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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").

Unilateral Conduct

SABAM Cleared Of Abuse Of Dominant Position

On September 10, 2009,[1] the Brussels Court of Appeals dismissed an appeal lodged by the company "3.14" against a June 14, 2007 order of the President of the Brussels Commercial Tribunal, in which the President had rejected a complaint by 3.14 alleging that the civil co-operative Société Belge des Auteurs Compositeurs et Editeurs ("SABAM") (the Belgian association of authors, composers and publishers) abused its dominant position by refusing to deliver authorizations for the reproduction of musical works to intermediaries unless they entered into a framework agreement with SABAM.

3.14, established in Brussels, specializes in the pressing or duplicating of artistic works on DVDs, CDs or CD-Rs. 3.14 generally acts as an intermediary between its clients (the owners of artistic work) and the pressing factories.

The case was initiated when, following an unannounced inspection by SABAM of 3.14, 3.14 refused to renew its framework agreement with SABAM "*for the pressing or duplicating of supports in subcontracting*". 3.14 insisted that, under the agreement, it could not be inspected without notice, and that the recent unannounced SABAM inspection, in particular, had occurred at an exceptionally busy period for 3.14. As a result, after expiry of the framework agreement, SABAM discontinued delivering pressing authorizations to 3.14. 3.14 then sought a declaration by the President of the Brussels Tribunal of Commerce:

- Declaring that SABAM had abused its dominant position, thereby infringing Article 3 APEC as well as Article 93 of the Law on Commercial Practices and Consumer Protection; and
- Ordering SABAM to cease refusing to deliver reproduction authorizations.

The President dismissed the claim, and 3.14 appealed that decision to the Brussels Court of Appeals.

The Brussels Court of Appeals, in its judgment, first recognized SABAM's *de facto* monopoly in the market for the protection of copyright on musical works. In noting that Article 3 APEC must be interpreted consistently with ECJ case law under Article 82, the Court then went on to cite the ECJ's *Magill* judgment holding that the exercise of an exclusive right of reproduction may, in exceptional circumstances, involve abusive conduct.[2] It also cited the *IMS Health* judgment for the proposition that "*in order for the refusal by an undertaking, who owns a copyright to give access to a product or service indispensable for carrying on a particular business to be treated as abusive, it is sufficient that three cumulative conditions be satisfied, namely, that that refusal is preventing the emergence of a new product for which there is a potential consumer demand, that it is unjustified and such as to exclude any competition on a secondary market*."[3]

The Court then examined whether SABAM's refusal to deliver reproduction authorizations to intermediaries that did not enter into a framework agreement with SABAM was justified and proportionate:

- The Court noted that the obligation imposed on intermediaries to conclude a framework agreement with SABAM was justified by association's need to ensure the intermediaries' respect for the copyrights owned by SABAM. The framework agreement contained various obligations concerning the efficient management of copyrights – which the Court viewed as non-substitutable by other less restrictive means. Accordingly, the refusal to deliver authorizations to intermediaries unless they were bound by a framework agreement with SABAM was viewed as justified and not abusive.
- Second, the Court analyzed the content of each of the contested provisions of the framework agreement and concluded that the system of control was proportionate to SABAM's legitimate aims. The fact that the obligations imposed by SABAM involved access by

1 Cour d'appel de Bruxelles, arrêt du 10 septembre 2009, 2007/AR/1907.

2 Case C-241/91, *RTE and ITP v.Commission (Magill)*, judgment of April 6, 1995, para. 50.

3 Case C-418/01, *IMS Health*, judgment of April 29, 2004, para. 38.

it to the intermediaries' confidential business information did not make the agreements abusive, since SABAM agents are bound by professional secrecy.

Finally, the court dismissed 3.14's claim of discriminatory treatment as between production intermediaries and producers. 3.14 had argued that it was competing with producers (*i.e.* the manufacturers of CDs and DVDs) and should have received comparable treatment from SABAM. The Court of Appeals disagreed, noting that 3.14's failure to request that SABAM bestow on it the benefits received by producers, precluded any finding of discrimination.

Auditorate Declares Belgacom's "Happy Time" Offer To Be Abusive

On September 29, 2009, the Auditorate submitted its report to the Council finding that Belgacom had abused its dominant position by engaging in a margin squeeze by offering its retail fixed line customers free calls to other fixed line customers at off-peak hours (known as Belgacom's "Happy Time" offer). This offer, combined with Belgacom's high wholesale rates, allegedly prevented other competitors from achieving a reasonable profit margin.

The Auditorate's report resulted from a complaint lodged by Tele2. The case will now be brought before a chamber of the Competition Council, before which Belgacom will be able to respond in writing to the allegations in the report. Both Tele2 and Belgacom will also be heard at an oral hearing. The Council will examine both the factual allegations and the Auditorate's application of the law and determine whether an infringement of competition law took place and what, if any, sanctions should be imposed.

Mergers and Acquisitions

Competition Council Rejects Auditorate's Kinepolis Médiacité Project Opinion And Allows Kinepolis To Proceed With A New Cinema Complex in Liège

On September 8, 2009, the Competition Council rejected the Auditorate's opinion on the creation of a new cinema complex in Liège, also known as Kinepolis' Médiacité Project, and held that Kinepolis did not need the Council's approval to proceed with the project.

On April 16, 2007, the Council had lifted certain conditions that were imposed on Kinepolis in 1997, following the merger of two Belgian cinema groups. These included a prohibition preventing Kinepolis from significantly increasing the number of screens or seats, and from acquiring or building new cinema complexes without the prior approval of the Council. On March 18, 2008, the Brussels Court of Appeals, however, required the Council to reconsider its April 2007 decision, and on October 1, 2008, the Council reversed itself and decided to maintain the existing conditions on Kinepolis – at least in part;for a period of three years, Kinepolis would continue to require the Council's approval for the construction or acquisition of new theatre complexes. The condition requiring Kinepolis to seek authorization from the Council prior to the expansion, renovation, or replacement of existing complexes was lifted, unless these amounted to a 20% increase in the number of seats or screens in the complex.

Kinepolis's "Médiacité" project involved the creation of a new complex to replace the nearby "Palace" complex, which Kinepolis was planning to tear down. The Auditorate was of the view that Kinepolis should have sought the Council's authorization for this project. The Council, in its decision, first analyzed whether Kinepolis' activity constituted the construction of a new theatre complex or merely the replacement of an old complex. Because it concluded that Médiacité was a replacement project, the Council found that Kinepolis was not required to seek authorization before proceeding with construction. It also noted that Kinepolis did not need to have reached a formal decision to close the previous complex at the moment when it decided to build the new complex. It was sufficient that Kinepolis decided thereafter that it would replace the previous complex. The Council also found that it was not necessary for Kinepolis to close the old complex before opening the new complex.

The Council also reviewed whether the Médiacité complex entailed an increase in seats or screens of more than 20% - as compared to the Palace complex. On this, it found that the new complex would contain 1,264 seats, slightly less than 20% more than the Palace complex, and that there was thus no need for Kinepolis to obtain the Council's approval before proceeding with the project.

DENMARK

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

Horizontal Agreements

High Court Reduces Fines on Coach Drivers' Association

On September 3, 2009 the High Court of Eastern Denmark reduced the fines imposed by the Frederiksberg City Court on the Danish Coach Drivers' Association (Danske Busvognmænd, "DB") for infringing section 6 of the Danish Competition Act from DKK 1 million (€134,000) to DKK 400,000 (€54,000). The personal fines imposed on two of DB's executives were both reduced from DKK 35,000 (€4,700) and DKK 25,000 (€3,400) to DKK 15,000 (€2,000).

The High Court upheld the City Court's finding that DB, along with its managing director and deputy managing director, had infringed section 6 of the Act (restrictive practices) by recommending in newsletters and a trade newspaper that member undertakings collect a fuel surcharge of 4% on coach services. However, the High Court reduced the fines imposed by the City Court on the basis that the infringement had little effect on competition, since it was limited in duration, and that members of the association did not comply with the recommendation to apply the surcharge.

High Court Doubles Fine on Danish Christmas Tree Growers Association

On September 24, 2009 the High Court of Eastern Denmark doubled a fine imposed by the Fredriksberg City Court on the Danish Christmas Tree Growers Association ("DCTGA") in February 2009 for infringing section 6 of the Danish Competition Act to DKK 400,000 (€54,000) but did not increase a personal fine of DKK 15,000 (€2,000) imposed on an association director.

Despite a 2001 DCA decision ordering the DCTGA to cease illegal information exchanges concerning the pricing of Christmas trees, further such exchanges occurred in 2005. As a result, in February 2009, the City Court found that the association had illegally issued guidance as to the pricing of Christmas trees in order to prevent members from undercutting each other and that this conduct amounted to a concerted attempt to standardize members' prices. On appeal, the High Court confirmed the findings of the City Court, but doubled the fine on DCTGA in light of the duration and severity of the infringement, the turnover of the undertakings involved, and the fact that the DCTGA had been made aware that such behavior was illegal 4 years earlier.

Vertical Agreements

Viasat's Terms For Distribution of Pay TV Channels Held to Violate Article 81

On September 30, 2009, the DCC issued a decision finding that Viasat, a media and television company owned by the Modern Times Group, infringed section 6 of the Act and Article 81 EC by adopting business terms which restricted the freedom of local cable networks to decide which TV channels to include in their television packages.

In Denmark, cable distributors offer households a choice of two or three channel packages. In networks with three packages, the first package (generally the cheapest) normally contains only "must-carry" and free-to-air TV channels. The second package includes the channels from the first package along with approximately 10 more (mainly pay channels). The third (and most expensive) package includes the channels from the first and second packages and up to 20 more. Due to bandwidth and price limitations, only a limited number of channels can be placed in the first and second packages. Placement in the second package is typically the most financially advantageous for commercial TV channels. Viasat's business terms stipulated that its channels TV3 and TV3+ had to be placed in a cable network's second package. On March 29, 2006 the DCC adopted a clearance decision holding that these business terms did not violate Article 81 EC or section 11 of the Act. However, in April 2007, the Danish Competition Appeal Tribunal annulled that decision on the basis that the DCC had incorrectly defined the relevant market. Moreover, the Tribunal held that Viasat's terms restricted competition by their very object.

