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This report summarizes principal competition law developments in Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, the Netherlands, Spain, Sweden, Switzerland, and the United Kingdom during the third quarter of 2008.

AUSTRIA

This section reviews developments concerning the Cartel Act of 2005, as enforced by the Cartel Court, the Federal Competition Authority (FCA) and the Federal Antitrust Commissioner (FAC).

Horizontal Agreements

Federal Competition Authority Investigates Fuel Price Developments

On July 11, 2008, the FCA published an interim report regarding its ongoing investigation into Austrian diesel and petroleum retail prices.[1] In a previous investigation of pricing practices in the sector, the FCA concluded in 2004 that there was not sufficient evidence to find cooperation among competing fuel companies in Austria. The FCA at that time, nonetheless, agreed to continue monitoring fuel price developments.

In its July 2008 interim report, the FCA addressed two primary concerns:

- whether Austrian retail fuel prices reflect movements in the Rotterdam spot market[2] ; and
- whether fluctuations in Austrian retail fuel prices indicate coordination among Austrian fuel suppliers.

On the first issue, the FCA reviewed comparisons between the Rotterdam spot market and fuel prices at 1,750 stations (around 61% of the domestic market) in Austria between August 2004 and March 2008. The FCA identified a direct correlation between the Rotterdam spot prices and Austrian pump prices, though it also noted a non-trivial asymmetry in pump prices. In particular, it found that increases in diesel prices (on the Rotterdam market) are passed-on to Austrian consumers either the same day or the next day, while decreases in diesel prices are not passed on to customers until typically three days after prices change in Rotterdam. A similar pattern can be observed in unleaded petroleum – with price increases observed at the pump a day after they change in Rotterdam, while the lag in price decreases can be up to four days. The FCA further did not find a statistically significant difference in the timing of price movements of the major or minor fuel suppliers active in Austria.

On the second issue, the FCA first hypothesized that a small degree of pump price variation among the suppliers combined with inflated average pump prices would amount to compelling evidence of collusion. The FCA's data set for this analysis consisted of weekly diesel and petroleum pump prices in the 15 pre-2004 Member States (the 'EU-15'), collected and published by the European Commission. Based on this data, the FCA calculated price variations for:

- net and gross prices; and
- net and gross price movements for diesel and unleaded petroleum for each of the EU-15.

The FCA then ranked the countries by price variation including:

- net price variation;
- gross price variation;
- variation of net price movements; and
- variation of gross price movements.

These rankings revealed little consistency. While correlations among net price data variations may have been high in some countries, for example, they were low in gross price variations. The FCA attributed these inconsistencies to differences in national taxation, and other unspecified national fuel market idiosyncrasies. The FCA concluded that the available data did not indicate collusion among the major Austrian fuel suppliers.

Going forward, the FCA intends to analyze the effect of discount fuel stations (so-called "white pumps") on Austrian pump prices.

1 The report is available at the FCA's website at www.bsb.gv.at.

2 The main European market for retail fuel is in Rotterdam; fluctuations in the prices on this market affect pump charges across Europe.

3 Defined as suppliers with a share of the Austrian market greater than 15%, such as BP, OMV, Shell, etc.

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Fines Imposed On Innsbruck Driving School Cartel

On August 29, 2008, the Cartel Court, at the request of the FCA, imposed fines of EUR 70,000 on six driving schools in and around Innsbruck for their participation in a price-fixing cartel.[4] A seventh driving school that participated in the infringement was granted immunity under Austria's leniency program. The companies all renounced their right to appeal the decision.

In its press release, the FCA welcomed the Court's decision, and interpreted it as a signal that the Court is willing to pursue and sanction even cartels of "*minor importance*." The FCA stressed in particular the positive effects of the Court's enforcement efforts on consumers, who will benefit ultimately from lower prices.

BELGIUM

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

Horizontal Agreements

Competition Council Fines The Federation Of Professional Driving Schools Of Belgium

On July 7, 2008, the Competition Council fined the *Fédération des Auto-Ecoles Professionnelles de Belgique* (the Belgian Federation of Professional Driving Schools; the "Federation") EUR 6,990 for enacting rules designed to limit price competition between its members.

The Federation's rules forbid members from enticing customers to switch driving schools through "*destabilizing pricing practices*" – defined as the setting of prices demonstrably below those charged for an analogous service by a competing school. The Council concluded that this provision was designed to prevent price competition between members of the Federation, the effect of which was to increase driving school prices in Belgium. The Council considered this equivalent to price fixing, and thus a breach of Article 2 of APEC.

The Federation was found to be in further breach of Article 2 of APEC for having recommended price increases to its members through a system of "*price studies*." The Council accepted that associations may provide their members with information on the evolution of their market, but that such information could not be employed (directly or indirectly) to influence competition between members. The Council held that the price studies were not produced solely for the informational benefit of members, but were aimed at coordinating and harmonizing members' price increases.

Despite the Federation's being found in breach of APEC, no fine was imposed because the infringement was terminated in 2005. It was thus governed by the old APEC (of 1999), which contained no provision allowing for the imposition of fines on associations of undertakings.

Association Of Interior Designers Found To Have Committed Price-Fixing

On July 25, 2008, the Competition Council issued a decision finding the *Association des Architects d'Interieur de Belgique* (the Belgian Association of Interior Designers) in breach of Article 2 of APEC for having adopted a rule encouraging its members to set certain minimum fees. Here again, the Council did not fine the association as this conduct too, having been terminated in April 1995, was governed under the old APEC (of 1999).

Preliminary Reference To The European Court Of Justice In The "Flemish Bakers' Association" Case

On September 30, 2008, the Brussels Court of Appeal issued a preliminary judgment seeking clarification from the European Court of Justice on the compatibility of Belgian competition law with EC Regulation 1/2003.

In a previous, January 2008 decision, the Competition Council had fined VEBIC, the Flemish Bakers' Association, EUR 29,121 for fixing bread prices for the period of July 1, 2004 to June 8, 2007. VEBIC appealed the decision to the Brussels Court of Appeal.

Under the old APEC (of 1999), following the appeal of a Competition Council decision, the Council had the right to submit written comments to the Brussels Court of Appeal. As this provision no longer exists in the current APEC, the Court of Appeals requested the European Court of Justice to clarify whether the removal of the provision is compatible with Regulation 1/2003. Specifically, the Court of Appeals requested the European Court of Justice to confirm whether, in excluding National Competition Authorities from submitting written remarks in such circumstances, Member States might be violating Regulation 1/2003. The Court also asked whether, under Regulation 1/2003, National Competition Authorities have the right (and the duty) to participate in appellate proceedings.

4 This is the second decision imposing fines on undertakings active in the driving school sector. In October 2005, the Cartel Court imposed fines totaling EUR 75,000 on six driving schools in Graz, Styria.

Unilateral Conduct

Auditorate Finds No Predatory Pricing Or Excessive Pricing By Electrabel In The Gas And Electricity Sector

On July 3, 2008, the Auditorate closed its investigation into the pricing practices of gas and electricity provider Electrabel. The Auditorate concluded that Electrabel had not abused its dominant position (within the meaning of Article 3 of APEC and Article 82 EC) both for the period from January 1 to September 30, 2007 (when the company charged suspiciously low prices), and from October 1, 2007 onwards (when it dramatically increased its gas prices).

In conducting its analysis on the excessive pricing charge, the Auditorate adopted an effects-based approach, considering in particular whether prices charged from October 1, 2007 were greater than:

- prices set by rival operators;
- prices set by the Commission for Regulation of Electricity and Gas; and
- prices charged by providers in other Member States.

