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AUSTRIA

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

Horizontal Agreements

Austrian Federal Competition Authority Publishes First Monthly Report On Fuel Prices

On November 10, 2009, the FCA published its first "fuel newsletter" providing information on the Austrian diesel and gasoline markets. Updated newsletters will be published on the FCA's website on a monthly basis.[1]

The newsletters will provide summaries of the following market information:

- Diesel and gasoline price developments nationally and in each of Austria's nine provinces;
- Comparisons of fuel price levels across EU Member States;
- Crude oil prices; and
- Fuel export and import data for Austria.

The FCA decided to publish this newsletter following its 2009 investigation into Austrian fuel prices. That investigation focused on the reason for the significant differences in fuel prices between Austria's Eastern and Western regions – but the investigation's outcome was largely inconclusive.[2] Although the FCA identified three factors that had a noticeable effect on fuel prices (the presence of significant transit traffic; demand by consumers from neighboring countries; and price levels on the Rotterdam spot market) the majority of factors that the FCA considered as potentially influencing fuel prices, in fact, had ambiguous or inconclusive effects on prices. Notably, the FCA concluded that differences in market concentration levels across Austria had no clear impact on the level of fuel prices. However, it found that new market entry by independent service stations often led to a reduction in average fuel prices.

The newsletter does not indicate that the FCA will continue its investigation into fuel pricing or that it will initiate any new formal proceedings against individual suppliers. The FCA has, however, repeatedly voiced general concerns about Austrian fuel price levels, expressing that price increases on the Rotterdam spot market are passed on to consumers immediately while price decreases are only passed on with a significant delay. The FCA has also noted the lack of price transparency in fuel markets in Austria. This second concern, and specifically the goal of increasing Austrian fuel price transparency, appears to be one of the primary reasons why the FCA has chosen to begin publishing its monthly fuel newsletter.

BELGIUM

This section reviews competition law developments under the Act on the Protection of Economic Competition of September 15, 2006 ("APEC"),[3] which is enforced by the Competition Auditorate ("Auditorate") and the Competition Council ("Council").

Unilateral Conduct

Auditorate Dismisses Complaint Against Inbev For Alleged Abuse Of Dominant Position

On October 27, 2009,[4] the Auditorate dismissed a complaint lodged by two catering trade associations and several private pub owners against Inbev (the largest producer of beer in Belgium) alleging an abuse of Inbev's dominant position in Belgium.

On August 29, 2006, following an Inbev decision to increase its standard 25-centiliter glass size by 10 per cent, a number of pub owners and two trade associations filed a complaint with the Competition Council, claiming that Inbev had abused its dominant position by imposing the new glass size without prior consultation with the industry and by refusing to continue to supply the old glasses. Since Inbev had recently implemented two price increases, the pub owners

1 See at www.bwb.gv.at/BWB/treibstoffnews/default.htm.

2 See the FCA's reports on fuel prices in Vorarlberg of August 2009 and on fuel prices in Salzburg of September 2009, available at www.bwb.gv.at/BWB/Aktuell/spritpreise_vorarlberg_24092009.htm and www.bwb.gv.at/BWB/Aktuell/treibstoffe_salzburg_25092009.htm.

3 Loi sur la protection de la concurerrence économique coordonnée le 15 septembre 2006, M.B., 29 septembre 2006, p. 50.613.

4 Raad voor de Mededinging, Auditoraat, beslissing nr. 2009 P/K-26-AUD van 27 oktober 2009, zaak CONC-P/K-06/0034: Vzw Federatie Ho.Re.Ca Wallonie, Vzw Federatie Ho.Re.Ca Vlaanderen, BVBA Excellence, BVBA Jesy, De heer […] en de heer […] / Inbev NV.

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claimed they could not pass on the extra cost of additional beer in larger glasses to end consumers. The pub owners also requested interim measures, which were refused by the Auditor-General on January 24, 2007.[5]

On October 27, 2009, the Auditorate also rejected the complaint on the merits. The Auditorate defined the relevant market as the production and sale of beer in Belgium, and held that Inbev was dominant on this market. However, the Auditorate noted that the introduction of the new beer glasses did not amount to an abuse of dominance, as Inbev could not be held responsible for the pub owners' independent decision not to pass the extra costs of additional beer on to their clients. Moreover, the timing of the price announcements and the decision to increase the glass size allowed sufficient time for pub owners to adapt to the new situation. Finally, the Auditorate noted that Inbev had also introduced the new glasses in the Netherlands, where Inbev is not dominant. The introduction of the new glasses therefore amounted to a standard commercial practice, as opposed to an attempt by Inbev to abuse its market power. As a result, the Auditorate rejected the pub owners' complaint as unfounded.

Auditorate Dismisses Complaint Against Dilibel And Interforum

On October 20, 2009, the Auditorate rejected complaints lodged by a trade association representing French-language booksellers in Belgium ("SLFB") against book distributors Dilibel and Interforum.[6]

Dilibel and Interforum hold exclusive Belgian distribution rights for books published by the large French publishing houses Hachette Livre and Editis, respectively. According to SLFB, Dilibel and Interforum together account for more than 60% of the distribution of imported French books in Belgium. The prices charged by Dilibel and Interforum to Belgian booksellers are marked up from the prices at which the same books are sold in France (French prices are set in accordance with a French price-control law).

SLFB claimed that this mark up amounted to collusion between Dilibel and Interforum, with the aim of aligning their distribution costs and increasing the price of books imported from France. SLFB further claimed that Dilibel and Interforum abused their dominance by imposing excessive selling prices on booksellers in Belgium. SLFB also argued that the relevant geographic market was the Belgian nation. The Auditorate rejected this argument, and followed the European Commission's approach in *Lagardère/Natexis/VUP*,[7] where the Commission had defined several markets for the marketing, distribution, and direct sale of books, and held that each relevant geographic market encompassed the French-speaking communities in Belgium, France and Luxembourg.

The Auditorate held that the market investigation did not reveal any collusion between Dilibel and Interforum, as they each apply different mark ups based on different criteria. They were therefore unable to align themselves on a single distribution cost level. With regard to the alleged abuse of dominance, the Auditorate found that both companies had a market share of less than 30% and that publishers could change distributors without difficulty and that the companies were thus not dominant. As a result, the Auditorate rejected SLFB's complaint.

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

Commitments Accepted By The DCC In Forestry And Laundry Rental Services Investigations

On November 25, 2009, the DCC closed two investigations by accepting binding commitments.

Forestry Investigation

In the first case, the DCC accepted commitments, submitted by members of the Danish Forest Associations Trade Committee ("DFATC"), addressing the DCC's concerns regarding the improper exchange of certain information among association members. DFATC members are competing traders and forest owners, including the largest forest owner, the Danish Forest and Nature Agency, which administers all forests owned by the Danish State.

5 Raad voor de Mededinging, Auditoraat, beslissing nr. 2007-V/M-04-AUD van 24 januari 2007, zaak CONC-V/M-06/0035: Vzw Federatie Ho.Re.Ca Wallonie, Vzw Federatie Ho.Re.Ca Vlaanderen, BVBA Excellence, BVBA Jesy, De heer Patrick Pauwels en de heer Jean Boegen / Inbev NV.

6 Raad voor de Mededinging, beslissing nr. 2009- P/K-24-AUD van 20 oktober 2009, zaak CONC- P/K- 06/0009: Syndicat des Libraires francophones de Belgique / Dilibel, B.S., 25 november 2009, p. 73654 and Raad voor Mededinging, beslissing nr. 2009- P/K-25-AUD van 22 oktober 2009, zaak CONC- P/K- 06/0009: Syndicat des Libraires francophones de Belgique / Interforum, B.S., 25 november 2009, p. 73657.

7 Commission Decision of 7 January 2004, Case No COMP/M.2978 Lagardère / Natexis / VUP.

Based on its preliminary investigation, the DCC found that ongoing exchanges of information between DFATC members concerning Danish and foreign prices on raw wood, including expected future prices, had taken place both at DFATC meetings and bilaterally outside of the association. The DCC concluded that it was most probable that this exchange of information constituted a concerted practice with the object of restricting competition.

The DFATC's commitments, accepted by the DCC, included: (1) members committing not to discuss prices, rebates, or other material competition parameters; (2) members committing to leave immediately a committee meeting should discussions turn to prices, rebates, or other material competition parameters; (3) the Danish Forest and Nature Agency, as the largest forest owner, agreeing no longer to continue its practice of submitting 4-8 week old price information to be used in the association's pricing statistics (although other members will be permitted to continue to publish such information provided that it is at least 4-8 weeks old and aggregated); and (4) members committing to cease the circulation of their supply and demand expectations for the following months and (5) the association ceasing its publication of a monthly "trade barometer" containing an overall outlook on such supply/demand expectations for the upcoming month.

Laundry Rental Service Investigation

In the second case, the DCC closed its investigation after accepting binding commitments from the Danish Laundry and Textile Renting Services Association ("DLTRSA"), addressing the DCC's concerns regarding DLTRSA's circulation of a cost index to its members.

DLTRSA members account for more than 90% of the market. The cost index, which had been circulated to DLTRSA members twice a year, contained a detailed listing of cost items specific to the industry, including a breakdown of cost components and a review of past and expected future changes in each of these costs. DLTRSA also set up a separate committee to discuss the contents of the index prior to its publication.

Based on its preliminary investigation, the DCC held that DLTRSA's practice of issuing such a cost index could be conducive to the coordination of members' pricing behaviour. The DCC held that a laundry company receiving the cost index could assume, with a reasonable degree of probability, that the other laundry companies would increase their prices in accordance with the total cost increase percentage mentioned in the index.

The DCC considered that the fact that the cost index was provided by the trade association could lend a degree of legitimacy to the cost index, thus making it particularly likely to have a standardizing effect on the pricing policy of the laundry companies. The DCC also took the view that the index committee's direct involvement in the preparation of the index further increased competitive concerns.

