CLEARY GOTTLIEB

National Competition Report

JANUARY – MARCH 2008

www.clearygottlieb.com

This report summarizes principal competition law developments in Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, the Netherlands, Spain, Switzerland, and the United Kingdom during the first quarter of 2008. There is no report for Austria and Sweden this quarter.

BELGIUM

This section reviews competition law developments under the Act on the Protection of Economic Competition of September 15, 2006 (APEC), which is principally enforced by the Competition Auditorate (Auditorate) and the Competition Council (Council).

Horizontal Agreements

Competition Council Imposes Price Fixing Fine On Flemish Bakers' Association

On January 25, the Council imposed a fine of €29,121 on VEBIC, the Flemish Bakers' Association, for fixing bread prices from July 1, 2004 to June 8, 2007. This was the first fine imposed under the new APEC, which entered into force on October 1, 2006.

Following liberalization of Belgian bread prices on July 1, 2004, VEBIC had begun advising its members in detail about adjustments in costs likely to affect them (including labor, raw material, energy and overhead costs) and published a bread price index that applied cost increases to the last bread price fixed by law.

The Minister of Economic Affairs requested the Competition Council to initiate an investigation into these practices. In issuing its January decision, the Council held that, as a result of the association's practices, VEBIC's members no longer needed to calculate their own costs, but could (and did) simply apply the published price index. The price index was also specifically intended to influence its members' pricing decisions, as well as competition on the Belgian bread market more generally. This, the Council held, amounted to an infringement of APEC's Article 2.

Mergers and Acquisitions

Supreme Court Clarifies Right Of Access To File In Merger Cases

In its January 22 ruling in the *Tecteo/Brutélé-Câble* case, the Belgian Supreme Court held that third parties do not have an absolute right to access the Council's files in merger cases.

The *Tecteo/Brutélé-Câble* merger was initially notified to the Council on September 28, 2007 as the first (non-simplified) notification under the new APEC. Belgacom, the incumbent and a competing Belgian telecommunications provider, requested leave to access the Council's file in the case. The Competition Council, however, stayed its decision on the access to file request, pending referral to the Supreme Court on the question of whether, and on what basis, a third party may gain access to the Competition Council's files in merger proceedings, and if so, how confidential data should be treated.

In its January judgment, the Supreme Court found that the Competition Council was entitled, even in the framework of merger control proceedings, to refer questions to the Supreme Court for preliminary resolution. The Supreme Court then held on the merits that interested third parties do not have an absolute right to access the Council's file in merger proceedings, and, in particular, that third-parties' rights of defense may not be invoked to justify their access to the file.

The Supreme Court clarified, however, that a third party's access to the Council's file was not necessarily excluded in all cases. An intervening third party has the right to be heard by the Competition Council, and implicit in that right is a "limited" right of access to the file. The Council must thus, on a case-by-case basis, determine the scope of a third-party intervener's access to file, while taking into account; (i) the need for interested third parties to effectively comment on the merger; (ii) the impact granting access will have on the market and on the notifying parties' confidentiality rights; and (iii) the general interest that the Council reach a decision within the legally mandated deadline. The Supreme Court also stressed that access may not be granted under any circumstances to internal Competition Council documents or documents containing business secrets.

Court Of Appeals Recognizes Letter As Council Decision In Walloon Cable Merger

In a further judgment arising out of the *Tecteo/Brutélé-Câble* case, on January 25, the Court of Appeals held that a letter written by the Competition Council's President may constitute a decision of the Council that is subject to appeal.

The President of the Competition Council wrote a letter to the Supreme Court on January 7 informing the Court that the Council planned to continue its review of the *Tecteo/Brutélé-Câble* merger. Upon appeal by both Tecteo and Brutélé, the Court of Appeals ruled that the letter did

© Cleary Gottlieb Steen & Hamilton LLP, 2008. All rights reserved.
This report was prepared as a service to clients and other friends of Cleary Gottlieb to report on recent developments that may be of interest to them. The information in it is therefore general, and should not be considered or relied on as legal advice. Under the rules of certain jurisdictions, this report may constitute Attorney Advertising.

constitute a Council decision as it gave rise to legal obligations affecting Tecteo's and Brutélé's interests.

At the same time, however, the Court suspended the Council's January 7 decision pending its submission of several questions to the Constitutional Court for preliminary ruling. The Court of Appeals specifically sought clarification on whether Articles 72 and 73 APEC (regarding the Competition Council's right to submit preliminary questions to the Supreme Court for resolution) infringe the equal treatment provisions of Articles 10 and 11 of the Constitution as:

- they do not distinguish between a concentration's notifying parties (who may be denied the right to have their transaction reviewed within a strict deadline), and parties to other legal proceedings seeking enforcement of the APEC (to whom strict deadlines do not apply); and
- they allow the Council to submit questions at both the first and second phase stages, while notifying parties are limited to appeal a Council's second phase decision.

Court Of Appeals Requires Competition Council To Re-examine Kinepolis Merger Restrictions

On March 18, the Brussels Court of Appeals required the Competition Council to reconsider its decision to lift merger conditions imposed on Kinepolis in 1997.

On April 16, 2007, the Competition Council decided to lift the conditions imposed on Kinepolis when it was created through the merger of two Belgian cinema groups in 1997. Kinepolis' competitors, the Belgian Cinema Federation, UGC and Utopolis, appealed the lifting of the conditions, and, as previously reported, the Court of Appeals granted an interim suspension of the Competition Council's decision pending review.

The Court of Appeals based its March ruling primarily on procedural arguments; specifically pointing to the facts that the Competition Council's chamber was not properly composed in line with APEC requirements when it reached its decision, and that the Council had unlawfully refused the plaintiffs access to file during the proceedings. Contrary to the Competition Council's April 2007 decision, the Court concluded that the market had not substantially changed since 1997.

Pending a revised Competition Council decision, Kinepolis will remain bound by the 1997 restrictions that, for example, require it to seek the Council's approval before adding or acquiring any additional theaters.

DENMARK

This section reviews competition law developments under the Danish Competition Act, as set out by executive order no. 1027 of 21 August 2007, and enforced by the Competition Council (DCC), assisted by the Competition Authority (DCA) and the Competition Tribunal (Tribunal).

Horizontal Agreements

Danish Financial Institutions Found To Be Engaging In Unlawful Concerted Behavior

On January 30, the Danish Competition Council issued a decision finding that a Danish association of regional banks ("Lokale Pengeinstitutter", hereinafter "LOPI") and its members had engaged in unlawful concerted behavior.

In particular, the DCC pointed to the following facts in reaching its conclusion:

- LOPI's bylaws stipulated that its board could exclude a member for demonstrating a "lack of collegial behavior;"
- LOPI's board, on several occasions, issued complaints to members for not displaying "collegial behavior", in particular, by soliciting and employing competitors' employees; and
- announcements by LOPI's board directly and indirectly urged its members to follow certain competitive parameters and curb internal competition.

The ruling was particularly significant as it established that non-solicitation clauses are covered by the Danish Competition Act, despite Article 3 of the Act specifically exempting "pay and working" conditions from the Act's jurisdiction. Whether a particular non-solicitation clause infringes the Act's prohibition of anti-competitive agreements must, however, still be determined on a case-by-case basis.

LOPI, whose members account for approximately 20% of the Danish regional bank market, has now conformed its bylaws to the DCC's decision. As a result the competition authorities did not further pursue the matter or seek monetary sanctions.

Unilateral Conduct

Schneider Electrics A/S Found To Have Abused Dominant Position On Market For Electric Installations

On January 7, the Danish Supreme Court issued a judgment finding that Schneider Electrics A/S (formerly Lauritz Knudsen A/S) had abused its dominant position on the market for electrical installations.

The Supreme Court upheld the December 20, 2000, May 17, 2002, and December 6, 2005 rulings by the Danish Competition Council, Danish Appeals Tribunal and Eastern High Court respectively, concluding that Schneider Electrics had abused its dominant position on the market for electrical outlets and sockets by applying loyalty-enhancing discount schemes including rebates for advanced orders. While the Supreme Court found that the Danish Competition Council's relevant product market definition (encompassing electrical outlets and sockets) may not have been sufficiently broad, it nonetheless concluded that even under a broader 'switchbox for fast installation' market, Schneider Electric was still dominant and engaging in abusive behavior.

Elsam's Excessive Electricity Wholesale Prices Found To Be Abuse Of Dominant Position

On March 3, the Danish Appeals Tribunal, in part, upheld the DCA's June 20, 2007 decision finding that Elsam had abused its dominant position on the Western Danish electricity market.

The Tribunal confirmed that Elsam's wholesale electricity prices in Western Denmark were excessive from January 1, 2005 to June 30, 2006 and so constituted an abuse of its dominant position for that period. With respect to the second half of 2006 however, the Tribunal held that the DCA had not met its burden of proving an abuse, primarily as it had not adequately disproven Elsam's claim that the Company set its prices during that period in line with its marginal costs of production. The Tribunal referred the case back to the DCA for retrial on this issue.

Mergers and Acquisitions

Sydbank A/S Acquires Bankrupt BankTrelleborg A/S

On January 25, the DCA approved Sydbank A/S's acquisition of BankTrelleborg A/S without conditions. The acquisition is estimated to leave Sydbank with a market share of less than 7% on the market for retail banking in Denmark. The Competition Authority approved this transaction particularly expeditiously on account of BankTrelleborg's bankruptcy.

FDB's Reacquisition Of Coop Danmark A/S Cleared Without Conditions

On January 30, the DCC cleared FDB's reacquisition of Coop Danmark A/S from Coop Norden AB without conditions. Coop Norden will be liquidated, and its remaining retailers in Sweden and Norway sold to owners' associations in those countries. The transaction did not encompass Coop Trading A/S, a cooperative purchasing company, which will continue to be owned jointly in equal shares by Coop Sverige AB, Coop Norge AS and Coop Danmark A/S.

Saint Gobain Distribution Nordic AB Acquires DLH Træ & Byg A/S

On February 26, the DCA approved Saint Gobain Distribution Nordic AB's ("Saint Gobain") acquisition of control in DLH Træ & Byg A/S ("DLH") without conditions. Saint Gobain is a holding company for Dahl International AB and Optimera Gruppen AS, and is part of the Saint-Gobain Group, a company active on the Danish building materials market. DLH consists of 19 timber businesses, which sell timber, plates, construction materials, tools and fittings to craftsmen, entrepreneurs, minor companies and consumers. The DCA considered the acquisition unlikely to have any perceptible effects on the market for building materials and so approved it without conditions.

