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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).

Horizontal Agreements

Austrian Supreme Court Confirms €1.9 Million Fine On Chemicals Wholesalers

On March 25, 2009, the Supreme Court confirmed the imposition of a fine of €1.9 million on Donau Chemie for its part in an industrial chemicals sector cartel.[1]

Donau Chemie and Brenntag, both Austrian chemicals wholesalers, we found to have allocated customers amongst each other, fixed prices, and exchanged sensitive information for a number of years, beginning in the late 1980s. Brenntag disclosed its involvement in the cartel at the end of December 2006 and applied for leniency with the FCA, which eventually granted it full immunity. The Cartel Court, however, imposed a fine of €1.9 million on Donau Chemie in an October 24, 2008 decision. The company appealed that decision to the Supreme Court and contested the scale of the fine. *Inter alia*, Donau Chemie's appeal focused on the following arguments:

- The anti-competitive agreements with Brenntag were never implemented in practice and, because the cartel related only to long-term customers, a large portion of Donau Chemie's and Brenntag's customers could not have been affected by the cartel;
- Because the Cartel Court failed to make findings as regards the extent of Donau Chemie's unjust enrichment, absent proven damages to its customers, the scale of Donau Chemie's fine should be reduced;
- Following the infringement, Donau Chemie introduced an anti-trust compliance code, which the Cartel Court should have taken into account as a mitigating factor;
- Despite the fact that the mere absence of certain documents or evidence may not in itself constitute an aggravating factor, the Cartel Court treated the failure by Donau Chemie and Brenntag to produce meeting minutes and certain other potentially incriminating documents as an aggravating factor.
- The calculation of the fine should not have been based on Donau Chemie's turnover, but on its consolidated profits. On that basis, the fine would have amounted to only €50,000.

With one exception, the Supreme Court rejected each of these arguments, and confirmed the fine, observing that it was proper for its fine calculation to take into account the undertaking's total overall turnover, and not just the affected turnover. Profits were not a relevant factor for the calculation of the fine because consolidated profits are not related specifically to the cartel infringement.[2] Because the fine imposed on Donau Chemie did not amount to even 10% of the maximum possible fine under the law[3], and given the serious nature of the hardcore cartel arrangement between Donau Chemie and Brenntag, the fine imposed on Donau Chemie was found to be in no way inappropriate. Price fixing and customer allocation, by their very nature, were likely to harm the parties' customers, and so it could not be maintained that, merely because the Cartel Court did not determine the amount of Donau Chemie's unjust enrichment, the cartel had not caused harm to customers.

The only argument accepted by the Supreme Court was that the absence of incriminating documents did not constitute an aggravating factor in itself. Such an absence of documents would only be considered an aggravating factor if a party had intended to conceal the existence of the anti-competitive arrangement from the Court.[4] Because no such intention existed in the present case, the absence of documents could not lead to an increase in the fine. Despite accepting this point, the Supreme Court concluded that the overall fine imposed was appropriate, and confirmed it in its entirety.

1 Case 16 Ok 4/09 *Donau Chemie*, judgment of March 25, 2009.

2 Without saying so explicitly, the Supreme Court's reasoning appears only to be valid with regard to groups of companies with diversified activities.

3 The maximum legally possible fine would have been 10% of Donau Chemie's consolidated group turnover.

4 In that context, the Supreme Court referred to Case T-347/94 *Mayr-Melnhof Kartongesellschaft v. Commission*. In that case, among other factors, the Commission had based the amount of the fines on the fact that "*elaborate steps were taken to conceal the true nature and extent of the collusion (absence of any official minutes or documentation for the PWG and JMC; discouraging the taking of notes; stage-managing the timing and order in which price increases were announced so as to be able to claim they were 'following', etc.)*" (at para. 257). The Court of First Instance expressly approved of these criterion to be applied when setting the fine (paras. 260 and 262).

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

Brussels Court Of Appeals Annuls The Council's Decision In Belgian Order Of Pharmacists Case

On April 7, 2009,[5] the Brussels Court of Appeals annulled a 2007 Competition Council decision finding that the Belgian Order of Pharmacists ("BOP") had infringed Article 2 APEC.

In its October 26, 2007 decision,[6] the Council found that by adopting and enforcing restrictions on the opening hours of pharmacies and by prohibiting pharmacies from advertising or offering rebates to customers, the BOP infringed Article 2 APEC. However, despite the finding of infringement, no fine was imposed on the BOP because the administrative procedure (which had lasted almost 10 years) had far exceeded a "*reasonable time*" within the meaning of Article 6.1 of the European Convention of Human Rights.

In its April 7 judgment, the Brussels Court of Appeals confirmed the Council's finding that the BOP's practices amounted to an infringement of Article 2 APEC, but annulled the decision on procedural grounds. According to the Court, the Council's chamber responsible for the contested decision had not been properly composed under Article 19 APEC. Under this provision, the General Assembly of the Competition Council must select the different chambers of the Council every year – which the Court found the Council had failed to do in this instance.

Unilateral Conduct

President Of The Competition Council Rejects Request For Interim Measures In Pharmaceuticals Parallel Trade Case

On April 2, 2009,[7] the President of the Competition Council rejected an appeal lodged by Bofar SA against the Auditor-General's decision of March 26, 2008 refusing Bofar's request for interim measures.

Bofar is a pharmaceutical wholesaler, established in Belgium. As Bofar has no license to distribute products in Belgium, it is exclusively involved in export sales to other countries. On December 19, 2007, Bofar lodged a complaint with the Competition Council alleging that several pharmaceutical companies had infringed Articles 81 and 82 EC and Articles 2 and 3 APEC by refusing to supply Bofar with pharmaceutical products that it had requested (some of the companies had stopped supplying Bofar, others had reduced the quantities ordered by Bofar). Bofar's complaint was accompanied by a request for interim measures seeking a preliminary order to obtain supplies.

In its decision of March 26, 2008,[8] the Auditor-General rejected Bofar's request for interim measures on the grounds that there was no *prima facie* infringement of Articles 81 and 82 EC and Articles 2 and 3 APEC. On April 25, 2008, Bofar lodged an appeal against this decision before the President of the Competition Council.

In reviewing the Auditor-General's decision, the President relied on principles established by the European Court of Justice ("ECJ") in its *Syfait II* judgment,[9] rendered after Bofar lodged its appeal. In *Syfait II*, the ECJ held that:

- A dominant pharmaceutical company may not refuse to satisfy "*ordinary*" orders of existing wholesalers for the sole reason that these wholesalers, in addition to supplying the national market, export part of their purchases to other Member States;
- An order is out of the ordinary if it is "*out of all proportion*" to the volume previously ordered "*by the same wholesaler to meet the needs of the [local] market*";
- A dominant pharmaceutical company may "*counter in a reasonable and proportionate way the threat to its own commercial interests potentially posed by the activities of a [wholesaler] which wishes to be supplied […] with significant quantities of products that are essentially destined for parallel export*".

By reference to these principles, the President ruled that if a pharmaceutical company is allowed to protect its commercial interests by limiting parallel exports by national wholesalers in a

5 Cour d'Appel de Bruxelles (18e ch.), décision n°. 2007/MR/5 du 7 avril 2009.

6 Conseil de la concurrence, décision n° 2007-I/O-27 du 26 octobre 2007, affaire CONC-I/O-98/0004: E.S./Ordre des pharmaciens, affaire CONC-I/O-98/0024: L.P.D./Ordre des pharmaciens, et affaire CONC-I/O-98/0032: Groupe Multipharma/Ordre des pharmaciens.

7 Raad voor de Mededinging, beslissing nr. 2009-V/M-04 van 2 april 2009, zaak MEDE-V/M-07/0038 – Beroep van Bofar NV bij de voorzitter van de Raad voor de Mededinging tegen Beslissing nr. 2008-V/M-12-AUD van 26 maart 2008.

8 Raad voor de Mededinging, Auditoraat, beslissing nr. 2008-V/M-12-AUD van 26 maart 2008, zaak MEDE-V/M-07/0038: Bofar NV tegen Alcon-couvreur NV, AstraZeneca NV, Bayer NV, Biogen Idec Belgium NV, Boehringer Ingelheim Comm. V., Bristol Myers Squibb Belgium, Janssen-Cilag Belgium, Pfizer NV en Serono Benelux BV.

9 Joined cases C-468/06 to C-478/06, *Sot. Lélos kai Sia (and others) v. GlaxoSmithKline*, judgment of September 16, 2008.

reasonable and proportionate way, it is also allowed to protect its interests in preventing wholesalers from serving export markets exclusively.

Moreover, and according to the President, the concept of "*ordinary*" orders used in *Syfait II* cannot be applied in a case involving refusals to supply pure exporters, such as Bofar. This is because the ECJ ruled in *Syfait II* that the size of "*ordinary*" orders must be determined with regard to the requirements of the Member State in which the orders are placed. As Bofar was not allowed to sell pharmaceuticals in Belgium, the President concluded that dominant pharmaceutical companies could protect their commercial interests by limiting parallel trade and reducing supplies to a pure exporter, without abusing their dominant position. As a consequence, the President rejected the appeal against the Auditor General's decision, confirming that there was no *prima facie* infringement of Article 82 EC and Article 3 APEC.