The issue was remitted to the DCC, which conducted a new market analysis. The DCC decided that the relevant product market was the market for wholesale distribution of pay TV channels in cable networks in Denmark. Viasat was the principal player on the market, and the business terms in question had been adopted in all distribution agreements between Viasat and cable networks. The DCC concluded that Viasat's business terms violated section 6 of the Act and Article 81 of the EC Treaty by their object and effect, by restricting competition between TV channels for access to favorable package placements. As Viasat reserved the most favorable placements for its own channels, competing channels were squeezed out of the market.Cable networks were forced to create one large, expensive package, resulting in fewer or no consumer options. The DCC ordered Viasat to cease the imposition of package placements. Viasat has since lodged an appeal against DCC's decision before the Tribunal.

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 ("SAC").

Horizontal Agreements

SAC Imposes Fines In Asphalt Cartel Totaling € 82.55 Million

On September 29, 2009, the SAC delivered judgment in the asphalt cartel case, imposing fines on seven asphalt contractors totaling € 82.55 million, the highest fines imposed in Finland for cartel activities. The highest individual fine, € 68 million, was imposed on Lemminkäinen, which was found to be the leader of the cartel. The fines imposed on other asphalt contractors (VLT Trading, NCC Roads, Skanska Asfaltti, SA-Capital, Rudus Asfaltti and Super Asfaltti) ranged from € 50,000 to € 4.8 million each.

In 2007, the Market Court imposed fines in the same case totaling € 19.4 million. The SAC increased these fines by over 300%, with the total amount close to that requested by the FCA. Some of the fines approached the maximum fine under the Act on Competition Restrictions, i.e., 10% of a company's turnover from the year preceding the Market Court's judgment. In assessing the fines, the SAC observed that the matter was the most serious competition infringement ever handled in Finland. Appeals by six asphalt contractors seeking annulment of the Market Court's judgment were dismissed.

The SAC found that the seven asphalt contractors had participated in a nation-wide cartel from 1994 to 2002 involving allocation of customers and markets, illegal exchange of information, and bid rigging. The participants had infringed Sections 5 and 6 of the Act on Competition Restrictions (in force at the time of the cartel) as well as Article 81 of the EC Treaty. The SAC found that the cartel was continuing, national, and covered all contract types, whereas the Market Court had found that the cartel had been limited in duration, territory and type of contract covered.

The SAC found that, although the evidence presented by the FCA did not cover all individual events of the cartel, the possibility that such series of similar events took place simultaneously by chance could be ruled out. The Court said that it was essential to assess the evidence comprehensively, i.e., to study the connection between individual events within a certain time frame. Similar events and actions in the market may indicate a competition infringement if no other logical explanation for the activities can be found.

On the basis of the evidence presented by the FCA, the Court found that it could form an overall view of the activities that took place on the Finnish asphalt market during the years 1994–2002. The Court found that the most credible explanation for the series of events was that the seven asphalt contractors had, under Lemminkäinen's lead, agreed to allocate the Finnish asphalt market and had agreed the measures for implementing that allocation. This conclusion could be reached based on previous experiences of cartels and cartel investigations, observations of the witnesses, and the fact that similar activities took place simultaneously in the asphalt market all over Finland. According to the Court, the purpose of the cartel participants was to remove competition from the Finnish asphalt market.

The Court said that, in order to prove their innocence, the asphalt contractors should have – but were unable to - provide the Court with a credible alternative explanation for the observed conduct. The Court also took into account the fact that Lemminkäinen had not appealed the Market Court's decision in whole. The Court found that this further strengthened the impression that the cartel allegations were true and that it also affected the credibility of the asphalt contractors' witnesses who had denied the existence of a cartel.

FRANCE

This section reviews developments under the Part IV of the French Commercial Code on Free Prices and Competition, which is enforced by the Competition Council ("Council") and the Minister of the Economy ("Minister").

Horizontal Agreements

Cour De Cassation In Part Overturns Paris Court Of Appeals' Judgment On Collective Dominance

On July 7, 2009, the Cour de Cassation, the highest French appellate court, partially annulled a May 6, 2008 judgment of the Paris Court of Appeals in the "Corsican cement" case.[4] While it confirmed the judgment's findings regarding anticompetitive agreements reached between cement manufacturers Lafarge and Vicat and their main distributors, the Cour de Cassation annulled the section of the judgment relating to the cement manufacturers' alleged abuse of collective dominance.

Following a referral by the Minister in June 2000, the Competition Council had rendered a decision in the case on March 12, 2007, imposing a total fine of €25 million on the cement manufacturers as well as their primary distributors. In particular, the Council found that, in two agreements, Lafarge, Vicat, and their key distributors had allocated the market for the supply of cement in Corsica and prevented other companies from competing. Separately, the Council concluded that Lafarge and Vicat's practice of rewarding wholesalers who purchased only domestic (rather than imported) cement constituted an abuse of the companies' collective dominance on the Corsican market.

Both cement manufacturers appealed the Council's decision to the Paris Court of Appeals, which reduced the fine on the grounds that the practices had a less significant impact on competition in Corsica than the Council had initially found.

4 Cour de Cassation – 7 July 2009, Société Vicat et Société Lafarge ciments c. Ministre de l'économie, des finances et de l'emploi, et autre (Bulletin 08-15.609; 08-16.094).

The Cour de Cassation confirmed the Paris Court of Appeals' judgment with respect to the cartel infringements. The Court, however, annulled the section of the judgment on abuse of collective dominance finding that the Court of Appeals had failed to show whether, in the absence of the anticompetitive agreements between the cement companies and their customers, Lafarge and Vicat could have behaved completely independently from their customers and collectively abuse their dominant position in the supply of cement. In other words, the Cour de Cassation found a contradiction between the cement manufacturers' apparent need to enter into vertical agreements with their clients and the notion of a dominant position, which implies that the manufacturers' ability to behave independently and abusively without the assistance of their customers. Thus, the Cour de Cassation held that the Court of Appeals' judgment was legally flawed.

Mergers and Acquisitions

The French Conseil d'Etat Clarifies The Definition Of Collective Dominance Under French Law

On July 31, 2009 the Conseil d'Etat rejected an appeal[5] by Société Fiducial Audit and Société Fiducial Expertise against a decision of the Minister to authorize accounting firm Deloitte's acquisition of sole control of BDO Marque et Gendrot (the "Decision").[6] In its judgment, the Conseil d'Etat focused on the notion of collective dominance and, for the first time, applied the criteria set out in the European Court of First Instance's *Airtours* judgment.[7]

The underlying transaction involved the acquisition of a second tier accounting firm by one of the "Big Four" international auditing and accounting firms. Given the concentrated nature of the market, the Minister assessed whether the transaction would increase the risk of collective dominance by the "Big Four. "A key issue was whether the removal of one of the four second-tier firms from the market would reduce customer choice or reduce constraints on coordination between the "Big Four. "The Minister concluded that no such concerns arose. On May 23 and August 23, 2007, Société Fiducial Audit and Société Fiducial Expertise (two second tier firms in competition with BDO Marque et Gendrot) appealed the Decision.

The appellants first argued that the Decision was insufficiently reasoned with respect to potential anti-competitive effects on the market for contractual audit and public accounting for major companies. Having found that collective dominance was not likely on the highly concentrated segment for legal audit, the Minister concluded that the same reasoning would apply in the related contractual audit and public accounting sectors, since supply was less concentrated, services were less homogeneous, and prices were less transparent in those sectors. The Conseil d'Etat upheld the Minister's reasoning and found that he had sufficiently explained the link between the two segments.[8]

Second, the appellants argued that the Decision was flawed because the Minister had not analyzed whether the *Airtours* criteria for collective dominance were met. These criteria can be stated as follows: for a transaction to raise collective dominance concerns, (i) the market at issue must be transparent, (ii) competitors must be able to engage in retaliatory measures against one competitor's departure from the group of competitors' common policy, and (iii) countervailing factors (consumers, competitors or potential entrants) must not jeopardize the results expected from the competitors' common policy. The Conseil d'Etat held that the Minister had analyzed the characteristics of the market and the transaction at issue in sufficient detail. It also found that the Minister could rely solely on the conclusion that the third *Airtours* condition was not fulfilled – given the significant competitive constraints exercised by second-tier firms –in finding that the transaction was not likely to create or strengthen a collectively dominant position. There was no need to arrive at a conclusion as to the first two conditions. The Conseil d'Etat thereby recognized the cumulative nature of the three *Airtours* conditions. Regulators are entitled to rely on a finding that just one of the conditions is not fulfilled in order to conclude that concerns as to collective dominance do not arise.

The appellants also cited the *Impala* judgment[9] arguing that the Minister had failed to conduct a prospective analysis of the effects of the transaction as regards the potential for the creation of collective dominance. The Conseil d'Etat rejected this argument, holding that the Minister had assessed the foreseeable effects of the notified transaction under the three *Airtours* criteria. In particular, the Minister had rightly concluded that even if some uncertainty remained as to the degree of transparency on the market and the possibility of implementing an efficient retaliatory system, the segment still remained under competitive pressure from second-tier firms (and in particular from the firm Mazars) post-transaction.

5 Conseil d'Etat – 31 July 2009, Société Fiducial Audit, Société Fiducial Expertise.

6 Decision No C2006-91 of 15 December 2006.

7 Case T-342/99, *Airtours plc v. Commission*, [2002] ECR II-02585.

8 The Competition Authority is however under no requirement to provide reasoning for its authorization decisions unless it is conditioned on the parties offering some commitments.

9 Case T-464/04, *Independent music publishers and labels association (Impala) v. Commission*, [2006] ECR II-02289.

The Conseil d'Etat thus upheld the Minister's assessment and concluded that post-transaction, three independent firms would continue to exercise a competitive constraint on the "Big Four" accounting firms.