Policy and Procedure

Supreme Court Judgment Denies Telia Telecom A/S Damages Claim

On February 1, the Danish Supreme Court upheld the High Court's decision in the *Telia Telecom* case, which had held that Telia Telcom A/S was not entitled to damages following a DCA dawn raid at its premises. The Court confirmed that the DCA had properly carried out its inspection at Telia Telecom's premises despite the fact that the search warrant authorizing the dawn raid had misstated Telia's address. The Court also dismissed Telia Telecom's claim that the DCA had illegally disseminated information to the media.

FINLAND

This section reviews competition law developments under the Finnish Act on Competition Restrictions, which is enforced by the Finnish Competition Authority (FCA), the Market Court, and the Supreme Administrative Court.

Unilateral Conduct

FCA Proposes Fines On Three Telecom Companies

On October 23, 2007, the FCA published separate decisions proposing that the Market Court impose fines on three incumbent telecom operators for unlawfully favoring their own service distributors in making available wholesale subscriber line leases. Aina

Group (formerly Hämeen Puhelin) was to be fined €75,000 for abusive practices from 2000 to 2002, Kymen Puhelin €50,000 for practices from 1997 to 2002, and Telia Sonera Finland €40,000 for practices from 2001 to 2002.

The FCA found that all three telecom companies held dominant positions in the wholesale market for the lease of subscriber lines in particular regional geographic markets. It further held that in providing its own service distributors discriminatory and non cost-based rebates, the companies had committed abuses of these dominant positions. The FCA specifically noted that quantity rebates which distort competition between undertakings of different sizes without objective justification are abusive.

The FCA went on to hold that although increased volume leases might result in some cost savings to the companies, any such savings could not justify the maximum rebate levels granted to certain favored customers (25 to 30%). In fact, the thresholds for the highest levels of rebates were set such that they could, in practice, only be attained by the three telecom companies' own service operators. In addition, new entrants faced significant barriers due to the "bottleneck" nature of the local networks, and the fact that the three incumbents had market shares of over 95% on their respective relevant geographic markets. The rebate practices at issue were thus deemed to have had harmful effects on competition and to have reduced supply on the retail market for subscriber lines.

FRANCE

This section reviews competition law developments under Part IV of the French Commercial Code on Free Prices and Competition, which is enforced by the Competition Council (Council) and the Ministry of Financial and Economic Affairs.

Horizontal Agreements

Paris Court Of Appeals Overturns Competition Council Bid Rigging Decision

On January 15, the Paris Court of Appeals overturned a Competition Council decision finding that Dehe TP, Devin Lemarchand Environnement, and EGC Ouest had engaged in anticompetitive exchanges of pricing information in advance of responding to a public tender for drainage works by the city of Vannes.

As a preliminary matter, the Court clarified that, when applying the competition laws to companies in the midst of insolvency proceedings (such as Dehe TP), the Council must ensure that, under Article L.622-22 of the French Commercial Code, a nominee and administrator appointed by the Commercial Court attend all proceedings before the Council. Given the absence of such representatives in the instant case, the Court found the proceedings against Dehe TP to be irregular. However, the Court proceeded to issue a ruling on the case, because the Council had allowed the Court appointed nominee and administrator to present their arguments to the Council following the issuance of its decision in this case.

With respect to the merits of the case, the Court recited the high burden of proof required to establish an infringement, noting, in particular, that a single document providing no more than ambiguous circumstantial evidence was not enough to meet such a burden. The Council had, in fact, based its finding that the companies exchanged pricing information with a view to sharing the market, on a single chart detailing prices offered by the various competitors that had been seized at one of the companies' premises. The Council had relied heavily on the inaccuracy of several of the figures in the chart as evidence that the exchanges must have taken place prior the competitors' submission of offers, reasoning that if the figures had been collected following submission of offers, they would have been accurate, reflecting the companies' actual bids.

The Court held that, in the absence of any additional incriminating evidence, the chart was not sufficient to establish an infringement or bid rigging. The Court overturned the finding of liability against Dehe TP and Devin Lemarchand Environnement; EGC Ouest had not appealed the Council's decision.

DGCCRF Issues Guidance To Encourage Civil Actions For Damages Brought By Local Elected Representatives And Public Buyers

On March 21, the DGCCRF issued guidance aimed at encouraging local elected officials and public buyers to bring civil damages actions in response to competition law infringements.

The DGCCRF noted that the encouragement of such damages actions by public buyers is important because, while competition authorities are able to impose fines, they cannot order payment of damages to public institutions that have become the victim of anticompetitive practices. Moreover, such damages are often significant (potentially amounting to overcharges of 30% or more) and, without legal relief, would need to be borne by tax payers. The DGCCRF, in fact, noted that where public institutions fail to bring damages actions, taxpayers may act on their behalf to obtain compensation for damages caused to public buyers.

The DGCCRF provided guidelines on the specific procedures for public buyers' to obtain compensation for damages resulting from competition law infringements:

- The DGCCRF first noted that any challenged conduct must be presumed legal in the absence of evidence to the contrary. Thus public buyers cannot reject offers from candidates which they view to be illegal unless the competition laws have blatantly been violated.
- Second, public buyers may await a binding decision from the investigating competition authority condemning the anticompetitive practices before bringing their own civil damages action. This has the advantage that they can then rely on the competition authority's decision to prove the existence of the anticompetitive practices. To this end, they may request the competition authority's report and any expert reports submitted from the administrative court's president. Should public buyers choose to proceed with legal proceedings without a prior competition authority decision, they must independently prove the existence of any such anticompetitive practices.
- Third, any damages caused to the public buyer must be assessed by an administrative court in the area where the contract was concluded and performed.
- Finally, damages may be claimed by public buyers on either of the following two grounds:
  - Fraud, pursuant to Article 1109 of the French Civil Code, in which case the public buyer must provide evidence of the damages caused and assess such damages; and
  - Invalidity of contract, in which case the public buyer may request the reimbursement of all amounts paid (plus interest) by the party engaging in anticompetitive practices.

Unilateral Conduct

Competition Council Accepts NMPP's Commitments To Provide Competitor Direct Access To Its Presse 2000 Software

On February 25, the French Competition Council accepted Nouvelles Messageries de la Presse Parisienne ("NMPP")'s commitments to provide its primary competitor, Messageries Lyonnaises de Presse ("MLP"), direct, automated access to NMPP's Presse 2000 software with respect to all newspapers.

The market for the distribution of press in France includes three sectors: (i) companies that distribute publications nationwide (NMPP - with a market share of over 80% - and MLP); (ii) wholesale press agents; and (iii) press retailers.

NMMP, working with wholesale press agents, created the Presse 2000 software, to allow it distribute information contained in all newspapers to all its distributors. Although MLP developed its own, similar software, NMPP has consistently refused to link TID and Presse 2000 or grant MLP access to Presse 2000.

MLP thus brought a complaint before the Council claiming that NMPP was abusing its dominant position to the detriment of MLP. It claimed that, as long as NMPP refuses to grant direct automated access to the Presse 2000 system, wholesale press agents working with Presse 2000 must manually re-enter information received from MLP.

In its preliminary assessment on the merits, the Council acknowledged that NMPP's refusal to grant MLP automated access to Presse 2000 could lead to data entry errors, disruptions and discriminatory treatment of non-MNPP distrbuted newspapers by wholesale press agents. The Council gave no clear indication as to whether the essential facility doctrine applied, but stated that, given the broader efficiency problems existing in the French newspaper distribution sector, it was not feasible for MLP to establish its own software (even though MLP had the financial and technical means to develop a system equivalent to Presse 2000).

In order to allay the competitive concerns expressed by the Council, NMPP undertook to allow the direct input of information relating to MLP-distributed newspapers into the Presse 2000 software, in return for a financial contribution from MLP. The Council considered that these commitments were likely to remove the identified distortion of competition.

Mergers and Acquisitions

SNCF Fined For Failure To Notify Concentration

On January 28, the Minister of Financial and Economic Affaires ("Minister") imposed a fine on SNCF for failing to notify a concentration that exceeded the French merger notification thresholds under Article L. 430-8 of the French Commercial Code. As such a fine for failure to notify is rare it merits further examination.

SNCF, for over 40 years, has had a 38.63% interest in Novatrans, a company active in combined road and rail transport. In autumn 2006, SNCF initially increased its interest in the company to 49.02%

without notifying the Minister. In January 2007, it again increased its stake in Novatrans to 52.81%. The 2007 increase was notified to the Minister, who was of the opinion that the acquisition was likely to distort competition, and thus sought the views of the French Competition Council. Following the Competition Council's findings, SNCF chose to abandon the transaction.

After SNCF had abandoned the transaction, the Minister proceeded to examine the various shareholdings held by SNCF at recent Novatrans general assemblies. In doing so, he concluded that, in view of the dispersed nature of Novatrans' shareholdings, SNCF had actually acquired control when it increased its stake to 49.02 %. He further concluded that the autumn 2006 acquisition had enabled SNCF to acquire exclusive control over Novatrans in 2007, and that as a result the 2006 share purchase should have been notified. SNCF, in response, reduced its interest in Novatrans to 38.63 %.

The Minister stated that he was entitled to impose a fine on SNCF under Article L. 430-8 of the Commercial Code as it had completed a concentration exceeding the French thresholds without proper notification. While Article L.430-8 allows for the imposition of a fine of up to 5% of the annual combined turnover of the buyer and target, the Minister considered that (i) SNCF had informed the *DGCCRF* of the acquisition of the disputed shares in the context of another notification; (ii) the shares in question were held for only one year; and (iii) SNCF had already accepted to reduce its shareholding in Novatrans. For these reasons, the Minister held that SNCF had acted in good faith and, as a consequence, limited the fine to €250,000.

Policy and Procedure

European Court Of Human Rights Condemns France For Breach Of Article 6 Of Convention For The Protection Of Human Rights

On February 21, the European Court of Human Rights ("ECHR") held that the French system for judicial review of search and seizure operations in tax proceedings was in breach of Article 6.1 of the Convention for the Protection of Human Rights (the "Convention"). The Court's judgment may affect dawn raids in the context of competition law proceedings.

