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AUSTRIA

This section reviews developments concerning the Cartel Act of 2005, which is enforced by the Cartel Court, the Federal Competition Authority (FCA) and the Federal Antitrust Attorney (FAA).

Policy and Procedure

Austrian Federal Competition Agency Joins Central European Competition Initiative

On February 20, 2009, in the course of the 8th Global Forum on Competition hosted by the Organisation for Economic Co-operation and Development (OECD) in Paris, the FCA formally joined the Central European Competition Initiative (CECI).

CECI, seated in Budapest, was founded in 2003 by the Czech, Hungarian, Polish, Slovak and Slovenian competition authorities. It is an informal forum of national competition authorities with the following common goals:

- Strengthening enforcement activities with regard to regional or overlapping markets that affect member agencies' territories and jurisdiction;
- Facilitating the exchange of information in ongoing cartel, dominance or merger investigations;
- Developing best practices for the enforcement of competition rules; and
- Exchanging enforcement experiences during the course of regular meetings.

FCA Director General, Dr. Theodor Thanner, commended CECI's importance, and emphasized the FCA's commitment "*to assume its role in the cross-border cooperation among competition agencies and to continue the collaboration with its sister authorities.*" Prior to becoming a formal member of CECI, the FCA had enjoyed "observer" status and participated in regular round-table meetings and conferences organized by CECI member agencies. Past discussions and conferences hosted by CECI concerned the design and implementation of merger remedies, and the regulatory challenges of regional electricity markets.

Separate from its involvement with CECI, in July 2008, the FCA, in cooperation with the Czech Competition Authority, organized the "*Marchfeld Competition Forum.*" This was the inaugural meeting of an even larger forum of competition agencies (including NCAs in Austria, Bulgaria, the Czech Republic, Croatia, Estonia, Hungary, Latvia, Lithuania, Poland Romania, Slovakia, Slovenia and Switzerland, as well as the European Commission) with discussion topics similar to those of CECI.[1]

BELGIUM

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

Horizontal Agreements

Dawn Raids In Bovine Spongiform Encephalopathy (BSE) Testing Laboratories

On January 20, 2009, the Competition Service carried out dawn raids at several laboratories that perform BSE testing on behalf of the Federal Agency for Food Chain Safety. The laboratories concerned are suspected of having entered into price-fixing and market-sharing agreements.

Policy and Procedure

Amendments To The Belgian Competition Act

On February 3, 2009, a bill was submitted to Belgian Parliament proposing several amendments to the Act for the Protection of Economic Competition. The majority of the amendments concern minor procedural matters, and do not propose substantive changes. The bill was adopted by the Chamber of Representatives on March 26, 2009, and forwarded to the Senate.

The primary amendments proposed under the bill can be summarized as follows:

- The Competition Service will be renamed "Directorate-General for Competition";
- "Serious indications" will no longer be required in order for the

1 The Memorandum of Understanding signed at that inaugural meeting on July 1, 2008 is available at the FCA's website at www.bwb.gv.at.

Auditorate to initiate an investigation at the request of the Minister of the Economy. According to the explanatory memorandum, the current reference to "serious indications" is confusing because it can be interpreted as requiring the Minister of Economy to justify his opening of an investigation;

- The Auditorate will be permitted to dismiss a complaint/request for interim measures on the basis of "policy priorities and available means";
- The Competition Council will be able to impose periodic penalty payments, in addition to fines, for violations of the prohibition to implement notifiable concentrations prior to obtaining clearance (*i.e.*, during the standstill period);
- In the event of continued or repeat infringements, the five-year limitations period during which an investigation may be opened will begin to run from the day on which the final infringement ceases. In essence, this rule codifies the Competition Council's prior practice.

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 Danish Competition Council (DCC), assisted by the Danish Competition Authority (DCA), and the Danish Competition Tribunal (Tribunal).

Horizontal Agreements

Additional Trade Associations Found To Have Been Involved In Illegal Information Exchanges With Members.

On February 17, 2009, Frederiksberg City Court imposed a fine of DKK200,000 (€27,000) on the Danish Christmas Tree Growers Association (DCTGA) for infringing Section 6 the Danish Competition Act by engaging in illegal information exchanges. The DCTGA's Director was also fined the nominal sum of DKK15.000 (€2,000).

In 2001, the DCA had issued a decision ordering the DCTGA to discontinue exchanging sensitive information concerning the pricing of Christmas trees. Further such exchanges ensued in 2005, however. Rather than issuing a further decision, and given that the DCA has no authority to issue administrative fines, the case was forwarded to, and pursued by, the public prosecutor before the Frederiksberg City Court. The Court found that the Association had notified its members about pricing with the goal of preventing undercutting of members' prices. The court concluded that the information exchanges were a concerted attempt to standardize members' prices.

On February 25, 2009, in an unrelated but similar matter, the DCC issued a decision finding that the trade association International Transport Danmark (ITD) had illegally exchanged sensitive information with its members, in violation of Section 6 the Competition Act, and Article 81 EC. Specifically, the Council found that the ITD had published:

- a partially completed cost calculation program;
- standard contracts, containing proposed fixed-cost waiting periods;
- cost forecasts; and
- appeals to members to pass on increased costs to customers.

The DCC found that the calculation models created and published by ITD for its members could have a coordinating (and consequently restrictive) effect on competition. ITD was ordered to refrain from future information exchanges, but the DCC chose not to impose any fines because ITD had ceased the illegal practices by the time the DCC issued its decision.

It is worth noting that this is the third time in only three months that the authorities have investigated trade associations for infringements of the Danish Competition Act flowing from information exchanges.

Mergers & Acquisitions

The DCA Unconditionally Clears The Sale Of KMD A/S To EQTV Limited And ATP

KMD is the largest supplier of IT solutions and services in Denmark. Prior to its sale, the company was owned by LGDK, an interest group consisting of all Danish municipalities. Act No.548 (of June 6, 2006), regarding the Performance by Municipalities of Tasks for other Municipalities and Authorities, however, required that KMD be sold by January 1, 2012. To accommodate the Act, KMD was sold to private equity company EQTV Limited (who acquired 85% of KMD's shares) and to pension fund operator ATP (who acquired the remaining 15%).

Although the parties met the ECMR's European turnover thresholds, the case was referred to the DCA at the parties' request, in accordance with Article 4(4) of the ECMR. The DCA found that the merger raised no competitive issues because the parties had neither overlapping horizontal nor vertical activities. The buyers had also entered into a transition agreement with the Municipalities, for the provision of IT solutions. The agreement contained *inter alia* a price cap for a fixed duration, and provisions securing actual and potential competitors increased opportunities to supply the Municipalities with

IT solutions going forward. The DCA considered this transition agreement pro-competitive, and held that competition would be increased post-transaction because KMD would be owned privately, compelling Municipalities to invite private companies to submit to public procurement tenders. Accordingly, the DCA cleared the transaction.

The DCA also observed that because KMD occupies a strong market position it might abuse this power by charging excessive prices or bundling its services; but such potential abuses would have to be addressed by reference to Section 11 of the Competition Act, which deals directly with abuses of dominance.

Sector Investigations

Danish Food Prices Continue To Increase

On March 23, 2009, and further to the DCA's October 2008 report on the food sector, the DCA issued a press release stating that Danish food prices had remained high. The DCA had expected retail prices for bread and milk to drop in tandem with the falling cost of commodities since mid-2008. Accordingly, the DCA announced its intention to investigate the bread and milk sectors with the stated purpose of determining why retail prices remain consistently high.

In its March press release, the DCA articulated its surprise and concern that the retail price for bread and milk had not undergone any reduction when the prices of source commodities had fallen so dramatically. The DCA noted further that it would have expected a timeline of *decreases* consistent with the market's rapid reaction to the sudden *increase* in commodity prices in mid 2007.

FINLAND

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

Horizontal Agreements

Wholesalers Fined For Collusion On Prices In Automobile Spare Parts Market

On 20 February 2009, the Market Court handed down its judgment – the first to be initiated by the FCA on the basis of a leniency application – concerning an alleged wholesale price cartel in the automobile spare-parts business by companies HL Group Oy, Oy Kaha Ab, Koivunen Oy, Örum Oy Ab and Oy Arwidson Ab. The Market Court found that the companies had participated in illegal collusion in the setting of prices during 2004/2005. Despite the FCA's recommendation that the Court impose fines of €3.8 million, the Court capped its penalties at approximately €1 million, with Koivunen Oy receiving the single largest fine of €500,000. The FCA recommended that Oy Arwidson Ab not be sanctioned, since it was responsible for exposing the cartel, and cooperated fully with the FCA's investigation.

The Market Court found that the parties had agreed to collude on prices after one of their customers, the Osaset resale chain, announced its intention to create a new business model working more closely with another wholesaler, Atoy Oy. According to the Market Court, the wholesalers decided to boycott Osaset in order to force the company to abandon its collaboration with Atoy Oy. The mutual boycott involved the reduction of discounts granted to the customer. The Market Court found the boycott to have succeeded, as Osaset chose not to proceed with the planned cooperation with Atoy Oy.

