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

AUSTRIA

This section reviews competition law developments under the Cartel Act of 2005, which is enforced by the Cartel Court, the Federal Competition Authority ("FCA"), and the Federal Antitrust Commissioner ("FAC").

Horizontal Agreements/Restraints

Record Fines On Elevator And Escalator Cartel Members Confirmed By Supreme Court

On October 8, 2008, the Austrian Supreme Court approved the Austrian Cartel Court's December 2007 imposition of fines totaling €75.4 million on five companies for bid-rigging and allocating contracts for the installation and maintenance of elevators and escalators in Austria.[1] Schindler was fined €25 million, Kone €22.5 million, Otis €18.2 million, Haushahn €6 million, and Doppelmayr €3.7 million. The cartel had been reported to the FCA by ThyssenKrupp, which was granted full immunity under Austria's leniency program.[2]

The FCA appealed the Cartel Court's December 2007 decision to the Supreme Court on the grounds that the fines had been insufficiently severe; the five cartel participants brought their own appeal, arguing (i) that the Cartel Court had transgressed its discretion by denying full immunity to the participants; (ii) that the Court had refused to consider mitigating circumstances; (iii) that the Court had misapplied the rules determining the scale of fines; (iv) that the cartel had not engaged in a single and continuous infringement; and (v) that the cartel's prosecution was, in part, time-barred.

The Supreme Court rejected as unfounded each of these arguments in a joined judgment. To the allegation that the Cartel Court had misapplied its discretion when setting fines, the Supreme Court countered that the fines imposed were preventative and punitive, and that only appropriately substantial penalties could reasonably be expected to secure the satisfaction of these objectives. As such, a fine amounting to 30% of each undertaking's turnover in the preceding business year was held not to be excessive; neither was the 50% increase in fines imposed on each of the undertakings for the cartel's long duration. The Supreme Court acknowledged that the Austrian rules concerning the determination of fines are not identical to those adopted by the European Commission, but that the Cartel Court was entitled to rely for guidance on the Commission's fining principles, assuming throughout that the Cartel Court respected the autonomous nature of the Austrian rules.[3]

With respect to those elements of an undertaking's turnover requiring consideration when setting fines, the Supreme Court found that the Cartel Court had correctly included not only the turnover achieved in the sale of affected products (*i.e.*, escalators and elevators), but also each participant's net turnover. It was necessary, therefore, for each party's turnover to include analytically the contributions of group companies if the fines imposed were to reflect each Party's economic strength.

In the sections of the judgment dealing with individual applicants, the Supreme Court upheld notably the Cartel Court's refusal of full immunity to every party except ThyssenKrupp. It rejected also the parties' reliance on mitigating circumstances and dismissed claims that the scale of the fines could never have been foreseen, and were therefore unlawful.

The FCA's appeal – which argued that the Court had not applied adequately its discretion when setting fines and that these fines were too low – was rejected in its entirety.

BELGIUM

This section reviews competition law developments under the Protection of Economic Competition Act of September 15, 2006

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1 Case OGH 16 Ok 5/08. A redacted version of the judgment, in German, is available at http://www.bwb.gv.at/NR/rdonlyres/EEF449F6-DAFC-4976-A0A1-6DA6BD91C679/33640/AufzugsFahrtreppenkartel16Ok5_08.pdf.

2 A similar cartel arrangement relating to Belgium, Germany, Luxembourg, and the Netherlands was the subject of an investigation by the European Commission that began in early 2004; *see* Case COMP/E-1/38.823 – *Elevators & Escalators*, Commission decision of February 21, 2007. The Commission imposed fines of more than € 990 million on Kone, Mitsubishi Elevator, Otis, Schindler, and ThyssenKrupp.

3 The Supreme Court did not, however, use the occasion to elaborate on the differences between the Commission's guidelines and the Austrian fining rules.

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(APEC), which is enforced principally by the Competition Auditorate (Auditorate) and the Competition Council (Council).[4]

Abuse Of Dominant Position

Brussels Court Of Appeals Annuls Interim Order Imposed On Portima For Failure To Provide Competitors With Interoperability Information

On November 18, 2008, the Brussels Court of Appeals annulled the interim Order of February 14, 2007, issued by the President of the Competition Council, compelling Portima to provide its competitors with network interoperability information necessary for the ensuring of the compatibility of competing operating systems with Portima's AS/2 network.[5]

Portima was established as a society by several Belgian insurance companies to design a telecommunications network (AS/2) for the secure exchange of data between insurance companies and insurance brokers in Belgium. To access AS/2, insurance brokers require a compatible operating system supplied either by Portima, or by a third-party software developer.

On September 3, 2003, the independent software provider, CRM, lodged a complaint with the Competition Council accusing Portima of abusing its dominant position by failing to disclose network updates and modifications to AS/2, thereby harming the reliability of CRM's operating system. CRM's complaint was accompanied by a request for interim measures seeking future access to the necessary interoperability information. In addition, CRM asked for a daily penalty should Portima fail to comply.

CRM's complaint was upheld by the President of the Council in his February 14, 2007 decision. The President found that Portima had a dominant position on both the Belgian market for operating systems for insurance brokers (with a 75%-80% market share) and the Belgian market for telecommunications platforms for the exchange of information between insurance companies and insurance brokers (where Portima held a monopoly). The President held that Portima was abusing its dominant position by harming competition on the downstream market for operating systems for insurance brokers. He therefore ordered Portima to disclose to competing operating system providers the various updates and modifications made to its telecommunications network in order to allow competitors to effect the necessary adjustments and prevent compatibility problems between their operating systems and any updated versions of AS/2.