Based on this comparison, the Auditorate concluded there was insufficient evidence to consider Electrabel's price increases as excessive.

On the predatory pricing charge, the Auditorate similarly concluded that there was insufficient evidence to find that Electrabel had engaged in predatory pricing practices. Specifically it considered that:

- the period under review was too short to be effective anti-competitively;
- no competitor was forced to exit the market;
- the price increase on October 1, 2007 did not cause any new entry into the Belgian gas market; and
- despite lowering its prices, Electrabel actually lost five percent of its market share to competitors during the period under review.

DENMARK

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

Mergers and Acquisitions

Reorganisation Of Broadcast Service Danmark A/S Cleared Subject To Conditions

On July 7, 2008, the DCA cleared the restructuring of Broadcast Service Danmark A/S ('BSD'), subject to conditions. BSD, since 2001, had been functioning as a (non-full function) joint venture between DR and TV2. Specifically, BSD, on behalf of its parent companies, administered the maintenance, technical support and third party access to DR and TV2's masts.

As of November 1, 2009, analog broadcasting will be replaced in Denmark by digital TV ('DTT'), with Boxer TV winning the contract for the planning, construction and operation of four nationwide multiplexes, *i.e.* those networks through which digital distribution will occur. After winning this contract, Boxer entered into an agreement with BSD to establish and operate these multiplexes.

This relationship will enable BSD to revise its relationships with third parties to such an extent that it will become a full function joint venture – which then required approval from the DCA. The DCA granted conditional approval, subject to a number of remedies including transparency of the JV's accounts, non-discriminatory pricing, third-party access to broadcasting equipment, and a change in the rules permitting third parties to gain control of the venture.

Danmarks Nationalbank And Det Private Beredskab Acquisition Of Roskilde Bank Cleared

On September 1, 2008, the DCA unconditionally cleared Danmarks Nationalbank ('DN') and Det Private Beredskab ('DPB')'s acquisition of Roskilde Bank ('RB'). The DCA did not consider that the acquisition would effect any substantial changes to the markets for retail banking, merchant banking and financial banking, given the parties' lack of significant overlaps. RS was active in retail and merchant banking, and maintained only marginal interests in financial banking – where DN was particularly active. Furthermore, DN is responsible for Danish monetary policy, and the takeover was part of DN's attempt to limit the impact of the current financial crisis on the Danish banking market.

Ditas Merger No Longer Subject To Conditions

On September 24, 2008, the Danish Competition Council removed the conditions the Danish Competition Authority had placed on the merger of timber wholesale cooperatives Dendek and Ditas in its 2002 clearance decision. When the DCA assessed the merger in 2002, it found that the merged entity would achieve a dominant position in the market for wholesale construction materials. As a result, the DCA subjected its clearance of the merger to a number of conditions, including limitations on Ditas' ability to enter into exclusive agreements or offer rebates.

Ditas asked the DCC to remove these conditions in 2005, a request that was partially granted in the DCC's May 31, 2006 decision. Since then, the cooperative lost its dominant position after Bygma, one of the members, opted to exit the cooperative in late 2007. This caused the DCC to revise its view and to entirely remove all conditions that had been placed on the cooperative.

It is noteworthy that the DCC rarely grants a motion for withdrawal of merger conditions, not least because the Danish Competition Act contains no specific provision for such withdrawals.

Policy and Procedure

Guidelines On The Competition Act And Sate Aid Issued

On August 11, 2008, the DCA published its guidelines on the Danish Competition Act ('the Act'). Just three weeks later, the DCA also published its handbook on EC State Aid (and the applicability of Articles 87-88 EC) in which it included an outline of the applicable community rules, case law, procedures and regional guidelines.

Guidelines On The Application Of Competition Law To The Construction Sector's Purchasing And Procurement Strategies

On September 19, 2008, the DCA, in cooperation with the Danish Association of Construction Clients, published its guidelines on the application of competition law to purchasing and (public) procurement strategies in the construction sector. These feature:

- an overview of purchase and bidding strategies likely to enhance competition;
- an overview of issues relevant to the decision process, including the use of external consultants and elements builders should consider when approaching a new project;
- a guide to the completion of market surveys;
- an overview of the options available to builders in markets of various size and geographical scope;
- a short overview of the applicable procurement rules and types of procurement; and
- an overview of advantages and disadvantages of using different types of construction contracts.

FINLAND

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

Unilateral Conduct

Market Court Finds Lännen Puhelin Oy Did Not Abuse Its Dominant Position

On July 2, 2008, the Market Court rejected the FCA's proposal to fine Lännen Puhelin Oy ('LP'), a regional telecom provider, for allegedly abusing its dominant position in the wholesale market of ADSL-based domestic internet connections. The FCA claimed that LP, from June 2001 to April 2003, had refused to offer its competitors an essential DSL wholesale product for domestic broadband connections, and that, from May 2003 to June 2004, LP had further engaged in an abusive margin squeeze.

The FCA concluded that LP's conduct rendered competitors unable to offer DSL connections to end-users on competitive terms, and fined LP EUR 1 million. LP appealed the FCA's decision to the Market Court arguing, *inter alia*, that it was under no obligation to offer a DSL wholesale product to its competitors, and that it thus could not have engaged in an abusive margin squeeze.

In its July 2008 decision, the Market Court noted that (as of July 2003) providers were subject to an explicit statutory obligation to offer DSL. It further noted that the obligation to offer DSL prior to July 2003 could only arise from the 'essential facilities doctrine'.

With this in mind, the Court considered that, prior to autumn 2002, LP had not offered a DSL wholesale domestic product at all, but that a number of competitors in that period were able to construct their own DSL networks. Thus, the Court held, LP could not have been compelled to offer competitors DSL when it was not even offering the product itself. The Court found that LP was, however, obliged to offer competitors domestic DSL as of May 2003, when LP published its price list and began offering the product domestically itself.

The Court also found that, as of July 2003, LP had offered its competitors a technically adequate wholesale product for domestic use based on IP technology[5], and that it was not necessary for LP to also offer its competitors an alternative wholesale product based on ATM technology. Finally, the Court rejected the margin squeeze claim.

5 ATM is a connection-oriented technology that establishes a virtual circuit between two endpoints, before any data is exchanged. ATM is a cell relay, packet switching protocol which provides data link layer services – unlike technologies based on packet-switched networks (such as the Internet Protocol ('IP') or Ethernet), in which are employed variable sized packets (known as frames).

FRANCE

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

Mergers and Acquisitions

Minister Approves Merger In Horse-Betting Services Sector Subject To Commitments

On July 16, 2008, the French Minister of the Economy approved PMU's and Serendipity's acquisition of joint control of Geny Infos, subject to behavioral remedies. PMU promotes, organizes, and markets betting on horse races on behalf of French horse racing associations; Serendipity is a private equity firm; and Geny Infos processes and sells racing information.

This transaction took place in the context of the liberalization of sport-betting services and on-line gambling in France. Although the sector is opening progressively to competition, PMU holds an effective monopoly in "upstream" horse-betting services.

The transaction involved only a limited overlap, but raised concerns regarding the vertical integration between PMU and Geny Infos, which is active in the "downstream" market for the supply of racing data. PMU has unique access to certain information upstream, including betting odds and information on the practical organization of races by the racing associations. Such information is collected in a database called "Infocentre" whose access is licensed by PMU to third parties (the media, press agencies, and content providers).