Competition Council Imposes Record Fine On Proximus For Abuse Of Dominant Position

On May 26, 2009,[10] the Competition Council imposed a €66.3 million fine on mobile operator Proximus (also known as Belgacom Mobile) for having abused its dominant position on the market for mobile telephony services in 2004 and 2005. This is the largest fine ever imposed by the Belgian competition authority.

In its decision, the Council found that during the 2002-2005 period Proximus had held a dominant position on the Belgian market for mobile telephony services. The Council based its assessment on Proximus' large market share, as well as a number of other factors, including Belgacom's extensive network of retail outlets, through which Proximus was able to sell its products.

The Council then analyzed Proximus' commercial strategy with respect to professional clients, in particular large companies and public authorities with specific mobile telephony requirements. It found that in 2004 and 2005, Proximus had abused its dominant position by engaging in a so-called "margin squeeze", *i.e.*, a practice resulting in a negative or insufficient margin between retail prices charged by a dominant company to end users and wholesale prices charged to competitors for similar services. The Council concluded that there had been a clear negative margin between Proximus' "on-net rates" (charges for communications between two customers on its network) and "termination rates" that competitors had to pay Proximus (charges for terminating a call on the Proximus network), which made it impossible for competitors to offer cheaper or even equivalent prices to their own customers for calls to the Proximus network.

In setting its fine, the Competition Council considered a number of factors, such as the nature and the economic impact of the infringement, Proximus' market share, and the fact that the violation had taken place in a sector where liberalization and the promotion of competition is a policy priority.

Policy and Procedure

The APEC was amended by the Law of May 6, 2009 (the "Law").[11] While most of the changes to the APEC concern only minor procedural matters and do not introduce substantive adjustments, certain of the amendments introduced by the Law could have significant practical consequences.

The main amendments introduced by the Law can be summarized as follows:

- The Competition Service will be renamed "Directorate-General for Competition";
- The "serious indications" condition will no longer be required in order for the Auditorate to initiate an investigation at the request of the Minister of the Economy;
- The Auditorate will be able 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.*, the standstill period);
- In the event of continued or repeated infringements, the five-year limitation period to open an investigation will start from the day on which the infringement ceases.

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).

10 Conseil de la concurrence, décision n° 2009-P/K-10 du 26 mai 2009, affaire CONC-P/K-05/0065: Base/BMB.

11 L. du 6 mai 2009 portant des dispositions diverses, *M.B.*, 19 mai 2009, p. 37860.

Unilateral Conduct

TV2 Found To Have Abused Its Market Position Through Annual Rebates For Television Advertisements

On June 22, 2009, the Danish Eastern High Court found that the Danish television operator TV2 had abused its market position by using rebates to create loyalty in the market for television advertisements.

This decision affirmed a 2005 decision by the Competition Council that TV2's annual rebate schemes for advertisement services constituted an abuse of a dominant position. On appeal to the Competition Appeals Tribunal this decision was annulled in 2006, although the Tribunal held that the peculiarities of the market for television advertisements should have been taken into account by the Competition Council, and that the annual rebates for television advertisements could not be compared with rebates in other sectors without further evidence to substantiate the analogy.

One of TV2's competitors, Viasat Broadcasting UK Ltd., appealed the Tribunal's decision to the Eastern High Court in Denmark. In its judgment of June 22, 2009, the High Court found – in accordance with the original decision of the Competition Council – that TV2 had abused its position because the rebates were suited to create loyalty to a considerable degree on the market for television advertisements, irrespective of the market's peculiarities.

Post Danmark Found To Have Abused Its Dominant Position Via Its Direct Mail Rebate Scheme

On June 24, 2009, the Competition Council found that Post Danmark A/S had abused its dominant position on the market for bulk mail by applying a rebate scheme for direct mail. The system offered customers of Post Danmark rebates of up to 16%, depending on the yearly amount of direct mail sent through Post Danmark A/S. According to the Competition Council's assessment, the rebate scheme compelled loyalty and had a cooling effect on competition in the market.

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.

Unilateral Conduct

SNOY Found To Have Abused Its Dominant Position In The Telephone Subscriber Information Market

On April 6, 2009, the Market Court issued a decision finding that Suomen Numeropalvelu Oy ("SNOY"), which maintains a centralized national database for telephone subscriber information, had abused its dominant position in the market from 2003 to 2005 by refusing to allow Eniro, a directory service provider, to register data in an internet database free of charge to its users. The Court accordingly imposed a fine of €100,000 on SNOY.

SNOY, citing Finnish data protection rules, had argued that the provision of subscriber data in an unrestricted on-line service would not be permissible without the consent of the registered individuals – or at least a prior notification of the registered persons. Since such consent had not been obtained, SNOY considered the service to be unlawful and, as the controller of registered data, that it had a duty to protect the registered individuals.

The Market Court found, however, that the relevant data protection legislation, which changed in September 2005, did not require advance consent from the registered individuals prior to September 2005. The Market Court held accordingly that, prior to September 2005, SNOY was required to sell Eniro the requested subscriber data for use in an open on-line service. The Court noted that Eniro was *de facto* dependant on SNOY, inasmuch as there was no economically feasible alternative for obtaining the data from other sources.

The Court held that SNOY's refusal to allow the use of the data in an open on-line service limited Eniro's freedom of action, and so constituted an abuse of a dominant position. In a slight deviation from the FCA's proposal, the Court noted that the abusive conduct ended at the time of the entry into force of the new data protection regulations, in September 2005, because from that point on the registered individuals should, in fact, have been notified.

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 Authority (FCA) and the Ministry of Financial and Economic Affairs.

Unilateral Conduct

French Competition Authority Imposes Interim Measures Against EDF For Alleged Abusive Practices In The Solar Power Sector

On April 8, the French Competition Authority ("FCA") adopted interim measures enjoining French incumbent electricity company EDF from using its advertising materials and customer database (developed in its capacity as a provider of electricity to residential customers at regulated tariffs) to benefit its solar power subsidiary EDF Energies Nouvelles Réparties ("EDF ENR").

The FCA's investigation was prompted by a complaint lodged by downstream competitor Solaire Direct on May 19, 2008 against several EDF practices favoring its solar power subsidiary EDF ENR. Solaire Direct claimed that EDF was abusing its dominant position as a provider of electricity to residential customers at regulated tariffs by foreclosing competitors on the emerging and closely connected market for the provision of services to individuals seeking to produce solar electricity. Solaire Direct requested interim measures to put an end to the alleged anticompetitive practices.

Solaire Direct specifically claimed that EDF (i) created deliberate confusion among customers in its advertising materials between its regulated and competitive activities, (ii) made use of the customer database maintained as a provider of electricity at regulated tariffs, (iii) cross-subsidized its solar power subsidiary EDF ENR, (iv) delayed the connection of photovoltaic installations to the electricity grid, and (v) foreclosed the upstream market for the supply of photovoltaic equipment.

EDF, in response, offered a series of commitments under the negotiated settlement procedure in Article L.464-2 of the French Commercial Code. The FCA concluded in early December 2008, however, that such undertakings were not sufficiently clear-cut to remedy the competition concerns identified and decided to proceed with the review of interim measures requested by Solaire Direct.

The FCA found that EDF enjoyed a quasi-monopoly on the market for the supply of electricity to residential customers at regulated tariffs, and that the market for the provision of services to companies seeking to produce solar electricity was sufficiently related to the dominated product market. The FCA further indicated that the use by EDF ENR of EDF's advertising materials and customer database might amount to a violation of Article 82 EC and Article L.420-2 of the French Commercial Code, and would potentially have a serious and immediate impact on competition, thus justifying interim measures.

- The FCA first considered whether EDF created deliberate confusion between its regulated and competitive activities in the Bleu Ciel advertising materials that were addressed to all its residential customers (and enclosed bi-annually with their electricity invoice). Notably, the Bleu Ciel Letter directed individuals to dial one and the same phone number, whether they were seeking information on their regular electricity bills or on the company's solar power. Calls from individuals seeking to purchase solar electricity were transferred to a salesman at EDF ENR. It appears that 80% of EDF ENR's turnover in 2008 was achieved through such client referral by phone, which, the FCA held could amount to an unfair advantage.
- The FCA also observed that EDF call center employees had access to the entire residential customer database maintained by EDF (as the incumbent electricity provider), when seeking to market its solar power by telephone. This database contained exclusive information gathered by EDF as a result of its regulated activities, such as electricity consumption habits, living space or heating modes. These data, the FCA found, could represent an unfair advantage if they enabled EDF's solar power subsidiary to make a more credible or attractive offer to individuals seeking to produce solar electricity.