The Market Court further held that the purpose of the wholesalers' actions were to restrict competition in the automobile spare parts market, and to force Osaset to continue buying from incumbent wholesalers. Had the Osaset-Atoy collaboration come to fruition, the wholesalers would have faced increased competition for Osaset's business. The Court considered the boycott to be particularly detrimental to competition as it affected significant market participants and the whole of Finland. The Court also stressed that a unilateral boycott by wholesalers would not have had a significant effect on the Osaset-Atoy relationship; it was only the wholesalers' joint actions that resulted in the break-up of the relationship.

While the Court did not find direct evidence of an express agreement to the boycott Osaset, the Court did find significant circumstantial evidence of a concerted practice, including: (i) evidence that the parties had met twice after Osaset informed them about the collaboration with Atoy Oy, (ii) evidence that the parties had discussed the cooperation, and (iii) evidence that the parties had jointly considered how it would affect their position in the market. Furthermore, two of the companies publicly expressed their intention to cut discounts and terminate their marketing arrangements with Osaset following the wholesalers' meetings. None of the other companies expressed any dissenting opinions, or sought to inform customers that they would not carry out such measures. Moreover, the parties, in fact, all terminated their respective marketing agreements with Osaset, while also reducing their respective discounts to the customer. Based on this evidence, the Market Court held that the parties' actions constituted a concerted practice in violation of both Article 81 EC and Section 4 of the Finnish Act on Competition Restrictions.

All five companies and the FCA have appealed the decision to the Supreme Administrative Court.

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 French Competition Council (FCC) and the Ministry of Financial and Economic Affairs.

Horizontal Agreements

French Competition Council Fines Temp-Agencies For Concerted Practices[2]

On February 2, 2009, the FCC fined temp-agencies Adecco, VediorBis and Manpower a total of €94.4 million for colluding in the French market for temporary employment services to large customers, in violation of Article 81 of the EC Treaty and Article L.420-1 of the French Commercial Code.

The investigation was initiated following a complaint by a former manager of the Luxembourg subsidiary of VediorBis to the European Commission. The complaint was in turn referred back to the French competition authorities for investigation.

Several incriminating documents were seized during dawn raids conducted by the FCC on November 30, 2004. These demonstrated that the Parties had met regularly to coordinate prices for key customers (*i.e.* large businesses dealing with several temping agencies) between March 2003 and November 2004. They also revealed that the Parties had exchanged confidential information in the context of an invitation to tender, issued by Alcan in 2004, concerning the invoicing coefficients applied to the salaries of temporary workers.[3]

Such concerted practices were deemed particularly serious given that the Parties accounted for 70% of the French temporary employment market, and supplied 90% of multi-agency customers in France. The FCC emphasized the adverse impact of inflated margins on employment policy, and raised as an aggravating factor the Parties' fine in 1997 for similar practices.

Adecco and VediorBis opted to engage in a negotiated settlement, pursuant to Article L.464-2 of the French Commercial Code, which enables any infringing company (i) not disputing the objections raised against it, and (ii) providing substantial, credible and verifiable commitments to adapt its future conduct, to benefit from a reduction in its fine.

As conditions of their settlement, Adecco and VediorBis committed to (i) organize internal compliance training sessions on competition law for executives and employees, (ii) establish an internal (and anonymous) whistle-blowing system, and (iii) appoint an independent, external consultant to assess whether the calls for certain tenders in which the company participates are compliant with competition rules. Adecco's commitment concerned at least 20 national and international calls for tender, while VediorBis's commitment was limited to commercial negotiations and responses to calls for tenders concerning only its top five customers. The FCC considered that such commitments constituted a strong incentive for Adecco and VediorBis to comply with competition rules, and reduced their fines by an average of 26.5%.

The FCC, however, refused to take into account a commitment offered by VediorBis to pay €1 million to a fund to help reintegrate long term unemployed and young people with difficulties into society, since this commitment did nothing to improve competition in the affected market.[4]

Unlike Adecco and VediorBis, Manpower chose not to settle. Instead, it claimed that its settlement discussions with the case-handler had not been fair, because the case-handler had changed the cap on fining proposals to the FCC at short notice. The FCC noted that it is not bound by discussions between parties and case-handlers, and that the conditions of a potential settlement can remain uncertain until the end of the procedure. A lack of fairness could not be inferred from this situation, therefore, and Manpower was duly fined €42 million.

It is worth noting the innovation of the commitments offered by the parties. The introduction of a supervision procedure for commercial negotiations, and responses to calls for tenders entrusted to external, independent consultants, is indeed more substantial than the commitments previously submitted to the FCC, where supervision

2 Decision No.09-D-05 of February 2, 2009, http://www.conseil-concurrence.fr/pdf/avis/09d05.pdf

3 Temping agencies charge businesses by applying a coefficient to temps' salaries. These coefficients are therefore a key factor when selecting agencies in calls for tender.

4 The Office of Fair Trading has accepted a similar commitment as a mitigating factor when setting the level of a fine – Decision CA98/05/2006 of November 20, 2006 relating to an exchange of information on future fees by certain independent fee-paying schools http://www.oft.gov.uk/advice_and_resources/resource_base/ca98/decisions/schools. The OFT granted a substantial reduction in its fines on English schools involved in an anticompetitive agreement in exchange for the creation of a fund for schoolchildren, to which they donated £3 million.

was carried out by Competition Compliance Officers or Mediators chosen among the employees of the company adopting the commitments.[5]

Vertical Agreements

Suspension Of Orange's iPhone Exclusivity Confirmed[6]

On February 4, 2009, the Paris Court of Appeal confirmed the interim measures granted by the French Competition Council suspending the exclusivity clauses contained in the agreements entered into between Apple and Orange for the distribution of iPhones in France.

In October 2007, Orange had entered into agreements with Apple, pursuant to which Orange was to act as the exclusive network operator and wholesaler of iPhones in France for five years – with Apple retaining the right to terminate the network operation agreement after three years. In parallel, Apple implemented a selective distribution system pursuant to which authorized retailers undertook to purchase iPhones exclusively from Orange. In turn, Orange entered into agreements with authorized retailers ensuring that iPhones could be sold only in authorized outlets, and only with Orange services.

On December 17, 2008, following a complaint by the mobile phone operator Bouygues Telecom, the FCC found that the scope and duration of Orange's exclusivity was likely to have an adverse effect on competition in the mobile telephony sector, and that this effect would be felt by consumers.[7] Pending a decision on the merits of the case, the FCC suspended Orange's exclusivity for current iPhones and reduced Orange's exclusivity to three months for future contract sales. Apple and Orange appealed the interim order.

The appellants claimed that (i) the exclusive agreements were covered by the EU Block Exemption Regulation on Vertical Restraints;[8] and in any event (ii) the agreements had no adverse effect on competition; (iii) any risk for competition was offset by gains in efficiency; and (iv) the agreements did not cause serious and immediate damage to the mobile telephony sector. The Paris Court of Appeal dismissed the appellant's claims and approved the FCC's analysis, holding that the exclusive agreements could not benefit from the Block Exemption Regulation on Vertical Restraints because they contained hard-core restrictions on cross-supplies between distributors within a selective distribution system (Article 4(d)), and on sales to end users by members of a selective distribution system (Article 4 (c)).

The Court of Appeal held, further, that such exclusive agreements were likely to have an adverse effect on competition. The length of the exclusivity term, in conjunction with the reputational advantage of Apple's position in the market for digital music players, was deemed to have provided Orange with a major competitive advantage. The Court also noted that the exclusive arrangements would reduce further the already low level of competition on the mobile telephony market where (i) there are only three mobile phone operators, (ii) the sale of handsets is usually coupled with the subscription of long-term contracts, and (iii) switching costs are particularly high. In addition, the Court emphasized the risk of market foreclosure flowing from the cumulative effect of similar agreements, particularly if other mobile network operators entered into similar exclusive arrangements (as SFR, a competing mobile phone operator, had done with Blackberry).

The Court did not consider the gains in efficiency sufficient compensation for the arrangement's anticompetitive effects, and it rejected Orange's argument that it was entitled to compensation for its investment in the launch of the iPhone in France – by reference primarily to the overt lack of proportion between that investment and the considerable revenues generated by the exclusivity agreement. The Court dismissed also the appellant's claim that exclusivity would foster lower prices for consumers.

Finally, the Court held that the restriction of competition had serious and immediate consequences for the mobile telephony sector. Because of the tendency among French consumers to renew their handsets (and in the light of the iPhone's worldwide success), sales of iPhones were not likely to decrease significantly over time. The Court noted further that Orange's exclusivity entitled it to attract new customers locked to long-term subscriptions, and by access to Apple's iTunes Music Store. Although Apple announced on January 6, 2009 the removal of the digital rights management ("DRM") that prevented songs downloaded on iTunes being read by another device, current iPhone or iPod customers will be charged to migrate their music libraries to a format without DRM. The Court took the view, therefore, that current customers had limited incentives to switch to another mobile phone operator.

5 Decision No.08-D-32 of December 16, 2008, http://www.autoritedelaconcurrence.fr/pdf/avis/08d32.pdf (appeal pending). See also National Competition Reports 2008.

6 Paris Court of Appeal, judgment of February 4, 2009, available at http://www.autoritedelaconcurrence.fr/doc/ca08mc01_iphone_fev09.pdf.