In France, tax authorities may conduct search and seizure operations in connection with an alleged tax fraud case, subject to an order issued by a judge from the competent court of first instance. Any such order authorizing a search must include the factual and legal elements that make the existence of tax fraud likely, and thereby justify the search for further evidence. Pursuant to Article L. 16 B of the Fiscal Procedural Code, the court order is open to an appeal – limited to points of law – before the French Supreme Court within 5 days of notification.

In 2000, search and seizure operations, subject to a court order, were conducted at the premises of two companies and at the home of a Mr. Ravon, the companies' representative. Mr. Ravon and the companies in question appealed the court order, alleging, in particular, that the order did not contain sufficient factual and legal elements. The Supreme Court dismissed the complaint.

The complainants then applied to the ECHR to determine whether a right of appeal limited to points of law, as provided by Article L. 16 B of the Fiscal Procedural Code, is compatible with Article 6.1 of the Convention, which provides for the right to a fair and public hearing by an independent and impartial tribunal.

The ECHR noted that, although search and seizure operations are conducted under the control of the judge of first instance who authorized them,[1] only the Supreme Court is competent to assess the validity of the court order. It proceeded to find that "*an appeal before the Supreme Court, which rules on points of law only, does not provide for a review of the factual matters upon which the court order was based*". Therefore, Article L. 16 B of the Fiscal Procedural Code did not offer adequate guarantees to the complainants in light of their right to a fair trial, and was held to be in breach of Article 6.1 of the Convention for the Protection of Human Rights.

Moreover, the ECHR observed that the persons subject to search and seizure operations did not seem to enjoy effective access to the judge of first instance, given that: (i) the investigating officials in France were under no legal obligation to inform the persons concerned that they are entitled to refer an irregularity in the investigation to the judge; (ii) the judge was not required to mention in the court order the possibility of or procedure for such a claim; (iii) it was immaterial whether the person subject to search and seizure operations was present during the search; and (iv) French law did not provide for the right to be assisted by a lawyer during the search and seizure operations.

The ECHR therefore awarded the plaintiffs €5,000 in light of the moral prejudice caused to them.

This ECHR judgment is likely to apply to dawn raids in the context of competition law proceedings. In France, similar to tax proceedings,

1 The judge of first instance may decide to suspend or terminate search and seizure operations if the persons subject to it point to irregularities being committed.

competition authorities must request an order from a judge of first instance to conduct a dawn raid. The judge assesses whether the elements of information submitted to him by the authorities warrant such a search. Similar to the tax proceedings, Article L. 450-4 of the French Commercial Code provides that the court order authorizing the search may only be appealed to the Supreme Court within 5 days, and that the right of appeal is limited to points of law. Therefore, the French legal system does not provide for judicial review of the factual matters upon which the court order was based, and in light of the similarity between dawn raids conducted in the context of tax and competition proceedings, Article L. 450-4 of the Commercial Code would likely be considered in breach of Article 6.1 of the Convention.

The French government is, therefore, currently contemplating introducing legislation consistent with the ECHR's ruling. It is envisaged that court orders authorizing dawn raids in the context of fiscal and competition proceedings would initially be subject to an appeal, on factual and legal grounds, before the Court of Appeals.

GERMANY

This section reviews competition law developments under the Act against Restraints of Competition of 1957 (the GWB), which is enforced by the Federal Cartel Office (the FCO), the cartel offices of the individual German Länder, and the Federal Ministry of Economics and Technology.

Horizontal Agreements

FCO Fines Pharmaceuticals Manufacturers And Pharmacist's Association

On January 8, the FCO announced that it had imposed fines on five pharmaceuticals manufacturers (Bayer Vital GmbH, Boehringer Ingelheim GmbH, McNeil Pharma GmbH & Co. KG, Novartis Consumer Health GmbH, and Procter & Gamble GmbH), the Federal Association of Pharmaceuticals Manufacturers, and nine regional pharmacists' associations for encouraging individual pharmacists to apply the manufacturers' independently developed recommended prices in violation of the Act Against Restraints of Competition (ACR).

Non-prescription medicine sales were broadly deregulated in Germany, allowing pharmacists to apply their own retail prices to such medication as of January 1, 2004. The FCO alleged that, following deregulation, the named pharmacists' associations arranged speeches in 24 different German cities at which business consultants, the associations themselves, and pharmaceutical manufacturers encouraged pharmacists to apply the recommended prices as listed.

The FCO condemned this behavior as restrictive of price competition in violation of the ACR. Though the total fines imposed (€465,000) were relatively modest, it is nonetheless remarkable that the pharmacists' associations, who unlike the manufacturers and pharmacists themselves are arguably not direct market participants, were also fined for having facilitated the infringing conduct.

FCO Fines Three Décor Paper Manufacturers A Total Of €62 Million

On February 5, the FCO announced that it had fined décor paper manufacturers Munskjö Paper GmbH, Felix Schoeller GmbH & Co. KG, and Arjo Wiggins Deutschland GmbH, as well as five individuals, a total of €62 million for engaging in horizontal price-fixing behavior and reaching agreements on facility shutdowns to prevent "over" capacity on the market.

Decór papers are specialty papers used in surface refining of wood products, particularly in the furniture industry. According to the FCO, beginning in August 2005 and for over two years, the three major European decór paper manufacturers engaged in the alleged price fixing and capacity restricting behavior. The FCO also specified that its investigation of additional manufacturers is still ongoing. The fined companies have announced that they will not appeal the FCO's decision.

FCO Fines Four Branded Cleaning Product Manufacturers €37 million

On February 20, the FCO announced that it had imposed fines totaling €37 million on cleaning product manufacturers Henkel Wasch- und Reinigungsmittel GmbH, Schwarzkopf & Henkel GmbH, Sara Lee Deutschland GmbH, and Unilever Deutschland GmbH, as well as several of these companies' sales managers. Colgate-Palmolive GmbH, another cartel participant was exempt from fines as the first applicant to submit a leniency application.

The FCO accused the parties of coordinating price increases and exchanging commercially sensitive information relating to the manufacturers' contracts with retailers. In particular, the FCO alleged that:

- The parties coordinated price increases of approximately 5% for certain of their competing dishwasher detergents, shower gels and toothpastes in 2005 and 2006. These were markets in which competition had been particularly fierce and the companies were thus allegedly particularly keen to reign in price competition.
- The companies met regularly at their national trade association's "Body Care, Cleaning Agents, and Detergents" working group, and there exchanged commercially sensitive information on the status

of their annual negotiations with retailers, including pricing and other contractual terms.

Mergers and Acquisitions

Federal Court of Justice Declares Merger Control Rules Applicable To The Hospital Sector And Prohibits Rhön-Klinikum's Acquisition Of A Bavarian District Hospital

On January 16, the Federal Court of Justice (FCJ) upheld the FCO's and Düsseldorf Court of Appeals' rulings prohibiting the leading private hospital group Rhön-Klinikum AG from acquiring the Bad Neustadt District Hospital from the Administrative District of Rhön-Grabfeld.

Rhön-Klinikum AG, whose principal shareholders are the Bavarian Hypo- und Vereinsbank and the Münch family, operates 45 clinics in 34 locations, achieving turnovers of almost two billion Euros in 2006. The proposed transaction would have strengthened Rhön-Klinikum's dominant position in the regional general hospital services market, leaving it with market shares over 50%.

Significantly, the FCJ found that the ARC does apply to the hospital sector, and that social security or hospital financing laws do not take precedent over it. While Section 69 of the Social Security Code V does explicitly, exclusively regulate social security's interaction with hospitals and doctors, the law does not contain such an exclusivity provision with respect to interaction among hospitals.

The Court also found that both private and public hospitals are part of the same relevant market; patients do not distinguish between hospitals on the basis of their ownership. Patients have the right to seek medical treatment at the hospital of their choice. The Court agreed with Rhön-Klinikum that hospitals (both private and public) do not engage in *price* competition for patients' business on this market. This the Court found to be true, because regardless of whether the patient is publicly or privately insured, insurance companies, rather than patients, pay or indirectly reimburse the cost of care. The Court, however, found that hospitals do engage in competition with respect to the quality of services they offer. This in turn, justifies application of the ARC to competition among hospitals.

Düsseldorf Court Of Appeals Declines To Issue Interim Order To Allow Lottery Merger

On March 3, the Düsseldorf Court of Appeals issued a decision declining to grant an application for interim relief from the FCO decision prohibiting the State of Rhineland-Palatine's acquisition of the Lotto Rhineland-Palatine GmbH.

The FCO, on November 29, 2007, had prohibited the transaction, which entailed the State of Rhineland-Palatine acquiring 51% of Lotto Rhineland's outstanding shares. Lotto Rhineland has a dominant position on the regional lottery market in Rhineland-Palatine and is legally mandated by the State of Rhineland-Palatine to run the State's lottery. The State in turn itself already jointly controls the Southern German Class Lottery together with other Federal States. The FCO viewed the transaction as a merger of the parties that would have resulted in the merged party holding market shares of 80-90% of the regional lottery market.

Under the ARC, Section 41, the parties are not permitted to proceed with a merger not cleared by the FCO. The FCO, however, may issue an interim order allowing an exemption to this general rule if the parties put forward important justifications in a separate application to the FCO. Normally such an application would be made before the FCO has reached either a clearance or a prohibition decision on the merits (particularly where the parties need to move ahead with their transaction as quickly as possible). In its March 3 judgment, however, the Court found that the jurisdiction to issue such an exemption remains with the FCO (and not with the Court of Appeals) even after the FCO has issued a decision on the merits, as long as that decision on the merits remains under review by the Courts of Appeal.

The parties had separately argued that under certain Federal Constitutional Court and European Commission precedent, the State has a duty to help prevent compulsive gambling, fraud, or misleading advertising and the transaction would allow it to accomplish these goals. The Court of Appeals, however, concluded that the State did not need to acquire the lotteries in this instance in order to accomplish these goals. The State could simply pass legislation to grant it supervisory authority over lottery operators.

FCO Prohibits Transaction Between Major Copper Manufacturers

On February 27, the FCO issued a decision prohibiting A-TEC Industries AG from acquiring control in Norddeutsche Affinerie AG, and further ordered it to sell 13.75 % of the shares that A-Tec had already acquired in July 2007.

