haulers;[19] and media rights for football games.[20]

10 Press Release, CNC, Ten Year Construction Defence Insurance (January 31, 2008), *available at* http://www.cncompetencia.es/PDFs/novedades/73ing.pdf. The CNC also found one of the insurance companies under investigation for obstruction. Case SNC /02/08 Caser-2, *available at* http://www.cncompetencia.es/PDFs/resoluciones/2008/2314.pdf.

11 Press Release, CNC, The CNC Investigates Various Companies in the Waste Management Sector (February 7, 2008), *available at* http://www.cncompetencia.es/PDFs/novedades/77ing.pdf.

12 Press Release, CNC, The CNC has Launched an Investigation Into a Possible Market-Sharing and Price-Fixing Cartels in the Jerez Sherry Sector (July 17, 2008), *available at* http://www.cncompetencia.es/PDFs/novedades/109ing.pdf.

13 Press Release, CNC, The *Comisión Nacional de la Competencia* (CNC) is Investigating a Possible Agreement to Fix Trading Conditions in the Iron Sector (July 9, 2008), *available at* http://www.cncompetencia.es/PDFs/novedades/107ing.pdf.

14 Press Release, CNC, The CNC Initiates the Investigation of Three Possible Price Agreements in the Cosmetic Sector (June 19, 2008), *available at* http://www.cncompetencia.es/PDFs/novedades/105ing.pdf.

15 Press Release, CNC, The CNC has launched an investigation into a possible concerted practice and/or cartel in the road transit sector (November 19, 2008), *available at* http://www.cncompetencia.es/PDFs/novedades/124ing.pdf.

16 Resolutions are *available at* http://www.cncompetencia.es, under "*resoluciones*". This is lower than the previous year, when 96 resolutions were adopted, of which just two were under the new law.

17 *See* CNC Council Decision of February 4, 2008, Case R 714/07 Telecinco/AIE; *see also* Press Release, The CNC will Continue to Investigate the Supposed Abuse of a Dominant Position by the Intellectual Property Rights Management Entity AIE (February 6, 2008), *available at* http://www.cncompetencia.es/PDFs/novedades/74ing.pdf.

18 *See* CNC Decision of February 14, 2008, Case 624/07 Iberdrola; *see also* Press Release, The CNC Imposes a Fine of €15.4 million on Iberdrola Generación for Abuse of a Dominant Position on the Electricity Generation Market (February 15, 2008), *available at* http://www.cncompetencia.es/PDFs/novedades/79ing.pdf. *See also* Press Release, CNC, The CNC has sanctioned Gas Natural €1.5 million for abuse of dominant position in the electricity generation markets (April 26, 2008), *available at* http://www.cncompetencia.es/PDFs/novedades/96ing.pdf.

19 Press Release, CNC, The CNC Fines the Cartel of Container Hauliers in the Port of Barcelona (April 4, 2008), *available at* http://www.cncompetencia.es/PDFs/novedades/93ing.pdf.

20 Press Release, CNC, Press Release on Case S/0006/07 (Football Rights) (April 9, 2008), *available at* http://www.cncompetencia.es/PDFs/novedades/94ing.pdf.

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SWEDEN

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A. Legislative Developments

1. Merger Control

Sweden's amended Competition Act (the "2008 Competition Act") came into force on November 1, 2008.[1] Among other amendments, the 2008 Competition Act contains new merger notification thresholds and a new substantive test for transactions, i.e., whether they "significantly impede effective competition or the development thereof". According to the new thresholds, a mandatory notification is triggered in Sweden if: (i) the parties to the concentration generate a combined turnover in Sweden exceeding SEK 1 billion (approximately US$128.4 million); and (ii) each of at least two of the parties generates a turnover in Sweden exceeding SEK200 million (approximately US$25.7 million).

The 2008 Competition Act also introduces a provision making pre-merger notification mandatory. No action may be taken to implement the concentration during the initial review period.[2] There are no direct sanctions for failure to notify or for breach of the standstill obligation. However, the Swedish Competition Authority (the "SCA") may issue a decision requesting that a notification be submitted or prohibiting the parties from implementing a notifiable concentration, and impose fines for failure to comply with the decision.

Additional minor amendments and clarifications to the merger review process include the automatic extension of the SCA's initial review period (Phase I) from 25 to 35 working days if commitments are offered by the parties to the concentration.

2. Sanctions and Leniency

Individual sanctions have not been part of Swedish competition legislation for many years. Although the question of creating criminal sanctions for individuals was discussed during the legislative process, criminal provisions were not included in the new Competition Act. However, an important amendment in the new Competition Act is that courts are authorized to impose disqualification orders on persons exercising legal or actual management of undertakings found to have initiated or participated in a cartel. It is possible to avoid a disqualification order by applying for leniency and thus contributing to the SCA's investigation.

The 2008 Competition Act also aligns Swedish rules for calculating administrative fines more closely with EC rules, taking into account the gravity of the infringement and its duration. These amendments are expected to increase predictability for undertakings.

As regards leniency, the relevant provisions of the Competition Act have been amended to permit undertakings that had the leading role in a cartel to receive full immunity. Only undertakings that have coerced other undertakings to participate in a cartel are barred from full immunity. The 2008 Competition Act does not include a marker system, however, which may cause practical problems for applicants making leniency filings in multiple jurisdictions.

B. Cartels

In September 2008, the Market Court delivered its judgment in a case involving a car retailer cartel, imposing a fine of SEK 21.2 million (approximately US$2.7 million) on eight car retailers.[3] The Court

1 (SFS 2008:579) (Swed.).

2 In order to extend the standstill obligation beyond the initial review period, the SCA must request the Stockholm City Court to issue an order prohibiting implementation until final clearance is granted.

3 Case 2008:12, Market Court, Konkurrensverket./.Aktiebolaget Bil-B and Others (September 10, 2008), *available at* http://www.marknadsdomstolen.se.

found that the car retailers had, over a four-year period: (i) engaged in price fixing by agreeing on the sales price for new cars; (ii) agreed on rebates for new cars; (iii) shared and allocated markets for sales of new cars; (iv) agreed on the purchase and sales prices for used cars; and (v) engaged in market sharing by agreeing that different rebates would be applicable within and outside their districts.

The Market Court concluded that these agreements violated Article 81 of the EC Treaty and the equivalent provision under the Swedish Competition Act. Given the serious nature of the conduct, it appears that the Court was prepared to impose even higher fines, but was bound to the penalty requested by the SCA.[4]

C. Abuse of a Dominant Position

In March 2008, the Swedish Supreme Court delivered an intermediate judgment in a case between ferry operator BornholmsTrafikken and Ystad Hamn (a harbour in southern Sweden).[5] BornholmsTrafikken brought a claim against Ystad Hamn in 2002 in the District Court alleging, *inter alia*, that Ystad Hamn had abused its dominant position by charging excessive prices for port services. The intermediate judgment of the District Court was appealed to the Court of Appeal, which found that Ystad Hamn controlled a dominant position in the relevant market, which it defined as the supply of port services in Ystad Hamn to ferry operators who perform ferry services for passengers and vehicles on the Ystad-Rönne route.[6] The Swedish Supreme Court subsequently upheld the interim findings of the Court of Appeal. The principal case on the merits is still pending before the District Court.

On December 11, 2008, the European Court of Justice (the "ECJ") issued a preliminary ruling in an abuse of dominance case,[7] following a request by the Swedish Market Court.[8] At issue is whether Stim (a copyright collection society which administers and licenses rights to music and text) is abusing its dominant position by applying a certain payment model for the right to broadcast copyright-protected music. Pursuant to this applied payment model, a fee is payable based on a certain share of the commercial TV channels' revenue, or alternatively based on a certain share of the commercial TV channels' revenues from advertising and/or subscription fees, or according to the payment model set out in an agreement between the TV channels and Stim. Two television stations, TV4 and Kanal 5, applied for an injunction ordering Stim to cease applying its payment model. The ECJ found that the application of the payment model in question *could* be considered an abuse of Stim's dominant position if a less costly model were available. Stim could also be considered to abuse its dominance by applying different payment models for commercial and public service TV channels if dissimilar models are applied to equivalent services, placing the commercial TV channels at a competitive disadvantage, unless such practice could be objectively justified.