DLTRSA's commitments to the DCC involved an agreement to cease the preparation and publishing of the association's cost index. Members of the association requiring continued access to cost development statistics within the industry would instead be able to obtain such data from independent third parties (*e.g.*, the Danish Technological Institute), provided that such data are sufficiently aggregated and historic.

Tribunal Decides Appeals Regarding Information Exchange By Transportation Associations

On November 26 and 30, 2009, the Tribunal issued judgments on two appeals from DCC decisions concerning information exchanges by transportation associations. While the appeal by the International Transportation Association in Denmark (the "ITD") was generally rejected, the appeal by the Danish Transport and Logistics Association (the "DTL") was accepted on the majority of its counts.

The ITD Appeal

On November 26, 2009, the Tribunal issued a judgment broadly upholding the DCC's decision finding that the alleged information exchanges between the ITD and its members constituted conduct by an association of undertakings with the object of restricting competition. The ITD, comprising more than 420 members, is the largest trade association in the Danish international transportation sector.

On February 25, 2009, the DCC adopted a decision finding that the ITD had infringed Section 6 of the Act. The infringement consisted of five individual counts, each involving various information exchanges between the ITD and its members. The DCC's decision is described in further detail in the Danish National Competition Report for the first quarter 2009.

On appeal, the Tribunal upheld the DCC's decision with respect to four out of five counts:

- Counts (1) and (2) concerned the issuing of two cost calculation tools, which were designed to enable the users to carry out different cost calculations based on figures filled in by the ITD in advance. The figures were updated quarterly by the ITD, and users had to actively deselect the pre-completed figures if they wished to apply their own individually selected figures. The Tribunal held that the DCC was correct to conclude that the figures filled in by

the ITD appeared to be realistic, and that it was likely that a substantial number of ITD's members would apply the calculation tool using the pre-completed figures. Hence, the Tribunal found that these counts were proven to have the object of restricting competition.

- The Tribunal also upheld the DCC's decision regarding count (3), which involved the ITD issuing certain cost forecasts, and count (4), which involved the ITD issuing specific prices for waiting time.
- The Tribunal annulled the DCC's decision on count (5), which involved calls made by ITD to its members encouraging them to pass on certain cost increases, including increases in oil prices, to its customers. The calls made by the ITD were not found to be sufficiently specific and precise to amount to a decision having as its object the restriction competition.

The DTL Appeal

On November 30, 2009, the Tribunal issued a judgment reversing in part the DCC's findings that information exchanges between the DTL and its members constituted conduct by an association of undertakings with the object of restricting competition. With more than 3,100 members, the DTL is the largest trade association in the Danish transportation sector.

On December 17, 2008, the DCC adopted a decision finding that the DTL had infringed section 6 of the Act. The infringement consisted of eight individual counts, each concerning various information exchanges between the DTL and its members. The DCC's decision is described in further detail in the Danish National Competition Report for the fourth quarter 2008.

In its November 30, 2009 judgment, the Tribunal agreed with the DCC that the DTL's information exchanges constituted conduct by an association of undertakings. The Tribunal also held, contrary to what the DTL had argued, that the DCC does not need to show that the conduct was actually implemented in order to find a violation of section 6 of the Act. However, the Tribunal annulled the DCC's decision with respect to five out of the eight counts, noting that the DCC had not shown that these alleged infringements had the object of restricting competition. The Tribunal noted that the DCC was required to establish that each of these alleged infringements had such significant potential anticompetitive effects that demonstrating actual anticompetitive effects is unnecessary.

- Count (1) concerned the issuing of a cost calculation program. The program was designed to enable users to carry out cost calculations based on figures completed by the DTL in advance. However, in contrast to the ITD case above, the figures had not been updated for several years and users had to actively choose the DTL's figures for these to appear in the applicable spreadsheets. The Tribunal found that the DCC had not proven that the figures completed by the DTL in advance constituted actual recommendations and not just mere examples. Accordingly, the Tribunal annulled the DCC's decision with respect to this count.
- With respect to count (4), concerning a calculation tool for oil price increases, and count (6), regarding a cost index published by the DTL, the Tribunal annulled the DCC's decision for lack of a sufficient factual basis to support the DCC's finding.
- The Tribunal also annulled the DCC's decision with respect to counts (7) and (8), which concerned the mention of a profit margin of 10% or 15% in a price calculation model and an instructional video. The Tribunal held that the figures were freely invented, manifestly misleading, and not suited to be directly applied in practice, and therefore did not amount *per se* to conduct that had the object of restricting competition.
- With respect to counts (2) and (3), which concerned the exchange of information on expected cost increases related to freight transport by road, the Tribunal upheld the DCC's decision.
- Count (5) concerned calls made by the DTL to its members encouraging them to pass on oil and insurance price increases to their customers. The Tribunal upheld the DCC's decision with respect to the insurance price increases, as the calls in this respect specifically recommended a price increase of 1.3% due to statutory changes and, therefore, had the object of restricting competition. However, the Tribunal annulled the decision with respect to oil price increases, on grounds that the calls made by the DTL in this regard were not sufficiently specific and precise to amount to conduct having as its object the restriction of competition.

Policy and Procedure

Committee Appointed To Assess The Need For A Review Of Competition Rules

On October 26, 2009, the Danish Ministry of Economic and Business Affairs ("DMEBA"), whose responsibilities include competition policy, announced the appointment of an ad hoc committee to assess: (1) whether there is a need to strengthen the DCA's general information and guidance efforts to prevent competition infringements and ensure compliance with the law; (2) whether the procedure for

dealing with competition cases can be organized more efficiently and in a way which imposes the least possible burden on businesses; and (3) whether the introduction of prison sentences could strengthen enforcement against cartels. The committee will deliver a report, including any suggested amendments, to the DMEBA before the end of April 2011.

FINLAND

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

Horizontal Agreements

Market Court Imposes Fines On Timber Cartel Participants

On December 3, 2009, the Market Court imposed total fines of EUR 51 million on Stora Enso Plc and Metsäliitto Cooperative for their infringement of both the Act on Competition Restrictions and Article 81 EC (now Article 101 TFEU).

The Market Court found that the fined companies had participated in a buyer-side price-fixing and information exchange agreement in the market for the purchase of timber in Finland from 1997-2004. The fines imposed on Stora Enso and Metsäliitto (EUR 30 million and EUR 21 million, respectively) matched the amounts requested by the FCA in its proposal to the Market Court in 2006.

Another participant (UPM-Kymmene Plc) was not fined, as it disclosed the existence of the infringement to the FCA in 2004, allowing the FCA to perform dawn raids on the suspected undertakings. Metsäliitto also applied for leniency and assisted the FCA in its investigation and thus received a 30% fine reduction. This is the second case in which the Market Court has reduced cartel fines under the Finnish leniency program.

In the Court's view, the infringement lasted from 1997 to 2004. During that time, the companies shared details of their cost structures and their price negotiations with the National Board of Forestry. The companies' directors and district managers also met regularly to discuss the pricing and availability of timber in order to influence future price developments. The Court found that the explicit purpose of the infringement was to control the price of timber in Finland by agreeing on common rebate objectives, target prices and maximum price levels. In its fining assessment, the Court took into consideration that the infringement was nationwide in scope, lasted for over seven years and that the participants were large international enterprises that together accounted for 80% of all timber sold in Finland at the relevant time. As a further aggravating circumstance, the Court also noted that the participants had previously been fined in 2001 for restricting competition in the same market.

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").

Vertical Agreements

Paris Court Of Appeal Overturns FCA Decision In The Perfume Case

On November 10, 2009, the Paris Court of Appeal reversed the FCA's decision in the perfume case, on the grounds that the proceedings had lasted excessively long and were thus in violation of Article 6 of the European Convention for the Protection of Human Rights ("ECHR"). This is the first time that the Court has reversed an FCA decision on the basis of the length of the proceedings.

In March 2006, the FCA fined thirteen luxury perfume and cosmetics manufacturers and three nationwide distributors a total of €46.2 million for entering into vertical price-fixing agreements between 1997 and 2000.[8] In June 2007, the Paris Court of Appeal reduced the fines imposed by the FCA[9] and limited the finding of infringement to the luxury perfume sector (excluding the luxury cosmetics market from the finding of infringement). However, in July 2008, the French Supreme Court set aside this ruling and remitted the case to the Court of Appeal for further review.[10]

On remand before the Court of Appeal, the defendant undertakings claimed that the FCA had failed to handle the case within a reasonable time, contrary to Article 6 ECHR. The appellants pointed out that the statement of objections had been served in April 2005, more than six years after the start of the investigation in October 1998. The FCA argued that the length of the proceedings was justified by the complexity and geographical scope of the infringement. The FCA also argued that since the undertakings were

8 RFrench Competition Council, Decision n° 06-D04 bis, March 13, 2006, http://www.autoritedelaconcurrence.fr/pdf/avis/06d04.pdf.

9 Paris Court of Appeal, June 26, 2007, Case 2006/07821, http://www.autoritedelaconcurrence.fr/doc/ca06d04_parfums.pdf.

10 French Supreme Court, July 10, 2008, Commercial chamber, Bull. 2008 IV n°152, http://www.autoritedelaconcurrence.fr/doc/cass06d04_juill08.pdf.

in any event under an obligation to retain commercial data for ten years under the French Business Code, the length of the proceedings had no impact on the parties' ability to produce exculpatory evidence.