The Minister viewed the information contained in Infocentre as *de facto* indispensable for companies active in the downstream market for the supply of racing information, and he found that Infocentre would be difficult to replicate for technical and financial reasons. The Minister thus held Infocentre to constitute an essential facility, and that PMU could not favor Geny Infos by restricting access to its competitors. To remove the Minister's concerns, PMU committed to granting access to the Infocentre to third parties on a transparent and non-discriminatory basis.

Policy and Procedure

French Parliament Effects General Reform Of French Competition Authorities

On August 4, 2008, French law No. 2008-776 (*'Loi de modernisation de l'économie'*, "LME") was enacted to effect a modernization of competition and commercial law in France. Under the new law, a new Competition Authority will hold the investigative powers and resources shared formerly between the Competition Council and the Ministry of Economy. The Ministry of the Economy, going forward, will focus purely on concentrations "of less significance."

The composition of the new Authority will be generally similar to the Council that preceded it with 17 members appointed for 5 years, although, in making appointments, there will be greater focus on individuals' professional experience and economic or competition qualifications. The Chairman will be appointed by the Minister of the Economy in consultation with certain Parliamentary Commissions, and his authority – which will be delegable to one of the Authority's four deputy chairmen – will encompass decision-making on:

- the admissibility or dismissal of a claim;
- anticompetitive practices in cases referred to the Authority by the Minister; and
- Phase I and II investigations in merger control matters.

The Competition Authority will review all notifications of concentrations and conduct Phase I and II investigations. The LME does, however, reserve for the Minister two significant means of intervention in the merger area:

- the freedom to request that the Authority carry out an in-depth investigation of a particular transaction; and
- the freedom to review (for general purposes "*other than the protection of competition*") a transaction already subjected to an in-depth Authority investigation. The Minister (within 25 days after receiving notification of a Phase II decision) may rule independently on a case, and pay particular attention to issues such as industrial development, the international competitiveness of relevant companies, or the creation/maintenance of employment.

These provisions allowing the Minister to intervene in the merger review process have caused great concern among practitioners. It is feared, for example, that the Minister's power to request an in-depth investigation might force the Authority to revise a decision in which it found no adverse competitive effects. It has also been suggested that it might be preferable to have cases reviewed for "*general interest purposes*" only following a prohibition by the Authority. Allowing a Minister to challenge an authorization issued *after* a Phase II investigation could legitimize the use of merger control for non-competitive purposes (*e.g.*, foreign investment legislation).

The LME also modifies certain thresholds and time-periods applicable to merger control, specifically:

- expressing time periods in business days, rather than calendar days;
- allowing for the suspension of time periods at a party's request "*on an ad hoc basis…to finalize commitments*"; and
- applying specific turnover thresholds (EUR 75 million and EUR 15 million respectively) when merging parties are active in retail or overseas territories.

With the concentration of investigative and decision-making powers within a singular authority, the LME also implemented measures to ensure decision-makers' impartiality. The Authority's own investigation service will by supervised by a *rapporteur general* (case handler) appointed by the Minister – and not by the Authority's Chairman. The case handler will appoint assistant chief case handlers, permanent case handlers, non-permanent case handlers and investigators, thereby creating an independent team – unlike the Council, which relies on the Competition Directorate's inspection services. While the Competition Directorate employs some 170 investigators at the national and regional level, only 30 investigators from the national office will be assigned to the Authority.

Finally, the LME will require the appointment of a 'hearing officer' by the Authority; whose task it will be to collect, '*the comments of the challenged and filing parties concerning the manner in which the procedures affecting them are carried out*'…[and to] transmit '*a report to the chairman evaluating these comments and proposing, if necessary, any measure that will enhance the ability of the parties to exercise their rights.*' (Articles 461 – 464 of the new Commercial Code).

GERMANY

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

Horizontal Agreements

FCO Fines Manufacturers Of Luxury Cosmetics For Illegal Information Exchange

On July 10, 2008, the Federal Cartel Office announced that it had fined nine German subsidiaries of leading luxury cosmetics manufacturers, including *Chanel, Clarins, Estée Lauder, L'Oréal* and *Shiseid* (as well as many of those companies past and present CEOs), almost EUR 10 million for engaging in illegal information exchanges. Overall, the individual fines ranged from EUR 250,000 to EUR 2.1 million.

Specifically, as of 1995, the companies began to exchange confidential commercially sensitive information (including sales data, price increases, planned product launches, and advertising expenditures) in so-called "*castle-round*" meetings. This information was sufficiently detailed and attributable to individual company sources for the FCO to characterize the parties' conduct as anticompetitive and in violation of European and German antitrust law.

Düsseldorf Court of Appeals Finds Insurers' Pool Exempted From Cartel Restrictions Under European Law

On September 17, 2008, the Düsseldorf Court of Appeal ('Oberlandesgericht Düsseldorf') suspended an FCO decision prohibiting Allianz, AXA, R + V Allgemeine Versicherung, and Victoria Versicherung ('the Insurers') from continuing to jointly adopt the liability risks of certain auditors and chartered accountants.

The legal predecessor to the insurers' pool ('Versicherergemeinschaft für das wirtschaftliche Prüfungs und Treuhandwesen') was founded in 1935; the Insurers maintained the pool since then offering collective coverage under standardized terms. The Insurers also "shared the risks" through a quota arrangement, on the understanding that they were not to insure auditors independently – with the exception of members of the so-called 'Big Four' (KPMG, Ernst & Young, Price Waterhouse, and Deloitte & Touche).

The FCO considered the Insurers' pool arrangements as a restriction of competition, in accordance with Article 81 EC, and Section 1 of the GWB. In its September decision, however, the Court questioned the FCO's identification of a separate market for the insurance of auditors and chartered accountants. In the absence of a decision by the European Commission to the contrary, the Court favored a joint market encompassing all consulting professions, including tax accountants, lawyers, notaries and auditors.

By reference to this wider market, the Insurers fell below the 20% market share threshold established by Article 7(2) of Commission Regulation (EC) No. 358/2003, and within the block exemption from Article 81(1) EC.

Unilateral Conduct

FCO Raises Objections To German Football League's Scheme For Future Centralized Marketing Of TV Broadcasting Rights

In a press conference on July 24, 2008, Dr. Bernhard Heitzer, President of the FCO, announced that the proposed centralized scheme for marketing of TV broadcasting rights for German football matches did not meet the legal requirements for adequate consumer involvement. As a consequence, the German Football League ('GFL') initiated an alternative plan for public procurement.

The GFL, a grouping of German Football clubs, had determined collectively not to merchandise broadcasting rights independently, but instead to license them cooperatively through a centralized marketing scheme (through which each club's rights were transferred to the GFL). Because TV stations could not separately purchase rights from individual clubs, the central marketing scheme was held to be anticompetitive under German and European law. The FCO assessed whether the scheme might nonetheless provide quantifiable benefits to consumers.

Ultimately, however, the FCO objected to the scheme because the GFL planned to license all broadcasting rights exclusively to Sirius Sport Media GmbH. In return, Sirius was to guarantee earnings of EUR 500 million a season and do so by limiting free-to-air coverage of highlights to the post-10pm timeframe on Saturdays (the GFL's primary match days). The FCO, however, deemed prompt free-to-air coverage before 8pm indispensable. It wished to provide consumers with a reasonable choice between live pay-to-view and free-to-air coverage of highlights.