D. Other

In April 2008, the SCA published its findings following an investigation into the activities of trade associations in Sweden.[9] According to the SCA, many of Sweden's trade associations are involved in activities that could constitute an infringement of Swedish competition law. Examples of such activities include price recommendations and the collection and distribution of information regarding prices, sales and costs. The SCA has distributed its report to 400 trade associations and asked them to respond. This will be used as the basis for SCA

4 Interestingly, one of the retailers was fined even though it had not participated in all of the cartel meetings. The Court nevertheless found that this retailer had been part of the cartel because it had continuously received information about its activities.

5 Case T 2808-05, Supreme Court, State of Denmark through BornholmsTrafikken./.Ystad Hamn Logistik Aktiebolag (March 19, 2008).

6 Case T 2094-03, State of Denmark through BornholmsTrafikken./.Ystad Hamn Logistik Aktiebolag (June 2, 2005).

7 The judgment of the ECJ is *available at* http://curia.europa.eu/index.htm.

8 Case C-52/07, Kanal 5 Ltd and TV4 AB v The Swedish Performing Rights Society (Stim).

9 Swedish Competition Authority Report, Rapportserie 2008:1 (April 2008), *available at* http://www.kkv.se/upload/Filer/Trycksaker/Rapporter/rap_2008-1.pdf.

guidelines on permissible trade association activities.

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SWITZERLAND

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A. Legislative and Administrative Developments

1. Review of the ACart

The Swiss Federal Council (the "SFC") is expected to submit a report to the Swiss parliament in early 2009 evaluating the effectiveness of Switzerland's competition legislation (the "ACart").[1] This review is mandated by Article 59A of the ACart and has been ongoing since 2007. Potential topics to be addressed in the report include: the institutional setting of the Swiss competition authorities; international cooperation with other competition authorities; sanctions against natural persons for competition law violations; possibilities for facilitating private enforcement of competition law; the assessment of vertical restraints; and an amendment of the merger notification thresholds and the substantive test to be applied to merger reviews.

2. Changes to the Competition Commission

Following a decision by the SFC in November 2007, the Swiss Competition Commission ("ComCo") was downsized from 15 to 12 members in January 2008.[2] In addition, ComCo is no longer divided into three chambers, with each in charge of a particular industrial sector. ComCo now makes its decisions as a joint commission and the number of vice-presidents has been reduced from two to one.[3] Even with these changes, the organization of ComCo remains the subject of ongoing debate.[4] In particular it is believed that the inclusion of representatives of interest groups impairs ComCo's independence.

3. Enhanced Cooperation with the EU

In an interview in June 2008, Professor Walter Stoffel, the president of ComCo since 2003, called for greater cooperation with the European competition authorities.[5] Formal cooperation, including the exchange of confidential information, coordination of investigations (in particular dawn raids) and collaboration in international merger controls would require a legal basis; *i.e.* a bilateral treaty between Switzerland and the EU.[6] Following a meeting in September 2008 between the Swiss Federal Councillor for Economic Affairs, Doris Leuthard, and EU Competition Commissioner, Neelie Kroes, the president of ComCo was given a mandate to discuss the possibility of such

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1 For an unofficial English translation of the ACart, *see* http://www.weko.admin.ch/imperia/md/images/weko/lcart-english-120107.pdf.

2 Swiss Competition Commission (ComCo), Annual Report 2007 to SFC in accordance with Article 49(2) ACart, at 4 and 23, *available at* http://www.weko.admin.ch/publikationen/00188/index.html?lang=en.

3 Interview by NEUE ZÜRCHER ZEITUNG (NZZ) AM SONNTAG (Swiss newspaper) with Professor Walter Stoffel, President, ComCo, Ein gravierender Regulierungsfehler (September 28, 2008), *available at* http://www.nzz.ch/nachrichten/wirtschaft/aktuell/ein_gravierender_regulierungsfehler_1.939150.html. *See also* Andreas Valda, *Die Wettbewerbsbehörde handelt gegen das vorgeschriebene Reglement*, TAGESANZEIGER (Swiss newspaper) (September 19, 2008), at 29.

4 *See* ComCo, Organisation Chart, *available at* http://www.weko.admin.ch/kommission/00203/index.html?lang=en.

5 Interview by NZZ am Sonntag with Professor Walter Stoffel, President, ComCo, Radnicht Zurückdrehen (June 1, 2008), at 27, *available at* http://www.nzz.ch/nachrichten/Wirtschaft/aktuell/rad_nicht_zurueckdrehen_1.747979.html.

6 For cooperation in the field of air transport, *see* Agreement between the European Community and the Swiss Confederation on Air Transport - Final Act, in OFFICIAL JOURNAL OF THE EUROPEAN UNION, 2002, L 114, (April 30, 2002), at 73 – 90, *available at* http://www.europa.admin.ch/dokumentation/00438/00464/00652/index.html?lang=en.

cooperation with EC Director General for Competition Philip Lowe.[7]

B. Mergers

Several merger decisions of ComCo in 2008 demonstrate ComCo's willingness to use behavioral remedies to address its concerns. On May 17, 2008, for example, ComCo allowed Switzerland's second largest retailer, Coop, to acquire the Carrefour stores in Switzerland run by Distributis subject to certain conditions, including: (i) an obligation that Coop not impose exclusivity on any of its distributors; (ii) a prohibition on the acquisition of any other food retailer in Switzerland within the next six years; and (iii) an obligation to offer an aggregate sales area of 20,000 m^2 to competitors in particularly concentrated markets.[8]

On August 21, 2008, ComCo approved Heineken Switzerland Ltd.'s acquisition of the beverage business of Eichhof Holding Ltd., Switzerland's last major independent beer brewer.[9] The phase two in-depth review of the concentration had revealed that there were no significant barriers for new competitors to enter the relevant market and that there would still be sufficient competition in the local and regional beer markets after the acquisition. Furthermore, large retailers limit the two brewery groups' ability to act without restraint in the market. Accordingly, ComCo concluded that the concentration would not create or strengthen a dominant position of the Heineken/Eichhof brewery group. ComCo further held that the merger did not lead to collective market dominance by Heineken/Eichhof and the biggest Swiss brewery, Carlsberg/Feldschlösschen.

On June 3, 2008, ComCo cleared the acquisition of The Phone House Ltd., an independent retail chain for mobile telecommunication services, by Switzerland's largest telecommunications provider, Swisscom.[10] The secretariat of ComCo had previously concluded that the concentration was not subject to notification; however, according to Article 9(4) ACart and a decision of ComCo, an acquisition by a company which is dominant in a certain market is subject to notification, even if the thresholds for notification are not met, if that market or an upstream or downstream market is affected by the concentration. Since Swisscom is dominant in the market for landline telecommunication services and The Phone House Ltd. competes with Swisscom in the downstream market for landline-related services, ComCo reversed its secretariat's decision and declared that the acquisition was subject to mandatory notification.[11]

In March 2008, ComCo gave conditional approval to the acquisition of Steffen-Ris Holding Ltd. by Fenaco, the largest company in the Swiss agricultural sector.[12] The concentration led to

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7 *See* Simon Thoenen, *Kartellwächter suchen Hilfe in Brüssel*, HANDELSZEITUNG (Swiss newspaper), September 17, 2008, at 19, *available at* http://www.handelszeitung.ch/artikel/Unternehmen-Kartellwaechter-suchen-Hilfe-in-Bruessel_397666.html.