The Paris Court of Appeal agreed with the defendants that the total duration of the proceedings had resulted in irremediable consequences for the undertakings and complicated their ability to conduct their defense. First, the Court observed that the undertakings had not been informed of the precise scope and nature of the investigation until the start of the adversarial phase, six years after the investigation began. Since the incriminating evidence on price monitoring was mainly based on price records, the length and secrecy of the investigation left these undertakings without any meaningful opportunity to gather appropriate exculpatory evidence in due time. Second, the Court found that the length of the investigation phase compared to the unusually short adversarial phase (eight months) rendered it even more difficult for the undertakings concerned to prepare their defense, and could not be justified by the alleged complexity of the case.

The Court ruled that this excessively long procedure infringed the named undertakings' rights of defense. Due to the very nature of this breach, and the lack of exculpatory evidence available to the defendants, the Court declared that the FCA was in no position to retry the case and quashed the FCA's decision in its entirety. The competition authority lodged an appeal before the Supreme Court in December 2009.

Mergers and Acquisitions

French Competition Authority Publishes New Guidelines On Merger Control

On December 16, 2009, the FCA released new merger control guidelines to provide up-to-date and refined guidance to merging parties.[11] The FCA took over responsibility for merger control from the Minister on March 2, 2009. The new guidelines will enter into force on January 1, 2010.

The new guidelines reflect the changes brought about by the Law on the Modernization of the Economy of August 4, 2008. In particular, they clarify the circumstances in which a simplified notification form may be used (namely, in cases where there are no overlapping activities or vertical/conglomerate relationships, takeovers by investment funds, and acquisitions by retail chains) and they address the newly implemented stop-the-clock procedures, which can be activated at the parties' request at any point in the procedure in order to finalize remedies.

The new guidelines also take into account recent European Commission decisional practice, such as, for example, allowing merging parties to refer potential ancillary restraints to the FCA for assessment if they give rise to uncertainty. The guidelines also clarify that while aggregate market shares of 50% or more are presumed to entail a substantial lessening of competition, market shares are less relevant where the undertakings concerned compete on tender markets. The guidelines further emphasize the role of economic analysis in merger control cases, and contain an appendix detailing the format and content of economic studies that notifying parties may wish to reference in order to substantiate claims of efficiencies. The FCA also clarifies that behavioral commitments may be used in place of divestitures where a suitable purchaser proves difficult to find (see, *e.g.*, the Caisse d'Epargne and Banque Populaire decision of June 22, 2009, where the FCA was satisfied that separating the new entity's three branch networks in the island of La Reunion from both a legal and operational perspective for a five-year period would bring about the same result as a divestiture by preventing any coordination on commercial policy).

Finally, the new guidelines address several issues brought to the fore by the recent financial crisis. For example, under the guidelines, where a takeover involves a company subject to insolvency proceedings, a derogation to the standstill obligation may be requested five days before the insolvency court issues a decision.

GERMANY

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

Horizontal Agreements

FCO Fines Coffee Roasters For Price Fixing

On December 18, 2009, the FCO issued a decision imposing fines totaling € 159.5 million on three coffee roasting companies (Tchibo GmbH, Melitta Kaffee GmbH and Alois Dallmayr Kaffee OHG) as well as six individuals for price fixing in the retail coffee sector.[12] Kraft Foods Deutschland GmbH, as the immunity applicant in the case, did not receive a fine.

11 Available at http://www.autoritedelaconcurrence.fr/doc/ld_concentrations_dec09.pdf.

12 See the press release, published in English on December 21, 2009. http://www.bundeskartellamt.de/wEnglisch/download/pdf/Presse/091221_Kaffeeroester-E.pdf

Based on the FCO's press release, and its January 14, 2010 case summary, the companies held regular meetings to preserve the pricing structure of their roasted coffee products at least from the beginning of 2000 until July 2008.[13] In particular, from 2003 to 2008 the companies agreed on five price increases, four of which were actually implemented. The FCO found that in two cases the price fixing agreements resulted in an overcharge to consumers of more than € 0.5 per 500g coffee pack, as retailers passed on the manufacturers' agreed increases to consumers.

Interestingly, in the case summary, the FCO explicitly referred to Kraft Foods as the immunity applicant. In the past, the FCO has not publicly revealed the identity of the immunity applicant unless the whistle blower had previously revealed its own position. In addition, the FCO does not usually refer publicly to the amount of a cartel overcharge. It is unclear at this stage whether these changes are the result of a conscious effort on the part of the FCO to encourage private damage claims or whether this case is merely an isolated incident.

Tchibo and Melitta, who also cooperated with the FCO as leniency applicants, have appealed the fines, as have five of the six named individuals. Separately, in January 2009 the FCO initiated further proceedings against several coffee roasters, including Mellitta, for suspected price fixing related to coffee for commercial use (catering sector, bulk buyers, etc.), and against several cappuccino producers for suspected fixing of cappuccino prices.

Berlin Court Of Appeals Disallows Passing-On Defense For Private Actions For Damages

On October 1, 2009, the Berlin Court of Appeals (Kammergericht Berlin) awarded approximately € 645,000 in damages and interest to the customer of a cement manufacturer that allegedly participated in the ready-mixed concrete cartel.[14]

Interestingly, while FCO fines on the participants of the cartel had already been confirmed in an earlier court decision, the defendant in this case had not been mentioned in the FCO's decision. The FCO's decision found that the market-sharing and price fixing cement cartel ran from 1995 to 1998.

The plaintiff in this case initially sought damages from the defendant in 2002, but the claim was rejected by the Regional Court of Berlin on June 27, 2003, because the plaintiff had not been specifically targeted by the cartel (which some argued was required prior to the 7th reform of the GWB in 2005). The Berlin Court of Appeals held that the Regional Court had erred in its interpretation of the relevant (now outdated) law. Even under the old law, customers of a cartel could claim damages without having been the specific target of the cartel. The Court held that the existence of a market-sharing cartel constitutes prima facie evidence of a cartel overcharge. Accordingly, the defendant was obliged to provide evidence to rebut the presumption that the plaintiff incurred damages, which the defendant failed to do.

In addition, the Court of Appeals explicitly disallowed the passing-on defense under the old law, given that the law granted standing to indirect purchasers. The Court explained that both direct and indirect purchaser can in principle claim the entire amount of the damage incurred, regardless of whether the overcharge was passed on from the direct to the indirect purchaser. However, any payment to either the direct or indirect purchaser relieves the defendant of its obligation to compensate damages incurred by others down the distribution chain. (The question of further distribution of damages would then be a matter between the direct and indirect purchasers but should play no role in the proceedings brought against the cartelist.) The Court of Appeals mentioned that in its view the same principle should apply to the new Section 33 (3) GWB, although it was not necessary to comment on the new provision.[15]

This is the first case to deal (albeit indirectly) with the passing-on defense under the new law, an issue that has been widely debated. While some commentators have interpreted Section 33 (3) GWB as expressly disallowing the passing-on defense, others (including the FCO) have interpreted the provision instead as a rule on the burden of proof, such that the defendant has to prove that the plaintiff did not incur any damages. This judgment provides an alternative solution by removing the issue from the proceedings for damages against the cartelist and "passing it on" to subsequent distribution claims within the purchasing chain.

Vertical Agreements

Federal Court of Justice Aligns Its Approach To Non-Compete Clauses In Companies' Bylaws With EU Law

On June 23, 2009 the Federal Court of Justice (*Bundesgerichtshof*) held that a non-compete obligation on shareholders of a joint venture ("JV") does not infringe the competition laws where such an

13 See the case summary (reference number B11-18/08), only published in German on January 14, 2010: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell09/Fallberichte/B11-018-08-Fallbeschreibung.pdf.

14 Kammergericht Berlin, October 1, 2009 – *Transportbeton II*, see WUW DE-R 2773 or WUW 2010 p. 189.

15 The provision states that if a good or service was purchased at an excessive price, the damage is not excluded because the good or service was sold on.

obligation is required to protect the existence and the commercial viability of the joint venture.

The Court held that, in order to meet this test, however, (i) the JV must be "competitively neutral", which it considered a full-function joint venture would be, and (ii) the shareholders must have a controlling influence over the JV's management. The Court found, in contrast to the lower court, that joint control suffices in this respect. With this decision, the Court reversed its own precedent (prior to the implementation of Regulation 1/2003) in which it held that non-compete clauses are admissible provided they serve an "acceptable" purpose.[16] It is clear now that such non-compete obligations need to comply with the stricter standard that has been commonly accepted under EU law.

FCO Fines Leading Manufacturer Of Hearing Aids For Resale Price Maintenance

On October 14, 2009, the FCO imposed a € 4.2 million fine on Phonak GmbH ("Phonak"), one of the three leading manufacturers of hearing aid devices in Germany. The FCO found that Phonak had infringed Section 21(2) GWB, a provision that prohibits compelling other companies to engage in anti-competitive behavior, by repeatedly refusing to supply one of its retailers in order to induce the retailer to raise its prices.[17]

One of Phonak's retailers had published a price list for its portfolio of hearing aids on the internet, indicating that it sold Phonak's devices considerably below Phonak's "recommended retail price". Phonak reacted to complaints from other retailers about the "price dumping" and refused to supply the retailer three times, each time for several months. Phonak resumed supplies only after the retailer raised its resale prices.

The FCO held that Phonak's behavior, had it been an agreement, would have infringed Article 81 EC and its German equivalent, Section 1 GWB, by restricting its retailer's freedom to set its resale prices. Because Phonak actively harmed the retailer economically it was found to have infringed Section 21(2) GWB.

This is the third FCO decision within a few months dealing with resale price maintenance, which has become a focus of the FCO's activities.[18] The decision also follows an in-depth analysis of the market for hearing aids that was conducted as part of a merger control case also involving Phonak (the transaction was prohibited).[19]

Mergers & Acquisitions

Düsseldorf Court Of Appeals Rules On Admissibility Of Declaratory Judgments

On May 27, 2009, the Düsseldorf Court of Appeals (*Oberlandesgericht Düsseldorf*) rejected as inadmissible the joint appeal by Edeka Zentrale AG & Co. KG, Kaiser's Tengelmann GmbH, and Plus GmbH, against the FCO's decision clearing their transaction subject to numerous conditions.