Pending a decision on the merits, the FCA thus required EDF (i) to remove any reference to EDF ENR's activity from the Bleu Ciel advertising materials, (ii) to discontinue any reference by EDF call center employees to the services offered by EDF ENR, (iii) not to communicate to EDF ENR any information on potential prospects gathered by EDF call center employees, and (iv) not to make available to EDF ENR information that EDF holds as a result of its activities as a supplier of electricity services at regulated tariffs. EDF was given one month from the publication of the interim order to comply with these injunctions.

Mergers and Acquisitions

New French Competition Authority Authorizes The Creation Of The Second-Largest Bank In France Subject To Innovative Remedies

On June 22, the FCA issued a Phase I decision clearing the merger between French-based mutual banks Banque Populaire and Caisse d'Epargne. The deal is the first merger to be authorized subject to conditions since the FCA took over responsibility for merger control enforcement from the Minister of the Economy on March 2, 2009.

Banque Populaire and Caisse d'Epargne are both active in the retail and corporate banking markets and, to a more limited extent, in the insurance and real estate services sectors (the parties had already merged their investment banking activities into a joint venture in 2006).

The FCA largely followed the European Commission's decisional practice with regard to product market definition in the banking sector:

- In the retail banking sector, the FCA examined the effects of the concentration on the following market segments: current accounts, savings accounts, distribution of mutual funds, mortgages, consumer loans, loan restructuring, and issuing of payment cards.

- In the corporate banking sector, the FCA examined the effects of the concentration on the following market segments: current accounts, savings accounts, domestic payment services, foreign payment services, short-term loans, long-term loans, credit to agricultural undertakings, leasing, real estate financing, export financing, credit to public entities, and payment card acquiring. The market investigation confirmed that banking services to Small and Medium Sized Enterprises ("SMEs") differed from banking services to large corporate customers but, in the absence of an obvious single parameter by which companies can be designated as SMEs or large corporate customers, the FCA only took account of the specificities of banking services to SMEs at the competition assessment stage.

On geographic market definition, the FCA analyzed the effects of the concentration in the French continental territory and in each of the French overseas territories – which constitute distinct geographic markets due to their distant location from the continental territory, their insularity, and the specificities of their local economy. In light of the importance of proximity in establishing a banking relationship, the FCA also examined whether the transaction would give rise to competition problems in local areas defined by a 20-minute drive radius for retail banking services and in counties (*départements*) for corporate banking services to SMEs.

The FCA defined a three-pronged test to determine the local areas and counties warranting increased competition scrutiny: (i) areas with HHI indexes exceeding the safe harbors set out in the Guidelines on horizontal mergers,[12] (ii) areas with aggregated market shares, based on the number of local branches, in excess of 30% and 10% higher than the nearest competitor's, and (iii) areas with fewer than five remaining competitors in the local area. With respect to corporate banking services to SMEs, the FCA also took into account the HHI index and the market shares based on outstanding deposits and outstanding loans by county.

In view of the abovementioned thresholds, the FCA found that the concentration would not harm competition in the French continental territory, either at the national or local levels.

However, the FCA noted that the concentration would impede competition in one French overseas territory (La Réunion Island) where the new entity would have operated three different branch networks. The entity's combined market shares would have exceeded 40% on two retail banking market segments (distribution of mutual funds and mortgages) and three corporate banking market segments (current accounts, savings accounts and short-term loans). Moreover, the new group would have faced competition from only four banks in the retail banking sector and three banks in the commercial banking sector. In particular, the FCA pointed out that five local areas would have been adversely affected based on the abovementioned thresholds, since the new group would have accounted for close to 50% of the local branches. Lastly, the FCA considered that the recent financial crisis, in particular, resulted in barriers to entry into the banking sector in La Réunion remained high.

While the parties recognized the FCA's concerns regarding La Réunion, given the current financial crisis, they explained that it would be difficult to find a suitable purchaser in the event of a divestment remedy. Instead, the parties proposed a two-stage remedy:

- They undertook to maintain the three branch networks strictly separate from a legal and operational perspective for a five-year period. The FCA deemed this commitment credible, substantial and verifiable, and was satisfied that this behavioural remedy would bring about the same result as a divestiture by preventing any coordination on commercial policy.
- Second, if the new group failed to implement these commitments, or if the FCA deemed these commitments ineffective based on mid-term reports drawn up by a monitoring trustee, Banque Populaire Caisse d'Epargne would need to divest its banking assets in La Réunion.

French Competition Authority Adopts Its Annual Report For 2008

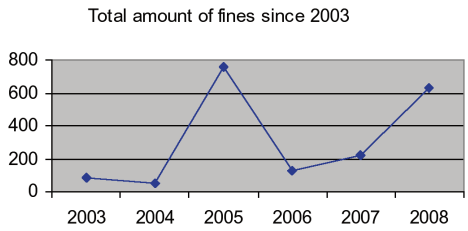
The French Competition Authority ("FCA") released its annual report for 2008 in the second quarter of 2009. The most remarkable developments highlighted therein are (i) the very significant increase of leniency applications and (ii) the steady increase in the level of fines.

In particular, the French Competition Authority received 18 leniency applications in 2008, up from an average of four applications per year since 2003. According to the President of the FCA, this can be explained by: the increase in the level of FCA fines, the FCA's publication of its four first leniency decisions, and the fact that the leniency procedure is now well understood by companies.

Fines were imposed in 16 decisions in 2008, totaling € 631.3 million (including a € 575.4 million fine on 11 steel trading companies and

12 http://www.dgccrf.bercy.gouv.fr/concurrence/concentrations/lignesdirectrices_2007.pdf, para. 320.

their industry association). After a peak in 2005, fines in 2008 again increased notably vis-à-vis 2006 and 2007.



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

German Federal Court Of Justice Confirms Admissibility Of CDC's Cement Cartel Claim

The German Federal Court of Justice confirmed on April 7, 2009 that a private action for damages seeking at least € 114 million from members of a cement cartel is admissible.[13]

The damages action was brought by the Belgian company Cartel Damage Claims ("CDC") on behalf of 36 purchasers who claim to have been harmed by the cement cartel. In April 2003 the Federal Cartel Office (FCO) had found six cement manufacturers guilty of colluding on quotas and territorial allocations in a cartel that lasted from the 1970s until 2002. CDC acquired the damage claims of 36 purchasers who had bought cement from these manufacturers at prices inflated by the cartel. If CDC prevails, it will be required to pay out 75% to 85% of the realized claims to its assignors.

In May 2008, the Higher Regional Court of Dusseldorf had already held the damages claims to be admissible, thus allowing the proceedings to advance on the substance. The Higher Regional Court had excluded the possibility of an appeal to the Federal Court. One of the defendants, however, challenged this part of the decision.

In its April 7 decision the Federal Court rejected the appeal finding that there were no substantive legal questions that needed to be resolved by the Federal Court. The Court also found that the fact that the exact amount of the claim was not specified is justified because the plaintiffs had left the exact sum to the discretion of the court.

Vertical Agreements

FCO Imposes Fine On Microsoft For Influencing Resale Prices

On April 8, 2009 the FCO imposed a fine of € 9 million on Microsoft Deutschland GmbH for having influenced the retail price of the software product "Microsoft Office Home & Student 2007".[14]

Several retailers had run advertising campaigns for this product in the fall of 2008. According to the FCO, Microsoft had influenced one retailer in an anticompetitive manner by providing the retailer financial support for his advertising campaign. The FCO also found that employees of Microsoft and the retailer in question had, at least o two occasions before the advertising campaign commenced, agreed on the resale price of the "Microsoft Office Home & Student 2007" product.

The FCO acknowledged that a supplier and a retailer may have some communications with respect to the resale price, but found that in this case the contacts between Microsoft and the retailer went beyond the acceptable and constituted an illegal concerted practice under Section 1 GWB

Microsoft, which had cooperated with the FCO during the investigation, accepted the fine in order to avoid long-lasting legal disputes, but made clear that it did not share the FCO's view expressed in the decision.

Mergers and Acquisitions

FCO Prohibits Total's Planned Acquisition Of 59 OMV Petrol Stations

On April 29, 2009, the Federal Cartel Office (FCO) prohibited Total Deutschland GmbH (Total) from acquiring 59 petrol stations in eastern Germany from OMV Deutschland GmbH (OMV).[15] The FCO found that the acquisition could lead to a further strengthening of the already existing oligopoly of Total, Shell, BP, ConocoPhillips, and ExxonMobil on the relevant regional petrol station markets which the FCO had identified in its Shell/HPV decision.[16] The acquisition of the 59 OMV petrol stations would have led to a combined market

13 Bundesgerichtshof, Beschluss v. 7.4.2009, KZR 42/08.

14 Bundeskartellamt, Beschluss v. 8.4.2009 – *Microsoft*

15 Bundeskartellamt, Beschluss v. 29.4.2009 – Total/OMV.

16 Bundeskartellamt, Beschluss v. 7.3.2008 – Shell/HPV.

share of the dominant oligopoly of 80-85%. The decision is one consequence of the FCO sector inquiry that was initiated in May 2008.[17]

Concerning the relevant product markets, the FCO distinguished between the market for gasoline and the market for diesel fuels. The regional markets were determined according to the so-called reachability model of the Federal Office for Building and Regional Planning, which takes into account the distance a driver is generally prepared to cover to buy motor fuel (30 minutes in urban areas) as well as the fact that drivers usually prefer the closest petrol station. The regional markets at issue were Chemnitz, Dresden, Erfurt and Leipzig. Before the planned acquisition, the combined market shares of the members of the dominant oligopoly reached up to 72% for gasoline and 80% for diesel fuels. According to the FCO, these market shares would have risen to 76-81% for gasoline and 83-86% for diesel upon the proposed acquisition in these areas. Moreover, the proposed acquisition would have eliminated one of the strongest competitors to the dominant oligopoly.