8 Press Release, ComCo, Weko bewilligt die Übernahme von Carrefour durch Coop unter Auflagen (March 27, 2008), *available at* http://www.weko.admin.ch/publikationen/pressemitteilungen/00311/index.html?lang=de; for further details on the acquisition of Distributis by Coop, *see* 2007 ANTITRUST YEAR IN REVIEW, at 87.

9 Press Release, ComCo, Weko bewilligt die Übernahme von Eichhof durch Heineken (August 21, 2008), *available at* http://www.weko.admin.ch/publikationen/pressemitteilungen/00317/index.html?lang=de. *See also* ComCo's Statement of August 18, 2008, *available at* http://www.weko.admin.ch/news/00008/Heineken_Eichhof_RPW_Version.pdf?lang=de.

10 ComCo, LAW AND POLICY ON COMPETITION 2008, at 341-350, *available at* http://www.weko.admin.ch/publikationen/00212/RPW2008-2.pdf?lang=de. *See also* Press Release, ComCo, WEKO bewilligt die Übernahme von The Phone House durch Swisscom (June 4, 2008), *available at* http://www.weko.admin.ch/publikationen/pressemitteilungen/00314/index.html?lang=de.

11 Press Release, ComCo, WEKO: Zusammenschluss Swisscom AG/The Phone House AG meldepflichtig (April 28, 2008), *available at* http://www.weko.admin.ch/publikationen/pressemitteilungen/00312/index.html?lang=de.

12 ComCo, LAW AND POLICY ON COMPETITION 2008 at 290 - 337, *available at* http://www.weko.admin.ch/publikationen/00212/RPW2008-2.pdf?lang=de. *See also* Press Release, ComCo, Weko lässt Zusammenschluss von Fenaco und Steffen-Ris Holding AG unter Auflagen zu (March 13, 2008), *available at* http://www.weko.admin.ch/publikationen/pressemitteilungen/00309/index.html?lang=de.

significant increases in Fenaco's market share in the wholesale market for consumer and industry potatoes as well as in the wholesale market for seed potatoes. ComCo therefore made the clearance subject to Fenaco's commitment not to impose any purchase or supply obligations on potato farmers.

C. Anticompetitive Practices

On March 13, 2008, ComCo initiated an investigation against Swiss distributors importing French books into Switzerland.[13] The distributors represent French publishers in Switzerland, each of them acting as an exclusive dealer for a particular French publisher. The investigation is assessing whether these importers have a dominant position in the Swiss market and, if so, whether they are imposing unreasonable prices on bookshops. Under the French law regarding book resale price maintenance, prices for books in France are set by publishers and imposed on bookstores. When importing the books into Switzerland, the Swiss distributors increase these prices based on a "conversion table" with the result that the books are sold at a higher price in Switzerland than in France. According to ComCo, this practice could constitute an abusive pricing policy. The investigation must be viewed in light of ComCo's and the SFC's earlier decisions to prohibit the so-called "Sammelrevers" system of book pricing in Switzerland.[14]

In July 2008, ComCo concluded its investigation of Documed Ltd., which publishes information on pharmaceutical products.[15] ComCo alleged that Documed Ltd. had abused its dominant position in the market by: (i) imposing unreasonable prices for the publication of this information; and (ii) refusing to enter into contractual negotiations with competitors. Documed subsequently abandoned its practices during the course of the investigation. As a result, and having regard to Documed's cooperation with the investigation, ComCo only imposed a fine of CHF 50,000 (approximately US$47,000).

On November 12, 2008, the Secretariat of ComCo submitted an application to ComCo to impose sanctions against Switzerland's largest telecommunications provider, Swisscom.[16] According to the Secretariat, Swisscom is abusing its allegedly dominant position in the market for ADSL services by overpricing ADSL set-up services to the detriment of competing internet service providers. In its application, the Secretariat of ComCo is requesting a fine of CHF 237 million (approximately US$221 million).[17]

On January 31, 2008, ComCo started proceedings against several electric installation companies and trade associations for alleged bid rigging, which is one of ComCo's enforcement priorities.[18] ComCo initiated the investigation by conducting dawn raids on the offices of various target companies.

A dawn raid was conducted on December 16, 2008, targeting companies in the heating, cooling and sanitary systems industries. ComCo's investigation was triggered by a whistleblower, and the

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13 Press Release, ComCo, Die Wettbewerbskommission eröffnet eine Untersuchung gegen die Vertreiber französischer Bücher in der Schweiz (March 17, 2008), *available at* http://www.weko.admin.ch/publikationen/pressemitteilungen/00310/index.html?lang=de.

14 *See* 2007 ANTITRUST YEAR IN REVIEW, at 88.

15 Decision of ComCo of July 7, 2008, *available at* http://www.weko.admin.ch/news/00008/Documed.pdf?lang=de. *See also* Press Release, ComCo, Weko beendet Untersuchung gegen Documed AG (July 17, 2008), *available at* http://www.weko.admin.ch/publikationen/pressemitteilungen/00316/index.html?lang=de.

16 Press Release, ComCo ADSL-Preispolitik – Antrag des Sekretariats in Untersuchung zugestellt (November 13, 2008), *available at* http://www.weko.admin.ch/publikationen/pressemitteilungen/00291/index.html?lang=de.

17 ComCo already imposed a fine of CHF 333 million. (approximately US$311 million) on Swisscom in 2007 for abusing its dominant position in the Swiss mobile phone market by charging other providers an excessive termination fee for routing calls into Swisscom's own mobile phone network. Swisscom has appealed ComCo's decision. The case is still pending before the Swiss Federal Administrative Court.

18 Press Release, ComCo, Weko eröffnet Untersuchung betreffend Abreden im Bereich Elektroinstallationen (February 1, 2008), *available at* http://www.weko.admin.ch/publikationen/pressemitteilungen/00306/index.html?lang=de.

investigation concerns the possible illegal exchange of information on prices, intended price increases, rebates and turnover.

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TAIWAN

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A. Legislative Developments

In October 2008, J.C. Tang, Chairman of Taiwan's Fair Trade Commission (the "Commission"), reported to the Legislature that the Commission has prepared a preliminary draft bill to amend the Fair Trade Law.[1] The proposed amendments, among other things, will aim to: (i) introduce a leniency program; (ii) exempt certain joint research and development activities from the prohibition against concerted actions; (iii) give the Commission search and seizure powers to better facilitate the investigation of concerted actions; and (iv) better differentiate the various types of violations and their respective administrative liabilities to provide more transparency and predictability of enforcement of the Fair Trade Law to the general public.[2]

B. Mergers

2008 was an active year again for mergers and acquisitions in Taiwan. In 2008, the Commission reviewed filings for a total of 65 mergers, 36 of which were allowed to proceed, two of which were prohibited, and the rest of which either remain ongoing or were actually below the filing thresholds.

One notable decision, rendered in April 2008, involved the proposed merger between Cashbox Partyworld Co., Ltd. ("Cashbox") and Holiday Group Co., Ltd. ("Holiday"),[3] the two largest audio-visual singing (a.k.a. karaoke or KTV) businesses in Taiwan. The combined businesses were estimated to have a share of over 50% in the karaoke market nationwide and an over 90% market share in Taipei, the nation's capital. Moreover, the market shares of remaining competitors would not individually exceed 1%. As a result, the Commission decided to prohibit the transaction on the grounds that it would seriously lessen competition to the detriment of consumers and suppliers. The Commission took this view even though the two companies had covenanted, as part of the transaction, not to raise prices or close down operating locations for a period of time after the merger.