The FCO stated that the transaction would have resulted in A-Tec acquiring a dominant position in the market for oxygen-free copper pellets, which are used as a raw material in the manufacture of electronics and other electro-technical products. The transaction would also have merged the two largest competitors on that market into an undertaking with a post merger EEA-wide market share of over 85%.

In fact, the FCO found that even A-Tec's acquisition of 13.75% of Norddeutsche's shares in 2007 should be considered an acquisition of control, and so required A-Tec to divest those shares. That acquisition granted A-Tec negative control as it allowed it to block key decisions at shareholder meetings, where the next largest shareholder held less than 5% of Norddeutsche's shares and which fewer than 40% of all shareholders actually attended.

Policy and Procedure

FCO Establishes New Decisional Division (B 10) Responsible For Unilateral Conduct Reviews In The Energy Sector And Initiates Proceedings Against Gas Suppliers On Grounds Of Excessive Gas Prices

The FCO, on January 2, established a new decisional division (B 10) meant to review potentially abusive unilateral conduct in the electricity, gas and district heating sectors. This followed the implementation of the German abusive pricing amendment to the ARC that was specifically meant to curb excessive prices in the German gas and electricity markets.

In early March, the FCO's new division then initiated abuse proceedings against approximately 35 gas suppliers (representing roughly 20% of total German gas supplies) alleging excessive pricing under the newly imposed amendment. Gas prices can differ across Germany by as much as 25-45% depending on the particular gas supplier.

GREECE

This section reviews competition law developments under the Greek Competition Act 703/1977, enforced by the Competition Commission, assisted by the Secretariat of the Competition Commission.

Vertical Agreements

Competition Commission Condemns Price Fixing Agreements Between Milk Companies And Supermarkets

On December 19, 2007, the Competition Commission issued a decision condemning certain agreements reached between Greek milk companies and the distributors and supermarkets to whom they sell.

The Competition Commission had previously found on November 29, 2007 that the five leading milk companies in Greece had reached a horizontal agreement to fix the wholesale price of milk and to prevent customers from switching milk suppliers.

In reaching its December ruling, the Competition Commission first examined the relationships between the relevant milk companies (Olympos, Vivartia, Mevgal, Fage, Kri-Kri, and Rodopi) and the supermarkets/cash & carry chains that sell their products (Carrefour/Marinopoulos, Alfa-Bita Vasilopoulos, Sklavenitis, Veropoulos, Atlantic, Elomas and Masoutis). It considered, in particular, the highly concentrated nature of the supermarket milk distribution market, and the fact that the stores listed account for 60-70% of all retail milk sales in Greece.

The Competition Commission concluded that the interests of milk companies and supermarkets converged as both worked together to maintain high milk prices from 2001 to 2006 in violation of Article 81 EC. While the suppliers' wholesale list prices for milk increased with the increase in recommended retail prices, the supermarkets at the same time received larger discounts and rebates to make up for much of the increase in their purchasing costs. The relative inelasticity in demand for milk (in part due to its important nutritional role) permitted and encouraged the suppliers and supermarkets to maintain artificially high prices rather than cut prices to attempt to gain market shares.

In particular, the Competition Commission examined the commercial agreements between each individual milk company and the supermarkets and distributors with which they did business. Whether verbal agreements or written contracts, these all included requirements to fix the minimum resale price for milk. In the case of one distributor, the agreement also prevented passive sales into an agreement assigned to another distributor. In several instances, the wording of the agreements explicitly obliged supermarkets to immediately adapt their retail prices to the retail pricelists issued by the milk company. The Commission concluded that the evidence showed that in such cases the supermarkets involved complied with these requirements.

The Commission found the parties' conduct to affect trade between the Member States and to be in violation of Article 81 EC. While certain of the parties argued they would be willing to make commitments not to apply any anticompetitive existing agreements, the Commission rejected such commitments on the grounds that they had not previously been notified to the Commission.

The Competition Commission's December 2007 decision required the parties to discontinue all infringing conduct, found all anticompetitive clauses of existing contracts to be void, and imposed significant fines on the milk companies, and supermarkets involved. Fines for conduct involving milk companies and supermarkets were

set at 3% of the revenues attributable to the sales of each undertaking in the relevant product markets for each year of the infringement, and ranged from €29,000 to almost €600,000. The Commission only imposed separate fines for conduct involving milk companies and distributors in the case of two milk companies (€2.6 million and €21.7 million) and it did not impose any fines on individual distributors (who were significantly smaller than the milk companies).

IRELAND

This section reviews developments concerning the Irish Competition Act 2002, which is enforced by the Irish Competition Authority and the Irish courts.

Unilateral Conduct

ASI Sugar Commences Damages Claim Against Greencore Group

ASI Sugar, a sugar distributor based in Dublin, has commenced proceedings in the Irish High Court seeking damages against the Greencore Group for an alleged abuse of dominant position.

The action follows a decision of the European Commission, which found that the Greencore Group had abused its dominant position in the granulated sugar market. In particular, the Commission found that the Greencore Group had infringed Article 82 EC by engaging in practices that included selective pricing, export rebates, price discrimination and target rebates. The European Court of Justice upheld the Commission's decision but reduced the fine on Greencore from €8 million to €7 million. The current action in the Irish High Court is a private damages claim based on the Commission's decision.

ASI Sugar claimed that, as a result of Greencore Group's abuse of its dominant position, API was forced out of the Irish retail sugar market, one year after an attempted re-entry. In 1990, when ASI was mainly owned by a French company, it attempted to enter the Irish market with sugar imported from France. According to ASI, its entry strategy was met with a vigorous response from Greencore Group, aimed at excluding ASI from the relevant market. The case is now ongoing.

City Bin Company Complains To Irish Competition Authority Regarding Four Dublin Local Councils

The City Bin Company, a private waste disposal company in Dublin, has complained to the Irish Competition Authority alleging that four Dublin Local Councils are violating the Irish Competition Act 2002 through their plans to restrict the number of private waste collectors to one.

The Local Councils have indicated that they plan to amend their waste management plans to reduce the number of private firms active in their jurisdictions. The Local Councils have justified the proposed changes by claiming that they are designed to ensure that different private refuse companies do not visit the same roads several times in any one week. The City Bin Company is one of three private waste companies currently operating in Dublin and has justified its compliant by stating that competitive conditions must be maintained in order to ensure lower prices for consumers. Another of the private companies, Panda Waste, is currently taking a Judicial Review action to prevent the changes being implemented. The cases are now ongoing.

Mergers and Acquisitions

European Commission Refers Heineken's Proposed Acquisition Of Scottish & Newcastle's Irish Business

On April 3, the European Commission announced that it had referred Heineken's proposed acquisition of Scottish & Newcastle's business in Ireland to the Irish Competition Authority. Scottish & Newcastle's Irish business consists of the Beamish and Crawford brands.

On the same date the Commission also cleared Heineken's proposed acquisition of Scottish & Newcastle, excluding the Irish assets. The Commission decision to refer the issue of the Irish assets to the Irish Competition Authority was a result of the Irish Competition Authority's request for a referral on February 29. The Competition Authority's right to request a referral is granted under Article 9(2) of the EC Merger Regulation.

Policy and Procedure

Competition Authority Outlines Proposals For Reform

In December 2007, the Competition Authority issued a report regarding the operation and implementation of the Irish Competition Act 2002. The report offered suggestions for reform in four categories.

First, the report suggested certain reforms in relation to the enforcement of Competition Legislation. In particular, it was suggested that a) the Irish Government amend the Competition Act 2002 to clarify that a warrant issued to search a premises also authorizes the search of vehicles on the premises; b) amend the Act to provide for sanctions in the event of obstruction of a Competition Authority investigation; c) amend the Act to provide for an offence

of perjury during Competition Authority investigations; and d) amend the Act to provide clearer sentencing guidelines for the Judiciary.

Second, the report suggested certain reforms in relation to the modernization of the Irish Merger Control provisions. In particular, the Competition Authority recommended that the Irish Government amend the Irish Competition Act 2002 to a) clarify the term "carry on business," b) bring the Competition Authority's Phase 2 merger review period in line with that of the European Commission, c) give the Competition Authority the express power to review late notifications, d) render a notification invalid if full details are not provided, e) extend time by 15 working days during Phase 2 where commitment proposals have been made by the parties, and f) eliminate criminal sanctions and provide for civil sanctions for failure to notify a merger.

Third, the report contained suggestions for general reform. These included a) a proposal to amend the Act to require notification to the Competition Authority of the filing of cases in the Irish Courts in relation to Section 4 or 5 of the Competition Act 2002 or Article 81 or 82 EC; or b) a proposal to give the Competition Authority the right to bring a civil action in situations of a breach of the aforementioned provisions.

Finally, the report discussed possibilities for providing the Competition Authority with greater advocacy possibilities.

Competition Authority Publishes Study On Grocery Sector

On April 9, the Competition Authority published a study outlining its review of the Irish Grocery Sector. The study followed a Government decision in March 2006 to abolish a previous order that banned below cost selling on certain grocery products. The report analyzed both the retail and wholesale segments of the Grocery sector and according to Authority Chairperson Mr. Bill Prasifka, "*revealed a number of bottlenecks…which will require continued monitoring by the Competition Authority and other consumer groups*." A full version of the report is available on the Competition Authority's website at *www.tca.ie*

ITALY

This section reviews developments under the Competition Law of October 10, 1990, No 287, which is enforced by the Italian Competition Authority (Authority), the decisions of which are appealable to the Regional Administrative Tribunal of Lazio (Tribunal).

Horizontal Agreements

Council Of State Upholds Jet Fuel Cartel Decision

In February, the Council of State ("Council"), Italy's highest administrative court, upheld the Administrative Tribunal of Lazio's 2007 jet fuel cartel decision in its entirety.

The 2007 decision[2] confirmed the findings of the Italian Antitrust Authority holding that six primary jet fuel suppliers in Italy had violated Article 81 EC by entering into agreements and/or engaging in concerted practices aimed at allocating the Italian jet fuel market among themselves, while excluding actual and potential competitors from the market. The Tribunal's decision also confirmed that the fuel suppliers had used storage and delivery joint ventures to facilitate their restrictive practices. The Tribunal, however, overruled the Authority's finding that the suppliers' joint ventures would need to be dismantled, finding that such a remedy to be disproportionate.