The appellants are major German food retailers that intended to move their discount chains into a joint venture and establish a purchasing cooperative. In its decision of June 30, 2008,[20] the FCO conditioned its approval of the transaction on the divesture of several outlets in different geographic areas prior to closing. In addition, the FCO prohibited the proposed purchasing cooperative and required a commitment not to reopen outlets in the same area as the divested stores for a period of two years.

As the appellants had complied with the divestiture condition in order to close the transaction, they were now required to seek a declaratory judgment in order to apply for judicial review of the FCO's decision. For this request to be admissible, they had to demonstrate a specific "legal interest" in such a ruling (Section 71(2)(2) GWB). The appellants referred to the Federal Court of Justice's ruling in *Springer/ProSiebenSat.1*,[21] which held that a company may be able to demonstrate the requisite legal interest even after renouncing a prohibited transaction, when it is likely to face similar arguments in the future in an attempt to acquire the same or a different target.

The Court rejected the request as the appellants could not establish the required level of "likelihood of a similar situation" in the future. The Court considered some of their arguments to be commercially unreasonable and found that the appellants' public announcements contradicted their arguments in court. The appellants have now appealed the decision to the Federal Court of Justice.

16 See also Bundesgerichtshof, judgment of December 12, 2008, Case KZR 54/08 – *Subunternehmervertrag II*, a decision regarding a non-compete obligation in a vertical relationship.

17 See FCO decision of October 15, 2009, Case B 3 – 69/08, available in German at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell09/B3-69-08.pdf and also the English press release at http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2009/2009_10_15.php.

18 See National Competition Report July – September 2009, p. 6.

19 See National Competition Report April – June 2007, p. 15.

20 See National Competition Report April-June 2008, p. 9.

21 See National Competition Report July-September 2007, p. 15.

FCO Clears Acquisition Of Insolvent Convertible Roof-top Manufacturer Edscha By Webasto

On December 22, 2009, the FCO cleared the acquisition of part of Edscha AG, an insolvent manufacturer of roof systems for convertibles, by competitor Webasto AG, despite collective dominance concerns.

The FCO found that the European market for convertible roof systems consisted of four companies, among them Edscha and Webasto. Despite the existing oligopoly presumption under German law, the FCO typically applies the *Airtours* criteria for determining collective dominance.[22] The application of these criteria in practice raised several questions in this case:

- With respect to the first *Airtours* criterion, the FCO noted that the market was characterized by a high degree of transparency, because the customers, the major carmakers, largely source their product by way of tenders.
- With respect to the second criterion, the FCO does not appear to have considered the question of a credible retaliation mechanism.
- With respect to the third criterion, the FCO was not convinced that the automobile manufacturers, a group often characterized as having a high degree of buying power, were capable of exerting countervailing pressure on the oligopoly.

However, the FCO ultimately turned away from coordinated interaction concerns and cleared the transaction on the basis that a bidding analysis showed that Webasto and Edscha were not each others' closest competitors. Accordingly, the FCO found that competition would not be harmed by Webasto's acquisition of Edscha. In addition, it relied on the buyer's assertion that absent the transaction it would exit the market due to its steadily declining commercial success. This is an interesting spin on the failing company defense, which usually applies only to the target company.

Policy and Procedure

New FCO President Appointed

In December 2009, Andreas Mundt took office as the new President of the FCO. He replaces Dr. Bernhard Heitzer, who became State Secretary in the Federal Ministry of Economics after just two years in office.

Mr. Mundt, a lawyer, has been with the FCO since 2000, having previously held various posts in the Federal Ministry of Economics and with the liberal parliamentary group. Prior to his appointment as President of the FCO, Mr. Mundt served as Director of the General Policy Division of the FCO since 2005.

As Mr. Mundt is already familiar with the FCO's agenda, his transition is expected to be smooth and he is expected to continue to act as a strong voice for the benefits of competition. His first public statements do not reveal any special area of interest, but one can anticipate that he will maintain the FCO's efforts to strengthen its cartel enforcement activities, to foster competition in the energy markets, and to engage actively in the reform of the GWB.

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

First Person In Ireland Jailed For Competition Law Offense

On November 30, 2009, the Irish Central Criminal Court handed down its first judgment requiring an individual in Ireland to spend time in prison for a competition law offense.[23] On April 3, 2009, Jim Bursey was initially given a 9-month suspended sentence and fined €80,000 for his participation in a cartel in the car industry. On November 30, following his failure to pay the fine, the court imposed a 28-day sentence on Bursey.

At the time of the November 30 hearing, the law in Ireland was not clear as to whether failure to pay a fine imposed for a competition law offense should result in a 28-day sentence (a standard sentence for this type of offense in criminal law cases) or whether the original suspended sentence should be imposed. Given the ambiguity in the law, the Court decided that Bursey should only be required to serve 28 days in jail.

Although the criminal prosecution of cartels has been possible in Ireland since the adoption of the Competition Act 1996, this is the first time that an individual has had to serve time in prison for their involvement in a cartel. Prior to this decision, several individuals were criminally prosecuted and had penalties imposed for such offenses, but these always involved monetary fines and suspended sentences. Prison terms for cartelists have been suspended in the past due to mitigating factors.

The Competition Authority welcomed the judgment of November 30 as a step in the right direction. The Authority has been advocating a

22 See Bundesgerichtshof, judgment of November 11, 2008, Case KVR 60/07 - E.ON/Eschwege; see also National Competition Report October – December 2008, p. 11.

23 *D.P.P. v Bursey & Anor*, Unreported, High Court, November 30, 2009.

strict approach to cartel offenses for a number of years, encouraging the courts to impose higher fines and actual jail time. The Authority's role is limited to investigating alleged cartel activity: the imposition of criminal sanctions is left exclusively to the courts.

Irish Supreme Court Issues Decision In Beef Industry Cartel Case

On November 3, 2009, the Supreme Court of Ireland ("SC") issued its decision in the long-running beef industry cartel case.[24] The Court remanded the case to the High Court ("HC") to determine whether the capacity reduction scheme at issue could be justified under Article 81(3) EC (now Article 101(3) TFEU).

The Beef Industry Development Society Limited ("BIDS") is an association of 10 undertakings representing 93% of the beef processing industry in Ireland. BIDS was set up in 2002 in response to excess capacity in the industry. The express purpose of the association was to reduce the number of processors on the market, thus reducing capacity by about 25%. BIDS sought approval for this scheme from the Competition Authority, which expressed its opposition to the arrangements and applied to the HC for a declaration that the scheme was contrary to Article 81 EC. The HC refused to grant this declaration, finding instead that the scheme did not infringe Article 81(1) EC. On appeal, the SC referred the case to the ECJ, which held that a scheme such as BIDS constitutes an infringement of Article 81(1) EC by its very object.

In light of the ECJ judgment, the SC allowed the Competition Authority's appeal on the basis of Article 81(1) EC. In relation to Article 81(3), however, the SC declined to issue a final judgment on the merits. The SC noted that McKechnie J. (the HC judge at first instance) was best placed to try the issue, as he had particular expertise in competition law and had heard the relevant witnesses at first instance. The SC therefore remanded the case to the HC to determine whether the scheme satisfied the conditions of Article 81(3). The case is currently pending before the HC.

Policy and Procedure

Irish Competition Authority Publishes Guidance To Trade Associations

On November 9, 2009, the Competition Authority published a Notice giving guidance to undertakings on the circumstances in which the activities of trade associations can infringe competition law. The Authority recently secured criminal convictions in relation to three cartels: the Connaught Oil Promotion Federation, Irish Ford Dealers Association and the Citroën Dealers Association. The fact that all three cartels used a trade association as a vehicle for exchanging sensitive price information prompted the Authority to warn undertakings of the risks inherent in trade association activity.

The Notice explains that Irish and EU competition law apply to the activities of trade associations insofar as they constitute associations of undertakings. Although the Authority recognizes that trade associations perform some valuable functions (such as providing support for lobbying activities, and facilitating economic development in a particular sector), it notes that certain activities carried out by undertakings in a trade association can constitute infringements of competition law.

In particular, the Authority points out that trade associations are more likely to facilitate anticompetitive horizontal coordination in times of economic difficulty. The Notice also emphasizes that an explicit agreement is not necessary for a restriction of competition to take place. A simple exchange of information may be sufficient to infringe competition law if it creates market transparency such that competitors can predict, with a high degree of certainty, the likely actions of their competitors.

The Notice concludes with a general warning to all undertakings involved in trade associations to seek legal advice and put compliance programs in place to prevent legitimate business exchanges from developing into illegal coordination. Although it is not legally binding, the Notice provides a clear indication that trade association activity is one of the Authority's key enforcement priorities.

ITALY

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

Horizontal Agreements

Italian Supreme Administrative Court Partially Overturns Ready-Mixed Concrete Cartel Decision

On October 1, 2009, the Italian Supreme Administrative Court partially overturned a December 2, 2005 judgment of the Tribunal, which had reduced a €40 million fine imposed by the Authority on ten manufacturers and distributors of ready-mixed concrete.

24 *Competition Authority v The Beef Industry Development Society Ltd*, [2009] IESC 72.

In 2004, the Authority found that the companies in question infringed Article 2 of the Italian Competition Law between September 1999 and December 2002, by sharing and allocating amongst each other the market for the supply of ready-mixed concrete for building sites in the Province of Milan.[25]

In its October 2009 judgment, the Court upheld the Tribunal's finding that the Authority had wrongfully characterized the infringement as "very serious." In the Court's view, the evidence showed that the contested infringement was merely "serious" in light of the limited geographic market concerned (the Province of Milan) and the absence of any evidence regarding the cartel's effects on the market. Nonetheless, the Court annulled the Tribunal's judgment with respect to the duration of the infringement, the participation of one of the companies under investigation in the cartel, and the aggravating circumstance of recidivism.