C. Anticompetitive Practices

The Commission rendered a total of 15 administrative decisions against anticompetitive conduct and 118 decisions against unfair trading practices in 2008.[4]

1. New Rules

Starting in late 2007, the Commission announced several industry-specific guidelines (or "handling principles") including: for the "sale and maintenance of elevator businesses"[5] and for "combinations and concerted actions of domestic civil aviation transportation businesses".[6]

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1 The Fair Trade Law (公平交易法), first promulgated on February 4, 1991, became effective on February 4, 1992, and was last amended on February 6, 2002. The Fair Trade Law is Taiwan's primary competition legislation addressing issues such as monopolistic conduct, combinations (mergers) and concerted actions (cartels).

2 Commission Report to the Legislature on Policy Execution and Budgets for the year 2009 dated October 13, 2008, *available at* http://www.ftc.gov.tw/200001012999010137 7.htm?disphtml=施政計畫&layer=1. The Commission has had several internal discussions over the last few years regarding proposed amendments to the Fair Trade Law, but none of these resulted in draft legislation being submitted to the legislature for consideration.

3 Commission Decision Gong-Chie-Tzi No. 097002.

4 Statistics published by the Commission, *available at* http://www.ftc.gov.tw/upload/39624f0c-5534-4013-8032-f96e0386a21f.pdf.

5 Issued by Commission Order Gong-Er-Tzi No. 0970007782 of September 3, 2008. The guidelines address issues such as monopolization, tied selling and concerted actions.

6 Issued by Commission Order Gong-Yi-Tzi No. 0970000065 of January 1, 2008. These guidelines address the principles to be followed by the Commission

2. Cartels

One of the more noteworthy cases was the Commission's investigation of two domestic airlines, TransAsia Airways Corporation ("TransAsia") and Uni Airways Corporation ("UniAir").[7] The two airlines entered into a "Revenue Pooling Agreement" pursuant to which they agreed to: (i) allocate the number of seats provided per week on the Kaohsiung-to-Magong route and the Kaohsiung-to-Kinmen route; and (ii) distribute the revenue in accordance with certain pre-agreed percentages. In reviewing this agreement, the Commission took into account that TransAsia and UniAir are the only two airline companies providing flight services on the Kaohsiung-to-Magong and Kaohsiung-to-Kinmen routes, and that the two companies had failed to obtain prior approval from the Ministry of Transportation and Communications. The Commission decided that the revenue pooling arrangement had resulted in a lessening of competition between 2003 and 2007 and fined each of the companies NT$1,000,000 (approximately US$30,000).

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in defining the relevant market, calculating market shares, assessing the extent of lessening of competition and assessing overall economic benefits, including the interest in saving failing businesses. The latter is of particular importance given industry-wide decline due to competition from high speed rail.

7 Commission Disposition Gong-Chu-Tzi No. 097084.

UKRAINE

DENIS LYSENKO AND MARIYA NIZHNIK
VASIL KISIL & PARTNERS

A. Legislative Developments

The Antimonopoly Committee of the Ukraine (the "AMC") has prepared draft legislation to amend the thresholds for merger notification in the Law on Protection of Economic Competition, 2001.[1] The draft legislation proposes to quadruple the existing thresholds, which are currently among the lowest of any national competition laws, including the CIS states. The draft legislation also clarifies that the merger notification obligations are not triggered when the asset/turnover thresholds are met by only one party. The draft legislation is currently being considered by the Ukrainian Parliament and will not come into force until passed.[2]

B. Mergers

In October 2007, the AMC prohibited the acquisition by IBE Trade Corporation of IBE Stirol (Ukraine). The AMC found that the proposed transaction would potentially result in the monopolization of the market for mineral fertilizers.[3] On the other hand, the AMC approved Bayer HealthCare's acquisition of the assets of Sagmel Group, a leader in the manufacturing and distribution of over-the-counter medications in the Ukraine (and elsewhere in the CIS), despite the significant market share held by the companies in the Ukraine (more than 25%).[4]

C. Anticompetitive Practices

In February 2006, the AMC fined seven major sugar wholesalers UAH 17.2 million (approximately US$2.2 million) for jointly agreeing on a pricing policy that resulted in an immediate price increase in the Ukrainian sugar market.[5] Despite numerous motions filed by the wholesalers challenging the AMC's decision, the Highest Commercial Court of the Ukraine affirmed the AMC's decision in March 2008.[6]

In October 2008, the AMC fined four advertising companies UAH 605,000 (approximately US$78,000) for collusion in responding to a tender for the procurement of services related to a national tourism advertising campaign.[7] Among other improprieties, the companies agreed on the terms of their responses to the tender, ensuring that one company (Grand Print Ukraine, LLC) would win.[8] This is likely the first time that the AMC has imposed a fine on companies for anticompetitive concerted actions in the context of a public procurement.

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1 Law No. 22-10 On Protection of Economic Competition, 2001 (Ukr.) ("Economic Competition Act"), art. 24, *available at* http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=2210-14.

2 Law on Amendments to Economic Competition Act – Draft (Ukr.) No.3436 December 4, 2008, *available at* http://gska2.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=33833. *See also* AMC Press Release, August 11, 2008, *available at* http://www.amc.gov.ua/amc/control/uk/publish/article?art_id=109241&cat_id=59331.

3 *See* Press Release, AMC (October 17, 2007), *available at* http://www.amc.gov.ua/amc/control/uk/publish/article?art_id=79993&cat_id=64110.

4 *See* Press Release, AMC (April 17, 2008), *available at* http://www.amc.gov.ua/amc/control/uk/publish/article?art_id=107048&cat_id=91184.

5 *See* Press Release, AMC (February 26, 2006), *available at* http://www.amc.gov.ua/amc/control/uk/publish/article?art_id=64634&cat_id=64109.

6 *See* Press Release, AMC (March 12, 2008), *available at* http://www.amc.gov.ua/amc/control/uk/publish/article?art_id=104509&cat_id=91184.

7 *See* Press Release, AMC (October 7, 2008), *available at* http://www.amc.gov.ua/amc/control/uk/publish/article?art_id=110591&cat_id=91184.

8 *Id.*

D. Abuse of a Dominant Position

In 2008, restrictions were imposed on Volya Cable, a company holding a significant share of the television broadcasting market, for abusing its dominant position. Volya Cable had sought to replace older, analog television broadcasts with newer, digital services, resulting in higher service fees payable by customers.[9] Volya Cable was found to have abused its dominant position because of its refusal to sell analog broadcast services where no other source of analog broadcast services was available.

In March 2008, the AMC fined Kernel-Trade LLC and SSE Suntrade UAH 60 million (approximately US$7.7 million) per company for abusing their jointly-held dominant position in the Ukranian sunflower oil market by imposing a non-justified increase in the wholesale price of sunflower oil.[10] This was the largest fine imposed by the AMC since its establishment. The AMC subsequently reduced the fines to UAH 1 million each (approximately US$128,000) after the two companies decreased their wholesale prices by almost 15%.[11]

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9 *See* Press Release, AMC (February 5, 2008), *available at* http://www.amc.gov.ua/amc/control/uk/publish/article?art_id=97889&cat_id=91184.

10 *See* Press Release, AMC (March 3, 2008), *available at* http://www.amc.gov.ua/amc/control/uk/publish/article?art_id=103769&cat_id=91184. *See also* Economic Competition Act, No. 12 (2001 (Ukr.), art. 24, *available at* http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=2210-14.

11 *See* Press Release, AMC (May 16, 2008), *available at* http://www.amc.gov.ua/amc/control/uk/publish/article?art_id=107422&cat_id=91184.