The Tribunal's decision was appealed by both the fuel suppliers and joint ventures, as well as the Authority, which sought to reinstate its structural remedy requiring dismantling of the joint ventures.

The Council dismissed the fuel suppliers and joint ventures' appeals in their entirety, noting that the parties merely reiterated the same arguments already presented to the Tribunal (which had correctly rejected the parties' challenges to the Authority's decision). The Council specifically held that the Authority had properly found the fuel suppliers to have entered into a single and continued anticompetitive arrangement that involved the: (i) exchange of sensitive information; (ii) coordination of bids for public jet fuel tenders; (iii) adoption of retaliatory measures; and (iv) establishment of further barriers to entry meant to prevent actual and/or potential competitors (including airlines themselves) from competing in the jet fuel supply market. The Council further confirmed the analysis of the Tribunal with respect to the involvement of the joint ventures in the cartel, but, in dismissing the Authority's appeal, refused to reinstate any structural remedies requiring the dismantling of such joint ventures.

Council Of State Overrules 2006 Industrial Gas Cartel Decision

On March 7, the Council overruled a 2007 Tribunal decision[3] and entirely annulled a 2006 Authority decision[4] that had fined the major producers of industrial, medical and specialty gases in Italy ("Parties") a total of almost €57 million for allocating markets and operating production joint ventures that restricted competition, all in breach of Article 2 of Law No. 287/1990.

2 *See* National Competition Report 1st Quarter 2007

The Council held that the Authority had inappropriately based its market allocation findings on primarily circumstantial evidence and structural features of the Italian market (including observed stable market shares and rare instances of customers switching suppliers) that together did not meet the Authority's burden of proof.

Specifically, the Council noted that:

- The Authority wrongly focused much of its attention (and placed significant evidentiary value) on a cartel agreement that existed between the parties in the 1980s, but was terminated in the early 1990s with the enactment of Italian antitrust laws.
- Most of the documents the Authority cited as proof of bilateral contacts among the Parties concerned only occasional contacts, involving transactions of minor value and limited to southern or central Italy.
- The Authority was unable to cite any evidence that the Parties' top management had been involved in any contacts with competitors.
- With respect to the allegation that the Parties rigged bids for sale of medical gases to public hospitals, the Authority was only able to provide documentation involving three minor bids, out of the thousands of bids that had taken place over a 13-year period.

The Council also stated that the Authority's case was not properly supported by its own economic analysis of the industrial gas market. First, with regard to the alleged stability of the Parties' market shares, the Council noted that the Authority had only considered a portion (1996-2003) of the timeframe of the alleged violation (1991-2004). The Authority was also unable to rebut the Parties' contention that stable market shares are a natural feature of mature markets such as those for industrial gases. Second, with respect to customer loyalty, the Council found that the Authority's claim that customer loyalty evidenced infringing behavior was simply not supported by the evidence. The Council noted that the Authority should have conducted an in-depth investigation into customer behavior, in order to prove that where customer loyalty existed it was the result of the Parties' alleged market allocation scheme rather than a natural feature of the market. The Council was also persuaded by, and found that the Authority had not rebutted, evidence that, over the relevant time period, prices for industrial gases were stable or declined, while alleged cartel members introduced new products and improved the quality of services offered.

The Council further rejected the allegation that the Parties' production joint ventures were used to facilitate the alleged cartel behavior. It rejected the Authority's request to impose structural remedies requiring the dismantling of the joint ventures as disproportionate and unreasonable. The Council noted that the Authority should have assessed whether there were less extreme remedies that might have resolved the Authority's alleged anticompetitive concerns with the joint ventures, before immediately requiring their dismantling or divestiture.

THE NETHERLANDS

This section reviews developments under the Competition Act of January 1, 1998, which is enforced by the Competition Authority (NMa).

Mergers and Acquisitions

NMa Sends European Directories' Acquisition of Truvo Nederland To Phase II

The NMa concluded on March 11, that European Directories' acquisition of Truvo Nederland and ClearSense raised significant competitive concerns and could not be cleared in Phase I proceedings.

European Directories publishes several yellow-page directories in Northern and Central Europe. It is active in the Netherlands through *De Telefoongids*, which publishes telephone and local business directories under the same name. Truvo Nederland produces *Gouden Gids*, a local business telephone directory, and ClearSense is a search engine marketer, assisting companies in positioning their websites at the top of online search engine result lists.

The parties argued to the NMa that they are active in one large relevant product market including the provision of all commercial search and advertising services. The NMa rejected such a broad market definition, however, instead defining the provision of advertising space in paper classified directories, and online advertising, as separate markets. In so holding, it noted that:

- online advertising is not at this time a true substitute for paper classified directories;
- the emergence of online advertising has not prevented the parties from growing their paper directory revenues and the parties continue to attain high margins for the sale of advertising space in

3 *See* National Competition Report 1st Quarter 2007.

4 *See* National Competition Report 2nd Quarter 2006.

paper classified directories, which suggests that they possess market power in a separate paper classifieds market; and

- the increased use of the internet has not influenced the parties' paper directory pricing strategies.

The NMa further distinguished the provision of advertising space in online directories from other online advertising opportunities, though it left the possibility open that these segments may make up one relevant product market. The NMa considered that online classified directories are different from other online advertising opportunities primarily because online directories focus specifically on local users and local advertisers. Broader search engines such as Google, Yahoo! and Live Search (Microsoft) search the entire world wide web and are not limited to localities input by a specific user, while online classified directories search only a particular directory that was compiled and managed by a specific party. Online classified directories require a local sales force to actively sell and promote advertising space to small or mid-sized businesses, while broader internet search engines often work without local sales forces, instead relying on passive sales through automated auctions. The NMa did recognize certain complementarities among online directories and online search engines, noting that *De Telefoongids*' website has search fields allowing a search in its limited telephone directory, its business directory, or the broader world wide web.

With respect to the concentration's likely impact on competition, the NMa rejected the parties' contention that there is no competition on price in the relevant markets. It concluded that it was likely that the concentration would lead to a significant impediment of effective competition in both the paper and online classified directory markets, and rejected the efficiencies put forward by the parties as inadequately substantiated. In so concluding it pointed, in particular, to:

- The parties' combined market share of 90-100% (Telefoongids has 50-60%, and Gouden Gids has 40-50%) in the paper classified directory market;
- The fact that Telefoongids and Gouden Gids are each other's closest competitors in the online classified market, with only a handful of marginal players providing any competitive restraint;
- The existence of high barriers to entry (caused by network effects, strong brand names and high sunk costs), portfolio effects, and an absence of countervailing buyer power in both the paper and online classified directory markets.

The parties submitted an application for a license initiating Phase II proceedings on March 31. It is worth noting that, since the Competition Act's inception in 1998, the NMa has prohibited only two mergers.

SPAIN

This section reviews developments under the Laws for the Protection of Competition of 1989 and 2007, which are enforced by the Spanish Competition authorities, Spanish Courts, and, as of 2007, by the National Competition Commission.

Unilateral Conduct

Iberdrola Fined For Abuse Of Dominant Position

On February 14, the Spanish Competition Commission ("CNC") imposed a fine of €14.5 million on Spanish electricity manufacturer Iberdrola for abuse of its dominant position in the electricity market.

Another energy producer, Endesa, had lodged a complaint against Iberdrola on March 7, 2005 alleging that the company had abused its dominant position on the Spanish electricity market by artificially creating so called "technical restrictions." In particular, Endesa claimed that the company deliberately charged inflated prices for electricity provided on the main grid (through the "electricity pool"), resulting in a supply and demand imbalance, and creating "technical restrictions" (artificial supply shortages) in particular areas of the main electricity grid. Iberdrola then supplied the required electricity in the areas experiencing shortages through its own local power plants at inflated prices.

As a result, the CNC found, buyers were forced to pay higher prices than if the technical restrictions had not occurred. The CNC specifically pointed to the second half of 2004 as well as to particular days in January and February 2005, when Iberdrola was able to distort competitive prices by supplying buyers locally through its "Castellon 3" plant. In fact, the number of "technical restrictions" that occurred in the Levante region supplied by Castellon 3 were four times higher during that period than they had been in that region in the previous year. The electricity provided by the Castellon 3 plant was sold at double the price of electricity sold on the main grid.

The CNC rejected Iberdrola's claim that prices on the main grid were insufficient to cover operating costs, noting that Iberdrola itself set its prices at these "competitive" levels where it was subject to competitive restraints.

The CNC held that Iberdrola's abusive conduct was to be treated as particularly serious in light of electricity's importance to daily economic activity and the competitiveness of Spain's industry.

Policy and Procedure

New Competition Act Implementing Regulation

Spain's new Regulation for the Defense of Competition, which serves as implementing regulation for the Spanish Competition Act (Act 15/2007), was enacted by Royal Decree 261/2008 on February 22, and entered into force on February 28.

Section I of the Regulation provides substantive guidance and clarification on a variety of provisions under the Competition Act, while Section II further develops and outlines the procedures to be followed under the Act.

In particular, Section I provides substantive guidance on (1) *de minimis* conduct (adopting the European Commission's criteria for assessing when conduct may be considered *de minimis* and so not covered by the Act), (2) merger control (including rules governing market share calculations), and (3) state aid (including rules governing the analysis of state aid and its effects on competition).

Section II sets out both procedural rules generally applicable under the Competition Act, as well as specific rules applicable in particular circumstances including in sanctioning, leniency and merger control proceedings.

- With respect to *generally applicable rules*, for example, (i) Article 13 sets out the Competition Commission's powers of inspection and clarifies under what circumstances the Commission must seek judicial authorization to conduct inspections, (ii) Article 18 outlines procedures regarding hearings before the Competition Commission's Council, and (iii) Article 19 provides for monetary fines to be imposed where parties refuse to cooperate fully with the Commission.

- Regarding *proceedings leading up to sanctions*, the Regulation distinguishes between the investigation phase (covered under Articles 28-35) and the decisional phase (Articles 36-39) of such proceedings. It clarifies that the Commission's Investigation Directorate has broad investigatory powers and may carry out activities necessary to elicit facts it believes to be relevant. Article 33 also provides that, upon finding an infringement, the Directorate must issue a Statement of Objections to all named parties describing these findings. The parties have 15 days to submit a response, after which the Directorate prepares a proposed decision for the Council. The Council in turn can consider any additional evidence it sees as relevant and hold further hearings with the parties. Ultimately it is up to the Council to issue a final decision putting forth whether there has been a violation of the Spanish Competition Act or the European competition laws. The decision may include behavioral remedies, fines, or any other measures authorized under the Competition Act.