7 Decision No.08-MC-01 of December 17, 2008, http://www.conseil-concurrence.fr/pdf/avis/08mc01.pdf. See also National Competition Reports 2008.

8 Commission Regulation (EC) No.2790/99 of December 22, 1999 on the application of Article 81(3) to categories of vertical agreements and concerted practices, [1999] OJ L 336/21.

The Court considered that the interim measures granted by the FCC were justified and proportionate, in part because Orange's investment in the launch of Apple's smartphone in France had been largely recovered. Orange appealed the judgment, and the case is currently pending before the French Commercial Supreme Court.

***SNCF Fined For Anticompetitive Practices In The On-Line Travel Agency Sector*[9]**

On February 5, 2009, following a complaint by three online travel agencies, the FCC imposed fines on the French incumbent rail operator, SNCF, and the world's biggest online travel agency, Expedia, of €5 million and €500,000 respectively, for engaging in anti-competitive practices. The FCC found that the parties had entered into an anticompetitive agreement in the market for travel agency services, and that SNCF had abused its dominant position in the market for train tickets. SNCF proposed extensive commitments in exchange for a reduction in its fine.

In September 2001, SNCF and Expedia established a joint venture called Agence VSC with a view to merging the sale of train tickets and travel agency services online into a single distribution channel (the voyages-scf.com website). The objective was to redirect Internet traffic generated by SNCF's customers for the sale of train tickets towards non-rail services (*e.g.*, travel agency services). The FCC noted that the mailing of joint commercial newsletters and the larger share of advertisement fees attributed to the voyages-scf.com website, provided Expedia with a major competitive advantage over its rivals.

The FCC concluded that SNCF had used its legal monopoly on railway passenger transport in France to develop an activity on a related competitive market (travel agency services), thereby restraining competition in violation of Article 81 of the EC Treaty and Article L.420-1 of the French Commercial Code. Despite its passive role, Expedia did not escape liability – although its fine was mitigated accordingly. Expedia has appealed the FCC's decision.

Furthermore, the FCC held that SNCF had abused its dominant position on the market for the sale of train tickets. SNCF had required online travel agencies to purchase IT licenses at inflated prices in order to allow them access to SNCF's computerized reservation system – a facility essential for information on scheduling, seat availability and fares. The FCC held also that SNCF had imposed technical restrictions on online travel agencies, so as to prevent them from selling train tickets with the same conditions as voyages-sncf.com.

Pursuant to Article L.464-2 of the French Commercial Code, SNCF did not dispute any of these findings, and offered substantial commitments to ensure the market for the sale of train tickets remained open and accessible. SNCF committed to refrain from soliciting clients of voyages-sncf.com for non-rail activities, and agreed to allocate advertising revenues depending on the nature of the pages viewed. SNCF also committed to reduce the price of its IT license, and to allow other online travel agencies to use the same direct connection system as voyages-sncf.com. The company further committed to negotiating the development of an alternative booking system with booking engines (during the first semester of 2009); this the FCC welcomed in particular in the light of the liberalization of international railway passenger transport.

Under the commitments, online travel agencies will be able to offer their customers promotional tickets and the option of self-printed tickets, all on the same conditions as voyages-sncf.com. SNCF also committed to apply the same compensation terms on train ticket sales, regardless of whether the Agence VSC or another online travel agency concluded the sale.

Ultimately, SNCF persuaded the FCC that its commitments were likely to remove current and future competitive concerns. Although SNCF's practices were deemed serious (by reason of their duration, exclusionary nature and the emerging nature of the market) the FCC imposed a relatively modest fine – equivalent to just 0.025% of SNCF's turnover.

GERMANY

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

Horizontal Agreements

FCO Fines Manufacturers Of Clay Roof Tiles

In December 2008 and February 2009 the FCO imposed €165 million in fines on nine manufacturers (and twelve individuals) for participating in anti-competitive agreements relating to the sale of clay roof tiles.[10] The companies involved were Creaton AG and Pfleiderer Dachziegel GmbH (both part of the Belgian Etex Group), Koramic Dachprodukte GmbH & Co. KG, Monier GmbH (formerly

9 Decision of the French Competition Authority No.09-D-06 of February 5, 2009, http://www.conseil-concurrence.fr/pdf/avis/09d06.pdf.

10 Bundeskartellamt, Beschl. v. 15.12.2008 – *Creaton AG*, Beschl. v. 15.12.2008 – *Pfleiderer Dachziegel GmbH*, Beschl. v. 15.12.2008 – *Koramic Dachprodukte GmbH & Co.KG*, Beschl. v. 15.12.2008 – *Monier GmbH*, Beschl. v. 15.12.2008 – *Erlus AG*, Beschl. v. 15.12.2008 – *Gebr. Laumanns GmbH & Co.KG* and Beschl. v. 9.2.2009 – *Etex Holding GmbH*.

part of the Lafarge Group), and Erlus AG, as well as four other medium-sized tile manufacturers.

In July 2006 the parties had met at a trade association and agreed to raise prices by imposing an "energy cost surcharge" of 4-6%. Etex, Koramic, Lafarge and Erlus had also separately agreed on a significant price increase for a specific type of tile.

In setting its fines, the FCO applied its new fining guidelines. Specifically, with respect to the four companies belonging to groups with turnovers greater than €2 billion a year, the FCO increased their fines as an express deterrent. The FCO also raised the fines on one of the companies as a result of its leading role in the cartel. The fact that two companies had cooperated with the FCO following the dawn raids in December 2006 was deemed to be a mitigating factor.

A second double-digit million fine was imposed on Etex Holding GmbH because a leading manager in charge of the European business at the company had made no attempt to prevent the anticompetitive behavior – despite clear indications of its existence. In setting that fine, the FCO took into account the previous fines on Etex's Creaton and Pfleiderer, and the view that the manager's omission was a less serious breach of competition law than active behaviour.

Unilateral Conduct

Federal Court Of Justice Upholds Requirements For Long-Term Gas Supply Agreements

On February 10, 2009 the German Federal Court of Justice (*Bundesgerichtshof*) rejected an appeal launched by E.ON, Germany's largest gas supplier, concerning FCO and Düsseldorf Court of Appeals rulings invalidating its long-term gas supply agreements.[11]

In a formal prohibition decision, the FCO informed E.ON in 2006 that its gas supply contracts with distributors violated Art. 81 and 82 EC (and Section 1 of the German Act against Restraints of Competition[12]), because of their long-term duration and total requirements clauses. The FCO ordered E.ON to stop entering gas-sales agreements that extended beyond two years and contained clauses obliging the distributor to purchase more than 50% or 80% of its total requirements from a single gas supplier. The FCO order also prohibited the combination of certain agreements that were permissible when considered separately. By way of example, if E.ON had already concluded an agreement covering more than 80% of a customer's requirements, another agreement for the remaining 20% could be concluded only if the first agreement was renegotiated.

After the Düsseldorf Court of Appeals upheld the FCO's order in October 2007, E.ON appealed the decision insofar as it prohibited combining agreements involving a single customer. The Federal Court of Justice held that free competition in the gas market was at risk if a company already supplying a large percentage of total requirements was at liberty to bid for the remaining percentage.

Mergers and Acquisitions

FCO Criticizes Oligopolistic Sugar Market While Clearing Nordzucker/Danisco Merger With Remedies

On February 17, 2009, the FCO cleared the acquisition of the Danish crude sugar producer Danisco by Nordzucker on condition that Danisco divest its facility in Anklam, Mecklenburg Western-Pomerania.[13]

In reaching its conclusions, and having determined the relevant geographic market to be national, the FCO identified and criticized exceptional oligopolistic structures and a lack of competition in the German sugar market: the FCO considered sugar to be a homogeneous product, that the sugar market lacks innovation, that there are only a few market participants on the market, and that conditions of demand and supply are stable, with no countervailing buyer power. Moreover, the European sugar association (*e.g.* the regulator of sugar quotas, meant to protect producers from cheap imports), the FCO's view, only favors even more oligopolistic tendencies. Working together, these factors have fostered a highly transparent market in which participants respect each other's traditional distribution areas and resist competition.

The FCO was concerned that the acquisition of Danisco's Anklam facility would increase Nordzucker's market share, thereby facilitating further coordination. To ensure clearance, Nordzucker and Danisco proposed the sale of the Anklam plant to the Dutch sugar producer Cosun. The FCO accepted this divestment because it considered Cosun to be a sufficiently powerful presence in the market to increase competition, and resist any likely retaliation by Nordzucker.

11 Bundesgerichtshof, Beschl. v. 10.02.2009 – E.ON.

12 Bundeskartellamt, Beschl. v. 13.01.2006 – *E.ON*; National Competition Report January-March 2006, p. 7; see also National Competition Report January-March 2005, p. 7; National Competition Report July-September 2005, p. 7; National Competition Report October-December 2005, p. 7.