With regard to the duration of the infringement, the Court held that the unlawful agreement ended in 2000 rather than 2002, and that the fines imposed should therefore be recalculated using the rules in force at that date. The rules in force in 2000 only allowed for fines of up to 10% of turnover in the products concerned, unlike the new rules established by Law No. 57/2001, which allow for fines of up to 10% of the infringing undertaking's total annual turnover. Therefore the Court held that the Authority should recalculate the fines with reference to the infringing undertakings' turnover in ready-mixed concrete only.

As regards participation in the infringement, the Court held that the involvement of a given company should be specifically evidenced by proof of the attendance of its own employees at the unlawful meetings. In the case of corporate groups that operate through more than one subsidiary, attendance by employees of one such subsidiary will not necessarily imply the involvement of the others, unless there is an agreement between those companies regarding their representation at cartel meetings. The Authority was unable to demonstrate any such links in the case at hand.

Finally, the Court set aside the part of the Tribunal's judgment restricting the ability of the Authority to apply the aggravating factor of recidivism in the case of violations that occur more than five years after the previous infringement. In the Court's view, a different conclusion would excessively limit the Authority's discretionary fining power, particularly in light of the long duration of administrative proceedings in Italy.

Unilateral Conduct

Authority Imposes A Fine Of €285,000 For Abuse Of Dominance In The Market For Dry Dock Services In Naples

On October 28, 2009 the Authority imposed a fine of €285,000 on Italian company Cantieri del Mediterraneo ("CAMED") for abusing its dominant position in violation of Article 82 EC (now Article 102 TFEU) in the market for the provision of large dry dock areas in the harbor of Naples.

The dry dock areas in question are owned by the State but are exclusively managed by CAMED by virtue of a 30-year administrative license issued by the Port Authority of Naples. These exclusive management rights confer a legal monopoly on CAMED within the meaning of Article 8 of the Italian Competition Law and thus create an obligation on CAMED to grant access to the infrastructure to any interested undertaking on fair and non-discriminatory terms.

The Authority launched an investigation following a complaint from CAMED's main competitor in the market for the provision of naval repair services, and found that CAMED unlawfully denied its competitors essential information regarding the availability of the only dry dock area in the harbor of Naples suitable for receiving large-sized ships. The Authority's investigation revealed that CAMED abused its privileged access to information regarding the availability of the dry dock areas for large ships with the aim and effect of reserving dry dock areas for naval repair services exclusively to itself.

In the Authority's view, CAMED's conduct, despite its limited geographic scope, had the effect of preventing, distorting or limiting competition within the EU contrary to Article 82 EC, as the harbor of Naples constitutes a substantial part of the common market. Although the infringement concerned a limited period of time (from 2007 onwards), the Authority found that CAMED's conduct was serious in both its nature and effect, insofar as it restricted competition and caused prejudice to end-users in the market for the provision of naval repair services. In imposing its significant fine on CAMED, the Authority also took into account recidivism - as CAMED had already been sanctioned for abuse of dominance in 2002.

NETHERLANDS

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

25 See National Competition Report (Italy) 2004 - 3rd Quarter.

Horizontal Agreements

€3 Million Fine Imposed On Participants In "Swimming Pool Chloride Cartel"

On November 12, 2009, the NMa imposed a fine of €3,107,000 on five distributors of natriumhypochloride for cartel arrangements in the swimming pool sector. Natriumhypochloride is a chemical product used to disinfect swimming pools.[26]

The NMa found that from January 1998 to April 2005, six distributors of natriumhypochloride regularly met at multilateral and bilateral meetings at which they divided the market and agreed on a so-called "swimming pool list," indicating what distributor could supply which public swimming pools. The cartel members also discussed market prices and rigged replies to requests for quotations. Where a distributor nonetheless lost a swimming pool to another distributor, the companies agreed on compensation in the form of free supply of natriumhypochloride or money. To cover the costs of these compensation arrangements, the cartel members were obliged to pay a yearly contribution calculated as a percentage of each member's total turnover.

In accordance with the NMa's Fining Guidelines, the fines were calculated as 10% of each company's natriumhypochloride revenues for each year of the infringement, multiplied by 2.5 on account of the infringement's severity (as the cartel participants accounted for some 90% of the Dutch market for natriumhypochloride). The NMa did not accept any of the mitigating circumstances invoked by the cartel members. Notably, the NMa held that the fact that legitimate topics (like supply continuity, security, and environmental issues) were also discussed during the cartel meetings, did not qualify as a mitigating circumstance. Similarly, the NMa found that the defendants' in-house compliance programs and codes of conduct prohibiting anti-competitive behavior did not constitute mitigating factors. In line with its earlier decisions, the NMa also held that early voluntary termination of the infringement before the NMa began its investigation could only amount to a mitigating element under special circumstances. Only when a company does more than required, i.e. more than merely abstaining from the illegal behavior, would such special circumstances exist. The minutes of one of the natriumhypochloride cartel meetings proved that one company proposed to end the cartel. However, the minutes did not show that that company actually tried to limit that meeting as well as the following meetings to lawful topics. The NMa therefore held there were no special mitigating circumstances.

Brenntag Nederland B.V. was not fined for participating in the cartel, as it informed the NMa of the existence of the cartel before the NMa began its investigation. Vivochem B.V., which had applied for leniency some considerable time after the NMa had conducted dawn raids, received a 25% reduction and ended up with a fine of €119,000. The other four cartel members were fined €1,440,000 (H. Fr. H. Breustedt Chemie B.V.), €1,034,000 (Caldic Nederland B.V.), €463,000 (Quaron Wormerveer B.V.), and €51,000 (Internation B.V.).

On Court's Instruction, NMa Fines Additional Gardening Company For Cartel Participation

On November 30, 2009, the NMa fined an additional company for involvement in a cartel it had first sanctioned in 2005.[27]

In April 2004, following a complaint by the city of Maastricht, the NMa started an investigation into a possible cartel infringement by various gardening companies. The city of Maastricht suspected that certain gardening companies, after receiving calls for tenders for five different contracts, met to agree what companies should get which contracts.

On December 15, 2005, the NMa found that eight companies had indeed met to rig the calls for tenders, and imposed fines. Seven of the eight gardening companies appealed. During their appeal, the companies provided new information that pointed to the possible involvement of another gardening company, Van der Linden Groen B.V. ("Van der Linden"). Van der Linden had submitted a tender for one of the contracts at issue together with one of the companies that had been fined (BTL). During the NMa's original investigation, three of the eight cartel members had stated that Van der Linden participated in the discussions on the calls for tenders, but one company had explicitly declared that Van der Linden was not present at those discussions. However, during the appeal procedure, the latter company changed its mind and confirmed Van der Linden's participation in the discussions. Another company that had not initially discussed Van der Linden's presence made a similar statement.

The NMa therefore opened an investigation into the possible participation of Van der Linden. Two more cartel members subsequently confirmed Van der Linden's presence at the discussions, although the director of another company withdrew his initial statement that Van der Linden had been present. On October 16, 2007, the NMa held that there were not enough indications to conclude that Van der Linden participated in the discussions on the

26 Case 6091-1/204, *Distributeurs van natriumhypochloriet,* NMa Decision of November 12, 2009.

27 Case 5698/242, *Openbaar Groen Maastricht (Aanvulling)*, NMa Decision of November 30, 2009.

calls for tenders. It indicated that Van der Linden's presence was only evidenced by *ex post facto* testimony, but that such testimony was not detailed and consistent enough. Only three of the seven companies that made an incriminating statement against Van der Linden had done so during the initial investigation. Moreover, two companies had made inconsistent statements.

The NMa's 2007 decision was appealed by six of the companies that were originally fined in 2005. On May 6, 2009, the Court held, on the basis of the evidence in the case file and statements by Van der Linden, that the latter had been aware of the existence of cartel agreements in the gardening sector for years. It found that Van der Linden's statements also showed that, shortly before submitting the joint tender with BTL, it did not merely suspect but was affirmatively aware that the eight companies – including BTL – had discussed the call for tenders. Since Van der Linden nevertheless proceeded with a joint tender with BTL, without distancing itself from the agreements of the other companies, the Court found that Van der Linden had itself infringed the cartel prohibition, irrespective of whether its presence at one of the cartel meetings could be proven.

The Court sent the case back to the NMa to decide on a fine for Van der Linden, in line with the Court's decision. The NMa agreed with the findings of the Court and consequently imposed a fine of €138,000 on Van der Linden.

Unilateral Conduct

NMa Rejects Abuse Of Dominance Complaint By TNT

On December 15, 2009, the NMa concluded that there were no indications that TNT had abused its dominant position in the letter processing and delivery sector.[28]

Two years earlier, Sandd B.V. ("Sandd"), a company active in the market for the transport, sorting, distribution, and delivery of letters and addressed printed matters, had brought a complaint against TNT N.V. ("TNT") and its subsidiaries, specifically Koninklijke TNT Post B.V. ("TNT Post") and Netwerk VSP Geadresseerd B.V. ("Netwerk VSP"). TNT Post is active in the market for the transport, sorting, distribution, and delivery of letters and addressed printed matters. Netwerk VSP offers a low-cost postal service, with a longer delivery period (called "Budgetmail"). Sandd claimed that TNT and its subsidiaries abused their dominant position in four ways.