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.

Vertical Agreements

Unilever Hellas And Certain Greek Supermarkets Receive A Euro 8 Million Fine For Including In Their Agreements A Prohibition Against Parallel Imports

On March 27, 2009, the Hellenic Competition Commission ("HCC") issued Decision No 441/V/2009, following an investigation into the detergents sector, imposing a EUR 8 million fine on Unilever Hellas and several supermarkets that it supplied for engaging in conduct to prevent parallel imports.

During its investigation, the HCC sent questionnaires to various suppliers and eight supermarkets including: Atlantic S.A.; Alpha Beta Vassilopoulos S.A.; Ora; Metro Aebe; Makro C&C; Afoi Veropouloi A.E.B.E.; D. Masoutis S.A.; and Kipseli S.A. The investigation revealed that Unilever had concluded agreements with these super-markets containing a clause explicitly prohibiting the purchase of products offered by Unilever Hellas from third-party importers. In cases of a breach of this clause, the agreement would cease to exist in its entirety. Most of the agreements had been concluded in 2000, and were to run for one-year terms.

In its analysis of the detergents sector, the HCC identified eight relevant product markets: (i) detergents for clothes to be used in washing machines (including powders, liquids and tablets; (ii) detergents for hand washing clothes (including foam, wool, silk etc.); (iii) softeners for clothes (including softening tablets, but not products used for the purposes of ironing; (iv) hand-dishwashing detergents; (v) dishwashing detergents to be used in dishwashers (including powders and tablets); (vi) household cleaning detergents; (vii) chlorine-whiteners; and (viii) soaps (including liquids).

The HCC found that Unilever Hellas was the market leader in 2006 (followed by P&G and Colgate Palmolive). The HCC examined the degree of liability of supermarkets in accepting such anticompetitive vertical restraints, and found that the relationship between the supermarkets and their suppliers was governed by cooperation agreements submitted by suppliers to supermarkets. In cases where these agreements contain anticompetitive provisions, the HCC held that it is important to examine whether the supermarkets sign their contracts voluntarily, or whether the anticompetitive terms are imposed on them.

The HCC identified in supermarkets significant buying-power that allowed for the negotiation of highly satisfactory terms of cooperation with their suppliers. This negotiating power was a consequence of (i) the high volume of sales achieved for suppliers through this distribution channel; (ii) the wide geographic coverage provided by the supermarkets chains, and (iii) the intensive promotion of the supermarkets' own-brand products, all of which allowed the chains to threaten suppliers with the removal of their products from the shelves. None of these issues attached to the region's smaller supermarket chains since they lacked the means of influence (or the ability to resist) their suppliers.

In calculating its fines, the HCC found that Unilever had played a leading role in the adoption and implementation of the restrictive agreements by threatening that breaches would result in the entire agreement being rendered null and void. Unilever and the supermarkets were also fully aware that this clause was prohibited. On the other hand, there were attenuating circumstances, such as the length of the agreements (only one year) and the deletion of the restrictive clause by Unilever in all subsequent agreements following the parent company's intervention.

The HCC ordered the companies to refrain from such conduct in the future, and threatened a daily penalty of €10,000 for each infringing company. It further imposed on Unilever Hellas a fine of

17 See National Competition Report April-June 2008, p. 10.

approximately €7 million. Six of the eight supermarkets held to have violated Article 1 of Law 703/77 and Article 81 EC, were fined approximately €1.1 million collectively. The remaining two received no fine, since it was considered by the HCC that they had no power to prevent Unilever from imposing terms.

IRELAND

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

Horizontal Agreements

High Court Finds Vintners' Associations Guilty Of Contempt Of Court Following Breach Of Commitments To The Competition Authority

On July 24, 2009 the High Court found the Licensed Vintners Association ("LVA") and the Vintners' Federation of Ireland ("VFI") guilty of contempt of court for issuing "price freeze" announcements to their members, in breach of undertakings to the High Court resulting from previous legal proceedings brought by the Competition Authority.[18]

In June 1998, the Competition Authority brought proceedings against the LVA and VFI in relation to price fixing in the sale of alcoholic drinks. The Competition Authority reached a settlement with the LVA in December 2003, and with the VFI in May 2005. Under the terms of these settlements, the two associations undertook not to make recommendations regarding the prices charged, or margins earned, on alcoholic beverages sold in premises owned, managed or controlled by members.

On December 1, 2008 the LVA and VFI issued a joint press statement announcing a "one year price freeze in drink prices in pubs with immediate effect." In March 2009, the Competition Authority brought further proceedings against the LVA and VFI, alleging that this announcement breached their previous undertakings to the High Court.

The LVA and VFI argued in their defense that the recommendation constituted a mere price "ceiling" which would have no effect on actual prices charged by publicans. The High Court rejected this argument. McKechnie J held that the original undertaking was broad enough to encompass "any recommendation that prices should be increased, or lowered, or held at their current levels." The thrust of the release was a communication to the public regarding prices, and it could not be said that the reference to prices was "incidental, secondary or subordinate to another topic." He therefore found that the LVA and VFI breached their undertaking, and were guilty of contempt of court.

The parties subsequently issued an apology for their contempt in open court, and issued a joint press release (published in 3 Sunday newspapers) announcing an immediate end to the price freeze. Members were informed in writing of the withdrawal of the recommendation, and were requested to remove all public references to the price freeze.

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

Authority Imposes Fines Totaling Euro 13.3 Million In Connection With Anti-Competitive Arrangements In The Lead Battery Recycling Industry

On April 29, the Authority imposed a fine of Euro 13,347,250 on the lead battery reclycling consortium COBAT (*Consorzio obbligatorio batterie al piombo esauste e rifiuti piombosi*), a number of recycling companies (smelters), and the recycling industry association AIRPB (*Associazione Imprese Riciclo Piombo da Batterie*), for having entered into anti-competitive agreements on the national market for the collection and recycling of used lead batteries beginning in 2002. The Authority had launched its investigation following complaints received from lead-acid battery manufacturers and companies active in the collection of used batteries to be exported abroad.

COBAT is a nonprofit consortium created under Italian environmental laws to manage the collection and warehousing of used lead-based batteries. It transfers the used batteries (collected at a national level by a number of authorized companies) to smelters for their recycling pursuant to applicable environmental regulations. Every manufacturer and importer of lead-based batteries and goods, is required by law, on a quarterly basis, to make, advanced payments to COBAT (a so called "environmental contribution") to cover the costs of its operations.

The Authority acknowledged that COBAT's activity should be assessed under the public interest exception provided for by Article 86(2) EC (and by the analogous Article 8(2) of Law 287/90).

18 *The Competition Authority v. The Licensed Vintners' Association, Lorcan Lynch, Frank Towey, Edward Byrne and Vincent Murphy*, Unreported, High Court, July 24, 2009.

Nevertheless, the Authority concluded that the conduct uncovered by far exceeded the limits of proportionality allowable under those articles. In particular, the Authority deemed unlawful the contractual provisions agreed among COBAT and the named smelters at AIRPB meetings, providing for (i) the number of batteries assigned by COBAT to each smelter, (ii) the reduction in assigned batteries to smelters who purchase batteries from sources other than COBAT (the so-called "curtailment clause"), and (iii) a penalty system penalizing those smelters who failed to give notice to COBAT that they had purchased or received batteries from third parties. Under this system, smelters had no economic incentive to handle or purchase used batteries from third parties.

The Authority found that the conduct carried out by COBAT and by the smelters was particularly serious both in nature and in effect; it favored strict maintenance of the *status quo* in the national recycling market by discouraging the creation of recycling and collection systems separate from and parallel to that of the consortium itself and by preventing competition among the incumbent smelters.

Vertical Agreements

Authority Motorway Assistance Services Decision Annulled In Part

On April 20, following an appeal by the Italian towing and repair company ACI Global S.p.A. ("ACI"), the Administrative Tribunal of Latium partially annulled the Authority's October 23, 2008 decision finding a number of antitrust violations in the market for the provision of assistance services on the Italian motorway network.