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

Dairy Farmers Appeal In Boycott Case Rejected

On September 9, 2009, the Düsseldorf Court of Appeals upheld an FCO decision finding that the Federal Dairy Farmers Association (Bundesverband Deutscher Milchviehhalter, "BDM") initiated an illegal collective boycott of creameries.[10]

In April 2008, German retailers negotiated a reduction in milk prices from creameries. BDM claimed that this reduction was unfair, as farmers would be unable to recover their costs at the new price level. In order to achieve a standard minimum price, BDM organized a 'milk strike' in May 2008, by requesting dairy farmers to cease supplying creameries. In November 2008, the FCO issued a decision holding that BDM's actions constituted an infringement of section 21(1) GWB, which prohibits associations of undertakings from calling for boycotts of goods or services. The FCO did not impose a fine, but warned BDM that it would initiate further proceedings if BDM infringed the competition law again in a similar fashion.

BDM appealed the decision, arguing that it is not subject to Section 21, as it does not constitute an "*association of undertakings*" but is rather a trade union of dairy farmers as "*home workers*. "The Court of Appeals rejected this argument, holding that dairy farmers are self-employed and commercially responsible for the marketing of their products, and are therefore not in the same situation as employees. The Court further held that it was irrelevant whether some of BDM's members had already decided to refuse to supply creameries prior to BDM's call for the boycott. Section 21(1) GWB prohibits calling for a boycott as such, regardless of whether the boycott is implemented. Finally, the Court held that competition law protects the process of competition, even if it leads to prices that do not cover costs. Thus, BDM did not have the right to engage in anti-competitive measures in order to achieve higher prices.

Vertical Agreements

FCO Prohibits Laboratory Chemical Distribution Agreement

On July 14, 2009, the FCO rendered a declaratory decision finding that a distribution agreement for laboratory chemicals between Merck KGaA ("Merck") and VWR International Europe BVBA ("VWR") infringed Article 81 EC and Section 1 GWB.[11] While the FCO did not impose a fine on either company, it ordered Merck to terminate the infringement within 30 days.

VWR was formerly Merck's internal distribution unit, until it was sold to a private equity company in 2004. At the time of the sale, Merck and VWR concluded exclusive agreements for a number of European countries, including Germany. Under the terms of these agreements, Merck was prohibited from appointing distributors other than VWR, and VWR was required to purchase laboratory chemicals exclusively from Merck.

In the FCO's view, these agreements fell within the scope of Article 81(1) EC and Section 1 GWB. As Merck's share was above 30% in the relevant markets, the agreement could not benefit from the European Commission's block exemption regulation for vertical restraints. Further, the FCO was not convinced that the agreement qualified for individual exemption under Article 81(3) EC or Section 2 GWB, as the parties cut off independent wholesalers formerly serviced by Merck and forced them to purchase products from a competitor, namely VWR. In addition, the FCO found that Merck had infringed Section 20 GWB (abuse of a dominant position) because it had discriminated against other wholesalers by only supplying VWR. The parties have appealed the decision to the Düsseldorf Court of Appeals.

FCO Imposes Fines For Resale Price Maintenance And Restricting Internet Trade

On September 25, 2009, the FCO imposed a € 11.5 million fine on CIBA Vision Vertriebs GmbH ("CIBA"), the market leader for contact lenses in Germany.[12]

The FCO found that CIBA violated Article 81 EC and Section 1 GWB by restricting Internet sales of contact lenses. In order to achieve this

10 Oberlandesgericht Düsseldorf, Beschluss of September 9, 2009, Case VI-Kart 13/08 (V).

11 FCO decision of July 14, 2009, Case B3-64/05, available in German at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell09/B3-64-05.pdf?navid=35.See also the English summary of this case at http://www.bundeskartellamt.de/wEnglisch/download/pdf/Fallberichte/B3-64-05-E.pdf?navid=28

12 FCO decision of September 25, 2009, Case B3-123/08, available in German at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell09/B3-123-08.pdf.See also the English press release at http://www.bundeskartellamt.de/wEnglisch/download/pdf/Presse/090925_Ciba_Vision-E_final.pdf

restriction, CIBA entered into agreements with new retailers prohibiting sales of certain products through the Internet. CIBA also agreed with several Internet resellers that they would only sell to final consumers, and it agreed with the online auction site eBay that it would remove offers for CIBA's contact lenses. Further, CIBA operated a system to monitor the retail prices of Internet resellers. If prices fell below a certain level relative to CIBA's suggested retail price, CIBA's staff contacted the sellers and tried to persuade them to increase prices. CIBA also offered preferential terms to its top 10 customers, who did not generally undercut the recommended retail prices by more than 10-15%. The FCO found that, by and large, CIBA's efforts to prevent significant undercutting of its recommended retail prices were successful.

While the FCO acknowledged that merely recommending retail prices is lawful, it held that CIBA's active approach conveyed the message that the recommendations were in fact binding. Therefore, the FCO found that retailers did not adhere to the recommended retail prices unilaterally, but rather as the result of an illicit vertical agreement or concerted practice with CIBA.

Mergers and Acquisitions

FCO Clears Acquisition Of Elmshorner Nachrichten By Schleswig-Holsteiner Zeitungsverlag

On 9 July, 2009, the FCO cleared the acquisition of a subscription daily newspaper ("Elmshorner Nachrichten") and a free advertising newspaper ("Die Woche im Blickpunkt") by publisher Medien Holding Nord ("MHN") from Axel Springer Group ("AS"), Germany's largest publishing house.[13]

The transaction affected the markets for local and regional daily newspapers (so-called "reader markets") as well as the related advertising markets in Northern Germany. MHN owned several local and regional newspapers in the areas affected by the merger, as well as in neighboring areas. The FCO held that MHN held a dominant position in the Pinneberg and Steinburg districts, which would be strengthened by the merger, as MHN would then also control its only potential competitor, Elmshorner Nachrichten, which was distributed in the neighbouring town of Elmshorn.

Nevertheless the FCO cleared the transaction by applying the "balancing clause" of Section 36(1) GWB. This provision enables the FCO to clear a transaction despite the creation or strengthening of a dominant position, based on efficiencies in markets other than the ones affected by the transaction. The FCO was convinced that the transaction would lead to sufficient improvements in the "reader market" in Elmshorn because it would result in that region's only two dailies being owned by different companies. After the sale of Elmshorner Nachrichten, AS would still be present in that market, but would now face competition from MHN. The FCO considered this improvement more significant than the loss of potential competition in Pinneberg and Steinburg.

FCO Clears Acquisition Of Eberbacher Zeitung Based On Failing Company Defense

On July 23, 2009, the FCO cleared the acquisition of Eberbacher Zeitung ("EZ"), a subscription daily newspaper distributed in the Rhein-Neckar district, by its only competitor Rhein-Neckar-Zeitung GmbH ("RNZ"). While the transaction would combine the only two players active in the market and thus create a dominant position, the FCO cleared the transaction based on the failing firm defense.[14]

The failing firm defense is only available when (i) the liquidation and market exit of the target is the only alternative to the contemplated acquisition; (ii) there is no alternative acquirer; and (iii) absent the contemplated acquisition, the failing company's market share would in any event be absorbed entirely by the prospective acquirer. EZ's previous owner had already filed for bankruptcy, which evidenced that EZ's liquidation was imminent. There was also no alternative acquirer as none of the 20 other publishers contacted by the liquidator had indicated any interest. Further, as RNZ was the only competitor, EZ's readers would in any event have migrated to RNZ.

Policy & Procedure

FCO Publishes Preliminary Report On The Fuel Sector Inquiry

On July 2, 2009, the FCO published a preliminary report on its long-term inquiry into competition in German fuel markets.[15] The FCO's principal conclusion is that competition in this sector is significantly impeded due to a high degree of horizontal and vertical concentration. Due to the oligopolistic market structures prevailing on German fuel markets, the FCO stated that any future mergers involving fuel companies would require special scrutiny in order to prevent further concentration.

13 FCO decision of July 9, 2009, Case B6-38/09, available in German at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion09/B6-38-09.pdf?navid=46.

14 FCO decision of July 23, 2009, available at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion09/Kurzberichte/B6-67-09-Fallbeschreibung.pdf?navid=45;the case summary is also available in English at http://www.bundeskartellamt.de/wEnglisch/download/pdf/Fallberichte/B06-067-09-engl.pdf?navid=35

15 In May 2008 the Bundeskartellamt launched a long-term inquiry into competition in the fuel markets.The interim report is available at http://www.bundeskartellamt.de/wDeutsch/download/pdf/2009-07-02%20Zwischenbericht_SU_Kraftstoffe.pdf.

In addition, the FCO concluded that sales volumes and prices at fuel stations were very transparent and facilitated certain pricing patterns (such as higher prices at the beginning of holiday seasons) without the need for collusion. The FCO stated its intention to closely monitor the efforts of oil companies and fuel station lessees to collect information about competitors' prices, and to intervene in the case of competition law infringements. The FCO also intends to investigate complaints about excessive fuel prices charged by integrated oil companies to independent fuel stations.

Finally, the FCO referred to the intention of Tank & Rast GmbH (which holds 90% of German motorway concessions for petrol stations and rest stops) to change its method for awarding rights to supply fuel stations located on federal highways in Germany. In the past, such awards were based on the fuel suppliers' shares of sales to normal "street" fuel stations. According to the FCO, Tank & Rast intends to set up a bidding process in 2013. The FCO will monitor this process to ensure that it is implemented in a non-discriminatory manner.

The FCO concluded its preliminary report by listing certain issues it will examine as part of the inquiry in the future, including the use of card systems for cashless payment at fuel stations, agency agreements, and econometric analyses of fuel prices (in order to assess whether fuel prices react more quickly to increasing as opposed to decreasing crude oil prices).

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.

Horizontal Agreements

The HCC Fines Book Wholesalers For Abuse Of Collective Dominance

On July 22, 2009, the HCC fined two book wholesalers, Apollon and Efstathiadis, a total of € 4.9 million for abuse of their collective dominant position on the foreign language teaching-book market.[16] The investigation resulted from a complaint in 2003 by the book retailer, Floras, alleging that Apollon was abusing its dominant position on that market.