13 Bundeskartellamt, Beschluss v. 17.02.2009 – *Nordzucker/Danisco*.

FCO Clears Takeover Of Berliner Verlag By M. Dumont Schauberg Without Conditions

On February 11, 2009, the FCO cleared M. DuMont Schauberg's acquisition of sole control of the publishing house Berliner Verlag.[14]

Among Berliner Verlag' publications are the regional daily *Berliner Zeitung*, the tabloid *Berliner Kurier*, several advertising newspapers, and the city magazine *Ti*p. Each is a regional publication, produced in and for Berlin. Berliner Verlag also controls the Hamburger Morgenpost Verlag, which publishes the regional tabloid *Hamburger Morgenpost*.

M. DuMont Schauberg is one of Germany's largest and oldest publishing houses. It is active mainly in the Cologne area where is publishes the regional dailies *Kölner Stadtanzeiger* and *Kölnische Rundschau*, and also the tabloid *Express*. It also publishes the regional daily *Mitteldeutsche Zeitung* in Saxony-Anhalt, and has a stake in the publishing house Druck und Verlagshaus Frankfurt am Main GmbH, which publishes the *Frankfurter Rundschau*.

In the FCO's opinion, the acquisition will neither create nor strengthen a dominant position because Berliner Verlag's publications, and M. DuMont Schauberg's circulation, are concentrated in regions far removed geographically from one another. Moreover, there are other strong competitors in Berlin and Hamburg, notably Axel Springer and Holtzbrinck.

FCO Imposes Fine On Publishing House Druck Und Verlagshaus Frankfurt Am Main For Violating A Prohibition Against Effectuating A Concentration

On February 5, 2009, the FCO levied a fine of €4.13 million against the German publishing house Druck und Verlagshaus Frankfurt am Main GmbH ("DuV") for violating a prohibition against effectuating a concentration.[15] DuV publishes not only the daily newspaper *Frankfurter Rundschau* but also a number of advertising newspapers in the Rhine-Main region. DuV is also active in the printing sector, with a 50% interest in a magazine publishing company in Frankfurt.

In the course of one of DuV's recent merger applications, the FCO realized that DuV had acquired the publishing company Frankfurter Stadtanzeiger GmbH ("FSG") in 2001. This acquisition exceeded the thresholds for German merger control, and should therefore have been notified to the FCO. Closing of the acquisition would have been allowed only after prior examination and clearance by the FCO. DuV, however, failed to notify the acquisition, an omission that the FCO viewed to be deliberate.

A violation of the obligation to notify a concentration is punishable as an administrative offence. In its calculation of the fine of €4.13 million, the FCO applied its own new guidelines on the setting of fines and referred in its reasoning to the company's turnover in the Frankfurt advertising market. Other considerations leading to the high fine included, DuV's share of approximately 60% of the Frankfurt advertising market, the probability of the transaction being prohibited had it been notified, the gravity of the intent, and the financial power of the company.

The fine imposed on DuV is the second of its kind within a relatively short period. In December 2008 the FCO fined the confectioner Mars for its infringement of a standstill obligation in relation to Mars' acquisition of the U.S. animal food producer Nutro Products.[16] Both fines demonstrate the FCO's determination to enforce its notification and clearance requirements.

It should be stressed, however, that there were good grounds for the FCO to believe that DuV had failed deliberately to notify the acquisition. Not only had DuV used a trust to hide the transaction, but the FCO had raised substantive issues with respect to a similar acquisition by DuV shortly before DuV acquired FSG.

Policy and Procedure

Introduction Of A Second Domestic Turnover Threshold In Germany

On February 13, 2009, the German legislature changed the conditions under which parties to a merger are required to seek prior clearance by the FCO.

The "Drittes Mittelstandsentlastungsgesetz" (MEG III) amended Section 35, Para. 1, Nr. 2 of the German Act against Restraints of Competition requires prior notification to the FCO of a concentration when the combined worldwide turnover of all participating undertakings exceeded €500 million in the last completed financial year, and if at least one participant achieved a domestic turnover exceeding €25 million in that period. The amendment introduces a second domestic turnover threshold, limiting the notification requirement to transactions that meet the existing threshold and in which at least one additional party to the concentration achieved a domestic turnover exceeding €5 million.

14 Bundeskartellamt, Beschluss v. 11.02.2009 – *M. DuMont Schauberg/Berliner Verlag*.

15 Bundeskartellamt, Beschluss v. 5.2.2009 – *Druck und Verlagshaus Frankfurt am Main GmbH*.

16 See National Competition Report October-December 2008, p. 11.

This additional prerequisite for the triggering of merger control is designed to reduce the comparatively large numbers of notifications in Germany. In 2007 there were more than 2,200 merger notifications in Germany. Conversely, only 141 merger notifications were filed in France in 2006. This is due, in part, to the German Act's "domestic effects doctrine", which renders German merger regulations applicable even in cases where Germany is only marginally affected by a merger.

Considering that smaller countries have much higher thresholds (for example, €30 million in the Netherlands, €40 million in Denmark and Belgium, and € 60 million in Spain), €5 million might seem a fairly low threshold – particularly given that Germany is now Europe's largest economy.

In general, however, the amendment more closely aligns Germany's merger regulations with those of other European jurisdictions, and is expected to reduce the number of notifiable transactions by a third. It will also abolish the legal uncertainty resulting from the FCO's often unpredictable interpretation and application of the domestic effects doctrine. As such, companies will now be better able to assess whether the domestic effects doctrine applies to applicable mergers.

Finally, the amendment ensures Germany's adherence to the public international legal principle of non-intervention. The domestic effects doctrine has been criticized as a violation of this principle, because the FCO has used it to prohibit mergers. The amendment renders such mergers less likely to be notifiable, thereby depriving the FCO of an assumption of control over clearance, and violating the principle of non-intervention.

GREECE

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

Unilateral Conduct

The Hellenic Competition Commission Fines Nestlé Hellas €30 Million For Abuse Of Its Dominant Position In The Coffee Market

On February 12, 2009, Hellenic Competition Commission Decision No. 434/V/2009 brought an end to the HCC's investigation into Nestlé Hellas' alleged abuse of dominant position in the Greek instant coffee market between 2002 and 2006. The decision fined Nestlé Hellas a total of €29.8 million for conduct committed from 2002 to 2006

The investigation had been prompted by a complaint by the coffee dealer G. Dritsas in 2002 that Nestlé had refused to sell its instant coffee "Nescafé Classic" to coffee traders unless they also bought Nestlé's Greek coffee.

In defining the affected market, Nestlé had contended that there was a single coffee market, including instant coffee, Greek coffee, filter coffee and espresso. The HCC disagreed, finding that each of these constituted separate product markets and that the markets could be further segmented into retail and professional markets. To support its analysis, the HCC referred to marketing studies (prepared on Nestlé's behalf) that were discovered during a dawn raid at the company's offices and that concluded that although certain types of coffee might be considered mildly substitutable by consumers they were imperfect substitutes because differentiating characteristics (primarily taste) determine the demand for these products. The HCC also found that a 5% to 10% price increase in one type of coffee did not result in a substantial number of consumers turning to another type.

On the dominance question, the HCC found that in the instant coffee retail market (represented by Nescafé Classic), Nestlé held a share of around 86%/87% from 2000 to 2006. In the business segment, Nestlé held a share of between 78% and 95%. These high market shares were sufficient to establish a dominant position. Nestlé's competitors held a share of between 5% and 7%.

In considering the specific episodes of abuse, the HCC found that Nestlé Hellas had abused its dominance in several ways in relation specifically to supermarket chains. It had, for example, imposed "target discounts" and "loyalty rebates" that, the HCC argued, foreclosed Nestlé's competitors from selling to supermarket chains. The HCC also condemned the requirement that supermarkets not promote competitive products during promotional events for Nestlé products, and the existence of an "English clause" that always allowed Nestlé to match better offers made by Nestlé's competitors.

The HCC noted that between 2002 and 2006, as a result of these practices, the supermarket turnover of Nestlé's products improved without interruption, and that Nestlé's market share in other types of coffee (namely Greek and filter coffee) increased also. The HCC cited this as proof of the practices' anticompetitive effect.

Apart from the violation of Article 2 of Law 703/77 and Article 82 of the EC Treaty, the HCC also found a violation of Article 1 of Law 703/77 and Article 81 EC. The HCC stated that Nestlé's agreements with supermarkets led to a compartmentalization of the Greek coffee market by restricting (or eliminating) the possibility of imports.

IRELAND

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

Mergers & Acquisitions

Irish High Court Annuls Irish Competition Authority's Prohibition Of Kerry Group Plc's Acquisition Of Breeo Foods Ltd And Breeo Brands Ltd

On March 19, 2009, the Irish High Court annulled the Irish Competition Authority's decision to prohibit the acquisition of Breeo Foods Ltd. and Breeo Brands Ltd. (Breeo) by Rye Investments Ltd., a subsidiary of the Kerry Group plc (Kerry Group).[17] Justice Cooke found that the Competition Authority had erred in its definition of the relevant markets, and that it had failed to consider the effects of countervailing buyer power. The case is the first in which the Irish Courts have reversed a prohibition decision of the Irish Competition Authority.

The transaction involved the acquisition of the consumer foods division of Breeo, together with a number of production facilities, and Breeo's IP rights to 225 trademarks, including Dairygold, Galtee, Shaws, Roscrea, Mitchelstown, and Calvita. After an in-depth investigation, the Competition Authority prohibited the transaction on the grounds that it would lessen competition in the markets for processed bacon, non-poultry cooked meats, and processed cheese.