The Authority's investigation and decision had included two elements:

- An alleged abuse of dominant position, in violation of Art. 3 of Law No. 287/1990, by a number of motorway operating companies who, so the Authority held, charged towing and repair companies (including ACI) unjustified fees to handle motorists' calls.
- An alleged restrictive agreement, in violation of Art.81 EC, concluded between the motorway operating companies and the two main towing and repair companies active at the national level (including ACI). This agreement, so the Authority found, aimed to restrict competition in, and foreclose access to, the market for the provision of assistance services through the implementation of an unlawful price-fixing strategy.

ACI's appeal concerned a specific set of commitments offered by the motorway operating companies and accepted (and rendered binding) by the Authority. These commitments, in essence, provided for a new regime requiring motorway operators to issue public bids for towing and repair services on the motorways.

The Tribunal found that the proposed new access regime would run counter to the Italian highway code and to other relevant Italian regulatory provisions pursuant to which access to the market for motorway assistance services must be granted, without any further limitation, to each and every operator who meets the conditions set forth by the relevant statutory highway provisions. Consequently, in the Tribunal's view, the Authority went well beyond the application of its supervising and monitoring powers aimed at safeguarding the proper functioning of market forces.

On the merits of the proposed commitments, and upholding the applicants' arguments, the Tribunal cited well-established Italian and EU case law to hold that the Authority had failed to comply with the principle of proportionality; the measures in question, so the Tribunal, exceeded the limits of what could be deemed appropriate and necessary for the intent pursued. Moreover, with respect to market access, the Authority's measures did not remedy the anticompetitive effects stemming from the investigated conduct.

The Tribunal also pointed out that the voluntary nature of the proposed commitments at issue did not relieve the Authority of the need to adequately assess the measures under the principle of proportionality; this is true because ultimately the Authority's decision makes these commitments binding *vis-à-vis* all the parties concerned (not only those parties that offered the given commitment). Therefore, the fact that an undertaking, for its own reasons, deems a certain commitment appropriate to submit to the Authority does not, in itself, imply that the said commitment complies with the principle of proportionality.

THE NETHERLANDS

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

Horizontal Agreements

NMa Fines A Cartel Facilitator For The First Time

On June 5, 2009, the NMa fined nine painting companies and a

cartel facilitator €181,000 for two instances of bid rigging[19] – this was the first time the NMa has fined an undertaking for facilitating a cartel.

These decisions concern two Ministry of Defence tenders from April. Three of the painting companies fined participated in both tenders. The NMa found that prior to the bids, the painting companies had allocated the projects, harmonized their bidding prices and agreed to a compensation scheme to cover the unsuccessful companies' costs. The participants in both cartels were supported actively by Calculatiebureau Vereniging Spegelt U.A ("Spegelt"), an association created by painting companies and individuals active in the painting industry for the calculation of costs associated with painting projects.

Spegelt's founders constitute its membership (to which it provides its services) but it also provides services to painting companies not attached as members. The costs of any calculation exercise are divided between the total number of companies requesting a calculation for a particular project. Spegelt has been known to court companies to whom it believes an invitation to tender have been sent, and in the two tenders that gave rise to NMa fines Spegelt was found to have organised a meeting at its offices with each of the companies invited to tender. During this meeting documents were drafted listing each of the agreements concluded, and so Spegelt was fined €17,000 as the cartel facilitator (€10,000 and €7,000 for each tender, respectively).

For bid rigging in both tenders, the NMa fined Rendon Eindhoven B.V. €28,000 and €7,000, Schildersbedrijf Metim B.V. was fined €10,000 and €7,000, and Schildersbedrijf Van de Looij B.V. was fined €10,000 and €7,000. For bid rigging in only one of the tenders Van Tour Eindhoven B.V. was fined €28,000, Ernis Schilderwerken B.V was fined €37,000, Dusol Schilderwerken B.V. was fined €6,000, Van Aarle Coolen Schilderwerken B.V. was fined €10,000, Buysen Schilders B.V. was fined €7,000 and Gevelinvest Vastgoedschilders B.V. was fined €7,000. Dusol Schilderwerken submitted a leniency application after the NMa launched its investigation and was awarded a 60% reduction in its original fine.

Mergers and Acquisitions

NMa Clears Industrial Water Merger

On June 30, 2009, the NMa cleared a joint venture between water treatment service providers Evides Industriewater B.V and N.V. Waterleiding Maatschappij Limburg ("WML")[20]. The NMa had previously voiced concerns that the concentration would impede competition in the purified industrial water market[21]. Following a Phase I investigation, the NMa assessed the parties' combined market share as between 67% and 87%. In its initial decision, the NMa announced that it would more closely analyse during Phase II proceedings whether customers might credibly provide their own high-quality industrial water in-house as an alternative to the parties' services, and also the extent to which foreign providers might be able to enter the Dutch market in the future.

After its Phase II investigation, the NMa conceded that it had inadequately defined the relevant markets during its initial examination of the joint venture. The NMa's investigation supported a distinction between a regional market for the exploitation and distribution of industrial water and a European market for water treatment. Since the parties' activities do not overlap in Limburg, the region where the joint venture would be active, there were no competition concerns in the market for the exploitation and distribution of industrial water.

On the European market for water treatment, the joint venture's combined share would be less than 20%. Additionally, there are many other providers of water treatment services throughout the EU, and customers of industrial water could readily decide to in-source treatment services in the event of a price increase. The NMa determined also that no conglomerate effects would arise as a result of the joint venture because of WML's statutory monopoly on the market for drinking water in Limburg. Drinking water is one of several sources for the exploitation and distribution of industrial water, and WML is obliged legally to supply drinking water in Limburg under reasonable, transparent and non-discriminatory terms to all customers – thereby preventing it from exploiting its market power.

Policy and Procedure

NMa Can Make Use Of Wiretaps Obtained In An Unrelated Criminal Investigation

On June 26, 2009 the District Court of The Hague ruled on a motion for a preliminary hearing to decide whether the NMa should be allowed to use wiretaps received from the public prosecutor in an unrelated criminal investigation[22].

19 *Zaak 6429, Kazerne I, NMa besluit van 5 juni 2008; Zaak 6431, Kazerne II, NMa besluit van 5 juni 2008.*

20 Zaak 6366, *Waterleiding Maatschappij Limburg - Evides Industriewater - Evilim Industriewater*, NMa besluit van 30 juni 2009.

21 Zaak 6366, *Waterleiding Maatschappij Limburg - Evides Industriewater - Evilim Industriewater*, NMa besluit van 5 september 2008.

22 *Janssen de Jong/Staat der Nederlanden*, District Court of The Hague, 26 June 2009, LJN: BJ0047.

In 2007, the National Police Internal Investigations Department (Rijksrecherche) began an investigation into possible government corruption in procurement projects. This investigation led to the placing of wiretaps at Janssen de Jong Infra, an undertaking in the construction industry. In 2008, the public prosecutor informed the NMa of possible price fixing agreements between construction companies who conversations were being recorded as part of the criminal investigation. The public prosecutor provided these recordings to the NMa, which began an investigation into price-fixing by, among others, Janssen de Jong Infra.

Janssen de Jong Infra requested a preliminary hearing before the District Court of The Heague, arguing that the transfer of information obtained using wiretaps to the NMa was unlawful because:

- Any information obtained through wiretaps as part of a criminal investigation concerning acts that are not criminal in nature cannot be transferred since it falls outside the ambit of the Act on Judicial and Criminal Proceedings Information (Wet justitiële en strafvorderlijke gegevens);
- Even if such information is procedurally acceptable, it cannot be transferred because the NMa's enforcement of the national competition rules does not constitute a "substantial public interest", in satisfaction of the Act. According to the company, the Dutch Supreme Court's recent ruling that the NMa's enforcement of the competition rules does not constitute a matter of public order[23], automatically rules out the possibility of engaging "substantial public interest."

The District Court ruled on these grounds that:

- The transcripts of the wiretaps belong in their entirety to the criminal file, including those portions dealing with acts that are not criminal in nature;
- However, the NMa's enforcement of the competition rules constitutes a "substantial public interest," in particular the need to ensure the economic well-being of the Netherlands, as recognized by Article 8 subsection 2 of the European Convention for the Protection of Human Rights as a basis for limiting the right to privacy.

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 Imposes Fine On Sherry Wine Cartel

On June 4, 2009, the Spanish NCC imposed a fine equivalent to 10% of the turnover of the association of sherry wine producers for completing anticompetitive agreements that infringed Article 81 EC and the Spanish national equivalents.

The NCC identified the relevant product markets as the markets for wines designated "Jerez/Xérés-Sherry" and "Manzanilla – Sanlúcar de Barrameda". Given that 75% of the sales of sherry wine are exported to other European countries, the Agreements affected trade between Member States.

In the case, the sherry wine regulatory board had adopted arrangements to implement a mechanism for stabilizing the sector based on sales quotas, rather than product quality; these arrangements thus lacked any legal justification. The arrangements were considered anticompetitive because they were based on the historical sales levels of each distributor of a designated product, thereby constraining competition and restricting freedom of trade. The NCC imposed a fine of €400,000 on the regulatory board, and ordered it to bring an end to the agreements, and refrain from engaging in comparable conduct in the future.