- *Leniency proceedings* are covered under Articles 46-53 of the Regulation, which outline the procedures for submitting leniency applications under Articles 65 and 66 of the Competition Act. In particular, for example, applications may be made orally or in written form, and may be provided in shortened format if an application covering the same conduct has already been made to the European Commission.

- *Merger control proceedings* are described in detail beginning at Article 54 of the Regulation. Importantly, the Regulation, for the first time, allows for "short form" notifications in a number of circumstances including, for example, where the merging parties are not active in the same relevant product or geographic markets, or in vertically related markets. The Regulation also in detail describes the Competition Commission's process of review of a proposed transaction including the different responsibilities of the Investigation Directorate and the Council in both Phase I and Phase II proceedings, and the Minister of the Economy's role in Phase II proceedings.

SWITZERLAND

This section reviews competition law developments under the Federal Act of October 6, 1995 on Cartels and Other Restraints of Competition (the Competition Act), which is enforced by the Federal Competition Commission (FCC). Appeals against decisions of the FCC are heard by the Federal Administrative Tribunal.

Unilateral Conduct

FCC Initiates Investigation Into Distribution Of Imported French Books

On March 31, the FCC initiated an investigation into the pricing of imported French books. The investigation is meant to assess whether distributors of such books, acting as exclusive dealers for French publishers, hold dominant positions Switzerland, and if so whether their pricing policies amount to an abuse of their positions.

There are only a small number of French book wholesalers/distributors in Switzerland. Each distributor serves particular French publishers on an exclusive basis for sales into Switzerland. Under France's "Lang Law", distributors must maintain their resale prices within a certain percentage of the price they pay the publisher. This rule does not, however, apply to Switzerland,

meaning that wholesalers are able to set prices in Switzerland at levels significantly higher than they could charge in France.

Mergers and Acquisitions

FCC Approves Maxit/Saint-Gobain Merger Subject To Commitments

The FCC cleared the French Saint-Gobain's acquisition of Swedish Maxit Holding AB in March. The acquisition was also cleared by the European Commission on March 4 subject to commitments to divest the subsidiaries of Maxit active in the production and sale of gypsum-related products. Given that the commitments to the European Commission would also resolve any potential competitive concerns in Switzerland, the FCC found that the proposed acquisition was not likely to create a dominant position in the market for gypsum-related products for the ceramic industry and it cleared the transaction.

Competition Commission Approves Coop/Carrefour Merger Subject To Commitments

On March 17, the FCC approved Coop's acquisition of Carrefour's stores in Switzerland (including 12 existing and 2 planned hypermarkets) following its second phase review of the transaction.

Carrefour's Swiss stores had been operated by Distributis SA, a company jointly owned by Carrefour and Maus Frères. Maus Frères also operates other discount food retail markets in Switzerland.

The FCC referred the case to second stage review on November 26, 2007. It was principally concerned with the increased concentration in the food retail market that would result from the transaction. As with Migros' recent acquisition of Denner,[5] the FCC was particularly concerned with the transaction's effects on suppliers who might be forced into a situation of dependence on a particular retailer. Given the significant size of the Carrefour stores in question, the FCC also feared that the acquisition might strengthen Coop's position in the "hypermarket" segment.

The FCC finally held that while Coop's takeover of the Carrefour stores would reinforce Migros and Coop's joint dominance in the national food retail market, its joint dominance, particularly in the discount segment, would likely weaken over time. The FCC took particular account of the competitive restraints that expected new market entrants (including German supermarket chains Aldi and Lidl) would likely exert. The FCC also took into account that Carrefour's market shares were relatively small, at less than 4 %.

The FCC concluded that Coop's acquisition would not establish or strengthen a dominant position leading to the elimination of effective competition, and it thus cleared the transaction. In doing so, however, the FCC imposed the following commitments:

- Coop may not require its suppliers to serve it exclusively (a similar obligation was also imposed on Migros in the Migros/Denner transaction).
- If Coop wishes to discontinue sale of a product (of standard quality and price), it must negotiate mutually agreeable terms with its supplier.
- Coop is barred from acquiring any further food retailers in Switzerland (including Migros/Denner, Manor, Aldi, Lidl, Spar, Maxi, Volg, Landi, Valrhône/Pam and Magro/Casino) for a period of six years.
- Coop must divest a certain retail outlets (a total of 20,000 m2) in regions where the intended takeover will lead to the establishment of a particularly concentrated market (e.g. in Geneva and the canton of Ticino). This sale must be performed using an independent auditor as intermediary.

Competition Commission Approves Fenaco/Steffen-Ris AG Merger

On March 13, following its second phase review, the FCC approved the proposed merger of Fenaco and Steffen-Ris AG subject to commitments.

Fenaco and the Steffen-Ris AG are active in the sale of agricultural products. Fenaco is one of the largest suppliers in this market, with important links to the Landi cooperatives, while Steffen-Ris is primarily involved in the preparation and distribution of agricultural products. The merger of these two undertakings will create Switzerland's largest player in the national agricultural sector.

The FCC's review led it to conclude that the merger would create or strengthen a dominant position in the wholesale markets for consumer, industry and seed potatoes. To remedy these concerns the FCC required the parties not to impose exclusivity provisions on any of their trading partners active in Switzerland (including in the parties' sale and purchase of product).

5 The FCC approved the merger of Migros and Denner subject to commitments on September 4, 2007.

Competition Commission Approves CSS/Intras Merger

In February 2008, the FCC cleared INTRAS Insurance's merger with CSS, one of Switzerland's largest health insurance providers, without commitments finding that the proposed merger was not likely to strengthen a dominant position that might lead to the elimination of effective competition. The merger must still be approved by Switzerland's public health supervisory bodies.

Policy and Procedure

FCC Annual Report

The FCC published its 2007 Annual Report on its website in the first quarter of 2008.

The report notes that 45 concentrations were notified to the FCC in 2007, of which 39 were cleared in the FCC's first phase review.

The Report also documents the first imposition of direct administrative fines by the FCC since it became competent itself to sanction violations of the competition laws in April 2004. On February 5, 2007, the FCC issued a decision imposing a fine of CHF 333 million on Swisscom Mobile for abuse of its dominant position in the market for call termination charges. Separately, the FCC also fined PubliGroupe CHF 2.5 million, for abuse of its dominant position in the market for sale and placement of print media ads. Both decisions are currently on appeal before the Federal Administrative Court.

The Report also discusses the FCC's prohibition of the road asphalt cartel in the Canton of Ticino. As the violations in that case took place before April 1, 2005 (the end of the Swiss Competition Act's grace period), the FCC did not impose administrative fines on the parties. It did, however, prohibit the conduct and noted that it would be pace close attentions to bid rigging conduct in the future.

UNITED KINGDOM

This section reviews developments under the Competition Act of 1998 and the Enterprise Act of 2002, which are enforced by the Office of Fair Trading (OFT), the Competition Commission (CC) and the Competition Appeal Tribunal (CAT).

Horizontal Agreements

House Of Lords Upholds Appeal Against US Extradition

On March 12, the House of Lords upheld the appeal of Ian Norris, the former chief executive of the Morgan Crucible Group ("Morgan Crucible"), finding that he could not be extradited to the United States as a result of his participation in an 11-year carbon price-fixing cartel. It held that, during the period at issue, individual participation in a price-fixing cartel did not constitute a criminal offence under U.K. law, and could not provide a valid basis for extradition to the U.S. Nonetheless, the House of Lords remitted proceedings to the Magistrates' Court to determine whether Norris could be extradited on the basis of secondary charges of obstruction of justice.

In September 2004, a U.S. grand jury indicted Norris on four counts of violation of the U.S. antitrust laws, including conspiracy to fix prices in relation to certain carbon products, and having further conspired to obstruct justice, in particular by providing false information to the grand jury, and tampering with witnesses and evidence. The indictment followed an investigation into a price-fixing cartel alleged to have operated between 1989 and 2000. During that period, Norris held senior management positions within Morgan Crucible, one of the companies implicated in the cartel. Subsidiaries of Morgan Crucible were subject to substantial fines, while most Morgan Crucible directors, officers and employees were granted immunity from prosecution as a result of a plea bargain arrangement. Norris, however, was not a beneficiary of this arrangement.

Following his indictment, the U.S. Department of Justice issued an arrest warrant and applied for the extradition of Norris, a UK citizen, pursuant to the Extradition Act, 2003. On September 29, 2005, the U.K. Home Secretary acceded to this request and ordered Norris's extradition. This decision was subject to judicial challenge, and litigated before the High Court and, on appeal, the House of Lords.

In resisting extradition, Norris contended that his participation in a price-fixing cartel did not constitute an "extraditable offence" for purposes of the Extradition Act, 2003. Under this Act, an extradition order will be granted by the English courts only where, *inter alia*, the conduct at issue would constitute a criminal offence punishable with a custodial sentence in both the country requesting extradition and in the U.K. The dishonest participation of an individual in a price-fixing cartel was criminalized in the UK under the Enterprise Act, 2002, which came into effect in 2003. In his defense, Norris submitted that his involvement in the carbon cartel (from 1989 to 2000) predated the introduction of the Enterprise Act 2002 and so was not an "extraditable offence". In response, the U,S, Government submitted that, notwithstanding the absence of a statute specifically criminalizing individual participation in a cartel during the time period of the cartel, Norris' participation in the cartel still amounted to conspiracy to defraud, a criminal offence under U,K, and U,S, common law and thus provided a sufficient basis for extradition to be granted.

The High Court endorsed the submission made by the U,S, Government and, in February 2007, dismissed Norris' appeal. In short, the High Court ruled that the common law offence of conspiracy to defraud extended to cover an agreement dishonestly to fix prices, causing prejudice to others. Furthermore, the Enterprise Act, 2002 did not preclude price-fixing from being regarded as a *common law* criminal offence.

In June 2007, the House of Lords granted Norris leave to appeal the decision of the High Court, on the basis that the case raised issues of general public importance. The Appellate Committee of the House of Lords delivered its ruling on March 12, overturning the High Court's decision (*Norris v Government of the United States of America and others* [2008] UKHL 16).