UNITED KINGDOM

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A. Legislative and Administrative Developments

In July 2008, the U.K. Office of Fair Trading (the "OFT") published its response to the European Commission's White Paper on Damages actions for breach of the EC Antitrust Rules.[1] The OFT welcomed the Commission's proposal to adopt final decisions by National Competition Authorities[2] ("NCAs") or final judgments by review courts[3] on Articles 81 and 82 of the EC Treaty as irrebuttable proof of infringement in subsequent civil antitrust damages cases relating to the same parties. The OFT considers that providing for such a binding effect is important for providing parties with increased certainty, reducing litigation costs and reducing burdens on the claimant.

The OFT also published for public consultation a draft version of its revised and expanded guidance on the OFT's merger control jurisdiction and procedure under the Enterprise Act 2002 (the "Enterprise Act").[4] The consultation on the draft guidance was open until June 20, 2008. The OFT has now published a summary of the responses received, which in broad terms welcome the OFT's clarifications and suggestions.[5]

B. Mergers

In September 2008, the Competition Appeal Tribunal (the "CAT") published its judgment on the joint appeals by BSkyB and Virgin against the Competition Commission's report, and the subsequent final decision of the Secretary of State, on BSkyB's acquisition of a 17.9% shareholding in ITV plc.[6] The CAT dismissed BSkyB's appeal, holding that the Competition Commission was entitled to conclude that: (i) the acquisition created a relevant merger situation; and (ii) this gave rise to a substantial lessening of competition. The CAT found that the Competition Commission was entitled to conclude that BSkyB had acquired a material influence over ITV's business and strategic policies despite only having a 17.9% shareholding. The CAT also upheld the Competition Commission's order that BSkyB partially divest its shareholding in ITV to a level below 7.5%.

In response to Virgin's appeal, the CAT did find that the Competition Commission had incorrectly interpreted the Enterprise Act in relation to the public interest consideration, namely the effect of the merger on media plurality. The CAT held that the Competition Commission was not entitled to take into account the extent of the influence acquired by BSkyB and the internal editorial independence of the parties post-merger in its assessment. The Competition Commission's conclusion that the merger would have no adverse effect on media plurality was therefore set aside and

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1 Office of Fair Trading, Response to the European Commission's White Paper, Damages actions for breach of the EC antitrust rules (July 2008), *available at* http://ec.europa.eu/comm/competition/antitrust/actionsdamages/white_paper_comments/oft_en.pdf.

2 A decision which has been accepted by the addressees (by virtue of their having refrained from appealing the decision) or which has been upheld upon appeal. *See id*.

3 A judgment by a court competent to review the decisions of an EU National Competition Authority under the laws of that authority's Member State. *See id*.

4 *See* Press Release, Office of Fair Trading, OFT consults on revised guidance on merger jurisdiction and procedure (March 28, 2008), *available at* http://www.oft.gov.uk/news/press/2008/42-08.

5 Office of Fair Trading, Mergers - jurisdictional and procedural guidance: Summary of responses to draft guidance consultation document and emerging thinking (September 2008), *available at* http://www.oft.gov.uk/shared_oft/business_leaflets/enterprise_act/oft1021.pdf.

6 British Sky Broadcasting Group plc and Virgin Media, Inc. v. (1) The Competition Commission and (2) The Secretary of State for Business, Enterprise and Regulatory Reform [2008] CAT 25 1095/4/8/08 and 1096/4/8/08 (U.K.), *available at* http://www.catribunal.org.uk/documents/Judg_BSkyB_1095_Virgin_Inc_1096_290908.pdf.

the issue has been sent back to the Competition Commission for reconsideration. The CAT's judgment does not indicate whether further divestiture will be necessary in light of the Competition Commission's reassessment.

In April 2008, the Competition Commission and the OFT announced that they intend to work together on reviewing their respective guidelines for the substantive assessment of mergers with a view to publishing a single set of guidelines.[7] The joint review will cover the guidance contained in Merger references: Competition Commission Guidelines (April 2003) with the OFT's Mergers: substantive assessment guidance (first issued in May 2003 and revised in 2004 and 2007). It has been five years since the Enterprise Act brought a new merger control regime into force. Competition Commission Chairman Peter Freeman commented, upon launching the review, that five years' experience of working under the current regulations leaves the two organizations well placed to provide joint guidance.[8] Mr. Freeman also asserted that "joint guidelines will provide clarity for merger parties and promote consistency of approach". The Competition Commission and the OFT plan to publish the draft of their joint substantive merger guidelines for public consultation in March 2009.

In October 2007, the Secretary of State gave regulatory clearance to the acquisition of HBOS plc by Lloyds TSB Group plc.[9] A new category of "financial stability" was added to the Enterprise Act 2002 recently (in addition to existing public interest intervention provisions) and, on that basis, the merger was called in for review by the Secretary of State.[10] The OFT considered that the proposed acquisition could potentially result in a substantial lessening of competition in relation to personal current accounts, banking services for small and medium sized enterprises (SMEs) and mortgages, thereby meriting an in-depth investigation by the Competition Commission.[11] However, the Secretary of State was satisfied that, on balance, the public interest was best served by allowing the merger to proceed without such a reference. That said, the Secretary of State did request that the OFT should "continue to keep the relevant markets under review in order to protect the interests of UK consumers and the British economy".[12] A legal challenge to this decision in the CAT was dealt with very expeditiously and dismissed.[13]

C. Cartels

In June 2008, custodial sentences were imposed on three UK businessmen found guilty of cartel conduct under the Enterprise Act affecting the global marine hose market.[14] These are the first prosecutions that have been brought in the UK under the criminal "cartel offence" provisions of the Enterprise Act since the legislation came into force on June 20, 2003. The Court imposed sentences of between two-and-a-half and three years on each

7 *See* Press Release, Office of Fair Trading, OFT and Competition Commission launch review to issue joint merger guidelines (April 22, 2008), *available at* http://www.oft.gov.uk/news/press/2008/53-08.

8 *See id*.

9 *See* Press Release, Department for Business, Enterprise and Regulatory Reform (National), Peter Mandelson gives regulatory clearance to Lloyds TSB merger with HBOS (October 31, 2008), *available at* http://nds.coi.gov.uk/environment/fullDetail.asp?ReleaseID=382908&NewsAreaID=2&NavigatedFromDepartment=True.

10 *See* Statutory Instruments 2008 No. 2645, Competition, The Enterprise Act 2002 (Specification of Additional Section 58 Consideration) Order 2008, *available at* http://www.opsi.gov.uk/si/si2008/uksi_20082645_en_1.

11 *See* Press Release, Office of Fair Trading, OFT report to the Secretary of State on Lloyds/HBOS merger (October 31, 2008), *available at* http://www.oft.gov.uk/advice_and_resources/resource_base/Mergers_home/LloydsTSB.

12 *See* Press Release, Department for Business, Enterprise and Regulatory Reform (National), Peter Mandelson gives regulatory clearance to Lloyds TSB merger with HBOS (October 31, 2008), *available at* http://nds.coi.gov.uk/environment/fullDetail.asp?ReleaseID=382908&NewsAreaID=2&NavigatedFromDepartment=True.

13 Merger Action Group (1) v. Secretary of State for Business, Enterprise and Regulatory Reform (2) supported by HBOS plc and Lloyds TSB Group plc (as Interveners) [2008] CAT 36, Case No. 1107/4/10/08 *available at* http://www.catribunal.org.uk/files/Judg_1107_MAG_101208.pdf.

14 *See* Press Release, Office of Fair Trading, Three imprisoned in first OFT criminal prosecution for bid rigging (June 11, 2008), *available at* http://www.oft.gov.uk/news/press/2008/72-08.

businessman. In addition, all three individuals were disqualified from serving as company directors for between five and seven years under the Company Directors Disqualification Act 1986, and are subject to confiscation orders under the Proceeds of Crime Act 2002.