Unilateral Conduct

National Competition Commission Sanctions Abertis Telecom For Abuse Of Dominant Position

On May 19, 2009, the Council of the NCC issued a resolution in which it imposed on Abertis Telecom SAU ("Albertis") a fine of €22,658,863.

In its resolution, the NCC declared the existence of an infringement of Article 6 of the Spanish Competition Law, and Article 82 EC by Abertis for its abuse of a dominant position. Specifically, Albertis was alleged to have:

- Charged large fines to customers (e.g., Sogecable, Telecinco, Antena 3, NET TV and VEO TV) for the early termination of contracts signed in 2006; and
- Established excessively long contracts with VEO TV in 2006 and Sogecable, Telecinco and NET TV in 2008, thereby restricting competition and limiting new competitors from entering the market.

23 *Gemeente Heerlen/Whizz Croissanterie v.o.f.,* Supreme Court of the Netherlands, 16 January 2009, NJ 2009, 54.

- Provided discounts for the joint procurement of television broadcasting capacity in all territories capable of subdivision, with the effect of preventing the entry of new competitors.

In deciding the size of the fine, the NCC's Council considered the gravity of Abertis Telecom's anticompetitive practices, and also the fact that they were conducted in a recently liberalized market.

Mergers & Acquisitions

NCC Approves Distrirutas/Siglo XXI/Gelesa/Logintegral Merger

On June 10, 2009, the NCC conditionally approved a merger in Madrid's newspaper distribution sector, subject to commitments designed to ensure efficiency and cost savings, whilst protecting the interests of unrelated publishers and point of sale retailers.

The NCC Council conducted an in-depth analysis in its second phase of its review, in large part given the very high market shares (90-100%) likely to be held by the new company in the market for daily newspaper distribution. The notifying parties, however, proposed a set of commitments that the NCC Council considered proportionate and sufficient to eliminate any possible anticompetitive risks. Among the commitments, the parties agreed that the new distributor of newspapers and periodical publications would, for a specified number of years, maintain the conditions currently offered to publishing houses and retailers. In addition, a protocol would be created for handling the information of different members and third-party customers to ensure that sensitive client information was not disclosed to members – thereby eliminating the risk of concerted practices amongst third-party customers.

The notifying parties contended finally that the efficiencies generated by the operation would be passed on to retailers. In order to ensure fulfillment of the commitments, an independent auditor was designated to certify compliance.

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).

Horizontal Agreements

Swedish Market Court Increases Fines In Swedish Asphalt-Cartel Case

On July 10, 2007, the Stockholm City Court found nine construction companies in violation of the rules on competition prohibiting anti-competitive agreements (former Article 6 of the Swedish Competition Act, and Article 81 EC) after having systematically enaged in bid rigging on road construction tenders. The total amount of the fines amounted to SEK 460 million. Individually, they ranged from SEK 300,000 to SEK 170 million.

Six of the construction companies appealed the Stockholm City Court's judgment, while the Swedish Competition Authority (the "SCA") appealed the court's findings concerning three of the construction companies. The key role played by NCC AB led the Market Court to add SEK 50 million to the company's fine, raising it to SEK 200 million.

Concerning two other appellants, Peab Asfalt AB and Peab Asfalt Syd AB, the Market Court upheld the fines handed down by the Stockholm City Court, and for the remaining two appellants, Peab Sverige AB and Sandahls Grus & Asfalt AB, the fines were reduced from SEK 50 million to SEK 40 million, and from SEK 3 million to SEK 2.5 million respectively.

Collectively, fines in the asphalt-cartel totaled SEK 450 million – the largest fine ever imposed in a Swedish cartel case. The Swedish Market Court's judgment cannot be appealed.

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.

Horizontal Agreements

Secretariat Opens Preliminary Investigation In Relation To Maestro Interchange Fee

On March 25, 2009, the Secretariat of the FCC opened a preliminary investigation against Maestro in connection with the introduction of an interchange fee for the use of its debit card. The opening of this investigation followed a preliminary notification filed in advance by Maestro.

The ACart provides for a system of non-mandatory preliminary notifications of potentially unlawful agreements and practices. Undertakings have the possibility to formally submit a potential restraint of competition to the FCC before it produces effects (Article 49a para. 3 ACart). Once the filing is made, the undertaking is allowed to perform the notified agreement or behaviour without the risk of sanctions as long as the FCC does not inform the undertaking

about the opening of an investigation. The FCC has five months to decide after the opening of such investigations.

In this case, a preliminary investigation was opened because the Secretariat considered that the introduction of an interchange fee might raise competition concerns. The question asked was whether the ACart authorized a multilateral agreement on interchange fees, given the strong position of the Maestro debit card on the market. Regarding the procedure recently completed on the introduction of a multilateral interchange fee for "V-Pay"(a Visa debit card not yet available on the Swiss market), the Secretariat concluded that there was no reason to intervene until the market share of V-Pay fell (and remained) below 15% during the first three years after market entry.

FCC Fines Felco And Landi For Retail Price-Fixing

On May 25, 2009, the FCC fined Felco SA and Landi Schweiz AG, two companies active in the professional cutting tools sector, for retail price-fixing. This was the first case where sanctions were imposed as a consequence of vertical price-fixing for resale, as provided for by Article 5 of ACart.

Felco, a family-owned business from the Swiss canton of Neuchâtel, is the market leader in shears and clippers for professionals. Landi is a retailer active in the agricultural and non-food sectors. In September 2006, Felco and Landi entered into an agreement setting prices for the resale of certain tools manufactured by Felco. After discovering that these agreements might violate the ACart, Felco spontaneously decided on August 15, 2007 to disclose the agreement to the FCC under the leniency program. The companies later reached an amicable settlement with the Secretariat of the FCC, which was approved by the FCC on May 25, 2009. The FCC nevertheless imposed a sanction on the undertakings for their illegal agreements.

Under Article 5(4) ACart, vertical agreements are deemed to eliminate competition if they include retail price-fixing or minimum retail price imposition. An undertaking participating in such a vertical agreement may be fined up to 10% of its turnover in Switzerland in the previous three business years. However, the fine may be (fully or partially) exempted if the undertaking co-operates with the FCC (leniency programme).

Policy and Procedure

FCC Publishes Its 2008 Annual Report

The Competition Commission published its 2008 annual report[24], summarizing the activities undertaken by the FCC during the year, which included establishing contacts with agencies and major bodies in the field of public procurement.

In the course of its advisory procedures, the FCC was able to clarify and refine its practices relating to the recommendation of prices. Because trade associations and industry organizations induce or encourage direct and indirect arrangements between members through the issuing of tariffs, descriptions of services (or cataloguing services) with tariffs are treated commonly as price-fixing agreements. The FCC held that at least two alternative instruments complying with the requirements of the Competition Act ("Acart") are available to associations. Services described without details of tariffs or quantities do not fix prices, and so do not restrict the freedom to determine prices. The second permissible practice is the publication of historical, survey-based and aggregated figures. Such data must be accessible to consumers, and the tariffs must be non-binding. This data must be compiled and published by independent third parties.

2008 was notable also for decisions in individual cases with broadly practical implications. For example, the groundbreaking Supreme Court decisions on the Internal Market Act rendered in response to appeals by the FCC relating to authorization procedures for practising a profession[25] established a precedent for the whole of Switzerland. These decisions confirmed the importance of powers allowing the FCC to appeal against cantonal decisions on market access restrictions. The FCC has announced that it will make use of this option in future.

With regard to direct penalties, the FCC imposed fines on a subsidiary of Galenica AG for its abuse of a dominant position in connection with the publication of the medicinal products compendium. In addition, the Secretariat requested that penalties be imposed on Swisscom for its pricing policy in the field of ADSL broadband internet. The Secretariat also conducted dawn raids in several cases of alleged price-fixing agreements. The Federal Criminal Court and the Swiss Supreme Court have issued clarifying decisions in relation to competition authority procedures for dawn raids, as well as authorizing the competition authority to remove the seals from evidence that has been seized and sealed[26].

24 A summary in English of the annual report is available at the following address: http://www.google.ch/search?hl=fr&q=%22annual+report+2008+of+the+competition+commission%22&meta=&aq=o&oq=

25 Decisions of the Swiss Supreme Court of September 24 2008 (2C_85/2008) and October 13 2008 (2C_15/2008).

26 *See*, e.g. decision of the Swiss Supreme Court of October 28 2008 (1B_101/2008).

Finally, the competition authorities concluded two significant merger cases, *Coop/Carrefour* and *fenaco/Steffen-Ris*, in which undertakings were imposed to ensure the maintenance of competition. In particular, the *Coop/Carrefour* operation made a crucial contribution to the concentration process characterizing the retail distribution sector in Switzerland, strengthening as it did the collective dominant position of Coop and Migros in the downstream distribution market to the extent that effective competition risked being eliminated. However, the merger was cleared because of Coop's commitment to hand over a number of existing sites to third parties, notably the German discount retail stores Lidl and Aldi. As for the upstream supply market, Coop committed to maintain commercial relationships with suppliers having achieved more than 30% of their turnover with Carrefour from between 2005 and 2007, provided that their products were offered at competitive prices.