The House of Lords reached the conclusion that, in the absence of "aggravating factors" such as dishonest misrepresentation, fraud, intimidation or violence, participation in a price-fixing cartel did not constitute a criminal offence at common law. As it was not suggested that Norris' conduct included any of the aggravating factors identified by the House of Lords, it followed that Norris had not committed an extraditable offence under the Extradition Act 2003. In support of its analysis, the House of Lords noted that no individual or company had ever been criminally prosecuted in the UK for being a party, or giving effect, to a price-fixing agreement. In fact, it was on recognizing the absence of any legal basis for criminal proceedings that the legislature chose to criminalize individual cartel participation under the Enterprise Act, 2002. Consultation papers and statements by Ministers confirmed that the Enterprise Act, 2002 would not have retroactive effect in relation to historic conduct. To construe the application of the Enterprise Act, 2002 in such a manner, without express legislative support, would be contrary to general English legal principles. Having regard to these varied factors, the U.S Government's contention that Norris had committed a common law criminal offence, providing a basis for its extradition application, was unfounded.

While rejecting the principal ground plead by the U.S. Government, the House of Lords also considered the scope for extradition on the basis of the secondary offences for which Norris was indicted in the U.S. (obstruction of justice). In his defense, Norris had argued that it would not be a criminal offence under English law to obstruct a U.S. criminal investigation. The House of Lords dismissed this argument, maintaining that the correct test was to ask whether it would have been a criminal offence under English law to obstruct an equivalent investigation conducted by the appropriate investigatory body in England. The House of Lords was satisfied that Norris' obstructive conduct would have constituted a criminal offence under English law, and could therefore legitimately provide grounds for his extradition. The House of Lords refrained from reaching a final conclusion on this issue, instead remitting the matter for consideration by the Magistrates' Court. In particular, the Magistrates' Court must now decide whether an extradition order, granted on the basis of obstruction of a criminal investigation, would be compatible with Mr. Norris' human rights, as enshrined in the European Convention of Human Rights.

Given the remittance of the case back to the Magistrates' Court, it remains unclear whether extradition proceedings against Mr. Norris will ultimately prove successful. Nonetheless, certain conclusions can be derived from the House of Lords ruling. It is evident that, absent "aggravating circumstances", individual participation in a cartel prior to the introduction of the Enterprise Act, 2002 will not provide a basis for extradition from the U.K. to the U.S. The House of Lords has stated unequivocally that the Enterprise Act, 2002 cannot be construed retroactively, and that price-fixing conduct will not ordinarily constitute a criminal offence at common law.

The significance of these observations is, however, limited, and likely to diminish further over time. It is not disputed that dishonest cartel participation by individuals has constituted a criminal offence since the introduction of the Enterprise Act, 2002. The appeal proceedings in respect of Norris' extradition have raised no grounds to contest future extradition proceedings based on the statutory criminal offence provided by the Enterprise Act, 2002.

Mergers and Acquisitions

BSkyB Ordered To Reduce ITV Shareholding

On January 29, the Secretary of State for Business, Enterprise and Regulatory Reform (the "Secretary of State") issued his decision on British Sky Broadcasting Group PLC's ("BSkyB") acquisition of a 17.9% shareholding in rival UK television broadcaster, ITV plc ("ITV"). Basing his decision on a report prepared by the CC, the Secretary of State concluded that the transaction is likely to cause a substantial lessening of competition in the provision of television services in the UK. Accordingly, the Secretary of State ordered BSkyB to reduce its shareholding in ITV, and required BSkyB to abstain from seeking representation on ITV's board.

On November 16, 2006, BSkyB announced that it had acquired a 17.9% stake in ITV. Preliminary investigations were launched by the OFT and the Office of Communications ("OFCOM"), the UK communications industry regulator. These investigations were

effectively superseded, however, when, on February 26, 2007, the Secretary of State for the first time issued a public intervention notice, pursuant to section 45 of the Enterprise Act 2002.

While merger control proceedings are typically undertaken by the OFT and CC, agencies independent of the U.K. Government, ministerial intervention is permitted in exceptional circumstances, where transactions raise specific public interest or concerns. Of relevance to this case, the Communications Act, 2003 provides that it is in the public interest to preserve a sufficient plurality of persons with ownership of media enterprises. Responding to the concern that the BSkyB acquisition might lead to an adverse concentration of media ownership rights in the UK, the Secretary of State ordered the OFT and OFCOM to investigate the impact of BSkyB's shareholding in ITV on competition and media plurality, respectively.

On May 24, 2007, acting on reports received from the OFT and OFCOM, the Secretary of State referred the BSkyB acquisition for in-depth investigation by the CC. The CC was required to evaluate whether the BSkyB acquisition had: (i) led to a substantial lessening of competition in respect of the provision of products or services in the UK; and (ii) adversely affected media plurality, and therefore operated against the public interest.

On December 14, 2007, the CC issued its final report to the Secretary of State. With respect to the competitive effects of the BSkyB acquisition, the CC was, as a preliminary matter, required to determine whether the transaction had given rise to a "relevant merger situation" susceptible to review under UK law. For a relevant merger situation to arise, it is necessary for two enterprises to be brought under common ownership or control. The concept of control is broad and the CC assessed whether BSkyB's modest shareholding was sufficient to confer the lowest level of control recognized, the ability to materially influence ITV's commercial policies and competitive conduct.

As a matter of principle, the CC confirmed that an assessment as to the acquisition of material influence was to be made on a case-by-case basis, and was primarily a question of fact and degree. The decisional practice of the UK agencies, and the OFT's substantive merger guidance, indicate that the acquisition of a shareholding in excess of 25% is likely to be seen as presumptively conferring material influence. Conversely, a shareholding of less than 15% will give rise to a situation of material influence only in exceptional circumstances. Given that BSkyB had acquired only a 17.9% interest in ITV, the CC was required to undertake an in-depth assessment of the broader circumstances of the case.

First, the CC assessed the absolute and relative size of BSkyB's shareholding, noting that its interest made BSkyB the single largest ITV shareholder, with voting rights double those of the next largest shareholder. In previous decisions, the OFT and CC had recognized that the ability of a shareholder to block special company resolutions was a strong indicator of material influence. Under U.K. law, special resolutions must be approved by 75% of those who vote on a resolution, in person or by proxy, at a general meeting. Given that BSkyB's shareholding was less than 25%, it lacked the automatic ability to veto special resolutions. Analyzing attendance and voting patterns at recent general shareholder meetings, the CC nonetheless concluded that, as a matter of practice, BSkyB would have the ability to block special resolutions. The CC found that such influence would allow BSkyB to potentially constrain ITV's strategic policies and options, in particular limiting its ability to raise substantial debt financing. Second, the CC recognized BSkyB's importance and stature as an industry player, which would likely increase the weight attached by other shareholders to views expressed by BSkyB. As a result, BSkyB would have the opportunity to influence policy formulation by ITV at an early stage, and in advance of policies being submitted for general shareholder assent. On these bases, the CC concluded that BSkyB's 17.9% shareholding, allied to additional factual considerations, was sufficient to confer material influence over ITV.

Having established jurisdiction, the CC assessed the competitive impact of the BSkyB acquisition. The CC concluded that free-to-air TV services, provided in the UK by operators such as the British Broadcasting Corporation ("BBC") and ITV, exercised an important constraint on the pricing behavior of pay-TV broadcasters, such as BSkyB. BSkyB's business model depends on its ability to persuade consumers to pay for the content available in its subscription packages, rather than rely on freely-available television services. Given this market situation, it was found that BSkyB had the incentive and ability to influence ITV's strategy so as to reduce competition. In particular, BSkyB could reduce ITV's investments in respect of program content, production, and new technologies, such as the development of high-definition television broadcasting capabilities. Through these means, BSkyB could diminish the competitive influence of ITV, diluting the rivalry between the two broadcasters. Accordingly, the CC concluded that the BSkyB acquisition resulted in a substantial lessening of competition in the UK TV market. To remedy these competitive issues, the CC concluded that BSkyB should reduce its shareholding in ITV to less than 7.5%, and provide a commitment not to seek or accept ITV board representation.

With respect to public interest concerns, the CC found that a plurality of control in the media was desirable since concentrated ownership could result in a restriction of the information and views provided to different audiences. The CC assessed existing levels of plurality of ownership in national television and cross-media news services. Five main UK channel providers, including ITV and BSkyB, account for at least 97.5% of total television news viewing. Television news program supply is more concentrated, with the BBC, ITN and Sky News serving as the main content providers. Considering the impact of the BSkyB acquisition on plurality of news, in terms of direct editorial influence on content, the CC found that across television broadcasting there is a strong commitment to editorial independence, coupled with regulatory constraints on television news production, which would prevent BSkyB from exerting editorial influence over ITV's news output. Given these factors, the CC concluded that the BSkyB acquisition did not operate against the public interest.

Following receipt of the CC's final report, the Secretary of State issued his decision on January 29. On the competition issues, the Secretary of State was required to accept the CC's recommendations. Accordingly, the Secretary ordered the partial divestment of BSkyB's interest in ITV, and accepted an undertaking preventing BSkyB from obtaining representation on ITV's board. In relation to the CC's media plurality assessment, the Secretary of State also chose to endorse the CC's findings, accepting that the BSkyB acquisition did not have an adverse effect on the public interest.

There are several novel aspects to the 15-month merger investigation into the BSkyB acquisition. This case represents the first instance in which a public intervention notice has been issued by the Secretary of State, and was also the first occasion on which the Secretary of State issued a reference to the CC for examination of public interest concerns raised by a merger.

The CC's control analysis has also excited considerable debate, culminating with BSkyB lodging an appeal with the Competition Appeal Tribunal ("CAT") on February 22, challenging, *inter alia*, the validity of the CC's finding that BskyB was able to exert material influence on ITV. On February 25, Virgin Media, Inc., a rival U.K. television operator, applied to the CAT for judicial review of the CC's final report and the Secretary of State's final decision, alleging that both are vitiated by manifest errors of law and assessment. In particular, it has contended that in determining that the BSkyB acquisition had not prejudiced the public interest, the CC and Secretary of State misapplied the media plurality test. The litigation ensuing from these two parallel appeals will likely result in the CAT providing additional guidance on the exact meaning of material influence, the application of the media plurality test, and the respective roles of the CC and Secretary of State in public interest cases.