The HCC identified a market for the wholesale trade and distribution of foreign language teaching-books for all languages and levels, as well as the audiovisual educational material (*e.g.*, CDs or DVDs) that accompanied such books. The HCC found that the market was composed of three tiers: publishers (Greek and foreign); wholesalers; and retailers. Retailers purchase books mainly from wholesalers, but wholesalers also sell books to other wholesalers, especially books for which they have the exclusive distribution rights. The HCC found that there had recently been an increase in exclusive arrangements between publishers and wholesalers, and that Apollon and Efstathiadis had the highest number of such arrangements. Publishers sell to wholesalers at a discount, as do wholesalers to their customers. The HCC found that Apollon had reduced its discount rates to its customers during the years 2000-2005, with the result that wholesale prices had increased. Retail prices of the books of Greek publishers are fixed by law.

The HCC found that the market shares held separately by Apollon and Efstathiadis for the period under examination (2002-2006) were not sufficient to establish individual dominance, but that their combined market share for this period, ranging between 55.8% and 61.7% was sufficient that, if these firms had followed a coordinated commercial practice and imposed common commercial terms, a collective abuse of dominance could be established.

The HCC referred to the judgment of the CFI in *Airtours* (Case T-342/99), which identified three conditions necessary for the existence of collective dominance. First, the coordinating firms should be able to monitor to a sufficient degree whether the terms of coordination are being adhered to. Second, there should be some form of credible deterrent mechanism that could be activated if deviation was detected. Third, the reactions of outsiders, such as current and future competitors not participating in the coordination, as well customers, should not be able to jeopardize the results expected from the coordination.

Analyzing the market on this basis, the HCC found that the market was characterized by limited competition, resale price maintenance (as publishers recommended retail prices which were in essence binding), transparency of commercial terms, and harmonization of such terms and discounts. The contractual terms common to both included: (i) that customers notify orders by March/April of each year; and (ii) that the percentage of the discounts granted was not determined exclusively on the basis of their customers' turnover but also by reference to other factors. In such circumstances, the HCC said, the exclusive distribution agreements of A& E should be assessed severely.

The HCC also found that a relation of economic influence had developed between Apollon and Efstathiadis, such that, if one were

16 Decision No.452/V/2009.

to deviate from the collective behaviour, the other could impose such economic terms and pressure as to compel a return to the agreed behavior. The exclusivity rights held by each of Apollon and Efstathiadis (for books which they might sell to each other) served as a negotiating weapon to deter deviation from the abusive behaviour.

The HCC therefore found that Apollon and Efstathiadis had abused a position of collective dominance. After assessing the duration (2002-2006) and the gravity of the infringement, and taking into account the circumstance that the position of collective dominance was not the result of a concerted practice, it fined Efstathiadis € 2.2 million and Apollon € 2.7 million, and ordered them to cease and desist from such practices in the future.

Policy and Procedure

Amendments To The Greek Competition Act 703/1977

Law 3784/2009 has introduced important changes to the Greek Competition Act 703/1977. These changes concern provisions of substantive law, the composition and powers of the HCC, and the fines and sanctions that the HCC can impose for breach of the law. Law 3784/2009 entered into force on September 7, 2009. Several of the most important changes are summarized below.

Amendments in Substantive Legal Provisions

- In accordance with EC Regulation 1/2003, individual exemptions for agreements falling under Article 1(1) of 703/77 -- the equivalent of Article 81 EC (now Article 101 TFEU) – have been abandoned and self-assessment has been introduced. Accordingly, agreements, decisions, and concerted practices falling under Article 1(1) but satisfying the conditions of Article 1(3) -- the equivalent of 81(3) EC -- are valid without the requirement for a prior decision to that effect.
- Post-completion merger notification is still required, but the information to be notified is substantially reduced.
- With respect to pre-completion merger notification, in the event that the HCC enters into a full, in-depth investigation of the transaction and notifies the undertakings concerned, the latter may within 15 days from such notification propose remedies eliminating the anti-competitive effects of the concentration.

Amendments Relating to the Composition and Powers of the Commission

- The HCC must going forward adopt a decision within six months of the assignment of the case to a rapporteur.
- Cases involving prohibited agreements, abuse of dominance, and mergers will be examined by three-member divisions of the HCC, while the full nine members of the HCC (reduced from 11) will only hear cases of major importance.
- The HCC's investigatory powers for the collection of evidence have been further expanded, with express provision for the collection of electronic data, including from outside the investigated premises.

Amendments Regarding Fines and Other Sanctions

- A minimum sentence of six months imprisonment has been introduced for those persons or representatives of legal entities who enter into agreements or concerted practices caught by Article 1 of Law 703/77 or Article 81 EC (now Article 101 TFEU).
- The fines for violations of antitrust law have been increased from €3,000-€30,000 to €15.000-€150.000.
- The minimum sentence for obstructing the HCC's investigation, for refusing to provide information, or for providing false information has been doubled from three to six months imprisonment, and the fine has increased to €50,000.

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

Vintners Association Found Guilty Of Contempt For Breach Of Undertaking On Price Recommendations

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.[17]

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 their members.

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

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 was in breach of their previous undertakings to the High Court.

In their defense, the LVA and VFI argued that the recommendation constituted a mere price "ceiling" which would have no effect on actual prices charged by customers. The High Court rejected this argument. Justice McKechnie 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. The LVA and VFI issued a joint press release announcing an immediate end to the price freeze. Members of the two organizations were informed in writing of the withdrawal of the recommendation and were requested to remove all public advertising of 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).

Mergers and Acquisitions

Council Of State Finds That EU Commission Had Jurisdiction Over Insurance Merger Approved By The Authority In 2002

On July 16, 2009, the Council of State (the "Council"), Italy's highest administrative court, ruled that the merger between Italian insurance companies Società Assicuratrice Industriale S.p.A. ("SAI") and La Fondiaria Assicurazioni S.p.A. ("Fondiaria"), that had been approved by the Authority in 2002, should have been subject to the jurisdiction of the European Commission. The Council annulled the Tribunal's judgment that had upheld the Authority's jurisdiction over the transaction and declared that the European Commission actually had jurisdiction to review the transaction.[18]

In 2002, SAI and Fondiaria notified a concentration involving, what was in the parties' view, SAI's acquisition of sole control of Fondiaria. The Authority, however, viewed that transaction as involving Premafin (SAI's parent company) and Mediobanca Banca di Credito Finanziario S.p.A. ("Mediobanca") acquiring joint control of a merged SAI and Fondiaria entity. Because Mediobanca also exercised *de facto* control over Generali Assicurazioni S.p.A. ("Generali"), the merged entity's leading competitor in the affected markets, the Authority considered the transaction as raising significant competitive issues and decided, in October 2002, to commence a Phase II investigation.[19]

Mediobanca appealed the decision to open Phase II, as well as the Authority's ultimate conditional clearance decision,[20] to the Tribunal on the grounds that the transaction was actually under the European Commission's jurisdiction, and not under the Authority's jurisdiction to review. Mediobanca argued that given the Authority's conclusion that Mediobanca held *de facto* control over Generali (within the meaning of Article 5.4 of the Merger Regulation), the turnover of Generali should have been taken into account for purposes of determining whether the transaction fell within the Authority's jurisdiction. The Tribunal, however, rejected Mediobanca's arguments and concluded that turnover of undertakings under *de facto* control need not always be taken into account for jurisdictional purposes.[21] The Tribunal emphasized that the *de facto* control of Mediobanca over Generali remained uncertain until a later stage of the investigation (given that Mediobanca denied actually holding such control throughout the proceedings). The Tribunal thus held that the Authority had correctly disregarded Generali's turnover, and considered that the assessment of control under Article 5.4 requires a prompt assessment to be carried out at the outset of an investigation, without regard to circumstances possibly emerging during the course of the review.

The Council overturned the Tribunal's judgment, holding that Article 5.4 should be objectively applied and include the turnover of entities under the parties' *de facto* control, even where control is not established until a later stage in the proceedings. Any other conclusion, in the Council's view, would create a new requirement of

18 Judgment of 16 July 2009, n. 4448/09, *Mediobanca S.p.A. v. Autorità Garante della Concorrenza e del Mercato*.

19 Case C5422B, *Sai-Società Assicuratrice Industriale / La Fondiaria Assicurazioni*, 10 October 2002, Boll. 40/2002.

20 Case C5422B, *Sai-Società Assicuratrice Industriale / La Fondiaria Assicurazioni*, 17 December 2002, Boll. 51-52/2002.

21 Judgment of 20 February 2004, n. 1631, *Mediobanca S.p.A. v. Autorità Garante della Concorrenza e del Mercato*.

"*awareness of the control relationship from the outset of the investigation*," which would clearly be extraneous to and not be consistent with the body of rules and principles set forth under the Merger Regulation. The Council therefore found that Generali's turnover should have been included for purposes of the jurisdictional analysis, and that the European Commission (and not the Authority) had jurisdiction to review the concentration.

As a practical matter, it is unlikely that this decision will have significant effects on the outcome of the transaction. This is particularly the case given that, in 2003, the Authority found that Mediobanca no longer exercised *de facto* control over the merged SAI/Fondiaria entity.[22] Accordingly, although the Council found that the concentration should have been subject to Commission jurisdiction in 2002, that is no longer likely to be true today.

NETHERLANDS

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

Horizontal Agreements

NMa Imposes Fine On Former Director For Not Cooperating With Cartel Investigation

On July 9, 2009, the NMa imposed a fine of €150,000 on a former director of an unidentified company for failing to cooperate with a cartel investigation in an unidentified industry.[23]

The former director had refused to cooperate with the NMa's cartel investigation, invoking the right to remain silent as provided for under Article 53 of the Competition Act and claiming that the requested information was subject to a duty of confidentiality imposed on him by his former employer.

The NMa rejected these arguments noting that:

- On the basis of Articles 5:16 and 5:20 of the Dutch Administrative Law Code, all individuals are obliged to cooperate with a cartel investigation;"all individuals" must be interpreted as meaning all individuals involved in activities to which the investigation relates. The duty to cooperate with a cartel investigation therefore also applies to former directors of a company under investigation.
- Under Article 53 of the Competition Act undertakings suspected to have committed competition law infringements have the right to remain silent. A Dutch court has ruled that this right extends to all individuals *currently* belonging to the undertaking. Consequently, the NMa held that only current employees have the right to remain silent, but that this is not the case with respect to former employees.
- Former directors cannot invoke a post-contractual duty of confidentiality, as such a duty cannot supersede a rule of public order, such as the duty to cooperate in a cartel investigation.