Improvement Of Circumstances For Competition In Recycling Sector

In August 2008, and after consultation with the FCO, the recycling company Duales System Deutschland ('DSD') announced that, as of 2009, it would no longer employ its trademark ('The Green Dot'; Der Grüne Punkt; the 'Trademark') in contracts for the disposal of sales packaging.

DSD originally introduced the Trademark in 1991. Under European and German law, all companies using product packaging must also recover such packing. Producers can transfer this obligation to a recycling company such as DSD. The packaging must be marked identifiably as recyclable (using, for example, a logo such as the Trademark). Given that such logos are obligatory in several other European countries, and because changing labels, or using alternatives can be costly, many German companies chose to use (or to continue using) the Trademark – even after the number of DSD's competitors entered the market. DSD, however, agreed to the use of its Trademark only if manufacturers sub-contracted a share of DSD's management services.

Now that DSD has abandoned the Trademark, manufacturers who wish to use a logo are no longer locked in to using DSD for their removal services. As the dominant provider of rights for the Trademark, DSD has assured its competitors' customers that it will grant them the right to use it on the same terms as those granted to existing customers, with an accessible price list.

Mergers and Acquisitions

FCO Prohibits Müller From Acquiring Three Cheese Dairies

On July 2, 2008, the FCO issued a decision prohibiting Germany's leading dairy producer, Theo Müller GmbH & Co. KG (represented by a subsidiary, Käserei Loose GmbH & Co. KG) from acquiring the shares of three cheese-producing dairies from Poelmeyer Holding GmbH. In its decision the FCO focused primarily on relevant market definitions, and, in particular, on the identification of a separate national market for cheese made from curdled milk. The Authority concluded that the resulting concentration would have afforded Müller a dominant position in that specific national market, with a total annual turnover of EUR 88.5 million, and a post-merger market share exceeding 70%.

Policy and Procedure

Discussion About Buyer Power In Competition Law

On September 18, 2008, the FCO invited university professors from economic and legal faculties, judges and other competition experts, including Philip Lowe, the Director General for Competition at the European Commission, to a discussion of the Working Group on Competition Law ('Arbeitskreis Kartellrecht') about 'Buyer Power in Competition Law – Status and Perspectives'.[6]

GREECE

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

6 The FCO's discussion paper prepared for the conference, and several of the speeches from the conference, are available at: http://www.bundeskartellamt.de/wEnglisch/download/pdf/2008_ProfTagung_E.pdf.

Mergers and Acquisitions

Competition Commission Approves Forthnet Acquisition Of NetMed and Intervision

In its July 29, 2008 decision, the Hellenic Competition Commission ('HCC') approved Greek telecommunications and Internet company Forthnet' acquisition of NetMed N.V (the only Greek provider of pay TV (PTC) services)), and Intervision (Services) B.V. from Myriad International Holdings B.V. (MIH) and Teletypos Cyprus Limited.

The HCC examined the transaction under the New Media Law on the Concentration and Licensing of Media Companies and under the Law for the Protection of Free Competition. The HCC found there to be one market for TV services, including both PTV and free-to-air ("FTA") television – despite having concluded in a 2003 decision that PTV and FTA make up distinct markets.

The HCC reached a different conclusion on this occasion because:

- the New Media Law did not distinguish between PTV and FTA;
- the UK Competition Commission had adopted a similar approach when considering Sky's acquisition of shares in ITV; and
- there is supply-side substitution between PTV and FTA, as demonstrated by the fact that a Greek FTA television channel had operated for almost a year (from 2001 to 2002) as a PTV channel.

Concentrations of media companies are prohibited under the New Media Law where one or more of the participating undertakings holds (or through the transaction acquires) a dominant position in the relevant media market(s). Dominance is specifically defined by reference to the undertakings' market shares. With regard to television providers, the overall market (and market shares) are not assessed based on overall turnovers, but based on 12-month advertising and program license revenues. The HCC held that the New Media Law did not distinguish between PTV and FTA for this purpose and it thus assessed NetMed's shares based on an overall PTV and FTA market.

The HCC concluded that NetMed's share in the Greek television market were below the 35% dominance threshold and that the acquiring company, Forthnet, was not active in that market. It thus cleared the transaction without commitments.

IRELAND

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

Mergers and Acquisitions

Competition Authority Approves Heineken NV's Acquisition Of Beamish & Crawford Plc.

On October 3, 2008, the Irish Competition Authority approved the acquisition by Heineken NV of Beamish & Crawford Plc. The merger was the first to be referred by the European Commission to the Irish Competition Authority for review. After a Phase II investigation, the Competition Authority found no competitive concerns in the ale, stout and lager markets – an otherwise unremarkable decision made unusual by the Competition Authority's identification of distinct product markets for ale, stout and lager.

Amendments To The Competition Act 2002: Mergers Of Credit Institutions

On October 2, 2008, the Irish Parliament passed the Credit Institutions (Financial Support) Act 2008. Section 7 allows the Minister for Finance to review a concentration involving credit institutions in a situation where its completion is pivotal to the securing of Irish financial stability. The Minister's power supercedes that of the Competition Authority, which may no longer review concentrations involving credit institutions in times of national financial instability.

In such times of financial instability (as it is described in Section 7 of the Act), parties are required to notify any concentrations to the Minster for Finance, rather than the Competition Authority. There is no formal schedule by reference to which the Minister must reach a decision, and the Minister is entitled to appoint an advisor to assist in the analysis of competitive effects. The Minister is required to approve a concentration if it is not expected to foster a substantial reduction of competition in the relevant markets – unless it is compelled and justified by the threat of financial instability, the threat of instability among credit institutions, or the need to resolve a serious disturbance to the national economy.

The Competition Act 2002 will be amended to reflect Section 7 of the Credit Institutions (Financial Support) Act 2008.

Policy and Procedure

Irish Competition Authority To Merge With National Consumer Agency

The Irish government has announced that its Competition Authority[7] is to be merged with the National Consumer Agency as part of a plan, enacted under the Finance Act 2008, to bring together a number of government agencies. No specific plans or details have yet been submitted.

New Exemptions From Section 4 Of The Competition Act, 2002.

Following a Private Members' Bill, independent voice-over actors and freelance journalists are to be excluded from Section 4 of the Irish Competition Act 2002. Section 4 is equivalent to Article 81 EC and prohibits agreements between undertakings that have as their object or effect the prevention, restriction or distortion of competition within the Irish State. The exemption is motivated by a desire to allow voice-over actors and freelance journalists to negotiate common fee schedules with employers and employers' unions. The Competition Act will be amended to incorporate the new exemptions.

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

Competition Authority's Autoclaved Aerated Concrete Cartel Decision Partially Annulled

On June 26, 2008, the Regional Administrative Court for Lazio partially annulled the Italian Competition Authority's 2007 decision fining Xella International GmbH and RDB S.p.A. for anticompetitive practices in the supply of autoclaved aerated concrete in Italy.

The Authority had found that:

- Xella and RDB engaged in an anticompetitive arrangement designed to coordinate their commercial strategies with a view to monopolizing and sharing the Italian and neighbouring markets. In addition to imposing fines of EUR 510,000 and EUR 1.86 million on Xella and RDB respectively, the Authority ordered the companies to dismantle a joint venture company, RDB Hebel S.p.A., which the Authority considered to be pivotal to the cartel's implementation.
- RDB abused its dominant position by engaging in a complex exclusionary strategy designed to eliminate Italgasbeton S.p.A., the only remaining manufacturer of the Products in Italy. The authority held that RDB's abusive conduct included (i) the selective application of below-cost prices to Italgasbeton's clients; (ii) the soliciting of Italgasbeton's employees; and (iii) the dissemination of information likely to harm Italgasbeton's reputation in the marketplace.