Annulling the Competition Authority's decision, Justice Cooke noted that the market definition adopted by the Competition Authority was too narrow, and that the market shares applied in the Authority's analysis did not accurately reflect the structure of the market. Justice Cooke further held that the Competition Authority had not provided sufficient evidence for its finding that food retailers would not be able to resist a post-transaction increase in price by the merged entity.

On April 7, 2009, the Competition Authority lodged an appeal to the Supreme Court. Two weeks later, on April 21, 2009, the Competition Authority was ordered to pay 80% of the legal costs incurred by Kerry Group during the High Court hearing.

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

Pasta Producers Fined In Price Fixing Cartel

On February 25, 2009, the Authority fined the largest producers of dry pasta in Italy, as well as their trade association (UNIPI), for having entered into an anti-competitive agreement to fix price increases for dry pasta products between October 2006 and March 2008. Aggregate fines in the case amounted to approximately €12.5 million.

The infringing arrangement was not "typical" of price fixing cartels. Indeed, the Authority found that the parties colluded in so called "focal price increases", whereby each undertaking decided autonomously on the amount and timing of price increases. However, the fact that pasta manufacturers had agreed on the "need to increase prices", and shared details of their own price increases, was sufficient, in the Authority's view, to eliminate any uncertainty concerning future pricing behavior. It allowed them to apply increases higher than might have been possible without collusion. The Authority held, further, that smaller manufacturers would not have been able to obtain increases in prices but for the exchange of information. Larger players would have needed to ensure that smaller competitors increased their prices in parallel, to avoid the risk of market share loss.

The Authority considered that the parties' conduct represented a "hard-core" violation of Article 81 EC, and rejected each of the commitments offered by the seven undertakings. The Authority did acknowledge, however, that the pasta price increases were motivated, in part, by the dramatic increase in the cost of durum wheat, but concluded that this could not justify collusion and that, in any event, the parties fully intended to continue their conduct even had the cost of durum wheat dropped.

This decision represents one of those rare occasions when the Authority provides some indication of the criteria it adopts for the calculation of fines. In order to set the basic amount of a fine for each undertaking, the Authority considered: (i) the value of the undertaking's sales to which the infringement directly or indirectly

17 *Rye Investments Ltd. v. Competition Authority* (2009. I.E.H.C. 140)

related in the relevant geographic market; (ii) the economic situation of the pasta industry; and (iii) the duration of the infringement for each of the undertakings involved. he basic amount of the fine for each undertaking was adjusted to allow for a variety of aggravating circumstances (*e.g.*, the leading role played by six of the undertakings). Despite the Authority's rejection of commitments, six of the undertakings' implementation of proposed commitments was considered as a mitigating factor. Referring specifically to one of the undertakings involved in the investigation, the Authority also took into account that company's granting of special rebates to its customers. The Authority also reduced its fines against those undertakings who had suffered financial losses over the preceding three years.

Mergers and Acquisitions

The Authority Conditionally Clears The Acquisition Of Cartasi By Istituto Centrale Delle Banche Popolari Italiane

On March 26, 2009 the Authority conditionally cleared the proposed acquisition of the CartaSi group by the Istituto Centrale delle Banche Popolari Italiane ("ICBPI"). CartaSi is Italy's primary credit card issuer and acquirer, while ICBPI owns Key Client Cards & Solutions, a competing credit card issuer and acquirer.

In line with recent EC Commission practice (and contrary to its traditional definition of a single credit card market), the Authority held that the proposed transaction would impact the following markets within the credit card sector:

- The card issuing market (which involves the issuance of credit cards, the definition of card characteristics and terms and conditions, the establishment of contractual relationships between the card customers and the issuing bank, the management of the issuer's relationship with international payment circuits, as well as marketing and anti-fraud services);
- The merchant acquiring market (which involves the establishment of contractual relationships between merchants accepting payments and the credit card companies; the management of the relationship with international payment circuits, the negotiation and management of the merchant fees, as well as related customer services); and
- The card processing market (which involves both servicing activities (such as the administration, accounting and financial management of cards and transactions) and IT processing services (such as the management of IT platforms and applications in support of issuing and acquiring activities, for example, clearing and settlement services).

The Authority pointed out that the proposed transaction would result in the creation of a dominant position in the card issuing and merchant acquiring markets (with the post-merger entity holding market shares of around 45% and 60% respectively). In particular, the Authority focused its attention on the issuing and merchant acquiring markets, as they concerned small and medium-sized banks not engaging in issuing and acquiring activities, but merely distributing third parties' credit cards.

The Authority's investigation revealed that the largest Italian banks (which have all obtained issuing and acquiring licenses from Visa and/or MasterCard) typically tend to carry out their credit card business in-house and, therefore, do not offer issuing and acquiring services to small and medium-sized banks.

Regarding the processing market, the Authority found that the post-merger entity would be able to leverage its market power in the issuing market to the market for processing services, given its high issuing market shares, its capability to make an integrated offer that could not easily be replicated by other undertakings, and, most importantly, the structural links of the post- merger entity with SIA-SSB, the largest credit card processor in Italy.

Regardless, the Authority cleared the transaction, because the post-merger entity committed to:

- Ensuring that all services are offered separately under transparent and non-discriminatory conditions;
- Making a transparent and non-discriminatory selection (based on the best economic offer) of its processing provider, should the merged entity decide to outsource the management of IT platforms and applications services to a third party;
- Eliminating all financial or structural links to SIA-SSB (ICBPI currently has a 3.1% stake in SIA-SSB); and
- Ensuring that all members of the merged entity's board of directors not sit on the board of any competing Italian credit card company.

THE NETHERLANDS

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

Mergers & Acquisitions

Nma Accepts First Ever Efficiency Defence

On March 25, 2009, following a Phase II investigation, the NMa approved the merger of Walcheren and Oosterschelde hospitals, subject to conditions.[18] The decision marks the first time the NMa has allowed an efficiency argument as a primary justification to clear a merger.

The NMa found that the merger would result in a monopoly in clinical and non-clinical hospital care in Middle-Zeeland. The parties argued, however, that the merger was necessary for the continuity of hospital care in the region, and that the benefits of the merger outweighed any likely harm to consumers since, without the merger, both parties would be unable to attract the requisite number of specialists needed to maintain the quality of service for patients. Moreover, the merger would enable the hospitals to provide services they currently could not provide and improve the quality of services they already provide by allowing specialists more opportunities to treat patients and focus on subspecialties. The merged entity would also benefit from economies of scale and scope, which would translate into cost savings and benefits for consumers. Finally, the parties maintained that the region was simply not large enough to support competition between two hospitals and that, were the merger to be prohibited, one or both of the hospitals would be forced from the market.

The NMa accepted the efficiency defence, but attached strict conditions to the merger. In particular, the remedies required the parties to:

- implement a price cap for non-regulated medical services based on national price averages;
- guarantee essential medical facilities, such as an intensive care unit and an emergency room; and
- assist any new market entrants by providing services such as surgery room facilities.

Policy and Procedure

NMa Publishes New Merger Procedure Guidelines

On January 9, 2009, the NMa published a revised version of its Merger Procedure Guidelines (*Spelregels Concentratietoezicht*),[19] replacing guidelines published in 2004. These changes were necessary in the light of amendments to the Dutch Competition Act (adopted in October 2008) and recently implemented rules outlining when a concentration may be cleared without a fully reasoned decision (*Besluit verkort afdoen concentratiezaken*).[20] The major changes to the 2004 Guidelines include:

- specifying how parties to a merger should go about requesting an extension of the NMa's four-week Phase I investigation period;
- specifying how parties to a merger should go about submitting a remedy proposal during a Phase I investigation;
- specifying how the NMa will handle a request for access to information on the basis of the Open Administration Act (*Wet openbaarheid van bestuur*) which the Dutch Council of State recently ruled applies to case files held by the Nma;[21]
- specifying how the NMa will coordinate investigations into mergers in the media sector with the Media Commission (*Commissariaat voor de Media*), as required by the Temporary Act on Media Concentrations ((*Tijdelijke wet mediaconcentraties*);
- committing the NMa to publish all future informal opinions in merger control cases (*informele zienswijzen*). An informal opinion may be requested by parties to a transaction seeking clarification on whether it needs to be notified.

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 (NCC).

Horizontal Agreements

National Competition Commission Adopts Settlement Decision Regarding Collective Bargaining Agreements

On March 16, 2009, the NCC issued a decision, under Article 52 of Law 15/2007, to settle two investigations brought against various business associations and trade unions for their alleged infringement of Article 1 of Law 15/2007 for the Defence of Competition (LDC), by entering into two collective bargaining agreements containing price fixing clauses.