Accordingly, the NMa found that by refusing to answer the authority's questions, the former director had infringed his duty of cooperation. Although the NMa is able to impose a fine of up to €450,000 for such an infringement (depending on the financial situation of the defendant), the NMa limited its fine to €150,000 based on its estimate of the former director's financial situation (the former director himself refused to provide any information regarding his financial situation).

NMa Imposes Fines In Painting Cartels

On August 21, 2009, the NMa imposed fines totaling €57,000 and €104,000 respectively in two separate painting company cartel cases. The painting companies involved, along with the "calculation agency" Spegelt, were found to have infringed the Competition Act by rigging bids and allocating customers/jobs. The first case (involving the painting companies Coolen, Van der Kruijs, Liebregts and Van Tour) concerned a tender by a local sports company[24] while the second case (involving Coolen, Dirks Deurne and Van de Looij) concerned a tender by a construction company.[25]

In both cases the painting companies met at the premises of Spegelt, an agency used by the companies to assess the costs of complex projects. All tender recipients participated and agreed on which company would offer the lowest price and thus win the contract. The participants also agreed to divide other projects amongst themselves, and fixed the prices at which employees and materials would be made available to each other. This, the NMa concluded, represented a serious violation of the Competition Act.

The parties claimed that they only met at Spegelt to discuss necessary practicalities regarding the division of work for very large projects that could not have been carried out by one company alone and that

22 Case C5422B, *Sai-Società Assicuratrice Industriale / La Fondiaria Assicurazioni*, 12 June 2003, Boll. 24/2003.

23 Case 6678/30, *[X]*, NMa Decision of July 9, 2009.

24 Case 6492_1/146, *De Tongelreep*, NMa Decision of August 21, 2009.

25 Case 6430_1/131, *Meiveld*, NMa Decision of August 21, 2009.

were thus assigned to a consortium of companies. The NMa rejected this argument stating that if the parties wanted to have contact with Spegelt for cost-calculation or other purposes, each company should have contacted Spegelt individually without the other competitors involved.

With respect to Spegelt, which was not itself active on the painting company market, the NMa followed the reasoning in the *AC-Treuhand* case,[26] in which the European Court of First Instance found that an undertaking that participates in the implementation of a cartel without itself being active on the relevant market, can be found to have been a participant in a cartel if that undertaking actively and consciously contributes to the illegal agreement between the parties active on the relevant market. Given Spegelt's active participation in both cartels here, Spegelt was found to have infringed the Act and fined in both cases.

Mergers and Acquisitions

NMa Imposes First Ever Fine For Providing Incorrect And Incomplete Information In A Merger Notification

On August 5, 2009 the NMa imposed a €468,000 fine on soft drink manufacturer Refresco Holding B.V. ("Refresco") for providing inaccurate and incomplete information in the regulatory notification of its planned merger with Schiffers Food B.V.[27] The fine amounted to 0.22% of the Company's Dutch turnover

According to the NMa, the authority had to issue three requests to Refresco before it finally received accurate and complete information on the company's production capacity. When the NMa finally received the correct information, Refresco's production capacity was uncovered to be substantially greater than first indicated in the company's notification.

This is the first fine imposed by the NMa under its expanded fining authority, that came into force on October 1, 2007. Under the new rules, the maximum fine that may be imposed in circumstances such as these was increased from€22,500 to €450,000 or to 1% of the undertaking's annual Dutch turnover (whichever is greater).

NMa Imposes Conditions On De Persgroep's Acquisition of PCM

On July 1, 2009, the NMa conditionally cleared the Belgian media-company De Persgroep N.V. ("De Persgroep")'s acquisition of 58.5% of the shares (and thus sole control) of Dutch publisher PCM Holding ("PCM").[28]

De Persgroep is the publisher of the Dutch newspaper Het Parool, while PCM Holding publications include the Dutch newspapers *De Volkskrant, Trouw, NRC Handelsblad* and *nrc.next*.

In assessing the competitive effects of the transaction, the NMa focused on the four regions in the Netherlands where the overlap of the parties' activities was the greatest (Amsterdam, Haarlem, Hilversum and Almere[29]). In three of the four regions, the parties combined market share was below 30-40% in the relevant product markets, and thus, in the NMa's view, not likely to raise competitive concerns. In the Amsterdam region, however, the merged entity's market share was 50-60% both in the market for national and regional newspapers. Moreover, the second largest competitor, De Telegraaf Media Groep, had a market share in the region of 40-50%. Consequently, the collective market share of the two largest competitors would have been between 90 and 100%. The NMa also stressed that its market investigation revealed that *Het Parool*'s closest competitors were *De Volkskrant* and *NRC Handelsblad* (both PCM publications). As a result, the NMa found that the transaction was likely to negatively effect competition and lead to an increase in prices in the Amsterdam region.

To resolve these competition concerns, the parties adapted the merger, and committed to divesting *NRC Handelsblad* and *nrc.next* to an independent third party, to be approved by the NMa. The NMa accepted the parties' argument that a well-suited buyer for these newspapers could be found (in large part because there had already been significant interest expressed by potential buyers), and approved the acquisition subject to commitments.

NMa Approves Hospital's Acquisition of Ambulance Company

On July 24, 2009, the NMa approved hospital company AMC's acquisition of VZA Groep B.V. ("VZA"), which provides primarily ambulance services.[30]

Interestingly, the NMa consulted (but chose not to follow the advice of) the Dutch Health Care Authority ("Nza") before issuing its approval. The NZa recommended that the concentration be prohibited on the basis that:

26 *AC-Treuhand AG v Commission*, Case T-99/04, July 8, 2008.

27 Case 6687/62, *Refresco*, NMa Decision of August 5, 2009.

28 Case 6666/76, *De Persgroep – PCM*, NMa Decision of July 1, 2009.

29 These are four of the "Cebuco-territories," which are territories in the Netherlands defined by Cebuco, the marketing organization of Dutch newspapers.

30 Case 6704, *AMC-VZA*, NMa Decision of July 24, 2009.

- The transaction would harm the public interest, resulting in a deterioration of the quality, availability, and price of ambulance services; and
- The merged entity would be in a position to abuse its dominant position on the ambulance services market by leveraging that position to other markets in which AMC is active.

The NMa chose not to adopt these recommendations for two reasons.

- First, the NMa considered that the merged entity's ability to influence the flow of patients toward particular hospitals was limited. The scope and rules of ambulance services are strictly defined, and ambulance service personnel must act in accordance with these rules. In particular, ambulances must take patients to the nearest hospital with the capacity and ability to provide suitable care. The only exception to this rule is that patients may express a preference for a particular hospital – in which case the ambulance operators may abide by this patient request where it is medically safe to transport the patient to the requested hospital.
- Second, the NMa concluded that the merged entity would not likely have any significant incentives to influence patient flow. Although additional patients at the AMC hospital would increase the hospital's turnovers, only a very small number of such patients were likely to be delivered by AMC's new ambulances given that: (i) as a rule, only 0-5% of a hospital's patients arrive by ambulance; and (ii) in the few instancces where ambulance personnel could legally choose between the AMC hospital and another nearby hospital, the patient could still opt a different hospital. The NMa also considered that AMC was limited by its capacity for new patients, and that any attempts to influence the flow of patients could hurt both the hospital's and the ambulance service' reputation.

The NMa thus concluded that the transaction would not result in negative competitive effects and cleared the transaction.

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/Vertical Agreements

NCC Fines Oil Companies For Indirectly Fixing Retail Prices For Petrol Stations

On July 30, 2009, the National Competition Commission issued a decision fining three major oil companies (Repsol, Cepsa, and BP) a total of €7.9 million for indirectly fixing the oil retail price for petrol stations.[31] The NCC found that the oil companies, by means of their relationships with independent distributors, had undermined the freedom of retailers to determine prices in their petrol stations, as retailers treated maximum and recommended prices as fixed prices.

The NCC focused in particular on the relationship between oil companies, commission agents, and resellers. The NCC found, *inter alia*, that oil companies, by fixing the sale price and commissions to retailers, reduced distributors' incentives to offer discounts and thereby eliminated price competition, as resale clauses prevented independent petrol stations from establishing their own sale prices.

Accordingly, the NCC found that each oil company controlled the retail prices of their (independent) own-brand petrol stations. This augmented the lawful price fixing in petrol stations owned by the oil companies, resulting in the elimination of intra-brand competition. Moreover, the NCC found that indirect price fixing also eliminated inter-brand competition among petrol stations, since the prices of petrol stations in the same area were based on maximum and recommended prices from the three companies. As a result, all petrol stations, irrespective of brand, location, or ownership regime, applied the same maximum or recommended prices that had been fixed by the oil companies.

The NCC found that vertical indirect price fixing had an equivalent effect to horizontal price fixing and, accordingly, competition among the three oil companies was eliminated.

Unilateral Conduct

NCC Fines Artists And Performers' Association For Abuse Of Dominant Position

On August 3, 2009, the NCC fined the Association of Artist and Performers ("AIE") for imposing on Gestevisión Telecinco ("Telecinco") unfair and discriminatory fees regarding the remuneration of artists' rights for the public communication of audio-visual records, in violation of Article 6 of Law 16/1989 for the Defense of Competition and of Article 82 EC (now Article 102 TFEU).[32]

31 Decision 30 July 2009, 652/08 REPSOL/CEPSA/BP

32 Decision 23 July 2009, 651/08, AIE/T5.

The NCC found AEI to be a *de facto* monopolist in the market for collective management of IP rights, and noted that AEI bore a special responsibility for transparency, objectivity, and reasonableness, more so than other operators in the market, due both to its monopolistic position and to the privileges conferred by Spanish IP legislation.