In reviewing the Authority's decision, the Court held that the Authority had failed to meet the required standard of proof in finding that the parties had engaged in an illegal restrictive agreement (or concerted practice) under Article 81 EC. In particular, the Authority had failed to show a 'meeting of the minds' between the Parties. The Court noted that the evidence relied upon by the Authority demonstrated, at best, that Xella had proposed to RDB that the companies coordinate their respective commercial policies in Italy. The case-file included no indication, however, that RDB actually accepted Xella's proposal. The Court also noted that the Authority had failed to actually demonstrate any parallel market behaviour.

With respect to the Authority's specific findings on the parties' sharing of the Italian and French markets, the Court held that the evidence relied upon by the Authority was irrelevant or inadequate. In particular, the exchange of commercially sensitive information via the parties' joint venture, RDB Hebel, was found to be legitimate, and necessary for the normal operation of the venture.

Regarding the Authority's finding that the very establishment and operation of RDB Hebel was incompatible with Article 81 EC, the Court found that the Authority had improperly concluded that the joint venture's creation amounted to an infringement *per se*. Instead, the Authority should have assessed the parties' conduct as parent companies, and investigated whether this conduct or any other evidence suggested an anticompetitive scheme surrounding the joint venture.

The Court thus annulled the Authority's finding of an infringement of Article 81 EC, including both the fines imposed for this violation and the joint venture termination order.

Conversely, the Court upheld the Authority's decision concerning RDB's exclusionary conduct. The Court found that the Authority had

7 Established as a ministerial adjunct by the Competition Act 1991, and granted independence by the Competition Act 2002.

adequately established that RDB with greater frequency applied below-average cost pricing to customers who purchased from both Italgasbeton and RDB, than to customers who bought only from RDB. The Court also agreed with the Authority that RDB's below-cost pricing strategy was not an expression of its general commercial policy, but was specifically targeted at Italgasbeton's customers and at removing Italgasbeton from the market.

Policy and Procedure

Italian Government Exempts Concentrations Involving Basic Public Service Providers From The Authorization Requirement Under Italian Merger Control Rules

In the wake of the continuing economic and financial crisis of the former flag carrier *Alitalia*, and with a view to facilitating the company's rescue, the Italian Government on August 28, 2008 adopted Decree No. 134/2008 that would exempt certain companies from the Italian merger control rules' pre-closing clearance requirement.

Alitalia's restructuring has involved a new group of private investors injecting capital into a newly formed company that would absorb *Alitalia's* profitable assets; all remaining assets would be collected into a separate company for liquidation. The "new" *Alitalia* would merge its operations with Italy's second-largest airline, *Air One*, with the post-merger entity controlling more than 60% of the domestic air transport market.

The new Decree No. 134/2008 amends Legislative Decree No. 347/2003, concerning extraordinary administration proceedings for large (more than 500 employees) insolvent (with debts exceeding EUR 300 million) companies seeking reorganization.[8] It makes available such extraordinary administration proceedings not only where reorganization is aimed at restructuring a company as a going concern, but also where it involves the divestiture of company assets, constituting one or more lines of business, to third-party purchasers.

Importantly, Decree No. 134/2008 also introduces an exemption from the clearance requirement under the Italian merger control rules for companies involved in "*the basic public service*" and for whom administration proceedings have been initiated. "*Basic public services*", as defined in Law No. 146/1990, include air transport. In particular, Decree No. 134/2008 exempts from the Authority's clearance requirement such restructuring transactions that:

- have been authorized by the Ministry of Economic Development; or
- are instrumental to the restructuring or to the preservation of the economic value of the company/-ies (or group of companies) involved, provided that the Ministry has granted authorization to an extraordinary trustee to enter into such transactions.

Exempt transactions must still be notified to the Authority together with any proposed behavioural remedies meant to reduce the risk of "*unduly burdensome*" pricing or other negative effects on consumers. The Authority may then, within 30 days of notification, impose on the parties either the notified (or modified) behavioural remedies. The Authority must also specify a time (at least 3 years from notification) within which any dominant positions created as a result of the exempt transaction must be dissolved. The Authority may not, however, directly prohibit an exempt transaction.

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 Home Care Industry Cartels

On September 19, 2008, the NMa issued two separate decisions sanctioning regional cartels in the home care industry. In the first, home care providers Hilverzorg, Vivium, and TGV were fined EUR 611,000, EUR 816,000, and EUR 1,621,000 respectively for allocating geographic and product markets amongst each other in the region of 't Gooi. In the second decision, the NMa fined home care providers Zorgbalans and Viva! EUR 800,000 and EUR 4,003,000 for similar violations in the region of Kennemerland.

The Dutch home care industry – which includes at-home nursing and housekeeping services – is regulated by the Exceptional Medical Expenses Act (*Algemene wet bijzondere ziektekosten*, the "Act"). The Act was amended in 2003-2004 with the goal of introducing and encouraging increased levels of competition in this sector. Both cartels at issue here were formed as a means of frustrating the objectives of these amendments.

Hilverzorg, Vivium and TGV, in 2002, initiated discussions on how best to protect their market positions in light of the upcoming

8 Once a company submits to extraordinary administration, creditors may no longer initiate or pursue individual claims. The Ministry of Economic Development (the "Ministry") appoints a trustee to oversee the company's management and take control of its assets. The Ministry also continues to oversee (and must authorize) certain major corporate transactions.

amendments to the Act. The discussions (that had included numerous communications on ways to restrict competition in the sector), ultimately resulted in a decision to merge. The parties' merger was notified on July 29, 2005, and the NMa opened a Phase II investigation in November 2005. On June 30, 2006, while the merger was still under Phase II review, the parties separately signed a cooperation agreement that was meant to achieve the parties' anticompetitive objectives in the event that they could not achieve merger clearance. Under the agreement:

- TGV was to take over all three competitors housekeeping services in the region and Hilverzorg and Vivium agreed not to offer such services going forward.
- Hilverzorg and Vivium split up the 't Gooi region into exclusive territories in which they were to offer at-home nursing care services, while not competing with each other across territories. TGV's at-home nursing care services were to be transferred to the other two competitors in line with their allocated territories.
- All three competitors agreed to refer customers to each other in line with the market partition.

When, in November 2006, it looked as if the NMa was going to deny clearance to the parties' merger, they withdrew their notification and proceeded with implementation of the agreement. The NMa, however, had discovered the cooperation agreement in the course of its Phase II investigation, and it opened *ex officio* cartel proceedings.

The second decision involved four small home-care providers in Kennemerland, who similarly entered discussions in 2003 on how best to limit competition among them. They ultimately chose to merge in 2005 (in a non-notifiable transaction), creating the entities Zorgbalans and Viva! These two remaining entities then entered agreements allocating territories to each other and agreeing not to compete in each others' territories. Existing customers were transferred and new customers referred to the other competitor, where these were located in other others' territory.

In both decisions, the NMa concluded that the parties' conduct amounted to anticompetitive agreements to partition the relevant markets by product and geography with the goal of restricting competition between the parties in violation of Article 6(1) DCA (the equivalent of Article 81(1) EC). The NMa classified both sets of infringements as particularly serious in light of the parties' status as closest competitors in the region, and the parties' high market shares.

Mergers and Acquisitions

NMa Clears European Directories' Acquisition Of Truvo Nederland And ClearSense

On August 28, 2008, following a Phase II investigation, the NMa cleared the acquisition by offline classified directories publisher European Directories of Truvo Nederland, a rival offline directory publisher, and ClearSense, a search engine marketing company.