In line with the OFT's stated intention to bring criminal prosecutions against individuals for cartel activity where appropriate, it announced in August 2008 that four past and present British Airways executives have been charged with cartel offences under the Enterprise Act.[15] The four executives have been charged with dishonestly agreeing with others "to make or implement arrangements which directly or indirectly fix the price for the supply in the United Kingdom of passenger air transport services by British Airways and Virgin Atlantic Airways". If found guilty, the executives could face a term of imprisonment of up to five years and/or an unlimited fine. They may also be subject to company director disqualification orders under the Company Directors Disqualification Act 1986 and confiscation orders under the Proceeds of Crime Act 2002.

The OFT also concluded early resolution agreements with six companies under investigation for unlawful practices in relation to fixing the retail prices of tobacco products in the UK, leading to total fines of £132.3 million (approximately US$192 million).[16] The use of this early resolution procedure is still a relatively novel one for the OFT, having been applied in only three OFT investigations to date, but it is likely to become more commonplace in the future.

The first ever representative action brought on behalf of consumers was settled in January 2008, entitling purchasers of the uniforms during the relevant period to a sum of between £5 and £20 (equivalent to between US$7 and US$29). The action was for damages suffered as the result of an agreement to fix the price of certain replica football uniforms during the period 2000 to 2001.[17] Despite the claim being settled in the early stages of proceedings, it nevertheless represented an important step in the recognition of the potential for the development of collective actions.

In April 2008, purchasers of electrical and mechanical carbon and graphite products were refused permission to bring a follow-on action for damages in the CAT against the members of the cartel relating to carbon and graphite products.[18] Under section 47A of the Competition Act 1998, a person who has suffered loss or damage by virtue of an infringement of EC or UK competition law has the right to bring a follow-on damages action in the CAT.[19] However, CAT rules require its permission in cases where the decision upon which the claimant seeks to rely is still subject to appeal. In this instance, the appeals brought by certain members of the carbon and graphite product cartel against the European Commission's decision are still ongoing.[20] Whilst each case is assessed on an individual basis, in this instance the CAT decided that it would not grant permission for an action to commence until the proceedings before the European courts had concluded.

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15 *See* Press Release, Office of Fair Trading, OFT announces criminal charges in airline fuel surcharges cartel case (August 7, 2008), *available at* http://www.oft.gov.uk/news/press/2008/93-08.

16 *See* Press Release, Office of Fair Trading, OFT reaches early resolution agreements in tobacco case (July 11, 2008), *available at* http://www.oft.gov.uk/news/press/2008/82-08.

17 *See* Press Release, JJB to make payments to consumers for replica football shirts (January 9, 2008), *available at* http://www.which.co.uk/news/2008/01/jjb-to-pay-fans-over-football-shirt-rip-off-128985.jsp.

18 Emerson Electric v. Morgan Crucible, [2008] CAT 8 1077/5/7/07 (U.K.), *available at* http://www.catribunal.org.uk/documents/Jdg1077Emerson280408.pdf. In December 2003, the European Commission found six members of a carbon and graphite products cartel in breach of Article 81 of the EC Treaty for price-fixing and market sharing, and imposed total fines of EUR 101.44 million (approximately US$147 million) on five of the cartel members. 2004/420 EC: Commission Decision of December 3, 2003 (Case No C.38.359 - Electrical and mechanical carbon and graphite products), Official Journal L 125, 28/04/2004 P. 0045 - 0049.

19 *See* the *Competition Act* 1998, s. 47A 'Montetary claims before Tribunal'.

20 Cases T-68/04 (SGL Carbon v. Commission), T-69/04 (Schunk and Schunk Kohlenstoff-Technik v. Commission) and T-73/04 (Carbone Lorraine v. Commission), Official Journal C 106, 30/04/2004 P. 0071-0072.

Grampian Food Group and others (the "Purchasers") sought the CAT's permission in 2008 to bring an action for damages against the members of the Vitamins cartel.[21] In 2001, the European Commission found that F. Hoffman-La-Roche AG, Sanofi-Aventis SA, BASF SE and others had illegally participated in a cartel involving price-fixing and sales quotas relating to vitamin products in breach of Article 81 of the EC Treaty.[22] The Purchasers contend that they paid higher prices than they otherwise would have done for the duration of the cartel and suffered economic loss and damage as a result.

In April 2008, the OFT sent a Statement of Objections to 112 construction companies regarding their alleged involvement in bid rigging arrangements which are deemed to have led to higher prices for construction services across large parts of England.[23] In the same month, the UK energy regulator, OFGEM, launched an investigation into two of the UK's biggest energy companies concerning alleged abuses of their dominant market position in Scotland.[24]

Finally, in August 2008, the Competition Commission published its provisional findings in the BAA airports market investigation, in which it provisionally concluded that BAA's common ownership of seven UK airports created a restriction on competition, with adverse consequences for both passengers and airlines.[25] The Competition Commission then consulted with BAA on remedies, which included a proposal to require BAA to divest two of its three London airports and also either Edinburgh or Glasgow airport. In September 2008, BAA announced its decision to sell Gatwick airport.[26] In response, the Competition Commission stated that it would take into account any action by BAA which may impact on the competition problems that the Competition Commission has identified.[27] The Competition Commission published its provisional decision on remedies in December 2008, confirming that, subject to final consultation, it will require BAA to sell both Gatwick and Stansted airports, as well as Edinburgh airport.[28] If implemented, this will be the first time that a market investigation reference has led to a structural rather than a behavioral remedy. The Competition Commission is expected to publish its final report by March 2009.

D. Anticompetitive Practices

The Competition Commission published its final report on the supply of groceries in the UK on April 30, 2008.[29] Whilst the OFT acknowledged that "in

21 Notice of a Claim for Damages under section 47A of the Competition Act 1998 Grampian Country Food Group Limited and others v. Sanofi-Aventis SA and others, (2008) 1101/5/7/08 (U.K.), *available at* http://www.catribunal.org.uk/documents/Sum_1101_Grampian_02.07.08.pdf.

22 2003/2/EC: Commission Decision of 21 November 2001 (Case COMP/E-1/37.512 - Vitamins), Official Journal L 006, 10/01/2003 P. 0001 - 0089.

23 *See* Press Release, Office of Fair Trading, OFT issues statement of objections against 112 construction companies (April 17, 2008), *available at* http://www.oft.gov.uk/news/press/2008/52-08.

24 *See* Information Note, OFGEM, OFGEM launches Competition Act investigation into Scottish Power Limited and Scottish and Southern Energy plc (April 8, 2008), *available at* http://www.ofgem.gov.uk/Media/PressRel/Documents1/Ofgem%2012.pdf.

25 COMPETITION COMMISSION, BAA AIRPORTS MARKET INVESTIGATION: PROVISIONAL FINDINGS REPORT (August 20, 2008), *available at* http://www.competition-commission.org.uk/inquiries/ref2007/airports/provisional_findings.htm.

26 *See* Press Release, BAA, BAA to sell Gatwick Airport (September 17, 2008), *available at* http://www.baa.com/portal/page/Corporate%5EAll+Press+Releases/cd315e60c2b6c110VgnVCM10000036821c0a____/a22889d8759a0010VgnVCM200000357e120a____/.

27 Competition Commission, Statement from Competition Commission on BAA plans to sell Gatwick Airport (September 17, 2008), *available at* http://www.competition-commission.org.uk/inquiries/ref2007/airports/pdf/statement_17_sept.pdf.

28 Competition Commission, News Release, BAA MARKET INVESTIGATION, Provisional decisions on sale of three airports and other remedies to competition problems (December 17, 2008), *available at* http://www.competition-commission.org.uk/press_rel/2008/dec/pdf/40-08.pdf.