The NCC found that the AEI imposed unreasonable, discriminatory, and unfair general fees in negotiations with television channels. The fees differed from market prices without an objective justification and, as a consequence, AEI had distorted prices and market conditions. Moreover, the AEI discriminated against Telecinco by imposing higher prices than for other free TV channels. As a result, the NCC imposed a € 770,000 fine on AEI.

Mergers & Acquisitions

Abertis's Acquisition Of Axion And Teledifusión Madrid Receives Conditional Clearance

On July 17, 2009, the NCC cleared Abertis's acquisition of sole control over Broadband Network of Andalusia S.A ("Axion") and Teledifusión Madrid S.A ("TDM"), subject to conditions to ensure effective competition in the market.[33] Abertis, Axion and TDM are all undertakings active in the recent liberalized market for audiovisual broadcasting (TV and radio).

Following notification of the transaction in 2008, the NCC found that the transaction would impede the maintenance of effective competition, as it would remove Abertis' principal competitors both in the national market and in the narrower markets of the regions of Madrid and Andalusia. The NCC also noted the particular problem of high entry barriers, for which legislation has not been able to compensate. Moreover, the NCC found that the transaction would not result in any important efficiency to pass on to consumers, and that the commitments initially offered by Abertis would be insufficient to resolve the concerns raised by the transaction.

The NCC cleared the transaction subject to the following conditions, which were meant to guarantee third parties' access to Abertis' facilities in order to (i) replicate the competitive pressure the acquired companies used to exert, and (ii) open "windows of opportunity" for Abertis' contracts with broadcasting companies.

- Abertis must offer a full wholesale service for TV broadcasting in the regions of Madrid and Andalusia.
- Abertis must offer access to each of its TV broadcasting centers located in the regions of Madrid and Andalusia.
- Abertis must offer access to its Axion radio broadcasting centers located throughout Spain.
- Abertis must permit third parties already engaged under contract with Axion and TDM to reduce the maximum contract duration to five years. Likewise, Abertis' future contracts will be limited to five years in duration.

Policy and Procedure

Legal Impact Analysis Of Proposed Legislation Must Include Competition Analysis

On July 3, 2009, the Council of Ministers approved Royal Decree 1083/2009, concerning the analysis of the legal impact of legislation, which provides for the first time that an analysis of competitive effects is a compulsory step in the evaluation of the legislation proposals' legal impact.

This development accords with the two most important documents issued recently by the NCC: (i) the "*Recommendations to the Public Administration for a more Efficient and More Favorable Competition Regulation,*" and (ii) "*Guidelines for the Preparation of Competition Reports on Legal Proposals*," published in 2008 and 2009 respectively.

NCC Identifies Competition Concerns In The Spanish Road Fuel Sector

On September 3, 2009, the NCC issued a "*Report on Competition in the Road Fuel Sector,*" in which it concluded that the intensity of competition in the sector remains limited and that wholesalers' efforts in entering into the market and consolidating their position have been frustrated, despite the privatization and liberalization of the sector in the 1990s and subsequent legal initiatives aimed at promoting competition.

The NCC found that the sector still suffers from high concentration and vertical integration that deters entry by new competitors, facilitates anticompetitive behavior, and therefore inhibits competition in the market.

The NCC made the following recommendations and observations:

- The tendering procedure to open new petrol stations should be simplified, and competition criteria should be applied.
- Petrol stations located in supermarkets have demonstrated the greatest ability to compete on price. However, their expansion has been slowed down by administrative barriers and especially by

33 Decision 16 July 2009, C-110/08 ABERTIS/AXION and TRADIA/TELEDIFUSIÓN MADRID

local authorities' resistance to granting approval for such petrol stations.

- As is the case in other network monopolies, the government should fix an "access to network" fee. If this measure is not adopted, CLH[34] should, at least, be obliged to be more transparent in its "access to network" pricing.
- As is generally the case in network monopolies in the energy sector, undertakings active in the market should not have an ownership stake in CLH or participate in its management.

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

Dawn-Raids At Guided Bus Tour Operators

The Swedish Competition Authority has opened an investigation into alleged anticompetitive practices on the market for guided bus tours in Europe. On August 4, 2009, the Competition Authority carried out dawn raids at the premises of Scandorama AB and Ölvemarks Holiday AB. The Competition Authority suspects that there was anticompetitive cooperation between the said undertakings until June 2009, when Scandorama AB was acquired by Ölvemarks Holiday AB.

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

FCC Imposes Fines For Collusive Tendering In Electrical Equipment Sector

On July 6, 2009, the FCC fined eight undertakings CHF 1.24 million for colluding in relation to private and public tenders for electrical equipment for use in construction projects.

Following a complaint, the FCC found evidence of market sharing in the manner in which tenders (including prices) for electrical equipment in private and public construction projects were submitted in the Bern region. It also found that the award of tenders for electrical equipment works was based on a rotation process. On January 31, 2008, the FCC launched an investigation into these practices, and conducted dawn raids on the offices of the principal market participants.

Following its investigation, the FCC concluded that the undertakings in question had participated in a collusive tendering agreement. In its fining analysis, the FCC considered the duration and gravity of the infringement, as well as the fact that all of the undertakings concerned immediately brought the infringement to an end once the inquiry was launched. The FCC also took into account the fact that the undertakings involved all applied for leniency, and had agreed to reach an amicable settlement.

This decision is the first time that the FCC has imposed fines for collusive tendering. The FCC also confirmed that an amicable settlement does not rule out fines in respect of infringements that took place before the conclusion of that settlement.

FCC Opens Investigation In Relation To Credit Card Domestic Multilateral Interchange Fees

On July 16, 2009, the FCC initiated an investigation into the Domestic Multilateral Interchange Fees ("interchange fees") applicable to Visa and Mastercard credit card payments in Switzerland. Interchange fees are fixed by companies which issue credit cards ("issuers") and companies that affiliate retailers to the credit card payment systems ("acquirers"). The interchange fee is paid by the acquirer to the issuer each time a transaction is paid for by credit card.

This is the second time that the FCC has investigated credit card interchange fees. In December 2005, the FCC found that the agreements on interchange fees for the Visa and Mastercard credit card systems amounted to a restriction on price contrary to the Competition Act, but exempted the agreements subject to commitments, including a 15% reduction in the fee, and the removal of a clause prohibiting retailers from passing fees on to customers. The FCC's approval was limited to four years. In its new investigation, the FCC will re-assess the effects of the settlement in light of present market conditions.

34 Compañía Logística de Hidrocarburos, S.A. ("CLH") received its current name as a result of the entry into force of Oil Industry Law 34/1992, which removed the oil monopoly and deregulated the oil industry.CLH, which owns the network of oil pipelines, is controlled by the oil companies, conducts most of its business activities in mainland Spain and the Balearic Islands, and mainly provides logistic services for the storage, transportation, and distribution of all kinds of oil products in the inland, maritime, and aviation markets.

Unilateral Conduct

FCC Opens Investigation Against The Swatch Group In The Market For Movement Blanks

On September 14, 2009, the FCC opened an investigation against ETA Manufacture Horlogère Suisse SA, a subsidiary of the Swatch Group, which specializes in the production of movement blanks (unassembled watch movements). In late 2008, ETA announced price increases and changes in payment terms for 2009. Following this announcement, several of ETA's customers complained to the FCC that ETA's actions constituted an abuse of its dominant position in the market for movement blanks. The FCC's investigation will likely focus on the allegation that ETA is engaging in price discrimination against third party watch manufacturers.

Mergers and Acquisitions

FCC Approves Tamedia/Edipresse Merger

On September 17, 2009 the FCC approved a proposed concentration between Tamedia and Edipresse without conditions or commitments under the failing firm doctrine. Tamedia is Switzerland's fourth-largest media firm and publishes more than 20 regional and local newspapers, including the free daily newspaper 20 Minutes. It also runs radio and television stations and online services. Edipresse Switzerland is based in Lausanne, and publishes the newspapers Le Temps and Le Matin Bleu, a scaled-down version of the daily Le Matin.

On June 2, 2009, Edipresse and Tamedia announced that they were planning to merge their Swiss businesses by 2013. The FCC decided to subject the transaction to a Phase II investigation, as it had concerns that the combination of Le Matin Bleu and 20 Minutes would create or strengthen a dominant position in the free newspaper market in French-speaking Switzerland. The FCC was also concerned that the merged entity could dominate the market for early newspaper distribution in French-speaking Switzerland.

Although the FCC raised serious concerns as to the effects of the transaction, the failing firm defense was successful, since the FCC found that in the long term there was no room in the market for two free daily newspapers in French-speaking Switzerland. Tamedia and Edipresse had both incurred significant losses since the launch of their free French-language dailies. The investigation showed that in the absence of the merger, Le Matin Bleu would inevitably have left the market and, as a result, Edipresse's market share would have accrued to Tamedia in any case. The investigation also showed that there was no alternative transaction that could be undertaken, since no other publisher had expressed interest in acquiring Le Matin Bleu.

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 Agreements

Court Of Appeal Dismisses U.K. Bookmakers' Challenge To Joint Venture TV Channel

On July 28, 2009, the Court of Appeal handed down its judgment in *Bookmakers' Afternoon Greyhound Services Ltd v. Amalgamated Racing Ltd & Ors*,[35] dismissing an appeal by a number of U.K. bookmakers, including Ladbrokes and William Hill (the "Bookmakers"), against a High Court decision finding that "Turf TV" had not violated Article 81 EC or Chapter I.

Bookmakers provide betting services, taking bets on sporting and other events at set odds; some bets are placed at the event itself, some are placed in licensed betting offices ("LBOs"), and some are placed over the internet. Turf TV is a service that broadcasts horse races to LBOs. It is provided by Amalgamated Racing Limited ("AMRAC"), a venture partly owned by 31 of the 60 U.K. racecourses (the "Racecourses"). The Racecourses assigned exclusive rights to AMRAC and Turf TV to broadcast their horse races to LBOs. Prior to the introduction of Turf TV in 2007, the only licensed live television broadcaster of horse races to LBOs was Satellite Information Services ("SIS"), a service owned and run by the four leading bookmakers, broadcasting via a station called Bookmakers' Afternoon Greyhound Services Ltd ("BAGS").