In opening its Phase II investigation in March 2008, the NMa had expressed concern that the concentration might lessen competition in:

- the offline classified directories advertising market, where the parties had a combined market share of 90-100%; and
- the online classified directories advertising market, where there are only a handful of players, and the parties were each other's closest competitors.

Following its detailed investigation, the NMa determined, however, that the merger posed no significant risk of harm to advertisers, primarily, because the competitive pressure exerted by the directories at issue on each other was limited. An NMa advertising survey revealed that only a small number of advertisers were likely to switch from one directory to another when presented with a price increase of 5-10%. In fact, a larger percentage of advertisers indicated they would transfer their business online, or stop advertising altogether, rather than switching to the other competitor consequent to a price increase. The NMa also considered that the use of offline-classified advertising has declined in recent years at the expense of online advertising.

The NMa acknowledged that while some advertisers might be subjected post-merger to limited price increases, according to the NMa, the majority stood to benefit from the transaction. As of 2009, the merged entity plans to provide consumers with a single offline and online directory. Advertisers not currently advertising in both directories will enjoy increased visibility, while paying lower relative prices for their ads. Customers already advertising in both directories will enjoy equal usage for less money.

NMa Opens Phase II Investigation In Industrial Water Case

On September 5, 2008, the NMa opened a Phase II investigation into the proposed joint venture between water treatment service providers Evides Industriewater B.V and N.V. Waterleiding Maatschappij Limburg.

In its decision, the NMa specifically focused on the broad base of customers, primarily in pharmaceutical, chemical and micro-electro-technical industries, who require high-quality purified industrial water, but do not have the complex filtration systems in-house to produce such water themselves. The NMa voiced concern that the concentration would impede competition in this purified industrial water market; it assessed the parties' combined share of the market as between 67% and 87%, in part because the only other major purified water provider in the Netherlands, Vitens, signed a cooperation agreement with Evides that forbids either party from engaging independently in new activities within Vitens' areas of operation. In Phase II, the NMa said it will more closely assess whether:

- customers can credibly provide their own high-quality industrial water in-house as an alternative to the parties' services; and
- the extent to which foreign providers might be able to enter the Dutch market in the near future.

Policy and Procedure

NMa Amends Rules On When Concentrations May be Cleared Without A Fully Reasoned Decision

On September 2, 2008, the NMa amended its rules outlining when a concentration may be cleared without a fully reasoned decision (*Besluit verkort afdoen concentratiezaken*). Under the previous rules, the NMa was able to provide such simplified clearance only:

- in Phase I investigations;
- where the merging parties' combined horizontal market shares in any affected market did not exceed 25%; and
- the parties' combined vertical market shares did not exceed 30% in any affected market.

Following the most recent change, the NMa will now only need to provide fully reasoned clearance decisions where:

- the notified concentration requires the opening of a Phase II investigation; and
- the NMa's decision is likely to diverge with advice provided by (i) the Dutch Health Authority (*Nederlandse Zorgautoriteit*), (ii) the Independent Post and Telecommunications Authority (*Onafhankelijke Post en Telecommunicatie Autoriteit*), or (iii) the Media Commission (*Commissariaat voor de Media*); or there are relevant complaints from interested third parties.

These amendments will increase the number of clearance decisions not requiring full reasoning, and allow the NMa to more efficiently allocate its resources.

SPAIN

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

Vertical Agreements

CNC Finds Haller Umweltsysteme & Co.Engaged In Illegal Vertical Agreements

On July 21, 2008, the *Comisión Nacional de la Competencia* ('CNC') issued a decision finding that technology transfer agreement ('TTA') between waste collection equipment manufacturer Haller Umweltsysteme & Co. ('Haller) and its Spanish distributors C.L.G Haller S.A. ('C.L.G'), Vehículos, Equipamientos y Carrocerías Prieto-Puga ('Veicar'), and Sociedade De Montagem Y Automóveis ('Soma'), constituted an infringement of Article 1 of the Spanish Competition Act (which is equivalent to Article 81 EC). Haller's supply of expertise, information and technical specifications to its distributors is governed by a technology transfer agreement that affords its distributors the exclusive right to sell Haller products within a defined geographical area.

On February 28, 2006, the former Competition Service opened an investigation into Haller and its Spanish and Portuguese distributors following allegations that the TTA contained total restrictions on the distributors' ability to sell outside of the exclusive area allocated to them. MDC Ingenierias S.L. ("M.D.C"), a company registered in Galicia, Spain, specialising *inter alia* in the adaptation of trucks for the collection of Solid Urban Waste ('SUW'), had initiated the complaint against Haller.

M.D.C. had ordered the same SUW container from SOMA and C.L.G. to service a contract with a local municipality. When C.L.G., however, learned that M.D.C. had ordered the *same* container from SOMA, and that M.D.C. would be using SOMA's container, C.L.G. informed the local municipality that M.D.C. would not be able to meet its duties under the contract. M.D.C. thus lost the contract. C.L.G. then informed M.D.C. that its request for Haller's products from SOMA was an infringement of SOMA's agreement with Haller.

Over the next four years, M.D.C. continued to source a variety of Haller products directly from SOMA (to service public tenders raised by other Spanish municipalities) on the grounds that SOMA's prices were lower than C.L.G.'s. When, however, on May 29, 2004, M.D.C. took part in a public tender involving Veicar, which was acting at the time as C.L.G's exclusive distributor, Veicar became aware that M.D.C. was using Haller's products and it asked C.L.G. to intervene to protect its position as Haller's exclusive distributor.

M.D.C. ignored these claims, and took part in another public tender for a contract to supply S.U.W collectors. M.D.C. sent two proposals for an S.U.W container, both featuring Haller's container from SOMA. On October 8, 2004, the Chairman of the board responsible for awarding the contract contacted M.D.C. to inform it that Veicar had attached a certificate indicating it was Haller's exclusive distributor in the region, and that C.L.G. was disavowing responsibility for M.D.C's warranty. M.D.C then filed its complaint before the CNC arguing that the TTA between Haller and its distributors infringed Article 1 of the Spanish Competition Act.

The Competition Service concluded that the TTA's passive sales restriction rendered these agreements anticompetitive. The CNC's Tribunal (now Council) was then required to evaluate whether the offending provisions of the TTA might be exempt under the current Block Exemption Regulation.

The agreements in question were signed by SOMA in 1998 and by C.L.G. in 2002; *i.e.* after entry into force of the former Block Exemption Regulation: Regulation No. 240/96. However, the anticompetitive conduct being investigated (the threats by C.L.G, Haller and Veicar to M.D.C and SOMA and the interference in the public tenders to which MDC was party) had taken place in 2004, and within the transitory period established by Article 10 of the new Block Exemption Regulation: Commission Regulation No. 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements that had entered into force in May 2004. Article 10 of the new Block Exemption Regulation established that agreements dated before March 31, 2006, and meeting the requirements of the Regulation would be exempted. As the result, the CNC concluded that both Regulations applied.

- *Regulation No. 240/96* stated that the obligation on the licensee not to place the product on the market in the territories of other licensees (thereby banning active and passive sales) could be exempted, but only for a period of five years from the date on which the licensed product was first sold in the Community by a licensee. In the Council's opinion, the absolute restriction of passive sales enshrined in the TTA exceeded this time limit, and could not be exempted under this Regulation.
- *Regulation No. 772/2004* describes the allocation of customers as a hard-core restriction except where the restriction is part of a non-reciprocal agreement, of active and/or passive sales by the licensee and/or the licensor into the exclusive territory or to the exclusive customer group reserved for the other party. The Council found that the absolute restriction of passive sales contained in Haller's agreements was not limited to a specific territory or group of clients and therefore did not fall within the scope of the exemption provided for by the Regulation.