29 COMPETITION COMMISSION, MARKET INVESTIGATION INTO THE SUPPLY OF GROCERIES IN THE UK (April 30, 2008), *available at*

many important respects, competition in the UK groceries industry is effective and delivers good outcomes for consumers", it also identified several problems related to the strong market positions held by large grocery retailers: (i) the use of restrictive covenants and/or exclusivity arrangements to prevent entry by competitors; and (ii) the ability to transfer excessive risk and unexpected costs to their suppliers. The supermarkets concerned are now in lengthy consultation with the Competition Commission over the remedies that it has proposed to address these issues.

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http://www.competition-commission.org.uk/rep_pub/reports/2008/538grocery.htm.

UNITED STATES

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A. Legislative and Administrative Developments

1. Unilateral Conduct Report

In 2006, the Department of Justice ("DOJ") and Federal Trade Commission ("FTC") held a series of joint hearings relating to unilateral conduct under Section 2 of the Sherman Act. On September 8, 2008, the DOJ released its report, "Competition and Monopoly: Single Firm Conduct Under Section 2 of the Sherman Act" (the "Report").[1] Immediately after the Report was released, three of the four FTC Commissioners (there is currently a fifth vacancy) jointly issued a statement disagreeing with much of the Report.[2] The FTC Chairman issued a separate statement.[3]

The Report examines issues such as dominance, general conduct standards, specific types of unilateral conduct, remedies, and international cooperation and convergence in dealing with unilateral conduct. Key recommendations in the Report include:

- adopting a market share safe harbor for companies with less than a 50% market share, and an inference of monopoly power for market shares over 66%;[4]
- rejecting the "effects-balancing" and "profit-sacrificing" tests;[5]
- using a "disproportionality" test when the conduct's anticompetitive effects are substantially disproportionate to any procompetitive effects;[6]
- for predatory pricing, using average avoidable cost as the appropriate measure of costs, as well as requiring that there be a recoupment of losses;[7]
- overruling the *per se* prohibition against tying;[8]
- assessing the legality of bundled discounts according to whether competitors can compete effectively on a bundle-to-bundle basis;[9]
- applying a predatory pricing analysis to loyalty discounts;[10] and
- that exclusive dealing be *per se* legal if less than 30% of existing customers or distribution is foreclosed.[11]

With the change of Administration in January 2009, and the nomination of a new Assistant Attorney General for Antitrust at the DOJ (Christine A. Varney), it is questionable whether any of the recommendations in the DOJ's Report will be put

1 U.S. Dep't of Justice, *Competition and Monopoly: Single Firm Conduct Under Section 2 of the Sherman* Act (2008), *available at* http://www.usdoj.gov/atr/public/reports/236681.pdf.

2 *Available at* http://www.ftc.gov/opa/2008/09/section2.shtm.

3 *Available at* http://www.ftc.gov/opa/2008/09/section2.shtm.

4 *Id*. at 24, 30.

5 *Id*. at 38, 42.

6 *Id*. at 46.

7 *Id*. at 69.

8 *Id*. at 90.

9 *Id*. at 101.

10 *Id*. at 117.

11 *Id*. at 141.

into effect. Many are predicting that the Obama Administration will take a more aggressive approach with respect to single firm conduct under Section 2.

FTC staff also released working papers from the joint hearings.[12] Among other things, the working papers examine various frameworks that have been proposed for analyzing single-firm conduct, discuss the challenges in defining markets in Section 2 contexts, and include a survey of all electronically published Section 2 cases during a seven-and-a-half-year period.

2. Proposed Changes to FTC Procedures

The FTC proposed substantial revisions to how it handles its adjudicative proceedings.[13] The revisions, if ultimately adopted, would significantly expedite pre-trial and trial proceedings that the FTC brings under its administrative process, as opposed to litigation brought in federal district court by the FTC or DOJ. Among other proposed changes, the administrative proceedings would deviate from the Federal Rules of Evidence as used in federal district court.

B. Mergers

Several notable transactions were cleared in 2008 with minimal remedies or without any conditions. Included among these was the DOJ's approval of Delta Air Lines' acquisition of Northwest Airlines, clearing the way for the creation of the world's largest air carrier.[14] The DOJ also cleared Sirius Satellite Radio's acquisition of XM Satellite Radio, representing a combination of the only two satellite radio service providers, *inter alia*, on the basis that the market is broadly defined to include numerous types of delivery methods including terrestrial radio and broadband internet.[15]

The FTC sought to use its administrative adjudicative proceedings to litigate Inova Health System's proposed acquisition of fellow Northern Virginia health care provider, Prince William Hospital.[16] Inova Health System, Northern Virginia's largest hospital chain, subsequently abandoned the transaction. The DOJ challenged the proposed JBS S.A./National Beef Packing Company deal, which would combine two of the largest four U.S. beef packers.[17]

In Whole Foods' acquisition of Wild Oats, the U.S. Court of Appeals for the D.C. Circuit reversed a lower court decision denying the FTC's request for a preliminary injunction to block the transaction.[18] The majority, concurring, and dissenting appellate opinions all placed significant weight on pricing and other economic data as well as the companies' internal documents and studies. Whole Foods has since sued the FTC in the U.S. District Court for the District of Columbia, alleging violations of the Administrative Procedure Act and seeking, *inter alia*, an order terminating administrative proceedings because of alleged prejudgment on the merits by the agency.[19] After voluntarily withdrawing the suit from the District Court, Whole Foods filed an emergency petition in the U.S. Court of Appeals for the D.C. Circuit seeking a writ of mandamus and injunctive relief against the FTC,

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12 *See* Federal Trade Comission and Department of Justice Hearings on Section 2 of the Sherman Act: Single-Firm Conduct As Related to Competition, *available at* http://www.ftc.gov/os/sectiontwohearings/index.shtm.

13 Notice of Proposed Rulemaking, 16 C.F.R. Parts 3 and 4, Federal Register, Vol. 73, No. 195 (October 7, 2008), *available at* http://www.ftc.gov/os/2008/09/P072104nprmpt3.pdf.

14 Press Release, Department of Justice, Statement of the Department of Justice's Antitrust Division On Its Decision to Close Its Investigation of the Merger of Delta Air Lines Inc. and Northwest Airline Corporation (October 29, 2008), *available at* http://www.usdoj.gov/atr/public/press_releases/2008/238849.htm.

15 Press Release, Department of Justice, Statement of the Department of Justice Antitrust Division on Its Decision to Close Its Investigation of XM Satellite Radio Holding Inc.'s Merger With Sirius Satellite Radio Inc. (March 24, 2008), *available at* http://www.usdoj.gov/atr/public/press_releases/2008/231467.htm.

16 *In the Matter of Inova Health System Found.*, Dkt. No. 9326 (F.T.C. 2008).

17 *U.S.* v. *JBS S.A.*, Case No. 08 C 5992 (N.D. Ill. 2008). As of this writing, the litigation is ongoing.

18 *FTC* v. *Whole Foods Market, Inc.*, 533 F.3d 869 (D.C. Cir. 2008).