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")

Horizontal Agrements

Court of Appeal Holds That Damages Claim Against BASF Is Time-Barred

On May 22, the Court of Appeal, overturning a preliminary decision of the CAT, held that a follow-on damages claim brought before the CAT by, among others, BCL Old Co Limited ("BCL") against BASF and others ("BASF") was time-barred.[27]

CAT claims must be brought within two years from the later of (1) the infringement decision, and (2) the conclusion of any appeal against such decision.[28] BCL brought its claim more than two years after the infringement decision, but within two years of the conclusion of BASF's appeal of the *penalty* decision. The Court of Appeal held that, although the decision imposing a penalty is contained in the same document as the infringement decision, the two are substantively distinct, and therefore BASF's appeal against the fine alone did not stay the two-year period limitation period for bringing a claim before the CAT. This decision not only offers clarity to claimants on the limitations period in future follow-on damage actions, but also opens the opporunity to bring claims before the CAT sooner than may have been possible previously, in cases where the infringement decision itself has not been appealed.

The damages claim in this case followed on from a decision in 2001 by the European Commission that BASF had been involved in illegal price-fixing of vitamins, imposing a fine of €296 million.[29] In 2002, BASF appealed the amount of the fine, but did not appeal the infringement decision itself. In March 2006, the CFI reduced the fine to €237 million. BCL, which had indirectly purchased vitamins from BASF, brought a claim for follow-on damages before the CAT in March 2008. The CAT, interpreting section 47A of the Competition Act 1998, held that BASF's mere appeal of the fine prevented the CAT's time limit from running. The CAT also stated that it had taken into account what it interpreted as the purpose of the statutory provisions, namely to prevent claims being brought without permission "*before the decision relied upon has become definitive.*"[30] BCL had argued that a mere appeal of the fine alone may have implications for the infringement decision itself.

The Court of Appeal held that the infringement decision and penalty decision were substantively distinct, even though, as a matter of practice, they were often contained in the same document. The Court referred, for example, to the European Commission's 2001 decision, in which the Commission found two undertakings, Sumitomo Chemical Co Ltd and Simika Fine Chemicals Ltd, had committed an infringement, but the Commission did not impose a fine because the relevant limitation period had expired. It followed, the Court held, that an appeal against the fine was distinct from an appeal against the infringement decision.

The Court also held that the natural reading of section 47A of the Competition Act 1998 indicated a reference only to infringement decisions, as opposed to penalty decisions. Accordingly, the "relevant date" from which the two-year window for a CAT claim began to run (for purposes of rule 31 of the CAT Rules 2003), was the last date when proceedings against the infringement decision could have been brought, and BASF's appeal against the penalty decision did not extend this period.

This decision is not necessarily fatal to BCL's claim, as the CAT has the power to extend any time limit as part of its general case

27 *BCL Old Co Limited and Others v BASF SE and Others* [2009] EWCA Civ 434, http://www.bailii.org/ew/cases/EWCA/Civ/2009/434.html.

28 *See* Section 47A of the Competition Act 1998 and Rule 31 of the CAT Rules 2003.

29 *Vitamins*, Case COMP/E-1/37.512, Commission decision of November 21, 2001, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:006:0001:0089:EN:PDF. *See also* Cases T-22/02 and T23/02, *Sumitomo Chemical Co Ltd v European Commission* [2005] ECR II-4065.

30 *BCL Old Co Limited and Others v BASF SE and Others* [2009] EWCA Civ 434, http://www.bailii.org/uk/cases/CAT/2008/24.html.

management powers.[31] However, this case demonstrates that claimants should not delay in bringing their claim before the CAT where there is any doubt as to whether the defendant is appealing the infringement decision (subject to the restriction that a claim cannot be issued without the permission of the CAT before the time-limit for bringing an appeal against the infringement decision has expired).

New Arrangements for Confessing To Cartels in Scotland

On June 11, the OFT and the Crown Office, Scotland, published a Memorandum of Understanding ("MoU") that updates the procedures for handling applications for leniency and immunity from criminal prosecution in antitrust cases.[32] The revised MoU provides greater clarity and predictability to the process of gaining criminal immunity in Scotland, where the Lord Advocate, through the Crown Office, is solely responsible for the investigation and prosecution of criminal antitrust offenses. The revised procedures will be subject to a trial period of 12 months, and will be reviewed subsequently.

There three principal changes under the new procedures are as follows:

- First, a would-be immunity/leniency applicant approaching the OFT about involvement in a cartel involving criminality wholly or partly within Scottish jurisdiction can seek an indication from the Crown Office on a "*no-names*" basis as to whether criminal immunity is likely to be granted, assuming continued cooperation and that there are no criminal convictions or associations to be disclosed.
- Second, an OFT recommendation that particular individuals should be granted criminal immunity will be given "*serious weight*" by the Lord Advocate, who will "*take cognisance of the OFT's own rules on the handling of leniency and no-action applications,*" and in particular whether the applicant has cooperated with the relevant authorities.
- Third, any information given in good faith by an immunity/leniency applicant to the Crown Office via the OFT to enable a criminal immunity decision to be made will not be used as evidence or intelligence against the applicant if immunity/leniency is refused.

The MoU also sets out the procedure for initial inquiries and references to the National Casework Division of the Crown Office ("NCD"), with respect to (i) the NCD's criminal investigation and its related use of powers, (ii) coordination between parallel investigations between the OFT and the Crown Office, and (iii) situations in which the OFT considers that a cartel case should be dealt with solely by the OFT applying its Competition Act powers.

The revised MoU, without detracting from the constitutional position of the Lord Advocate, should diminish the risk for business and individuals of having to defend a criminal prosecution for cartel conduct in Scotland at the same time as applying to the OFT for leniency/immunity for the rest of the U.K.

High Court Allows Follow-On Action For Damages in Switchgear Cartel To Proceed

On June 12, the High Court held that an action for damages by National Grid Electricity Transmission ("NGET"), against the ABB, Alstom, Areva, and Siemens Groups, should not be further delayed to await the outcome of the defendants' separate appeals to the CFI and the ECJ, and should proceed to the submission of defences, replies, and disclosure.[33]

It found that "*in the circumstances of this case, in particular the time which has already elapsed since the occurrence of the relevant events, the need for the follow on action to be processed so as to be ready for trial as soon after the conclusion of the proceedings before the CFI and ECJ are concluded as is reasonably possible outweighs the need to avoid expenditure which may be wasted if and to the extent that it is not compensated for by an award of costs.*" This case is likely to have a broad impact upon the speed with which follow-on actions for damages can be pursued in the U.K.

The action follows on from a European Commission cartel decision of January 24, 2007, that imposed fines of over €750 million on various competitors for infringing Article 81(1) EC by participating in a cartel in the market for gas insulated switchgear projects.[34] In April 2007, a number of the companies fined by the Commission lodged appeals with the CFI against the Commission's infringement and fining decision. NGET had purchased gas insulated switchgear from various of the companies fined by the Commission, and brought a claim in the High Court seeking damages of around £250 million for the over-charge resulting from the cartel activities. The defendants to the action applied for a stay of all further proceedings in the action pending the conclusion of their application to the CFI and any subsequent appeals to the ECJ.

31 *See* Rule 19(2)(i) of the CAT Rules 2003.

32 *Memorandum of Understanding between the Office of Fair Trading (OFT) and the National Casework Division (NCD), Crown Office, Scotland*, Office of Fair Trading, June 11, 2009, OFT 546, http://www.oft.gov.uk/shared_oft/reports/comp_policy/MOU.pdf.

33 *National Grid Electricity Transmission Plc v ABB Ltd and Others* [2009] EWHC 1326 (Ch), http://www.bailii.org/ew/cases/EWHC/Ch/2009/1326.html.

34 *Gas Insulated Switchgear*, Case COMP/F/38.899, Commission decision of January 24, 2007, http://ec.europa.eu/competition/antitrust/cases/decisions/38899/non_conf_dec_fin.pdf.

NGET accepted that, following the *Masterfoods* case,[35] its claim would have to be stayed at some point prior to the determination of the defendants' appeals at the European level. The High Court, after considering the *Masterfoods* case, held that the national court was free to determine how best to avoid a decision running counter to that of the Commission or European Courts. It also held that it would not be appropriate for the court to rely on CAT case-law as to whether a claim should be allowed to commence where there are proceedings pending before the European Courts, as in *Emerson III*,[36] for this was different to the decision to be made by the High Court whether to stay proceedings that had been commenced.