The Bookmakers (and BAGS) brought proceedings in the High Court, claiming that the arrangements between the Racecourses and AMRAC were anti-competitive or amounted to price fixing under Article 81 EC and the Chapter I prohibition on the following grounds:

- The object of the arrangements was to fix the prices for the broadcasting rights; the Racecourses and AMRAC knew that their charges would be recovered from the LBOs because the AMRAC service was a "must have;" and
- The effect of the arrangements was to restrict competition, increasing prices and foreclosing the market by means of the exclusive licences.

35 *Bookmakers' Afternoon Greyhound Services Ltd v Amalgamated Racing Ltd and Others* [2009] EWCA Civ 750.

The High Court in 2008 rejected both limbs of the claim.[36] It emphasised the economic context of the arrangements, and, in particular, that the Racecourses were seeking to establish a new competitor in a market in which there had previously been only one purchaser. The Court found that the object of the arrangements between racecourses was not to fix prices, but to sponsor the entry of AMRAC into the market to compete with BAGS, and that the arrangements did not have the effect of restricting competition.

With respect to the effects of the exclusive nature of the Turf TV arrangements, the Court found that the claimants had failed to prove the real possibility of entry by further competitors, and that, because the only meaningful competition between BAGS and AMRAC was for exclusive licences, the Racecourses and AMRAC were acting competitively in entering into exclusive arrangements. With respect to the alleged collective negotiations, referring to the Commission's decision in *UEFA*,[37] the Court accepted that the Racecourses remained in competition with each other in relation to the prices and terms to be achieved on granting the relevant licences; the Bookmakers had failed to prove that collective negotiations were likely to increase the prices paid by AMRAC. Finally, with respect to the closed selling allegation, the Court held that a grant of rights to BAGS and to AMRAC could not be compared; a deal with BAGS would not result in the existence of competition in the market or participation in a successful joint venture. Therefore it was not anti-competitive for the racecourse to decide which option they preferred and then deal on an "*alternative and incompatible basis*" (*i.e.*, to negotiate only with AMRAC and not with BAGS).

The Bookmakers' appeal against this decision to the Court of Appeal was dismissed, on similar grounds. The Court agreed with the High Court that the object of the arrangements between racecourses was not to fix prices, but to sponsor the entry of AMRAC into the market to compete with BAGS. The Court also agreed that the arrangements had no appreciable anti-competitive effects, and therefore did not breach Article 81(1) EC or Chapter I.

The most significant difference between the Court of Appeal's and the High Court's reasoning was that the Court of Appeals found that the Racecourses did not compete with each other for the sale of broadcasting rights to LBOs. *UEFA* was distinguished on the grounds that Champions League games were generally held simultaneously. Race meetings are deliberately scheduled for different times, and LBOs have an incentive to show live coverage of as many British races as possible and to screen a succession of races throughout the day in order to maximise their betting turnover (expert evidence to this effect was rejected with explanation by the trial judge). The Court found, therefore, that rights at the different racecourses were not substitutable, and racecourses did not compete with each other for LBO rights.

In assessing whether there was an appreciable anti-competitive effect, the Court referred to the CFI's judgment in O2, that "*the interference with competition may in particular be doubted if the agreement seems really necessary for the penetration of a new area by an undertaking.*"[38] The Court found that, as a new entrant, Turf TV faced substantial obstacles, required a critical mass of rights granted by racecourse, and was also under time pressure to acquire those rights. The Court compared the competitive position with and without the challenged aspects of the arrangements, and agreed with the High Court that the bookmakers had not shown that the alleged collective selling had resulted in actual or likely price increases. The Court commented that the Bookmakers could have argued that, but for the collective negotiation, AMRAC would not have been in a position to bid for the LBO media rights at all, but noted that this would have strengthened the respondents' argument based on objective necessity.

The Court then turned to consider the principle of ancillary restrictions and objective necessity, referring to the judgment of the CFI in *Métropole Télévision v. Commission*.[39] The Court agreed with the High Court that all three aspects of the restrictions (i) were directly related and objectively necessary to the implementation of the object of the arrangements as a whole, (ii) were proportionate to that object, (iii) were subordinate to the implementation of that object, and (iv) had an evident link with it. Without the restrictions, "*the main object would have been, at the very least, difficult, and in reality impossible, to implement.* "The Court did, however, comment that the position may well be different on expiry of the current licences (in 2013), as AMRAC would no longer be in need of such protection.

36 *Bookmakers' Afternoon Greyhound Services Ltd v. Amalgamated Racing Ltd and Others* [2008] EWHC 1978(Ch).

37 *Re: The Joint Selling of the Commercial Rights of the UEFA Champions League* [2004] 4 CMLR 9.

38 *O2 (Germany) Gmbh v Commission*, Case T-328/03, [2006] 5 CMLR 5.

39 *Métropole Télévision v. Commission*, Case T-112/99, [2001] ECR II-2459.

OFT Imposes Fine In Construction Industry Cartel

On September 22, 2009, in one of its largest cartel investigations to date, the OFT fined 103 construction firms a total of £129.5 million.[40]

The firms were found to have colluded with competitors over a bid-rigging practice known as "cover pricing," where certain bidders in a tender process submit artificially high bids so as not to prevail and leave the business to the agreed competitor. This arrangement, the OFT said, provides a misleading impression to clients as to the real extent of competition, distorts the tender process, and makes it less likely that other, potentially cheaper firms, are invited to tender. In 11 instances of tenders reviewed by the OFT, all bids except the winning bid were found to be cover bids. The OFT also found that in six instances successful bidders compensated losing bidders between £2,500 and £60,000.

86 of the 103 firms received reductions in their penalties by admitting their involvement in the cover pricing, some through leniency applications, others by accepting the "Fast Track Offer" described further below. Kier Regional Limited, together with its ultimate parent entity, Kier Group plc, received the greatest fine, around £17.9 million. The non-confidential version of the decision has not yet been published.

Crest Nicholson Wins Judicial Review Case Against the OFT, But With Limited Results

On July 24, 2009, in connection with the construction industry investigation, the High Court found against the OFT in a judicial review action brought by Crest Nicholson plc ("Crest Nicholson").[41]

Crest Nicholson was investigated by the OFT in connection with the construction industry cartel, and had sought to take advantage of a new procedure called the "Fast Track Offer. "Based on an accelerated sanctions procedure pioneered by the Dutch competition authority, the Fast Track Offer is intended to streamline large-scale investigations by encouraging potential cartel participants to admit to their activities quickly. The Fast Track Offer, used for the first time by the OFT in the construction cartel case, was sent to 85 parties who had not sought leniency, offering a 25% reduction in fines in return for tender specific information.

The Fast Track Offer was originally sent to Crest Nicholson's subsidiary company Pearce Midlands, which had ceased trading in 2003 and whose business had been sold by Crest Nicholson to a competitor. Crest Nicholson thus had no relationship with the construction industry at the time of the investigation. All documents relating to the allegations had been transferred to the purchaser of the business of Pearce Midlands, and no employees of Pearce remained with Crest Nicholson. On December 18, Crest Nicholson told the OFT that it was unable to accept the Fast Track Offer, because the company had no means of investigating the allegations made or establishing that they had any basis in fact, and therefore the offer had not been extended to Crest Nicholson on equivalent terms to those extended to the other parties.

After the OFT issued a Statement of Objections ("SO") to all the parties concerned, including Crest Nicholson, Crest Nicholson wrote to the OFT requesting confirmation that the Fast Track Offer would still be open to acceptance. The OFT refused this request, on the grounds that it would not be treating addressees of the SO equally to allow Crest Nicholson to accept the Offer following service of the SO. Crest Nicholson launched judicial review proceedings, contending that the OFT's decision was in breach of the principles of (i) equal treatment, and (ii) procedural fairness.

Giving judgment, Mr. Justice Cranston adopted the approach of the CFI in *Automec II* on the discretionary powers of investigative bodies, as approved by the Court of Appeal in *Office of Communications v. Floe Telecom*, to hold that the OFT had infringed the substantive principle of equal treatment.[42] Crest Nicholson, as a historic parent company, was in an objectively different position to other addressees of the Fast Track Offer. The OFT's refusal to engage with Crest Nicholson when it provided evidence that it was in an objectively different position to the other addressees of the Fast Track Offer was in breach of the principles of equality and fairness, as was the refusal to consider Crest Nicholson's different position when fixing penalties.

The court rejected Crest Nicholson's second argument, that the OFT had breached its obligation of procedural fairness in not providing Crest with a summary of the case against it. In the circumstances of this case, in which the OFT was attempting to streamline a large-scale investigation, and given the OFT's considerable discretion in conducting investigations, requiring the OFT to provide a summary of its case to each party was not feasible and would undermine the benefit of the Fast Track Offer.

Despite the finding of unequal treatment, the OFT was not required to have agreed to Crest Nicholson's request to reopen the Fast Track

40 *See* http://www.oft.gov.uk/news/press/2009/114-09.

41 *Crest Nicholson Plc v. Office of Fair Trading* [2009] EWHC 1875 (Admin), July 24, 2009.

42 *Automec v. Commission (Automec II)* Case t-24/90 [1992] ECR II-2233; *Office of Communications v. Floe Telecom* [2006] EWCA Civ 768.

Offer, as this would have treated Crest Nicholson preferentially compared to the other SO addressees. The only consequence of the decision was that the OFT could not refuse to acknowledge that Crest Nicholson was in an objectively different position when it received the Fast Track Offer. However, whether and how to reflect any objective difference in fixing any penalty was left to the OFT's wide discretion. Crest Nicholson, together with its subsidiary, was ultimately fined £4,369,555, the 12th highest fine.