- **Predatory pricing**. Sandd claimed Netwerk VSP was offering its Budgetmail service below cost. For the delivery of non-urgent postal items, Netwerk VSP uses the infrastructure of TNT Post and pays a small fee for that service. Sandd claimed that the real costs for TNT Post to operate Netwerk VSP's Budgetmail service were higher than Netwerk VSP's prices (let alone the small service fee paid to TNT Post).
- **Tying and bundling**. Sandd claimed TNT was tying and bundling postal services on which TNT has to compete with its competitors (*e.g.*, the Budgetmail service) to other postal services for which TNT is, *de facto*, the only supplier (*e.g.*, the regular delivery in 24 or 48 hours), so that the customer could not switch for part of his needs to TNT's competitors.
- **Exclusive long-term contracts**. Sandd claimed that TNT in 2007 agreed on exclusive, long-term contracts for postal services with mostly large customers. Therefore, a significant part of the market for postal services was allegedly foreclosed for (potential) competitors.
- **Price discrimination**. Sandd claimed TNT selectively offered low prices to customers that were inclined to switch from TNT to its competitors, thus foreclosing a significant part of the market.

The NMa rejected all claims. It decided that it was not necessary to assess whether TNT had a dominant position on one or more relevant markets, since the investigation showed that there was in any event no abusive behavior by TNT.

- **Predatory pricing**. Following the European Commission's guidelines on its enforcement priorities, the NMa focused on TNT's long-run average incremental costs ("LRAIC"). The fee paid by Netwerk VSP to TNT Post to operate the Budgetmail service should not be included in these costs. Only the extra costs that TNT Post incurred in operating the Budgetmail service are relevant to calculate the LRAIC, since internal transfer payments by a subsidiary to its parent company have no effect on the costs of the whole group. The total number of Netwerk VSP's postal items delivered by TNT Post is relatively small compared to TNT Post's own volume, so that an efficient use of TNT Post's capacity is likely, without incurring significant extra costs for the group. Netwerk VSP's average prices were higher than TNT's LRAIC during the period reviewed, and the NMa concluded it was very unlikely that TNT was using predatory prices. Moreover, in certain examples where Sandd alleged that Netwerk VSP had offered predatory prices, the customer ended up opting for Sandd's services – thus evidencing a lack of foreclosure.

28 Case 6207/233.BT1239/, *Sandd vs TNT*, NMa Decision of December 15, 2009.

- **Tying and bundling**. Sandd presented some examples to the NMa of cases in which it claimed that TNT was tying and bundling its products. However, for five of the seven specific examples, the NMa decided that TNT did not unlawfully tie or bundle its services. For instance, TNT Post allegedly bundled its urgent and non-urgent mail services because a customer buying several services would receive quantity rebates, but would lose these rebates if it were to switch its non-urgent mail to a competitor of TNT Post. The NMa found that bundling of the urgent and non-urgent mail service was unlikely in this case, as the rebates were calculated per service, and a partial switch of the customer's needs to a competitor would not result in a lower rebate on the services that were still rendered by TNT Post. In two other examples, TNT Post might have tied and bundled its services, but the turnover related to these cases was low, so that the anti-competitive effects were limited. As Sandd did not provide the NMa with further examples, the NMa concluded there were no clear indications of unlawful tying or bundling.
- **Exclusive long-term contracts**. Exclusive long-term contracts could be abusive if they have anti-competitive effects and no objective justification. The NMa reviewed the contracts of customers that according to Sandd could have agreed exclusive long-term contracts with TNT. Sandd selected these customers on the basis of information from the media and TNT's own press releases. However, the NMa did not find any long-term exclusivity provision. Moreover, given the percentage of contracts that expire each year, the NMa concluded there is each year a significant part of the market open for new negotiations and contracts.
- **Price discrimination**. The NMa found that the prices offered by Netwerk VSP to (potential) customers of Sandd were similar to the prices offered to other customers, so that there was no proof of price discrimination.

Mergers And Acquisitions

NMa Conditionally Clears The Joint Venture Of Gemeente Amsterdam And Reggefiber Group In Glasvezelnet Amsterdam

On October 21, 2009, the NMa conditionally cleared a joint venture of Ontwikkelingsbedrijf Gemeente Amsterdam ("OGA") and Reggefiber Group B.V. ("Reggefiber Group") in the market for glass fiber networks.[29] The joint venture will be named Glasvezelnet Amsterdam C.V. ("GNA").

GNA and Reggefiber Group both install and exploit glass fiber networks for consumers, also known as "Fiber to the Home." Glass fiber connections allow data to be sent and downloaded 10 to 200 times faster than ADSL, cables, or a wireless network. GNA is active only in the city of Amsterdam, while Reggefiber Group is active nation-wide. The proposed joint venture is designed over the coming years to install a glass fiber network in the city of Amsterdam.

For the moment, GNA has a contract with telecom company BBned N.V. As a condition for the joint venture, the NMa decided that BBned must be able, at any time, to switch to the national network of Reggefiber Group. This prevents potential competition concerns by giving BBned the possibility to choose between contracting with GNA or Reggefiber Group.

The NMa held that under that condition the joint venture would not have a negative effect on competition, as Reggefiber Group is already committed to ensuring that telecom companies have open access to the Amsterdam glass fiber network in a non-discriminatory manner. Conditions had been imposed on Reggefiber Group in decisions of December 19, 2008 and July 28, 2009, when it became a joint venture of KPN B.V. and Reggefiber B.V. Under those conditions, telecom companies must have access to the glass fiber network of Reggefiber Group in a non-discriminatory manner at a predetermined maximum tariff. All the undertakings under the control of Reggefiber Group must offer access under the same conditions.

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 (CNC).

Horizontal Agreements

Insurance Companies Fined €120.7 Million For Fixing Prices For Buildings Insurance

On November 12, 2009, the CNC fined six insurance and reinsurance companies a record total of €120.7 million for fixing minimum prices for building insurance.[30] Asefa was fined €27.8 million, Swiss Re €22.6 million, Mapre €21.6 million, Scor €18.6 million, Munich Re €15.9 million, and Caser €14.2 million.

Introduced in 2002, the Spanish Building Regulatory Act requires

29 Case 6651/106.BT, *Reggefiber-OGA-GNA*, NMa Decision of October 21, 2009.

30 Decision S/0037/08 Compañías de Seguro Decenal

developers of new residential buildings to arrange insurance for damage caused by latent defects for a period of 10 years ("building insurance"). Around the time of the Act's introduction, rapid growth in the Spanish construction industry was matched by growth in the market for building insurance, resulting in intense price competition. Insurance companies took out policies with international reinsurance companies, transferring to them a high proportion of the risk and premium.

The CNC found that, in order to prevent price erosion for building insurance as a result of this intense competition, the leading insurance companies (Asefa and Mapfre) and reinsurance companies (Scor, Swiss Re, and Munich Re) met and exchanged information so as to fix minimum prices. These five companies first met in 2001, and reached an agreement on minimum prices in December 2001. The minimum pricing agreement was effective from 2002 to 2007; Caser joined the agreement in 2006. The prices agreed were implemented by the parties to the agreement as well as by the most other building insurance providers (because the reinsurance companies used these minimum prices in their compulsory pricing guidelines). Accordingly, the CNC found that the parties to this agreement had infringed Article 81 EC and Article 1.1.a of the Spanish Competition Law 16/1989.

The €120.7 million fine is the highest imposed by the CNC, and the parties have appealed the decision to the Spanish High Court.

SWEDEN

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

Policy and Procedure

New Legislation Concerning Unfair Competition By Public Authorities

In November 2009, the Swedish Parliament amended the Swedish Competition Act (with effect from January 1, 2010) to give the Swedish Competition Authority increased ability to proceed against public authorities for Competition Act violations. The legislation creates a new competition rule, known as the "conflict-solving rule," that will prohibit conduct by public entities that distorts or impedes effective competition.

Sweden has one of the largest public sectors in the EU in relation to its GDP. Increasing competitiveness in the public sector has been a priority of the Swedish legislature, due to the recent liberalization of certain markets (*e.g.*, pharmacy, healthcare, and education) that were previously reserved for public entities. The SCA has received a large number of complaints from private companies alleging that the activities of public authorities (*e.g*. municipalities that provide various goods or services on local markets in competition with private companies) distort competition in the market. Previously, the SCA was unable to enforce the Competition Act with respect to these public companies unless they held a dominant position.

The amendment to the Act addresses these issues by introducing a new tool for the SCA to use against unfair competition by public authorities. The amendment provides that the SCA may request the Stockholm District Court to order a public authority (be it central, regional, or local) or an entity owned or controlled by the government, to cease and desist from offering goods or services, where such activities have the object or effect of preventing, restricting, or distorting effective competition.

However, only "*activities of an economic or commercial nature*" may be prohibited. Exemptions are available for economic activity deemed to be in the "*public interest*" or to constitute "*the exercise of public authority.*" Where an order is adopted under the conflict-solving rule, it may be accompanied by an administrative fine. If the Competition Authority decides not to take action in a given case, affected undertakings have a subsidiary right to apply to the Court for an order.

In October 2009, the Director General of the SCA stated that the primary aim of the new rule would be to create a deterrent against the distortion of competition by public authorities, by encouraging them to "*review their activities and make them think twice before engaging in new commercial activities*." The SCA plans to publish guidance on its enforcement priorities under the new rule in due course.

SWITZERLAND

This sections 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 (FAT).

Vertical Agreements

FCC Fines Gaba For Prohibiting Parallel Imports Of Elmex Toothpaste

On November 30, 2009, the FCC imposed a fine of CHF 4.8 million on the manufacturer of Elmex toothpaste, Gaba International SA (a subsidiary of the US company Colgate-Palmolive), on account of the export prohibition Gaba had imposed on its Austrian license holder, Gebro Pharma GmbH. The FCC found that this clause constituted an unlawful ban on parallel imports into Switzerland and foreclosed competition in Switzerland.