The High Court has "*a general discretion to be exercised in the light of all the relevant circumstances […] In exercising its discretion it is to have regard to the overriding objective to deal with the follow on action justly*." The defendants had relied primarily on the expense that would be wasted if proceedings were to continue only for their appeal to be successful; NGET argued that it should be on an equal footing with the defendants, and that the follow on action should be dealt with both expeditiously and fairly.

The court found that, without an immediate stay, "*the defendants will sustain some prejudice because they will be required to prepare for a trial which may not occur and if it does not they will not be fully compensated for the waste of time and money involved in its preparation. The severity of that risk is lessened by the possibility that the Decision may not be completely annulled as against three of the four defendant groups, even if otherwise successful, and ameliorated by the availability of some compensation by an award of costs.*" However, the court found that this was outweighed by the prejudice to NGET from the further delay caused by a stay, and therefore ordered that the each of the defendants serve its defence by June 26, two weeks after the date of the decision, followed by service of replies by NGET, and that solicitors for the parties meet "*to consider and, if possible, agree on the scope of disclosure and inspection to be given and allowed pending the conclusion of the proceedings before the CFI and ECJ.*"

Unilateral Conduct

Ofcom Publishes Remedies Consultation In Pay TV Market Investigation

On June 26, the Office of Communications ("Ofcom") published a consultation paper in which in set out proposed remedies. This was the third consultation in the Pay TV market, in a broader investigation that commenced in March 2007.

Ofcom confirmed its previously identified competition concerns relating to the wholesale supply of core premium and movie channels by Sky. The consultation document sets out Ofcom's proposal to impose a "wholesale must-offer" obligation, of general application but in fact only relevant to Sky, and also explains the methodology for setting the wholesale pricing level. The consultation period lasts until September 19, but the process is likely to become increasingly contentious, as Sky has already expressed its intention to "*use all available legal avenues to challenge this unwarranted intervention.*"[37] In particular, Sky has threatened that Ofcom's proposals would undermine investment in content and adversely impact margins in content creation.[38]

Ofcom launched its investigation of the U.K. pay TV market in March 2007, following submissions from BT, Setanta, Top Up TV, and Virgin Media. Its initial assessment of the market was published for consultation in December 2007, and in September 2008 Ofcom published its second consultation, in which it identified competition concerns relating to access to premium content, and proposed that these concerns would be better addressed by establishing a wholesale "must-offer" condition, using its powers under section 316 of the Communications Act 2003, rather than by making a reference to the CC.

Ofcom confirmed its view that "premium" content – primarily certain sporting events and first-run Hollywood movies – is of sufficient importance to consumers that channels including this content make up their own narrow wholesale markets. The consultation document states that "*content aggregation has enabled Sky to gain a position of market power in these wholesale markets for premium sports and movies channels*," and indicates that Ofcom is consulting on a similar view for retail markets.

Ofcom identified three potential concerns related to Sky's market power:

(i) Restricted distribution of premium channels – Sky, as a vertically integrated company, could distribute its premium content in a manner that favours its own platform and retail business;

35 *Masterfoods Ltd v HB Icecream Ltd [2000] ECR 1-11369.*

36 *Emerson and Others v Morgan Crucible and Others* [2008] CAT 8.

37 *See* http://corporate.sky.com/investors/rns_and_sec_filings/24de29b72a88492bac9f54d06e2c39f3/77a3583b73864f22af77b5bccec34a0e/ResponsetoOfcomstatement.htm.

38 *See, e.g.*, http://www.broadcastnow.co.uk/news/sky-at-loggerheads-with-ofcom-over-pay-tv-sales/5003074.article.

(ii) Restricted exploitation of content rights – Sky could exploit content rights selectively, in order to favour its own platform and retails business; and

(iii) High wholesale prices – Sky's high wholesale margins could be reflected in high prices paid by consumers (Sky's profitability is analysed in a report by Oxera that is annexed to the consultation document).

Ofcom concluded that consumers could be adversely affected by the reduction of choice, the suppression of platform innovation, and high retail prices.

The wholesale "must-offer" remedy proposed by Ofcom would apply to "*wholesalers that have market power, and appear to be acting on an incentive to restrict supply of the channels within the relevant markets": i.e.*, Sky. It would cover Sky Sports 1 and 2, and all the Sky Movies channels apart from Classics. It would not cover either retail on Sky's own platforms or retail to commercial customers. Ofcom also concludes that the remedy would be ineffective without also setting conditions of supply, particularly prices. It proposes setting prices on a "retail-minus" basis,[39] citing the risk that "cost-plus" pricing could artificially depress rights values,[40] as firms would be unlikely to bid vigorously for content rights if the result of doing so would be pushing up the future price of the channels they buy from Sky. The document sets out a proposed range of prices for consultation, as well as other conditions of supply.

Ofcom did not think that there was a case for intervening to require major changes with respect to content rights, but is consulting on targeted intervention in relation to certain content rights, namely subscription video on demand movie rights and FA Premier League rights.[41]

Mergers & Acquisitions

OFT Publishes Revised Guidance On Jurisdiction And Procedure For Mergers

On June 30, after a three month consultation process, the OFT published the final version of its new guidance on jurisdiction and procedure for mergers.[42] The new guidance is partly an exercise in consolidation: it replaces, in a single document, five separate OFT publications ranging from 2003 to 2007.[43] More importantly, the new guidance provides greater clarity on a number of issues, particularly the jurisdictional test, reflecting case law and OFT practice over the past six years. This guidance will be a central point of reference for any assessment as to how the OFT may respond to a transaction.

The OFT began a review of its internal procedures and merger control guidance in 2007, and published draft guidance in March 2008; this was followed by a three month consultation period. In September 2008, the OFT published a summary of responses to the consultation, and an indication of its resulting thoughts. The final guidance is largely similar to the draft guidance, but takes into account the responses to the consultation and other developments.

The guidance covers a broad spectrum of issues. It explains the OFT's statutory duty to refer mergers, the legal test applied by the CC, the powers of intervention of the Secretary of State, and the thresholds for the application of the EC Merger Regulation. It provides detailed explanation of the jurisdictional tests under the Enterprise Act, and of how parties can voluntarily notify mergers and how the OFT will investigate non-notified mergers. It also deals with the OFT's assessment process, fees, and undertakings in lieu. Several of the more important issues are discussed below.

Central to the test as to whether the OFT has jurisdiction is the issue of what level of interest may constitute "*control*." There are three levels of control that may give rise to OFT jurisdiction, from greatest to least: *"controlling interest"; "de facto control"*; and *"material influence."* The OFT explains that *de facto* control may, in broad terms, be regarded as similar to the concept of "*decisive influence*" under the EC Merger Regulation. The OFT's guidance on material influence has been revised in a number of respects. Both shareholding and board representation are considered. The OFT identifies three levels of shareholding: a shareholding over 25% may presumptively confer the ability to materially influence policy (primarily, by enabling the holder to block special resolutions); a

39 The wholesale price that an efficient retailer could afford to pay given its own retail costs and the need to earn a return, while at the same time matching Sky's current retail prices.

40 The price that Sky's wholesale business would need to charge to earn a reasonable return given its input costs.

41 The next FA Premier League rights auction, in 2012, will not be governed by the commitments given to the European Commission (*see http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/356&format=HTML&aged=1&language=EN&guiLanguage=fr*) and therefore Ofcom intends to review with the FA Premier League how it intends to ensure that the 2012 auction complies with competition law. Ofcom also raises the possibility of new commitments.

42 *Mergers – jurisdictional and procedural guidance*, Office of Fair Trading, June 30, 2009, OFT 527, http://www.oft.gov.uk/shared_oft/mergers_ea02/oft527.pdf.

43 The publications replaced are: *Mergers – procedural guidance* (OFT526, May 2003), *Mergers – guidance note on the calculation of turnover for the purposes of Part 3 of the Enterprise Act 2002* (July 2003), Chapter 2 of *Mergers – substantive assessment guidance* (OFT516, May 2003), *Interim arrangements for informal advice and pre-notification contacts* (April 2006), and *Explanatory note in relation to 'Interim arrangements for informal advice and pre-notification contacts'* (October 2007).

shareholding of 15% may enable material influence, but there is no presumption; and even a shareholding of below 15% may enable the OFT to carry out a merger inquiry in exceptional circumstances. The OFT also indicates that board representation may confer material influence regardless of the level of shareholding, especially where there are cross-directorships. The guidance does not institute any change in the OFT's assessment, but provides greater clarity as to how this assessment will be conducted.

The guidance also formally reintroduces the possibility for the parties to seek confidential and non-binding informal advice on the likelihood of reference to the CC. It also states that the OFT will adopt a flexible approach in relation to "*near miss*" offers of undertakings in lieu, exceptionally offering parties an opportunity to revise their offer before referring the transaction to the CC. The guidance also introduces a fast track reference to the CC of as few as 10 days where the transaction clearly gives rise to competition concerns and remedies are not suitable.

Finally, the OFT and CC are developing joint substantive merger guidance to complement the jurisdictional and procedural guidance. Draft guidance was published in April, and the current consultation process ends on August 7.

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