OFT Imposes Fines In Construction Industry Recruitment Agency Cartel

On September 30, 2009, fines totaling £39.27 million were imposed on six recruitment agencies for coordinating prices for the supply of construction workers.[43] The cartel involved recruitment agencies whose margins were threatened by the entry to the market in 2003 of Parc UK. Parc UK introduced an innovative business model, acting as an intermediary between construction companies and different recruitment agencies for the supply of candidates. In response, the agencies formed a cartel, called the "Construction Recruitment Forum," which met five times between 2004 and 2006. The OFT found that they agreed to boycott Parc UK, and co-operated to fix fee rates charged to intermediaries such as Parc UK and the construction companies themselves. All parties to the cartel applied successfully for leniency, with the exception of one firm that was in liquidation. The total amount of fines before they were reduced for leniency was £173 million. The non-confidential version of the decision has not yet been published.

Unilateral Conduct

Court Of Appeal Dismisses Enron Coal's Appeal Against The CAT's Striking Out Of Its Follow-On Claim For Damages

On July 1, 2009, the Court of Appeal dismissed the appeal of Enron Coal Services Limited ("ECSL") against the striking out of its follow-on damages claim against English Welsh & Scottish Railway ("EWS") before the CAT.[44] This decision may have a significant effect on the choice to be made by claimants as to whether to bring private damages claims before the CAT or the High Court.

In November 2006, the Office of Rail Regulation (the "ORR") found that EWS had engaged in selective and discriminatory pricing practices, in breach of the Chapter II prohibition under section 18 of the Competition Act 1998 (the U.K. equivalent of Article 82 EC), and imposed a penalty of £4.1 million.[45] The ORR found that EWS, a provider of railway freight services, had (i) entered into exclusionary agreements with certain industrial coal users for coal haulage by rail from 1996 to 2005, and (ii) unlawfully discriminated against ECSL, a third party intermediary that managed the entire coal supply chain, in coal haulage pricing.

In November 2008, ECSL brought a claim for damages before the CAT under section 47A of the Competition Act 1998, "following-on" from the ORR decision. Section 47A gives the CAT jurisdiction over claims for damages made by a person who has suffered loss or damage as a result of the infringement of (*inter alia*) the Chapter I or Chapter II prohibitions, once a decision by certain regulators has established that the relevant prohibition has been infringed. Further, section 47A (9) provides that "*in determining a claim to which this section applies the Tribunal is bound by any decision […] which establishes that the prohibition in question has been infringed*. "Accordingly, the CAT only has jurisdiction over claims based on conduct that has been found to constitute an infringement. This was the crux of the present case.

In January 2008, EWS applied to the CAT to strike out part of ECSL's claim (relating to overcharges) under Rule 40 of the Competition Appeal Tribunal Rules 2003 (the "2003 Rules"), on the ground that the CAT lacked jurisdiction.[46] The CAT struck out one part of the claim for overcharges (for haulage to one power station, the "Edison claim"), but refused the strike out application with respect to the rest of the overcharge claim (for haulage to another power station, the "British Energy claim"). The CAT found that the basis of the British Energy claim was "*at the very least arguable,*" but the Edison claim was not. EWS appealed the refusal to strike out the British Energy claim to the Court of Appeal, and ECSL cross-appealed in respect of the striking out of the Edison claim.

The Court of Appeal first held that, under Rule 40 of the 2003 Rules, it should consider whether the claim was "bound to fail," while dismissing ESW's argument that, under section 49(1)(b) of the Competition Act 1998, there was no appeal from a Rule 40 strike-out decision.

The court then turned to the issue of the CAT's jurisdiction. Under section 47A, the court held, there is a difference between findings of fact as to the conduct of the defendant made as part of the overall decision and a determination by the regulator that particular conduct

43 *See* http://www.oft.gov.uk/news/press/2009/119-09.

44 *English Welsh & Scottish Railway Limited v. Enron Coal Services Limited (In liquidation)* [2009] EWCA Civ 647.

45 *English Welsh & Scottish Railway Limited*, Decision of the ORR, November 17, 2006, available at http://www.rail-reg.gov.uk/upload/pdf/ca98_decision_ews-dec06.pdf

46 *Enron Coal Services Ltd v English Welsh & Scottish Railway Ltd* [2009] CAT 7.

amounts to an infringement of the Chapter II prohibition. For a claimant to seek to recover damages under section 47A "*it is not enough to be able to point to findings in the decision from which an infringement might arguably be inferred.* "No right of action exists under section 47A unless the regulator has actually decided that such conduct constitutes an infringement of the relevant prohibition as defined. On this basis, while the CAT had correctly determined that the test on a strike out application was whether the claim was arguable or whether it was bound to fail, the jurisdictional limit of section 47A meant that the CAT had erred in law by considering whether the overcharge claims were "*arguable*" (and allowing the British Energy claim to survive on this basis) but without considering this jurisdictional aspect. Rather, the CAT should have decided, on the application to strike out, whether it was clear from the ORR's decision that a finding of infringement had been made which covered the pleaded claims.

As to the ORR decision, the Court of Appeal found that it did not contain findings of infringement that covered either overcharge claim. ECSL claimed, in short, that EWS should have charged ECSL the same prices as it charged Edison and British Energy between December 1999 and April 2000. However, the ORR's infringement finding related to a different period, as it found that "*between May 2000 and November 2000, EWS pursued discriminatory pricing practices against ECSL.* "There were some references to differences in pricing as between ECSL and other parties before May 2000, but this was not developed into a finding of discrimination. Accordingly, both overcharge claims should have been struck out as it was clear that, even if the claimants might arguably be able to prove the claims on a stand-alone basis, they could not establish them on a follow-on basis under section 47A. ECSL's appeal failed, and EWS's cross-appeal to have the British Energy claim struck out succeeded.

This decision emphasises that, if the decision of a regulator is not clear as to the scope of the infringement, it may be more appropriate for a prospective claimant to bring its claim for damages before the High Court, which does have jurisdiction to determine questions of fact.

Mergers and Acquisitions

CC Clears Holland & Barrett Acquisition Of Julian Graves

On August 20, 2009, the CC formally cleared the acquisition of Julian Graves Limited ("JG") by NBTY Europe Limited ("NBTY"), owner of Holland and Barrett Retail Limited ("H&B").[47] The CC launched its investigation in March 2009 following the referral of the completed transaction by the OFT, and made provisional findings in July 2009. JG and H&B are both retailers selling nuts, seeds and dried fruit ("NSF").

The decision is of particular interest for the CC's treatment of the "failing firm" defence, upon which NBTY relied. This defence involves a 3-stage test that required the CC to consider whether (1) JG would have been unable to meet its financial obligations in the near future; (2) JG would have been unable to restructure itself successfully; and (3) there was not a less anti-competitive alternative to the merger.

The CC found that JG satisfied the first limb of the test: the business was highly leveraged, was struggling to maintain debt payments, and the auditors would not sign off the accounts as a going concern without a letter of parental support from NBTY post-acquisition. The second limb of the test was also easily met: JG was "*desperate*" for cash, but with its debt and cash flow position, was unlikely to be able to raise more. The CC found that JG would only have survived with an investment of new equity, and its parent company Baugur Group hf was unlikely to have provided additional equity funding. Additionally, Baugur Group hf had serious concerns about the business's competitive position in the market, in particular with other retailers encroaching on JG's core offering.

However, the third limb of the test was not met: in spite of its high leverage and financial problems, the CC found that there were alternative private equity buyers interested in JG who had made a bid and would have succeeded in that bid (even if JG had entered administration) had NBTY not been involved. The CC also found, based on NBTY's actual success, that JG, with new capital and some management expertise from another buyer, would have continued to offer a wide range of NSF and would have returned to profitability. The CC therefore concluded that the requirements of a failing firm were not met and the appropriate counterfactual was a purchase of JG by a financial buyer (*i.e.*, creating no NSF overlaps).

The CC then considered whether the transaction would result in a substantial lessening of competition ("SLC") as compared to this counterfactual. The CC found that the businesses of NBTY and JG overlapped in the retailing of NSF, but decided that the relevant product market included supermarkets and any other retailers, including independent health food stores, where a sufficiently large range of NSF products was available at similar prices. The CC identified supermarkets as key competitors. Supermarkets' NSF market share had grown from 66% in 2003 to 71% in 2007,

47 *A report on the completed acquisition by NBTY Europe Limited of Julian Graves Limited*, CC, August 20, 2009, available at http://www.competition-commission.org.uk/Inquiries/ref2009/holland/index.htm.

whereas the market share of independent food stores had fallen from 10% to 8% over the same period.

When considering the relevant geographical market, the CC found that, while JG, H&B, and most supermarkets set prices nationally, the ability of customers to switch between retailers of NSF was limited to a local level. The CC then applied filters to determine in which local markets the loss of competition could be a concern. It identified, at most, 17 relevant locations (defined as areas within a 10 minute drive of an H&B store within which there would be two or fewer other retailers offering at least 50 NSF stock-keeping units). The CC found that this number, around 3% of H&B's store portfolio and less than 5% of JG's store portfolio, was insufficient for it to be profitable for the merged entity either to increase prices substantially or to reduce the range of its NSF offering at a national level. The CC also found that it would not be profitable to do so at a regional level either, due (*inter alia*) to the cost of diverging from a national pricing policy and the ease of entry at a local level. The CC therefore found that the completed acquisition of JG by NBTY would not result in an SLC in the retail supply of NSF in the U.K. or in any local market in the U.K.

Policy and Procedure

DBIS Doubles Merger Fees

The Department for Business, Innovation and Skills announced on September 7, 2009 that fees on the notification of mergers would increase by 100%.[48]

The new fees are as follows:

- £30,000, where the value of the U.K. turnover of the enterprises to be acquired is £20 million or less;
- £60,000, where the value is over £20 million but not over £70 million;
- £90,000, where the value exceeds £70 million.

The previous fee bands were, respectively: £15,000; £30,000; and £45,000.

These fee increases mark the end of a consultation process begun in August 2004. The original consultation document noted that merger fees had not covered investigation costs since the early nineties, and that merger control costs had run at a loss for every year except 1993/4. The March 2005 summary of responses to the consultation indicated that, while the majority of respondents favoured the retention of the banded fee structure, most respondents were opposed to full cost recovery through fees, and thought that higher fees would discourage mergers. Despite the consultation response, the Government decided on a policy that fees should recover the full cost of the service.

48 *See* http://www.berr.gov.uk/whatwedo/businesslaw/competition/mergers/fees/index.html.

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