The first case (Decision S/0076/0, "*Convenio Contact Centre*"), was brought against the business association ACE (Spanish Contact Centre Association) and the trade unions COMFIA-CCOO (Administrative and Financial Services Federation for the trade union

18 Zaak 6424, *Ziekenhuis Walcheren - Oosterscheldeziekenhuizen*, NMa Besluit van 25 maart 2009, hyperlink

19 Spelregels bij concentratiezaken, NMa publication of January 9, 2009, hyperlink

20 Besluit van de Raad van Bestuur van de Nederlandse Mededingingsautoriteit van 2 september 2008 tot het vaststellen van uitvoeringsregels omtrent het verkort afdoen van concentratiemeldingen, hyperlink

21 Uitspraak van de Raad van State van 7 februari 2007, *Nederlandse Mededingingsautoriteit/ Koninklijke Gazelle B.V.*, LJN nummer: AZ7951, hyperlink

CCOO) and FES-UGT (Services Federation for the trade union UGT). It alleged that the parties had entered into a nation-wide collective bargaining agreement in the Spanish contact centre industry that infringed the LDC.

The second case (Decision S/0077/08, "*Convenio Seguridad*"), was initiated against the business associations APROSER (Professional Association of Spanish Private Security Services), FES (Spanish Security Business Federation), AMPES (Association of Security Professionals and Companies) and ACAES (Catalan Association of Security Companies) , as well as against the trade union federations and FES-UGT and FTSP-USO (Workers Federation of Private Security), for entering into a nation-wide collective bargaining agreement of private security companies that infringed the LDC.

Article 55 of the contact centre agreement, for example, included a detailed list of minimum labour costs, broken out by day and night activities, and by seniority. Similarly, Article 74 of the private security agreement established minimum salary and non-salary related benefits.

In reaching its decision on the anticompetitive nature of these clauses, the Council of the NCC made reference to a previous decision of its predecessor body, the Tribunal for the Defence of Competition (TDC), in which the TDC held that collective bargaining agreements may not regulate any commercial matters – their scope being limited to employees' working conditions and to the relationships between employers and employees (See decision 607/706 "*Ayuda a domicilio*").

The parties' proposed commitments to the Directorate of Investigation included the removal of the problematic articles from both collective bargaining agreements, and an assurance that they would not be reintroduced in future agreements. In light of these commitments, the Council of the NCC agreed to the termination of both investigations and made binding, under Article 52 of the LDC, the parties' proposed commitments.

The NCC's settlement decision also requires the Directorate of Investigations to enforce the commitments and to request the parties to communicate to the competent labour authorities in the framework of the registration of future collective bargaining agreements, that they contain no clauses contrary to the LDC. Finally, the parties are also required to submit to the NCC a copy of the official gazette publication of the decision, declaring the anticompetitive articles to be inapplicable.

Mergers & Acquisitions

National Competition Commission Clears Gas Natural's Acquisition Of Union Fenosa In Phase II, Subject To Commitments

On February 11, 2009, the Council of the NCC issued phase II clearance of Gas Natural's €16,800 million bid for the Spanish utility Unión Fenosa S.A. – five months after Gas Natural's notification of the merger on September 3, 2008.

Gas Natural (GN) and Unión Fenosa (UF) are active in the production and retail marketing of natural gas. GN is also Spain's largest wholesale distributor[22] and the fourth largest supplier on the Spanish electricity market.[23] UF is Spain's third-largest electricity utility company. It is active also in the gas market via the vertically integrated joint venture, Unión Fenosa Gas, S.A. (UFG) with Italy's ENI SPA. UF is present in the renewable energy sector through another joint venture, Enel Union Fenosa Renovables (EUFER), with Italy's ENEL SPA.

On September 3, 2008, GN notified the NCC of its proposed acquisition of control of UF, following an agreement to acquire a 45.3% stake in UF from Spanish construction company Actividades de Construcción y Servicios S.A. (ACS). On November 7, 2008, the NCC initiated a second phase review of the concentration, having identified antitrust concerns in different gas and electricity markets. On January 19, 2009, the NCC issued a statement of objections outlining its concerns. Three weeks later, on February 11, 2009, the Council of the NCC adopted a final clearance decision, subject to commitments. The Council held that, save for the commitments proposed by GN, the transaction would have:

- reinforced GN's market power in the Spanish gas markets (particularly in the wholesale and retail supply of natural gas) because of the disappearance of UF as a vertically integrated independent competitor;
- lessened competition in the wholesale electricity markets because of the strengthening of the market position of GN, the potential facilitation of tacit collusive behavior with rivals Endesa and Iberdrola, and the resulting higher level of concentration in these markets;
- brought about the merger between two close competitors in the gas and electricity retail and distribution supply markets.

22 According to the figures provided by the CNC. The decision can be found at http://www.cncompetencia.es/Inicio/Expedientes/tabid/116/Default.aspx

23 See NCC press release. It can be found at http://www.cncompetencia.es/Default.aspx?TabId=75&pag=2

GN proposed a series of commitments to eliminate the competitive concerns identified by the NCC. These were found to be sufficient and proportionate, and included divestitures directed at reducing the impact of the disappearance of UF as an independent competitor. The commitments also included remedies designed to reduce GN's links with other competitors, and to ensure the autonomy of UFG's commercial strategy in Spain. In particular GN committed to divest:

- 600,000 gas distribution points (equivalent to 9% of the national distribution network);
- 600,000 small customers;
- 2,000MW of electricity generation capacity produced using combined-cycle technology; and
- its shareholding in Enagás, Spain's main natural gas transportation and storage company.

GN also committed to:

- reduce its structural links with Cepsa and Repsol YPF; and
- implement measures designed to ensure that UFG continued to operate autonomously as a gas supplier to third parties in Spain.

As one of the largest transactions in the European market during 2008/2009, this merger concluded a series of attempts by GN to acquire control over a Spanish electricity utility after its unsolicited takeover bid for Iberdrola in 2003, and its controversial unsolicited takeover bid for Endesa in 2005.

Policy and Procedure

Communication On Quantification Of Sanctions Arising From Violations Of Articles 1, 2 And 3 Of The Spanish Competition Act 15/2007 And Articles 81 And 82 Of The EC Treaty

On February 4, 2009, the Council of the CNC issued a Communication approving the quantification of sanctions envisaged by the Spanish Competition Act.

According to Section II of the Communication, the calculation of fines for infringements of the competition law require:

- a determination of the basic amount of the fine;
- an adjustment of the basic amount (upwards or downwards) depending on the aggravating and/or attenuating circumstances; and
- an adjustment (when necessary) of the amount resulting from the calculations contained in point (ii) above to:
  - o the limits established by the LDC; and
  - o the illegal benefits obtained by the infringing company as a result of its participation in the infringement.

Determining the basic amount. The determination of the basic amount of a fine will require a consideration of:

- the size and features of the relevant market;
- the market share of the infringing company;
- the gravity of the infringement; and
- the infringement's duration and its effects.

The resulting amount will be calculated as a percentage of the turnover affected by the infringement. When the market – in which the infringement has (or is likely to have) occurred – is broader than the Spanish territory, the turnover taken into account for the setting of the basic amount will be the turnover affected by the infringement in the European Economic Area, pursuant to Regulation 1/2003.

If it is not possible to determine the affected turnover for one or more years of the infringement, the turnover for consideration will be that produced during the last year in which the infringement occurred. The basic amount will be adjusted by applying a percentage ranging between 10% (minimum) and 30% (maximum) to the turnover affected. The initial percentage of 10% can be increased by a further 10% if:

- the infringement is thought to be very serious;
- the markets affected by the infringement relate to an input likely to produce effects upstream or downstream.

The basic amount of the fine will be increased with the duration of the infringement. The importance of each additional year will decrease with duration.

Criteria for the determination of an Adjustment Factor: Pursuant to Article 64 of the LDC, the basic amount of the fine will be increased or decreased depending on aggravating or attenuating circumstances listed in paragraphs 2 and 3 of Article 64. The application of each of these circumstances will lead to an increase or decrease of between 5 and 15% in the basic amount.

Maximum level of fines or fine cap. When it is possible to calculate the benefit resulting from an infringement, the fine imposed on the infringing companies shall not be below that amount. The final amount of the fine shall not, in any event, exceed 10% of the total turnover in the preceding business year of the participant undertaking or association.

Fines on individuals. The Communication also considers the possibility of imposing fines on legal representatives or members of management bodies who participated in the infringement. Article 63.2 of the Act establishes a limit of €60,000 on a fine that can be imposed on the legal representatives or management participating in the infringement. The penalty imposed will be fixed at between 1% and 5% of the sales volume affected by the violation, taking into account the duration of, and individual degree of responsibility for, the infringement. These fines must be paid by any individual guilty of participating in the infringement.

SWEDEN

This section reviews developments concerning the enactment of the new Competition Act in Sweden that came into force November 1, 2008, and which is enforced by the Swedish Competition Authority (SCA).

Unilateral Conduct

The Swedish Competition Authority Suspends The Effects Of A Previous Abuse Of Dominance Judgment By The Swedish Market Court

On January 9, 2009, the SCA decided that the injunction issued by the Swedish Market Court preventing SAS's *EuroBonus* scheme from being applied on Swedish domestic routes no longer applied. This judgment, issued by the Swedish Market Court in 2001, found that SAS' application of its *EuroBonus* scheme constituted an abuse of a dominant position, and the airline was ordered not to employ the scheme on domestic routes in which it operated in competition with other service providers.

In May 2008 SAS had applied to the SCA to have the Market Court's ruling overturned. Despite the success of SAS's appeal, the SCA's decision does not preclude it from opening another investigation into a new EuroBonus scheme, should the airline decide to introduce one.