The 1982 agreement between Gaba and Gebro included an export prohibition on Elmex products manufactured under license by Gebro (at least through September 2006). As a result, Swiss retail companies were prevented from buying Elmex products at lower prices in neighbouring markets. After Denner, a discount supermarket chain, filed a complaint noting that it was being prevented from importing Elmex products from Austria, the FCC opened an investigation.

The FCC found that this export prohibition comprised an unlawful ban on parallel imports. A prohibition on parallel imports may only be permitted under Swiss law where it temporarily facilitates the launch of a new product in the Swiss market; a condition that did not apply in this case, as the FCC found. The FCC thus fined Gaba CHF 4.8 million for the ban on parallel imports. Gebro was fined a mere symbolic CHF 10,000 because it did not benefit from the ban.

The Gaba/Gebro vertical agreement in place post September 2006 requires Gebro to inform Gaba of all exports, which could still produce the same effect as an export prohibition. However, Gaba and Gebro have committed to the FCC that they will not use this agreement to prohibit parallel imports.

FCC Fines Pfizer, Eli Lilly, And Bayer For Resale Price Maintenance

On December 8, 2009, the FCC issued a decision finding agreements between certain pharmaceutical manufacturers and distributors that fixed the resale prices of three pharmaceuticals to be unlawful. It imposed a total fine of CHF 5.7 million on the pharmaceutical companies concerned, Pfizer AG, Eli Lilly (Suisse), and Bayer (Schweiz).

The FCC found that the three producers fixed resale prices by establishing recommended retail prices for their erectile dysfunction drugs (Viagra, Cialis, and Levitra). While these are prescription-only drugs, as they are not reimbursed by the compulsory health insurance scheme, their price is set not by the public authorities but by the sellers. Consequently, the market concerned was deemed subject to the general rules of competition law.

The FCC found that recommended retail prices were integrated into the computer systems of the retail outlets or were communicated directly by wholesalers to drugstores and to physicians who, in the large majority of cases, would then charge their patients the recommended price. In particular, it held that this system of recommended prices, which covered the whole of the relevant market, stabilized producers' prices and distributors' margins. The FCC therefore prohibited the future publishing of recommended resale prices and imposed fines amounting to CHF 5.7 million on the pharmaceutical companies concerned for what it deemed to be unlawful resale price maintenance agreements, within the meaning of Article 5(4) of the Competition Act.

Unilateral Conduct

FCC Fines Swisscom CHF 220 Million For Abusive Margin Squeeze

On November 5, 2009, the FCC fined Swisscom AG CHF 219.9 million for having engaged in an abusive margin squeeze with respect to broadband internet services provided through the end of 2007. Swisscom, Switzerland's largest telephony company, was found to have charged competitors (*e.g.*, TDC A/S's Sunrise, VTX Services SA and Green.ch AG) excessive prices for broadband connectivity services, compared with the prices that it charged to end users. According to the FCC, such high prices prevented Swisscom's competitors from competing profitably in the high-speed internet access business.

On October 20, 2005, the FCC launched its investigation into possible abusive margin squeeze conduct in the market for asymmetric digital subscriber line (ADSL). According to the FCC, there were indications that Swisscom was dominant on the market for ADSL services. Swisscom, however, argued that it faced competition from cable, mobile and optic-fibre networks.

On November 12, 2008, the Secretariat – the FCC's investigative body – issued a draft decision against Swisscom, alleging abuse of a dominant position on the market for ADSL services. The draft decision envisaged a fine of approximately CHF 237 million. According to the Secretariat, the investigation revealed that Swisscom had abused its dominant position for broadband internet network capacity by means of a price or margin squeeze. The allegation was that the prices that Swisscom charged to internet service providers (ISPs) for access to the network were so high that it was not possible for ISPs to remain in the market in competition with Swisscom.

In line with EU and U.S. law, a margin squeeze is a violation of Article 7 of the Competition Act if a comparably efficient competitor cannot profitably compete in the downstream market due to the high prices imposed by the dominant undertaking in an upstream market. The FCC's findings confirmed the Secretariat's view that Swisscom charged its competitors such high prices in the upstream market (*i.e.*, the wholesale market for ADSL connection to the internet) that the competitors could not compete profitably with Swisscom in the downstream market (*i.e.*, the retail market for ADSL services). The FCC therefore found that Swisscom's pricing amounted to an abuse of a dominant position within the meaning of Article 7 of the Competition Act. The FCC assessed the fine at CHF 219.9 million, based on the type, duration and gravity of the infringement. The FCC considered it an aggravating circumstance that Swisscom had continued its practice over many years in a high-growth market.

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

OFT Publishes Construction Cartel Decision

On November 20, 2009, the OFT published the non-confidential version of its decision that 103 construction companies had been involved in a cartel to rig bids for building contracts.[31] The publication of the final decision followed the announcement on September 22, 2009, that the OFT had imposed fines totaling £129.2 million on the cartel members.

Commenced in 2004 following a complaint from an audit manager acting for Nottingham University NHS Trust, this was the OFT's largest cartel investigation to date. By early 2006, the OFT had gathered substantial evidence of collusive tendering, implicating up to 1,000 firms associated with 4,000 tenders, of which the total value was estimated to be around £3 billion. Due to its limited resources, the OFT decided to investigate only firms implicated in more than five infringements. The investigation was further streamlined by use of the "Fast Track Offer," which was sent to 85 parties who had not sought leniency, offering a 25% reduction in fines in return for tender specific information. The final decision is 1945 pages long.

The principal cartel activity concerned "cover pricing", *i.e.* pre-arranging the price of a winning bid in a tender process and providing "compensation payments" to the "losers" of the bid, so that there is an illusion of competition between the contributors of bids. Some cartel participants had submitted that cover pricing had no material or serious adverse effects on competition, since other "genuine" bidders also took part in tenders. The OFT rejected this argument. Referring to ECJ precedent, the OFT emphasized that there is no need to prove anti-competitive effect where the anti-competitive object of a horizontal agreement is established, and found that, whilst not every cover pricing infringement had the actual effect of preventing or restricting competition, all the infringements had the object of doing so.

When assessing fines, the OFT decided to consider each infringement separately. It imposed a fine on each undertaking for no more than three separate infringements, which were not assessed cumulatively. For some of the parties who were fined, the overall sum represented – in the OFT's view – a small part of their turnover. In order to ensure that the penalties imposed were sufficient to deter future infringement, as well as to ensure that the penalties were fair and proportionate as between all of the fined companies, the OFT increased the penalty for each undertaking to a level equivalent to a fixed proportion of that undertaking's total turnover in the last business year prior to the decision. However, in light of the current economic climate, the OFT took into account the financial position of a number of participants in the cartel; accordingly, although the OFT did not decide to waive the fine, some undertakings were allowed to pay their fines over an extended period of time.

Unilateral Conduct

Competition Appeal Tribunal Rejects Enron Coal's "Follow-on" Claim For Damages

On December 21, 2009, the CAT handed down judgment in the Enron Coal case, rejecting the first "follow-on" damages claim to reach trial in the UK.[32]

The claimant, Enron Coal Services Limited ("Enron"), brought a follow-on claim against English Welsh and Scottish Railway Limited ("EWS") based on a 2006 decision (the "Decision") by the Office of Rail Regulation ("ORR"), the antitrust regulator for the U.K. rail sector. The Decision held that EWS had abused its dominant position, contrary to Article 82 EC (now Article 102 TFEU), in rail haulage by engaging in price discrimination, such that Enron was foreclosed

31 *See http://www.oft.gov.uk/advice_and_resources/resource_base/ca98/decisions/bid_rigging_construction.*

32 *See* http://www.catribunal.org.uk/files/2.1.1106_Enron_Judgment_21.12.09.pdf.

from being able to supply coal to customers. The substance of Enron's claim related specifically to the loss of a chance to supply coal to electricity firm Edison Mission Energy ("Edison").

The CAT held that Enron had failed to show that: (1) it was more likely than not that Enron would have sought to negotiate with Edison for a contract to supply coal; and (2) there was a real or substantial chance that any negotiations between Edison and Enron would have led to the award of a contract.

Until 2001, EWS was the monopoly provider of rail coal haulage in the U.K. In 2000, Edison invited coal suppliers to tender for supply to two power stations in England for the period 2001-2004. Enron submitted a bid but was ultimately unsuccessful; the contract was awarded to EWS.

In January 2001, Enron complained to the ORR that EWS had acted to foreclose, deter or limit Enron's participation in the U.K. coal industry. The ORR defined the relevant product market as the market for coal haulage by rail in mainland Britain. Capacity constraints and price differentials meant that road haulage was not considered to be a substitute for rail haulage. In 2006, the ORR found that EWS was dominant in the supply of rail coal haulage in mainland Britain and that it had abused its position *inter alia* by engaging in discriminatory pricing practices that placed Enron in a competitive disadvantage in its contractual negotiations with Edison. The ORR imposed a fine of £4.1 million on EWS. EWS chose not to appeal the Decision and paid the fine in full.

In 2008, Enron commenced a follow-on claim for the loss that it alleged it had suffered as a result of the infringement found by the ORR. Although the scope of Enron's claim was wider, the issue that came to trial concerned the loss of the Edison contract. Enron's case was, essentially, that the discriminatory prices it had been charged had deprived it of a real or substantial chance of winning the contract to supply to Edison from 2001 to 2004. Enron estimated the value of that contract to be £19.1 million, and therefore claimed that amount.

The CAT rejected Enron's claim. It found that: (1) Enron's conduct was not consistent with a company in aggressive pursuit of an attractive business opportunity, and therefore Enron failed to show that it was more likely than not that Enron would have sought to negotiate with Edison; and (2) even if EWS's prices to Enron were discriminatory and placed it at a competitive disadvantage, non-economic factors suggested that Enron would not have been able to conclude a supply contract with Edison in any event (*e.g.*, Enron had a difficult business relationship with Edison, Enron's inflexible contract terms were unlikely to have been attractive to Edison, and Enron would have had to deal with a third party rail freight operator, as well as Edison).