The Council concluded that the TTA allowed Haller to exercise complete control over (and prevent) its distributors' passive and active sales outside of their territories. It found that such a restriction was not justified by any efficiencies it might produce, and that its main effect was a partition of the market. The Council thus declared that Haller and its distributors' conduct infringed Article 1 of the Spanish Competition Act and it levied fines of: EUR 125,000 on Haller, and EUR 108,000 on both C.L.G. and Veicar. SOMA was fined substantially less (EUR 15,000) because, although it had entered into (and, for several years, maintained) an infringing agreement, it did provide M.D.C. with the products that company had requested (outside of the territory granted to SOMA under the TTA).

SWEDEN

This section reviews developments under the Competition Act of 1993, which is enforced by the Competition Authority (SCA).

Horizontal Agreement

Motor Vehicle Dealers Convicted Of Cartel

On September 10, 2008, the *Marknadsdomstolen* ('Swedish Market Court') issued a decision finding that eight Volvo and Renault dealers in southern Sweden had engaged in unlawful price fixing behaviour, and fined the dealers a total of over SEK 21 million (around EUR 2 million). The SCA had gathered most of its incriminating evidence when it conducted surprise inspections at the premises of the dealers under investigation.

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.

Mergers and Acquisitions

Competition Commission Unconditionally Approves The Heineken/Eichhof Merger

On August 21, 2008, the FCC unconditionally approved Heineken's acquisition of Eichhof Holding's drinks division. The FCC identified no reason to believe that the acquisition might result in the creation or strengthening of a dominant position on any affected market or that Heineken/Eichhof might be collectively dominant with its largest rival Carlsberg/Feldschlösschen.

Heineken initially announced its plans to acquire Eichhof Holding's drinks division in April 2008. The FCC's preliminary investigation indicated that the merger might lead to collective dominance among Heineken/Eichhof and its leading Swiss rival Carlsberg/Feldschlösschen. For that reason, it referred the case to a second stage assessment to more closely review the merger's effect on various markets for alcoholic and non-alcoholic beverages.

In arriving at its clearance decision the FCC, for the first time, applied the concept of collective dominance under the Merger Regulation and it held, *inter alia*, that to find collective dominance there must be an expectation that tacit co-ordination will endure following, and as a result of, the transaction. The investigation ultimately concluded, however, that there would continue to be sufficient competition in the local and regional beer (and other relevant) markets post-merger, and that there were no significant barriers to market entry by new competitors. Companies active in the food and beverage sector were also seen as having sufficient buyer power to counterbalance any market power enjoyed by Heineken/Eichhof and Carlsberg/Feldschlösschen.

UNITED KINGDOM

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

Unilateral Conduct

Competition Commission Finds Provisionally That BAA's UK Airports Are Not Competitive

On August 20, 2008, the Competition Commission reported its provisional findings following its investigation into the dominant position held by BAA Limited on the UK airports market. The Commission identified several competitive issues that adversely affect service received by passengers and airlines and provided potential remedies to such issues, including proposals that BAA divest itself of a number of its airports.

BAA is the current form of the British Airports Authority that was privatized in 1987 and acquired in July 2006 by a consortium led by Grupo Ferrovial SA. BAA currently operates all of the UK's principal airports, including those at Heathrow, Gatwick, Stanstead in the London area, Southampton in the southeast, and Edinburgh, Glasgow and Aberdeen in Scotland. While broadly speaking BAA accounts for "only" 60% of the UK's passenger movements, it accounts for 84% in Scotland, and 90% in the southeast.

Triggered by a reference from the OFT, under section 131 of the Enterprise Act 2002, the Commission launched an initial market study of UK airports in June 2006, in extensive consultation with the Civil Aviation Authority ('CAA'), to analyse whether the market functioned efficiently and to the benefit of consumers. While the Commission identified a number of market features giving rise to competitive issues, including aspects of the regulatory and planning systems, the principal cause for concern was the common ownership by BAA of all of the UK's principal airports.

The Commission observed that an important characteristic of an airport for passengers and airlines was its location relative to other airports. From a demand perspective, passengers regard geographically proximate airports as substitutes, and although passengers will use generally the closest available airport, they may look elsewhere for lower fares, a greater choice of destinations, or more conveniently scheduled flights. In particular, the Commission found that certain non-BAA regional airports imposed some competitive restraint on BAA airports, benefiting subscribers through lower airport charges and better service. The Commission, however, found that overall there was no meaningful competition between providers, leading it to conclude that the same airports might compete effectively were they under separate ownership.

In particular, the Commission identified almost no competition between BAA's London airports. While BAA had argued that the scope for competition was limited in the southeast because of the significant capacity constraints, the Commission concluded that lack of capacity (notably in relation to runways) necessarily diminishes the scope for potential competition between airports, and so directly impacts the standard of service in London. In other words, there is an absence of motivation for service providers to improve (or maintain, even) the service provided.

While the Commission acknowledged that the UK government's airport policies, and the broader planning system, had contributed to existing capacity constraints, if found that the primary responsibility for inadequate airport capacity lay with BAA. The Commission concluded that BAA's planning and investment in airport capacity and resources had been inadequate and short-termist; in particular, the absence of an effective long-term strategy for infrastructure had contributed materially to the lack of capacity in southeast England. As such, BAA's common ownership of London's airports was responsible for the prevalent capacity problems, and for the competition restrictions that flowed from them.

In considering appropriate remedies, and in conjunction with its provisional findings, the Commission published a notice in which it proposed the compulsory divestiture by BAA of airports in Scotland and the southeast of England. The Commission then canvassed views on which of BAA's Scottish airports (Edinburgh or Glasgow) would be best candidates for divestiture, while in the English southeast the Commission stated that *two* of these airports should be divested. The Commission also noted that divestment of Southampton airport alone would not be sufficient to remedy competition issues affecting Heathrow and Gatwick airports. In addition to opinions on the best airports to be divested, the Commission sought views on the optimal divestiture process and period, as well as on future airport regulation.

All comments on the Commission's proposals and, more generally, the provisional findings report, were required on or before September 17, 2008; the Commission is required to publish its final report no later than March 28, 2009. BAA announced preemptively on September 17, 2008 that it would sell Gatwick, while indicating its intention to retain Stanstead. Unsurprisingly, the Commission has refrained from any significant comment on BAA's announcement in advance of its final report.

Mergers and Acquisitions

OFT Refers De Minimis Merger Of Acid Manufacturers To The Competition Commission

On August 29, 2008, the OFT referred to the Competition Commission Nufarm Limited's acquisition of rival chemicals producer AH Marks Holdings Limited, having found that the merger resulted in a monopoly for the supply of two phenoxyacetic acids, MCPA and 2,4-D.

Nufarm acquired AH Marks on March 5, 2008; three months later the OFT initiated an investigation, observing that the merging parties overlapped in their supply of the concentrated forms of MCPA and 2,4-D. The OFT found that the products were essential in the manufacture of certain downstream herbicides, and that the parties were the only significant UK suppliers of these products.