Policy and Procedure

OFT Offers Payments To Cartel Informants

On February 29, the OFT launched a new policy under which it will pay individuals financial incentives of up to £100,000 (roughly €125,000) for production of information that leads to the identification and prosecution of cartels.

Cartels are almost invariably conducted in a covert manner, rendering detection difficult. In common with many antitrust agencies, the OFT operates a corporate amnesty regime and a leniency program for individuals implicated in cartels, both of which are intended to solicit information. The OFT has now supplemented these program with a new initiative under which it will pay individuals financial rewards for information in respect of cartels. To obtain remuneration, information must be accurate, verifiable, and prove of value to the OFT in its anti-cartel enforcement work.

Informants are invited to contact the OFT with cartel information at the earliest opportunity, potentially on a no-names basis in the first instance. The OFT will ensure that all information disclosed to it will be safeguarded and handled with a view to maintaining the informant's anonymity. In any event, the OFT maintains that UK law does not permit an employer to dismiss or otherwise victimize an employee as a result of whistle blowing activities, with the Public Interest Disclosure Act, 1998 affording protection to informants. Given the innovative nature of the new OFT informant payment program, it should be noted that the statutory safeguards identified by the OFT have yet to be tested in a cartel context.

The OFT will maintain broad discretion in rewarding the provision of information. In assessing the level of payment, the OFT will consider the value of the information provided, the economic harm that the provision of information has averted, and the risk taken by the informant to obtain and disclose relevant information. The OFT will not negotiate the level of any payment, and will only pay rewards at the conclusion of an investigation, at which time it is in a position to fully assess the usefulness of the information provided.

Importantly, an individual directly implicated in cartel activities will not ordinarily be permitted to benefit from the new payment scheme. The OFT is of the view that such individuals should utilize the agency's leniency program, with relevant information disclosed to

support an application for personal amnesty. In exceptional circumstances, an individual may prove eligible for payment, with the OFT suggesting payment might be possible where the informant's role in a cartel is peripheral, for instance limited to attending occasional cartel meetings following instruction from managers.

It is proposed that the financial incentive scheme will operate on a trial-basis for an 18-month period. At the conclusion of this period, the OFT will take a decision as to whether the scheme should be introduced on a permanent basis. Irrespective of the eventual decision taken by the OFT, this new scheme underlines the agency's commitment to the vigorous prosecution of cartels. Companies would be well-advised to ensure that adequate competition compliance procedures are instituted within their organizations and that employees are made familiar with internal reporting processes.

OFT Consults On Revised Procedural Guidance For Merger Investigations

On March 28, for consultation, the OFT issued revised jurisdictional and procedural guidance on UK merger investigations ("Guidance"). While satisfied that current merger control procedures are effective in the overwhelming majority of cases, the OFT has published revised guidance to take account of its experience in applying the Enterprise Act, 2002, parallel developments in merger regulation by the European Commission, and a continuing dialogue with the business and legal communities. The Guidance provides helpful exposition on broad range of matters, providing explanation of jurisdictional issues, confirmation of interim arrangements regarding informal advice and pre-notification discussions, and clarification as to the OFT's administrative policy on undertakings.

To assist with the interpretation of the merger control rules enshrined in the Enterprise Act 2002, the OFT has, in the past, issued guidance on both substantive and procedural matters. As a result of its developing decisional practice, and litigation on certain merger decisions, over the last several years, the OFT has published two amendments to its substantive guidance. Over the last twelve months, the OFT has also been reviewing its internal decision-making procedures, and has reached the conclusion that its procedural practices are fundamentally sound. In light of these reviews, the Guidance proposes retention of the current procedural framework and processes, with incremental improvements recommended to address exceptional cases.

The Guidance incorporates and revises advice on jurisdictional matters previously included in the OFT's substantive assessment guidance. An explanation is provided as to circumstances in which a "relevant merger situation" will arise for the purpose of the Act. This explanation is prefaced by the observation that the Enterprise Act, 2002 requires the OFT to refer a merger to the CC for phase two investigation where, *inter alia*, it has a "reasonable belief" that a "relevant merger" exists or may be expected to exist. The OFT interprets this provision as meaning that a reference is possible if, on the basis of the evidence available to it, there is at least a significant prospect that a relevant merger situation exists or may be expected to exist. A final determination of this jurisdictional matter is made by the CC following reference. Accordingly, the standard to be satisfied by the OFT to assert jurisdiction over a merger is low. In the Guidance, the OFT expressly cautions merger parties not to dedicate an extensive proportion of the time available for review focusing on jurisdictional issues.

Of the jurisdictional issues that might be subject to dispute, arguably the most contentious is the concept of "material influence". Interim advice is provided in the Guidance, subject to revision on the resolution of current litigation in respect of the Secretary of State's *BSkyB/ITV* merger decision, referred to above. The OFT explains that material influence, the lowest form of controlling interest sufficient to justify investigation, will be presumed to exist where an acquirer obtains a shareholding in excess of 25%, or may exist where a smaller shareholding is combined to additional factors. In particular, the OFT will review the distribution of remaining shares; patterns of attendance and voting at recent shareholders' meetings, and the identities of and influence exercised by individual board members. In appropriate circumstances, the OFT indicates that it may investigate acquisitions of shareholdings as low as 15%, and refuses to discount the possibility that lower shareholdings may attract interest in exceptional circumstances.

Clarification is also provided regarding the period available to the OFT to review completed mergers. The UK operates a voluntary merger notification system. Merger parties have the ability to assume the competition risk and complete mergers without first obtaining merger clearance. Absent notification, the OFT has the ability to commence an investigation based on its own intelligence, and may refer a merger to the CC within 4 months of completion. Regarding this limitation period, the Guidance explains that time will run only when "material facts" concerning a completed transaction are "made public". The OFT interprets material facts as comprising all the key facts relevant to the determination of merger control jurisdiction. These include information on the parties, the nature of the transaction, and the date on which the transaction was completed,

or will likely be complete. Such facts will be made public when capable of being readily ascertained by the OFT acting reasonably and diligently in accordance with its statutory functions. This will be the case where an acquirer publicizes a transaction in the national or trade press, and includes on its website an appropriate press release. In conjunction with the publication of its Guidance, the OFT has appointed a dedicated Mergers Intelligence Officer, responsible for monitoring non-notified merger activity and liaising with other competition agencies. It is probable that this institutional change will increase the risk of non-notified transactions being detected by the OFT through its own market reconnaissance.

The Guidance confirms that the informal advice procedure, previously established on an interim basis, will now be formally adopted by the OFT. In future, the OFT will give advice on an informal basis in relation to significant competition issues arising out of prospective mergers that have yet to be made public. To conserve resources, informal advice will only be provided where: (i) there is a good faith intention to proceed with the relevant transaction (as evidenced by the existence of appropriate financing arrangements and heads of terms or similar preparatory agreements); and (ii) the prospective transaction raises significant and genuine issues. The OFT will not provide informal advice as a means merely to endorse analysis undertaken by merger parties to demonstrate an absence of competition issues. In seeking informal advice, the merger parties' advisors will be expected to outline the theory of harm causing concern, with submissions made to the OFT on a strictly without prejudice basis. The informal advice procedure will operate in conjunction with the broader provision of pre-notification services, with merger parties encouraged to commence a dialogue with the OFT at the first opportunity, as a means of educating the case team and address potential concerns and evidentiary requirements prior to formal notification.

Certain minor amendments are also introduced to the OFT's administrative timetables. Where parties notify a merger through an informal submission, as opposed to a statutory merger notice, the OFT will generally endeavor to provide its decision within 40 working days. The Guidance refines this policy, and provides that an extension of between 5 to 10 working days will be available on request of the merger parties in appropriate cases, where relaxation of the administrative deadline might enable first phase clearance to be provided. Conversely, the Guidance also provides that the OFT will exceptionally, at the request of the merger parties, adopt an expedited referral procedure in those cases where substantial competition issues are raised, which require assessment by the CC. Assuming parties can adduce satisfactory evidence to establish that the reference test is met, the OFT will compress its administrative timetable, to accelerate the first phase investigation.

A further procedural innovation is provided for the submission of undertakings in lieu of reference to the CC. Merger parties are free to submit undertakings in advance of the OFT's case review meeting. Such undertakings should provide a clear-cut remedy to competition issues identified by the OFT, relieving the agency of its duty to refer a case to the CC for second phase investigation. The Guidance establishes that in "near miss" situations, where undertakings offered by the parties are technically defective, or only narrowly fail to eliminate competition concerns, the OFT will in future permit merger parties an opportunity to amend and submit improved undertakings. It appears that merger parties will be informed of the need to offer revised undertakings, and given one working day in which to make suitable revisions. A second chance will be provided only where certain eligibility criteria are met. In particular, the OFT must be convinced that parties initially offered in "good faith" a credible set of undertakings. The Guidance emphasizes that the "near miss" exception falls within the exclusive discretion of the OFT. Merger parties cannot themselves request a further opportunity to submit revised undertakings at the end of a merger investigation.

The OFT invited comments on the Guidance, to be submitted no later than June 20, 2008, with a view to publishing final jurisdictional and procedural guidance by the end of 2008. While much of the Guidance re-states established practice, certain of its innovations, including the flexibility now available regarding administrative deadlines, and the potential opportunity to perfect and re-submit undertakings in the first phase, are novel and may well facilitate pragmatic merger regulation.

Contacts

JANUARY – MARCH 2008

www.clearygottlieb.com

NEW YORK

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

WASHINGTON

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

PARIS

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

BRUSSELS

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

LONDON

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

MOSCOW

Cleary Gottlieb Steen & Hamilton LLP
CGS&H Limited Liability Company
Paveletskaya Square 2/3
Moscow 115054, Russia
T: 7 495 660 8500
F: 7 495 660 8505

FRANKFURT

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

COLOGNE

Theodor-Heuss-Ring 9
50668 Cologne, Germany
T: 49 221 80040 0
F: 49 221 80040 199

ROME

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

MILAN

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

HONG KONG

Bank of China Tower
One Garden Road
Hong Kong
T: 852 2521 4122
F: 852 2845 9026

BEIJING

Cleary Gottlieb Steen & Hamilton LLP
Twin Towers – West
12 B Jianguomen Wai Da Jie
Chaoyang District
Beijing 100022
T: 86 10 5920 1000
F: 86 10 5879 3902