District Court Of Stockholm Makes A Request For A Preliminary Ruling From The European Court Of Justice In A Margin Squeeze Case

On January 30, 2009, the District Court of Stockholm stayed an SCA decision requiring TeliaSonera to pay a fine of SEK 144 million for abusing its dominant position in the internet services market pending its reference of certain fundamental underlying questions to the European Court of Justice.

The SCA had filed an application with the District Court in December 2004 for a summons requesting the court to compel TeliaSonera (the leading Nordic telecommunication company) to pay its fine. The alleged abuse consisted of a margin squeeze for certain broadband services. The District Court of Stockholm, however, decided to stay the proceedings and to refer certain questions for a preliminary ruling to the European Court of Justice ("ECJ"). The District Court of Stockholm has asked the ECJ to clarify whether a margin squeeze constitutes an abuse in circumstances where there is no regulatory obligation to supply, and the supplies would be addressed to new customers only.

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.

Vertical Agreements

Drug Makers And Distributors Receive Statement Of Objections In Impotence Drugs Case

On February 10, 2009, the Secretariat of the FCC issued a proposed decision charging the manufacturers and distributors of male impotence drugs with price fixing. Following a 2006 investigation into erectile dysfunction medication prices (including prices for Viagra, Cialis and Levitra), the Secretariat concluded that Bayer AG, Eli Lilly SA, and Pfizer AG effected unlawful agreements with resellers fixing recommended public retail prices for products in the affected market.

Under Article 5(4) of the Competition Act, vertical agreements are deemed to eliminate competition if they include retail price-fixing. The criteria according to which price recommendations may be deemed to be vertical agreements (falling under Article 5(4) Acart) were clarified by the FCC in its Communication "on the Assessment of Vertical Agreements" in July 2, 2007. According to the FCC, in cases of price recommendations by manufacturers or suppliers to resellers or distributors it must be established on a case-by-case basis whether there is an unlawful agreement affecting competition. The following factors are of particular relevance:

- Whether price recommendations were communicated openly, or only to resellers and distributors;
- Whether price recommendations were combined with some form of pressure, or in tandem with the offer of incentives;
- Whether the manufacturers or suppliers indicate price recommendations on the products, packaging or catalogues – without establishing expressly whether or not they were binding;

- Whether the prices for the products subject to recommendation were considerably higher than those in neighbouring countries, despite similar product or service specifications.
- Whether the price recommendations were adhered to by a large number of resellers and distributors.

Because the price recommendations in this case were adopted by a large majority of drug stores and physicians, the Secretariat concluded that the publication and observance of the recommended retail prices for the medicines Viagra, Cialis and Levitra represented illegal vertical collusion between producers and distributors. The FCC must now decide whether to follow the Secretariat's recommendation to impose penalties on the undertakings concerned or prohibit them from suggesting retail prices entirely.

Policy and Procedure

Evaluation Of The Competition Act

On January 14 2009, the Swiss Federal Government (Federal Council) was presented with a Synthesis Report[24] issued by the Cartel Act Task Force, a panel formed during the winter of 2006/2007 by the Head of the Federal Department of Economic Affairs to evaluate the ongoing effects and functioning of the Competition Act. The Task Force stated that, together with the legal instruments that were introduced upon the Act's last revision in 2003 (concerning leniency, raids, and opposition proceedings), it had demonstrated Competition Act's ability to serve its purposes. However, according to the Task Force, further modifications are necessary to improve the efficiency of (1) the FCC and its Secretariat, (2) international cooperation, and (3) enhanced control of mergers and vertical restraints.

The Competition Act was amended significantly in 2003, to include (i) provisions for a system of non-mandatory preliminary notifications of potentially unlawful agreements and practices, (ii) the FCC's ability to impose direct administrative fines for participation in a hardcore cartel or for the abuse of a dominant position, and (iii) the FCC's ability to reduce or eliminate fines when cooperation with hardcore cartel members allowed the cartel to be discovered or suppressed (*e.g.*, leniency). The amendments also sought to ease the burden of proof for the FCC, by introducing specific presumptions concerning vertical restraints.

Article 59a of Competition Act requires the Federal Council to evaluate the efficiency and conformity of any new measure before submitting a report and recommendation to Parliament. Accordingly, after 5 years, the effectiveness of the revised Competition Act was assessed by the Task Force Cartel Act, under the leadership of the Director of the Secretariat of the FCC. The Task Force issued a Synthesis Report, which makes a number of recommendations. The primary finding is that the underlying concept of the Competition Act (as introduced in 1995, and revised in 2003) should be maintained. However, while it is unnecessary to amend the instruments added in 2003 (namely direct sanctions, leniency program, and raids), the following improvements are deemed priorities:

- Competition authorities must be fully independent of political and business influence; decision making-members must be professionals. The FCC and its Secretariat should thus merge into a single entity;
- Switzerland must conclude cooperation agreements with its main trading partners, thereby allowing for the formal exchange of confidential information between competition authorities. It is necessary, moreover, to amend Swiss formal law in order to enable the competition authorities to cooperate with their counterparts under certain conditions;
- Switzerland must harmonize its merger control regime with the corresponding EU regulations, including the SIEC-test, efficiency defence, and dynamic consumer welfare standards;
- Regarding restrictions on vertical agreements, Switzerland must abandon the legal presumption of illicit conduct. However, the Competition Act should maintain the possibility of imposing direct sanctions in case of minimum or fixed price setting and restrictions with respect to territorial agreements;
- Once this revision is completed, the civil aspects of antitrust law, the civil and administrative procedure, and the system of sanctions should be improved, or further evaluated.

By reference to these recommendations, the Federal Council submitted a report to Parliament on March 25, 2009[25] proposing to maintain the current structure of the Competition Act on the basis of its three pillars: (1) the prohibition of harmful cartel agreements, (2) the prohibition of the abuse of a dominant position and (3) merger control. Identifying certain shortcomings of the Competition Act, the Federal Council instructed the Federal Department of Economic

24 A summary in English of the Synthesis Report is available at http://www.weko.admin.ch/dokumentation/ 00216/index.html?lang=en.

25 The report of the Federal Council in French, German and English is available http://www.news-service.admin.ch/NSBSubscriber/message/fr/26072.

Affairs to submit concrete proposals before the spring of 2010, with a view to adjusting the Competition Act accordingly.

UNITED KINGDOM

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

Unilateral Conduct

Court Of Appeal Clips Wings Of CAT In Judgment On Vodafone License

On February 10, 2009 the Court of Appeal handed down judgment in the *Ofcom v Floe Telecom Limited*[26] refusal to supply case.

Floe had complained to Oftel (Ofcom's predecessor) in July 2003 that Vodafone had breached Chapter II of the Competition Act 1998 by refusing to supply Floe with GSM gateway services, necessary for companies wishing to offer third parties low rates on calls to mobile phones. Ofcom's first decision,[27] which rejected this complaint, was set aside by the CAT on the basis of incorrect and/or inadequate reasoning.[28] In June 2005, Ofcom issued a new decision, finding (as before) that the refusal to supply was justified objectively because Floe lacked certain necessary GSM licenses.[29] Floe appealed again to the CAT. The CAT dismissed Floe's appeal, but set aside parts of Ofcom's decision as either misconceived or inadequately reasoned, particularly with respect to the conclusion that Vodafone's license did not cover the use of GSM gateways.[30]

The first issue before the Court of Appeal was whether Ofcom should be allowed to appeal against elements of a CAT decision, that was otherwise predominantly in its favor. Despite expressing some concern, the Court of Appeal agreed to hear the full appeal, recognizing that the CAT's judgment on the construction of a standard license was a matter of public interest that affected Ofcom's performance of its regulatory function. The importance of the appeal to Ofcom was emphasized by the fact that it was funding Floe, which had already gone into liquidation.

On the second issue, the construction of the Vodafone license, the Court of Appeal found that the CAT had been wrong to apply the so-called *Marleasing*[31] principle and that the ordinary and natural meaning of the license should have been applied instead. It therefore set aside the part of the CAT's order that would have affected Ofcom's decision and made declarations as to the construction of the Vodafone license.

The Court of Appeal drew particular attention to the perils of an appellate court, such as the CAT, expressing views on matters not applicable to its decision: "*more harm than good is likely to be done by deciding more than is necessary for the adjudication of the actual dispute.*"[32] It remains to be seen whether the CAT will heed the advice of the Court, and refrain from reaching unnecessary conclusions, and more general advice, in the course of its decisions.