19 *Whole Foods Market, Inc.* v. *Federal Trade Commission*, No. 1:08-cv-02121 (D.D.C. December 8, 2008) (Complaint).

which a three-judge panel denied in a *per curiam* opinion.[20]

Several litigated merger challenges from years prior were resolved or advanced in 2008. The Fifth Circuit ruled in favor of the FTC's post-consummation challenge of Chicago Bridge & Iron's acquisition of Pitt-Des Moines, involving industrial storage tanks.[21] Chicago Bridge was required to unwind and divest certain acquired assets integrated into its operations in 2001. The FTC also concluded its challenge of Equitable Resources' proposed acquisition of The People's Natural Gas Company, arguing that the transaction represented a merger to monopoly for the distribution of natural gas to nonresidential customers in certain areas of Pennsylvania.[22] In light of the FTC challenge, the parties abandoned the deal. A federal district court allowed the DOJ to continue its 2007 lawsuit against two newspapers in Charleston, West Virginia, whose combination DOJ argues would result in a merger-to-monopoly.[23]

C. Conduct

1. Criminal Enforcement

The Antitrust Division of the DOJ obtained criminal plea agreements, including large fines for corporations and fines and prison sentences for culpable executives, in several major cartel investigations. In November 2008, the Division announced guilty pleas by three manufacturers of liquid crystal display ("LCD") panels, which agreed to pay a total of US$585 million for conspiring to fix LCD panel prices over a five-year period.[24] The largest of these fines (US$400 million), imposed on LG Display Co., Ltd., is the second-largest criminal fine ever imposed by the Division.[25] The Division's investigation into a conspiracy to fix rates for international air cargo shipments, which began in 2007 in coordination with numerous foreign enforcement agencies, led to guilty pleas by several airlines and individual executives.[26] The Division, in cooperation with international antitrust enforcement agencies, has also actively pursued criminal charges against U.S. and foreign executives for conspiring to rig bids, fix prices, and allocate market shares of marine hose sold worldwide. The investigation, which began in 2007 with the arrest of eight foreign executives after a cartel meeting in Houston, has yielded guilty pleas by executives and corporations from the U.S., the United Kingdom, France, Italy and Japan, comprising millions in criminal fines and prison sentences ranging from 14 to 30 months.[27] Finally, in October 2008, five U.S. and Puerto Rican shipping executives agreed to plead guilty and serve prison sentences for participating in a six-year conspiracy to rig bids, fix prices, and allocate market shares for ocean vessel shipping between the continental U.S. and Puerto Rico.[28]

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20 *In re Whole Foods Market, Inc.*, No. 09-1020 (D.C. Cir. Jan. 23, 2009) (*per curiam*).

21 *Chicago Bridge & Iron Co. N.V.* v. *FTC*, No. 05-601192, (5th Cir. 2008).

22 *In the Matter of Equitable Resources, Inc., et al*., Dkt. No. 9322 (F.T.C. 2007).

23 *U.S.* v. *Daily Gazette Co.*, Civ. Act. No. 2:07-0329 (S.D. W.Va. 2007).

24 Press Release, U.S. Department of Justice, LG, Sharp, Chunghwa agree to plead guilty, pay total of US$585 million in fines for participating in LCD price-fixing conspiracies (November 12, 2008), *available at* http://www.usdoj.gov/atr/public/press_releases/2008/239349.htm.

25 Fines were also imposed on Sharp Corp. (US$120 million) and Chunghwa (US$ 65 million).

26 Fines have been imposed on British Airways plc (US$300 million), Qantas Airways Limited (US$61 million), Japan Airlines (US$110 million), SAS Cargo Group A/S (US$52 million), Cathay Pacific Airways Limited (US$60 million), Martinair Holland N.V. (US$42 million) and Air France-KLM (US$350 million). Individual employees of British Airways, Qantas and SAS have also pleaded guilty and agreed to penalties including fines and jail time.

27 Press Release, U.S. Department of Justice, British Marine Hose Manufacturer Agrees to Plead Guilty and Pay $4.5 Million for Participating in Worldwide Bid-Rigging Conspiracy (December 1, 2008), *available at* http://www.usdoj.gov/atr/public/press_releases/2008/239884.htm.

28 Press Release, U.S. Department of Justice, Four shipping executives agree to plead guilty to conspiracy to eliminate competition and raise prices for moving freight to and from the continental U.S. and Puerto Rico (October 1, 2008), *available at* http://www.usdoj.gov/atr/public/press_releases/2008/237849.htm.

Concluding a five-year battle between the Antitrust Division and Stolt-Nielsen Transportation Group Ltd. over the terms of a criminal amnesty agreement, in November 2007 a district court dismissed criminal indictments against Stolt and two company executives on the grounds that the amnesty agreement barred any criminal prosecution.[29] The Division had granted provisional amnesty to Stolt in 2002 for its cooperation in an investigation of customer allocation agreements among parcel tanker shippers. However, in 2003, the Division took the extraordinary step of attempting to revoke Stolt's amnesty, citing alleged misrepresentations by Stolt concerning the date of its withdrawal from the conspiracy. In 2005, the district court ruled that the amnesty agreement precluded the Division from indicting Stolt and its executives,[30] but in 2006 the Third Circuit reversed and the Division proceeded to issue indictments.[31] In light of the district court's subsequent dismissal of these indictments, the Division announced that it was dropping its case.[32]

2. Civil and Private Enforcement

In the wake of the U.S. Supreme Court's rejection of the *per se* rule of illegality for minimum resale price maintenance ("RPM") agreements in *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*,[33] federal and state enforcers have grappled with whether, and to what extent, *Leegin* should alter its enforcement policies and practices. At the state level, three attorneys general sued, and ultimately reached a settlement with, furniture manufacturer Herman Miller, Inc. for alleged RPM agreements with resellers of its Aeron office chairs. At the federal level, in May 2008, the FTC terminated a consent order entered in 2000 that prohibited shoe manufacturer, Nine West Group, Inc., from entering into RPM agreements with its resellers.

There were several significant decisions under Section 2 of the Sherman Act for monopolization or attempt to monopolize. The Supreme Court granted *certiorari* in *Linkline,*[34] in which the Ninth Circuit held that the Supreme Court's *Trinko*[35] decision did not bar a "price squeeze" claim against a local telephone company that was both retail competitor and wholesale supplier of DSL service to the plaintiffs. The question for the Supreme Court is whether a price squeeze theory is still viable post-*Trinko*.

In *Cascade Health Solutions* v. *PeaceHealth*,[36] the Ninth Circuit held that multi-product bundled discounts violate Section 2 of the Sherman Act only when the discount applied to the competitive product results in below-cost pricing on that product. But in *Meijer, Inc.* v. *Abbott Laboratories, Inc.,*[37] a Ninth Circuit district court refused to apply the *PeaceHealth* test to products with high fixed costs and low incremental costs, such as proprietary HIV medications.

The D.C. Circuit held in *Rambus Inc.* v. *FTC*[38] that the defendant's failure to disclose the ownership of a patent to a standard-setting organization of which it was a member did not cause competitive harm, even though it allowed the defendant to acquire monopoly power over four technologies. The Court found that there was not sufficient evidence that the standard-setting body would not have used the defendant's patent but for the deception, and that

29 Press Release, U.S. Department of Justice, Justice Department will not appeal Stolt-Nielsen decision (December 21, 2007), *available at* http://www.usdoj.gov/atr/public/press_releases/2007/228788.htm.

30 *Stolt-Nielsen S.A.* v. *U.S.*, 352 F.Supp.2d 553 (E.D.Pa. 2005).

31 *Stolt-Nielsen S.A.* v. *U.S.*, 442 F.3d 177 (3rd Cir. 2006).

32 Press Release, U.S. Department of Justice, Justice Department will not appeal Stolt-Nielsen decision (December 21, 2007), *available at* http://www.usdoj.gov/atr/public/press_releases/2007/228788.htm.

33 127 S.Ct. 2705 (2007).

34 *Linkline Communications, Inc.* v. *SBC California, Inc.*, 503 F.3d 876 (9th Cir. 2007), *cert. granted*, 128 S. Ct. 2957 (2008).

35 *Verizon Communications, Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) (holding that a regulated monopolist's refusal to deal with a competitor and wholesale customer did not violate Section 2 if that monopolist had no obligation to deal with the competitor absent statutory or regulatory mandate).

36 502 F.3d 895 (9th Cir. 2007)*, superseded and amended by* 515 F.3d 883 (9th Cir. 2008).

37 544 F. Supp. 2d 995 (N.D. Cal. 2008).

38 522 F.3d 456 (D.C. Cir. 2008).

there was thus no basis to impose antitrust liability. The Court left open the question of whether deception could constitute monopolization when there is a proven anticompetitive effect.

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