As an aside, the CAT also indicated that it does not consider itself to be bound by findings of fact contained in the Decision, where those facts did not constitute an element of the infringement. Accordingly, the CAT left open the possibility of revisiting and examining evidence and findings contained in an infringement decision where necessary.

As the first follow-on action to reach trial, this case provides some indication of the CAT's intended approach to causation in follow-on actions. Taken in isolation, this case would suggest that the CAT is likely to take a relatively strict approach to causation, such that potential claimants will need to show clearly that the infringement concerned was the direct cause of the loss claimed. Defendants would seem to be able to use this case to resist claims by showing that the loss claimed was not as a result of the infringement, but due, for example, to the claimant's own (unrelated) business shortcomings.

Further, the CAT's willingness to revisit and examine certain findings of fact may mean that follow-on actions concern more than simply a determination of the loss that flowed from an infringement, as was commonly thought to be the case. This, coupled with the High Court's willingness to commence some parts of an antitrust claim on a standalone basis before all appeals are exhausted (see *National Grid Electricity Transmission Plc v. ABB Ltd & Ors* [2009] EWHC 1326), indicates that potential claimants should consider their options carefully before embarking on a claim in the CAT.

BAA Wins Bias Appeal in Airport Markets Investigation

On December 21, 2009, the CAT handed down judgment in favour of BAA Limited in its appeal against the CC's final report on its investigation into BAA's supply of UK airport services, on the grounds that an observer would conclude that there was a real possibility that the market investigation was affected by apparent bias.[33] The CC has requested permission to appeal the decision.

Following a reference from the OFT in 2007, the CC published its final report in March 2009, which held that BAA's ownership of seven airports in England and Scotland gave rise to adverse effects on competition. In particular, the CC found that common ownership by BAA prevented competition between Glasgow and Edinburgh airports, and between Heathrow, Gatwick, and Stansted airports. The CC concluded that a package of remedies would effectively

33 *See* http://www.catribunal.org.uk/files/1110_BAA_Judgment_21.12.09.pdf.

address the adverse effects. This included the divestiture of both Gatwick and Stansted airports in England, as well as either Edinburgh or Glasgow airports in Scotland. These divestitures were required to take place within a specified, but undisclosed, timeframe. BAA has already agreed to sell Gatwick airport to Global Infrastructure Partners for £1.46 billion.

In 2009, BAA applied to the CAT for review of the report, relying on two grounds of challenge: apparent bias and proportionality. Ryanair, the single largest airline operator out of Stansted airport, supported the CC in its defence against the appeal.

First, BAA claimed that the decision was tainted with apparent bias, because of the connections between Professor Peter Moizer, a member of the CC group that conducted the investigation, and potential purchasers of airport assets to be divested by BAA. Professor Moizer had advised the Greater Manchester Pension Fund for twenty years. The Fund owned 100% of the shares in Manchester Airport Group plc (MAG), which owned and operated Manchester Airport. MAG played an active role in the investigation, providing evidence and submissions to the CC, and indicated at an early stage in the proceedings that it was interested in purchasing airport assets.

BAA's claim was based on the legal concept of "apparent bias" that automatically disqualifies decision-makers with a conflict of interest; BAA did not claim that Professor Moizer was actually biased. The CAT found, "*with the greatest reluctance*," that BAA's claim was well founded. The CAT referred, in particular, to General Pinochet's challenge to the legitimacy of the House of Lords extradition ruling on the grounds that Lord Hoffmann was a chairman and director of Amnesty International. The CAT found that, on MAG making the CC aware in October 2007 that it was keen to acquire any airports that were required to be divested by BAA, an observer would conclude that there was a real possibility that Professor Moizer would be affected by bias in favour of MAG.

On proportionality, the second ground of challenge, BAA submitted that, in assessing the proportionality of the divestiture remedies, the CC failed to take account of material considerations relating to the position of BAA, and in particular the timeframe for the divestitures. This ground of challenge failed. The CAT found that, in determining the appropriate divestiture period, the CC had conducted the required balancing exercise between factors favouring rapid disposal of the airports, and those favouring slower divestiture. The CAT found that it was "inconceivable" that BAA's representations on this issue and the risk of the loss of value of the assets to be divested were ignored.

Mergers and Acquisitions

CC Unwinds Stagecoach's Acquisition Of Preston Bus Company And Orders Divestments

On November 11, 2009, the CC published its final report on the completed acquisition of Preston Bus Ltd ("PBL") by Stagecoach Group plc ("Stagecoach"), an international public transport group.[34] The merger was completed in January 2009, and the OFT referred it to the CC in May 2009.

PBL provided urban bus services in Preston, a town in the north of England. In 1993, PBL was sold to its employees, and up to June 2007 the company was profitable. In July 2006, Stagecoach approached PBL with an offer to purchase the company. This offer did not proceed, and Stagecoach began to compete with PBL in providing bus services in the Preston area. Between the date of the launch of Stagecoach's Preston bus services and Stagecoach's acquisition of PBL, PBL suffered considerable losses. PBL's owners were ultimately left with little choice but to sell to Stagecoach.

Stagecoach therefore contended that PBL was a failing firm prior to the acquisition, and that the relevant counterfactual against which to assess competitive concerns was the situation immediately prior to the merger. The CC rejected both arguments. The CC found that PBL would have continued to run its services profitably as it had done without the competition from Stagecoach. Further, the CC found that Stagecoach's competition with PBL by running bus services at an operating loss in 2008 and 2009 was not consistent with gaining a minority share in the Preston bus market and was an "abnormal" competitive situation. The CC found that the merger removed the likelihood of increased competition against Stagecoach from PBL (or a more efficient purchaser of PBL), and therefore resulted in a substantial lessening of competition (SLC).

Turning to remedies, the CC concluded that a partial divestiture package, including bus routes and a bus depot, would result in Stagecoach facing a competitor of sufficient scale to restore the level of competition lost as a result of the merger. The CC found that behavioural remedies to control fares, service levels, and/or operating profit would not be effective in remedying the SLC.

The CC's conclusion that only a divestiture of a reconfigured PBL would be an effective remedy is little short of requiring an unwinding of the merger. Stagecoach has appealed the CC's decision; the CAT published a summary of Stagecoach's appeal application under section 120 of the Enterprise Act 2002 on December 11, 2009.

34 *See* http://www.competition-commission.org.uk/rep_pub/reports/2009/fulltext/551.pdf. .

CC Clears Ticketmaster/Live Nation Merger, Reversing Provisional Decision

On December 22, 2009, the CC published its final report on the proposed acquisition by Ticketmaster Entertainment Inc ("Ticketmaster") of Live Nation Inc ("Live Nation").[35] The final report approved the acquisition, reversing the CC's provisional decision that the merger would be anticompetitive. However, on February 12, 2010, the CAT quashed the CC's decision; the CC has undertaken to issue a new final report within three months.

Ticketmaster is the world's largest retailer of tickets to live events. Both Ticketmaster and Live Nation operate in the U.K. live music sector, but at different levels of the supply chain: Ticketmaster is a ticketing agent, whereas Live Nation is a promoter and venue operator. Live Nation historically used Ticketmaster as its principal ticketing agent, but this agreement expired in December 2009. In 2007, Live Nation entered into an agreement with Europe's largest ticketing agent, CTS Eventim ("CTS"), to the effect that it would start providing ticket services in the U.K., replacing Ticketmaster from January 1, 2010. On June 10, 2009, the OFT referred the merger to the CC on the grounds that there would be a realistic prospect of a substantial lessening of competition in the market for live music retail ticketing if the proposed merger went ahead.[36]

The OFT's concerns were initially borne out by the provisional findings of the CC (published on October 8, 2009) that the merger would result in the likely foreclosure of CTS from the market for ticket services.[37] The CC found that the effect of this foreclosure would be the loss of CTS as an effective competitor in the U.K. market for the primary retailing of tickets for live events. Ticketmaster's share of that market was found to be 40-50%. The CC provisionally concluded that the merged entity would have the ability and the incentive to impede CTS's position in the U.K. market.

On December 22, 2009, the CC published its final report, following the submission of new evidence by Live Nation and CTS on the 2007 agreement to enter the market. The CC found that this new evidence indicated that CTS's principal opportunity under the agreement was to provide Live Nation with a managed ticketing service, which was guaranteed by a minimum ticket allocation from Live Nation that would remain post-merger. Further, the CC found that this new evidence indicated that Live Nation's intention was always to sell as many of its own tickets as possible, and that promoting CTS would have harmed Live Nation's website. Accordingly, the CC found, with respect to ticketing services, that Live Nation would not, post-transaction, have the ability to significantly alter CTS's revenues (as it could not lower CTS's ticket allocation below the minimum, and would not have been likely to increase CTS's ticket allocation above the minimum in the counterfactual to the merger). Accordingly, the CC concluded that successful entry by CTS would depend not on its relationship with Live Nation but on its own ability to attract customers, sell tickets, and gain further allocations of tickets, which would not be affected by the merger.

With respect to live music promotions and venues, the CC found that Ticketmaster would have been able to harm the competitiveness of other live music promoters and venue operators by (i) selling fewer tickets to them (or at less favourable terms), and/or (ii) transferring customer data to Live Nation, but that there would be little incentive to do so as it would not be able to recoup foregone ticket revenue. Accordingly, the CC found that the merger would be unlikely to result in an SLC in any U.K. market.

35 *See* http://www.competition-commission.org.uk/rep_pub/reports/2009/fulltext/552.pdf.

36 *See* http://www.oft.gov.uk/news/press/2009/67-09.

37 *See* http://www.competition-commission.org.uk/inquiries/ref2009/ticketmaster/pdf/prov_find_report.pdf.

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