Mergers & Acquisitions

CC Prohibits Project Kangaroo

On February 4, 2009, the CC announced its prohibition of the proposed video on demand (VOD) joint venture between BBC Worldwide Limited (the commercial arm of the BBC), Channel Four Television Corporation, and ITV plc.[33] The resulting venture would have supplied VOD content directly to consumers, and also to third-party VOD retailers in the U.K., with each parent entity making a minimum amount of content available to the venture. The transaction was referred to the CC by the OFT in June 2008.[34]

26 *Office of Communications and T-Mobile (U.K.) Ltd. v. Floe Telecommunications Ltd.* [2009] EWCA Civ 47, http://www.bailii.org/ew/cases/EWCA/Civ/2009/47.html

27 *Competition Act Investigation by the Director General of Telecommunications into Disconnection of Floe Telecom Limited's Services by Vodafone Limited*, November 3, 2003, http://www.ofcom.org.uk/static/archive/oftel/publications/mobile/2003/gsm1103.pdf

28 *Floe Telecom Limited (in liquidation). v. Office of Communications* [2004] CAT 18, http://www.catribunal.org.uk/files/Jdg1024Floe191104.pdf

29 *Re-investigation of a complaint from Floe Telecom Limited against Vodafone Limited*, Case CW/00805/12/04, 28 June 2005, http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ccases/closed_all/cw_805/floe_vodafone.pdf

30 *Floe Telecom Limited (in liquidation). v. Office of Communications* [2006] CAT 17, http://www.catribunal.org.uk/files/Jdg1024Floe310806.pdf

31 *Marleasing SA v. La Comercial Internacional de Alimentacion SA* [1990] ECR 1-4135, http://www.bailii.org/eu/cases/EUECJ/1990/C10689.html

32 *Per* Mummery LJ, *Ofcom and T-Mobile (U.K.) Ltd. v. Floe Telecom Ltd*, supra, paragraph 22.

33 *BBC Worldwide Limited, Channel Four Television Corporation, and ITV plc, Final Report*, CC, February 4, 2009, http://www.competition-commission.org.uk/rep_pub/reports/2009/fulltext/543.pdf

34 *Anticipated joint venture between BBC Worldwide Limited, Channel Four Television Corporation, and ITV plc*, OFT, June 30, 2008, http://www.oft.gov.uk/shared_oft/mergers_ea02/2008/Project_Kangaroo.pdf

The CC found in December 2008 that the joint venture was likely to result in a substantial reduction of competition in both the wholesale and retail supply of UK television VOD content. In the wholesale market, the CC identified content as the key source of bargaining strength for VOD providers, and found that, in general, the parties had greater negotiating power than did VOD retailers. The CC also found that there were no credible alternatives to the parties' content, thereby preventing market entry and expansion. At both the wholesale and retail levels, the parties would – absent the joint venture – remain each other's closest competitors, with third parties providing little or no effective competitive restraint. Accordingly, the CC found that the joint venture could offer less attractive terms to retailers, who would in turn pass on any price increases to consumers.

The CC considered remedies other than prohibition, but found that the parties' ability to withhold content, or make syndication unattractive for third parties, would render such remedies ineffective. This may prove to be no more than a temporary interruption of the parties' collaboration, however. The CC prohibited a tripartite deal, but it did not prohibit an arrangement between two parties – thereby leaving open the possibility of a merger between BBC Worldwide and Channel 4. Furthermore, the BBC and ITV are planning to cooperate as "Project Canvas", a joint venture between BBC, BT and ITV that will deliver VOD by means of Freeview.

Deloitte Report on Merger Decisions Taken Under The Enterprise Act 2002

On March 18, 2009 the CC, OFT, and Department for Business, Enterprise and Regulatory Reform published a report (prepared by Deloitte LLP) reviewing eight merger decisions taken under the Enterprise Act 2002 – three by the OFT, and five by the CC.[35] The aim of the review was to comment on the approaches taken by the OFT and CC in the light of subsequent market developments. The Deloitte report broadly approved the approach taken by the OFT and CC, and found, on the basis of merger simulations carried out by Deloitte, that the competition authorities' analyses were "generally consistent, coherent and transparent". The report nonetheless offered a number of criticisms.

Specifically, in three of the CC cases (*Knauf/Superglass*, *EWS/Marcroft*, and *Cott/Macaw*), there were significant (actual or planned) entries not anticipated by the authority. The report suggested there was a tendency to overstate barriers to entry and expansion in early CC decisions under the Enterprise Act, but it did not recommended the revision of the OFT and CC's merger guidelines.

Although the report refrained from drawing any conclusions as to the soundness of the authorities' decisions, it found that subsequent market developments called into question two of the CC's decisions. In *DS Smith/Linpac* (which was approved unconditionally by the CC), there had been a series of price rises in one of the affected markets, and customers expressed concern at potential coordination. In *EWS/Marcroft*, for which divestments were required, there was evidence to suggest that the CC had overstated barriers to entry and expansion, and underestimated the competitive restraint of self-supply, and the likely impact of a competitor (Wabtec).

The timing of the report is of particular interest because the OFT and CC are consulting on the revision of merger guidance. Deloitte published its report on March 28; the consultation period for merger guidance closed on June 20.

Sector Investigations

Tesco's Appeal Against CC Competition Test Successful

On March 4, 2009 the CAT allowed Tesco's appeal against the CC's April 2008 report[36] on the UK grocery market.[37]

One of the CC's recommendations in its report was the introduction of a competition test by reference to which planning permission would be refused to large grocery stores in areas where there was already a high concentration in a market in which the applicant retailer was a substantial participant. Tesco submitted that the CC had failed, in recommending this test, to take account of relevant considerations which ought to have formed part of its assessment, including the detrimental effects on competition and consumers of preventing an incumbent retailer from expanding to meet demand.

Applying the same principles as would govern an application for judicial review, the CAT agreed that the CC had failed to properly analyze the adverse effects of this test. The CAT also found that the proportionality assessment made by the CC was flawed, beause the CC had assumed any adverse effects would be remedied by the competition test. The CC had not attempted, therefore, to estimate the extent to which the test might increase competition in existing, highly-concentrated local markets.

35 *Review of merger decisions under the Enterprise Act 2002*, Deloitte LLP, March 18, 2009, http://www.competition-commission.org.uk/our_role/analysis/review_merger_decisions.pdf

36 *Market Investigation into the Supply of Groceries in the U.K., Final Report*, CC, April 30, 2008, http://www.competition-commission.org.uk/rep_pub/reports/2008/fulltext/538.pdf

37 *Tesco Plc v. Competition Commission* [2008] CAT 20, http://www.catribunal.org.uk/files/Judg_1104_Tesco_04032009.pdf

On April 3, 2009 the CAT referred the matter back to the CC, which undertook to reach a new decision within 6 months.[38] The April 2008 report survived reassessment, but the CC's decision to make its recommendations was quashed. After proper consideration of the relevant factors, the CC could lawfully make the same recommendations again, however, and Tesco may thus have achieved no more than a delay in the implementation of the competition test.

Considered broadly, this decision might prove encouraging to other parties considering their options in response to CC market investigations. By allowing the first appeal against a CC final report, the CAT indicated its willingness to set a limit on the CC's discretion in its approach to market investigations, but if the CC does no more than rehearse its conclusions, such an appeal may have very limited effect.

Final Report In BAA Airports Market Investigation

On March 19, 2009 the CC published its final report on the BAA airports market investigation. The report found that several features in that market prevent, restrict or distort competition. The CC thus imposed various remedies, including the requirement that BAA divest Gatwick, Stansted, and either Edinburgh or Glasgow airports.[39]

The OFT referred the issue of BAA's supply of airport services to the CC in March 2007,[40] and the CC published its provisional identification of competition issues in August 2008.[41] At that time, the CC identified significant substitutability of passenger demand between BAA's London airports, and between those airports and Southampton, and it found that BAA's common ownership of the airports prevented competition between them. The CC reached the same finding with respect to the airports in Glasgow and Edinburgh.

The CC also found that a number of other market features affected competition, including aspects of planning procedure, government policy, and the current regulatory system for airports. The report, for example, concluded that Heathrow's position as the only significant hub airport in the South-East (or, indeed, the U.K.) restricted (actual and potential) competition between airports for airlines offering connecting flights. It also expressed concern at the isolated geographical position of Aberdeen airport.

The remedies imposed by the CC in its 2009 report were structural and behavioral, and included a number of regulatory recommendations. It required three sequential divestitures within two years: first Gatwick, then Stansted (to a separate purchaser) and finally either Edinburgh or Glasgow. The CC further required improvements in quality of service at Heathrow, and a consultation on capital expenditure at Aberdeen. A number of recommendations were also made to the Department for Transport concerning airport regulation and policy.

BAA has implied that it may yet appeal the decision to the CAT, on the grounds that the analysis was flawed and because the remedies are impractical under the current economic conditions. BAA may be emboldened by the recent decision of the CAT to uphold Tesco's appeal (see below), in which the CAT emphasized that the CC must give proper consideration to the possible costs to consumers and the effectiveness of the remedies proposed. The delay resulting from an appeal may also result in a more favorable economic climate for BAA's required divestitures.

38 *Tesco plc v. Competition Commission* [2009] CAT 9, http://www.catribunal.org.uk/files/Judgment_1104_Tesco_03.04.09.pdf

39 *BAA Airports Market Investigation, Final Report*, CC, March 19, 2009, http://www.competition-commission.org.uk/rep_pub/reports/2009/fulltext/545.pdf

40 *BAA: The OFT's Reference to the Competition Commission*, OFT, March 30, 2007, http://www.oft.gov.uk/shared_oft/reports/transport/oft912.pdf

41 *BAA Airports Market Investigation, Provisional Findings Report*, CC, August 20, 2008, http://www.competition-commission.org.uk/inquiries/ref2007/airports/pdf/prov_find_report.pdf

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