Under sections 22(2) and 33(2) of the Enterprise Act 2002, the OFT may choose not to refer an investigation to the Competition Commission if it believes the market concerned is insufficiently important to justify further investigation (the '*de minimis* exception'). While this transaction technically fell within the *de minimis* exception (the parties' annual turnover did not exceed GBP 10 million (EUR 13 million)), the OFT opted to refer the case to the Commission for Phase II investigation given the high probability that the merger would result in consumer harm, and the stark reduction it would likely cause in market competition (given the parties' previous rivalry). There was also little evidence to suggest that entry or expansion by alternative or existing suppliers would constrain anticompetitive conduct by the Parties.

The OFT's approach to this matter highlights the considerable latitude afforded it by the *de minimis* exception, particularly since 2007, when the threshold was raised from GBP 400,00 (EUR 500,000) to GBP 10 million. Given this significant increase, it has become particularly important that the exception not be applied formalistically but rather that it be considered on a case-by-case basis.

It is notable that this particular merger investigation was launched by the OFT on its own initiative – an approach that has led to remedial action in no fewer than thirteen cases since the passing into force of the Enterprise Act 2002. In this way, the OFT has sought actively to improve its detection of un-notified mergers, having in March 2008 appointed a dedicated Mergers Intelligence Officer. It is also worth noting that the present case was launched as a consequence of dialogue between the OFT and the Australian Competition and Consumer Commission, which cooperation emphasizes the growth in unity of purpose, and intelligence-sharing, among international competition authorities.

Banking Crisis: State Intervenes In Lloyds/HBOS Transaction

On September 18, 2008, the Secretary of State for Business, Enterprise and Regulatory Reform ('SOS') issued a public intervention notice in response to Lloyds TSB's proposed acquisition of HBOS plc. SOS argued that government intervention in the case was in the public interest and justified to ensure the stability of the UK financial system. In doing so, SOS made clear its intentions to approve the merger, irrespective of any competition concerns.

Section 42 of the UK Enterprise Act 2002 permits SOS to issue an "intervention notice" in circumstances where mergers raise "public interest considerations." While section 58 limits intervention notices to transactions involving issues of national security, and media mergers involving issues of quality and plurality, SOS may also issue such notices for other types of transactions if it has simultaneously sought Parliament's approval for their categorization as within the public interest. In this case, SOS proposed a new category of banking or financial sector mergers arising from financial crisis. Once approved by Parliament, the new financial public interest consideration will apply not only to Lloyds/HBOS but also to any other banking or financial sector merger compelled broadly by crisis.

Inevitably, the Lloyds/HBOS merger raises significant competition issues, not least that it brings under a single umbrella four of the country's biggest lenders/investment firms (Lloyds, TSB, Bank of Scotland and Halifax), which together control 28% of the mortgage market, and an estimated 15.4% share of the savings market. This was not a novel situation for the OFT who, in tandem with the Commission, had identified previously significant unilateral and coordinated effects arising in the UK retail banking market. In 2001, for example, the Commission prohibited the acquisition by Lloyds of Abbey National because the proposed merger would have increased the share of the four largest banks (Barclays, HSBC, Lloyds and Royal Bank of Scotland Group) of the personal current account market from 72% to 77%, with Lloyds holding a 27% share. Additionally, the market was deemed conducive to tacit collusion.

In this case, however, SOS, from the beginning, stated its intention to approve the deal despite competitive concerns.[9] This has been viewed (and not surprisingly) as a waiver of competition rules for a sector whose popularity and stability underwent a dramatic downturn during the Autumn of 2008. It will be interesting to see whether further intervention by the UK government occurs as the anticipated consolidation of the UK banking sector progresses, and whether the Banking sector will continue to enjoy what many consider to be insupportably anticompetitive and preferential treatment.

CAT Upholds Competition Commission Prohibition Of BskyB Share Acquisition In ITV

On September 29, 2008, the Commission Appeals Tribunal issued its judgment on appeals by British Sky Broadcasting Group Plc. and Virgin Media Ltd. of the Commission's recommendation that BskyB's acquisition of a 17.9% stake in ITV plc be prohibited. BskyB challenged the finding that its minority shareholding conferred control under UK merger control rules. The CAT rejected BskyB's submissions on this point, and provided an explanation on how the control thresholds under UK merger control law are to be applied.

On November 16, 2006, BskyB an,unced its acquisition of a 17.9% stake in ITV. On February 26, 2007, the SOS issued a public intervention notice. Responding to concerns that the BskyB acquisition might lead to an adverse concentration of media rights in the UK, the SOS ordered the OFT and the Office of Communications ('OFCOM') to investigate the impact of BskyB's shareholding in ITV on competition and media plurality.

On May 24, 2007, the SOS referred the BskyB acquisition to the Competition Commission, which had to determine as a preliminary matter whether the transaction caused a 'relevant merger situation' – triggered by the prospect of two enterprises being brought under common ownership or control. The Commission concluded that BskyB's shareholding, though modest, was sufficient to confer a 'material influence' over ITV's commercial policy and competitive conduct – and so enough to confer control.

In reaching its conclusion, the Commission emphasised the importance and stature of BskyB within the industry, and noted that its influence was likely to concentrate the value attached to its views by other shareholders. More importantly, the acquisition would render BskyB the single largest shareholder in ITV, with voting rights double those of the next largest and with the power to block special resolutions. For a special resolution to pass, it is necessary to secure no fewer than 75% of the shares voted at a general meeting. While BskyB's 17.9% did not allow it an *absolute* veto, the Commission analysed historic voting patterns and found that BskyB's shareholding would have been sufficient to veto a special resolution at four of the last five general meetings. BskyB argued in its appeal that past voting patterns were an unreliable guide to future voting practices, and submitted evidence suggesting that future turnout at general meetings would be higher as a function of increased concentration in share ownership among leading UK companies.

The Commission found, moreover, that ITV would need, in the near future, to secure significant funding for strategic projects vital to the maintenance of its competitive position. Such funding would require approval by special resolution. Consequently, BskyB's effective veto would prevent ITV (were BskyB so minded) from pursuing important

9 In fact, since the end of the third quarter 2008, on October 31, the SOS issued a decision approving the transaction finding that the possible anticompetitive effects identified by the OFT were outweighed by the public interest in maintaining the stability of the UK financial system. See the NCR for the fourth quarter for a more detailed analysis on this decision.

strategic investments. BskyB maintained in its appeal, however, that ITV had access to alternative sources of funding, and that the Commission had overstated the importance of BskyB's shareholding.

BskyB further argued on appeal that the Commission had failed to satisfy the requisite standard of proof (namely 'balance of probability') by failing to consider the circumstances of each potential strategic investment by ITV over the coming two to three years.

The CAT rejected BskyB's appeal. It found that were the Commission obliged to consider every permutation potentially arising from a transaction, this would lead ultimately to the emasculation of the UK merger control system. Instead, the CAT held that the Commission was under a duty to ask itself only whether BskyB would have an opportunity to exercise material influence. Since this was the Commission's defining concern, the CAT judged the Commission's position to be well reasoned, vigorously evidenced and neither perverse nor irrational.

This decision highlights the pragmatic application by the Commission of the material influence threshold, with control analyses based on a scrutiny of case facts and company conduct *ex post facto*. Given the voluntary nature of the UK merger regime, and the increased frequency with which the OFT now launches its own-initiative investigations of non-notified transactions, merging parties are well advised to consider carefully whether a transaction might confer control – even when the target shareholding is low. Practical factors, and, in particular, the dispersal of shares and conduct at general meetings, must now be considered as significant analytically as the size of the shareholding itself.

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