This Brussels Court of Appeals, however, suspended the President's decision on September 24, 2008.

In its subsequent decision of November 18, 2008, the Court of Appeals annulled the President's interim Order of February 14, 2007, holding that Portima's rights of defense and the principle of legal certainty had been violated in the proceedings before the President. In particular, the Court found that the file that formed the basis of the President's decision did not meet some fundamental requirements: the pages in the file were unnumbered and the table of contents failed to identify numerous documents. Furthermore, a number of documents lodged by CRM in the course of proceedings were withheld from Portima without justification.

The Court of Appeals further found that the President had failed to justify adequately his finding that Portima's conduct amounted to a *prima facie* abuse of its dominant position. The President had based his decision solely on the consideration that Portima had failed on occasion to inform CRM and other software developers of changes to the AS/2 network. Moreover, Portima did not deny that some competitors had complained about the company's approach to updates. However, the evidence put forward by Portima was not examined sufficiently by the President.

Mergers And Acquisitions

Competition Council Partially Maintains 1997 Merger Conditions Imposed On Kinepolis

In its decision of October 1, 2008, the Competition Council decided to maintain, in part, the conditions imposed on Kinepolis in 1997 following the merger of the Belgian cinema groups Bert and Claens.[6] The conditions imposed in 1997 prohibited Kinepolis from entering into exclusivity arrangements that would prevent other cinema chains from screening certain films. Kinepolis was also prohibited from increasing significantly the number of its screens or seats, and from acquiring or building new cinema complexes without the prior approval of the Competition Council.

In its April 16, 2007 decision, the Council had lifted these conditions, referring to changes in the structure of the Belgian cinema market during the preceding ten years. However, in a judgment on March

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

5 Hof van Beroep te Brussel, A.R. nr. 2007/MR/1 van 18 november 2008, zaak Portima CVBA./ NV Computer Resource Management - DEV - NV Computer Resource Management.

6 Raad voor de Mededinging, beslissing nr. 2008-C/C-52 van 1 oktober 2008, verzoek van Kinepolis tot opheffing van de voorwaarden opgelend in beslissing nr. 97-C/C-25 van 17 november 1997, B.S., 20 oktober 2008, p. 55779.

18, 2008, the Brussels Court of Appeals annulled the April 16, 2007 decision on procedural grounds and referred the case back to the Competition Council.

In its decision of October 1, 2008, the Competition Council confirmed in part the restrictions imposed on Kinepolis in 1997, but limited their continued application to a period of three years. During that period the construction or acquisition of new theatre complexes will continue to require approval by the Competition Council. However, the condition requiring Kinepolis to seek authorization from the Competition Council prior to the expansion, renovation, or replacement of existing complexes was lifted.

Competition Council Approves Kinepolis' Acquisition Of A 50% Share In Imagimons

On October 29, 2008, the Competition Council approved the acquisition by the Kinepolis Group of a 50% share in the cinema chain Imagimons – provided that Kinepolis secures neither sole control of, nor the power to run, the company.[7]

The request for approval of the proposed acquisition was made on July 29, 2008 in line with one of the conditions imposed on Kinepolis in 1997 (discussed above), according to which the construction or acquisition by Kinepolis of new theatre complexes requires the prior approval of the Competition Council.

Competition Council Approves Acquisition Of Betv By Tecteo With Conditions

On October 31, 2008, the Competition Council approved the acquisition of pay-TV channel operator BeTV by cable operator Tecteo.[8]

Together with its partner Brutélé, Tecteo is the primary cable operator in Wallonia, and an important operator in the Brussels Region. Tecteo and Brutélé market their services under the brand VOO; BeTV is the main pay-TV operator in French-speaking Belgium.

The decision of the Competition Council followed the opinion of the Auditorate, which stressed that Tecteo was one of the few distributors not to dispose of a pay-TV offering, contrary to integrated operators such as Belgacom and Telenet. However, the Competition Council rejected the Auditorate's recommendation to authorize the acquisition without conditions.

The Council approved the concentration subject to two conditions; namely (i) that Tecteo be prohibited from entering into exclusive arrangements with free-to-air TV channels (thereby addressing the Council's concern that Tecteo might use its bargaining power to impose exclusivity conditions that would make it impossible, or at least very difficult, for free-to-air TV channels to be distributed on another platform); and (ii) that Tecteo commit to granting access to its cable platform to both free-to-air and pay-TV channels on non-discriminatory terms (thereby addressing the concern that Tecteo might grant exclusive access to its infrastructure to BeTV, depriving other non-vertically integrated audiovisual service broadcasters of similar access).

Remaining in force until December 31, 2011, these commitments will correspond essentially to the ones imposed previously by the Competition Council in its *Tecteo/Brutélé-Câble* decision of April, 25, 2008.

Competition Council Conditionally Clears The Acquisition Of Scarlet By Belgacom

In its decision of November 7, 2008, the Competition Council conditionally cleared the acquisition of Scarlet, a Dutch telecommunications company, by Belgacom, following a Phase II investigation.[9]

Belgacom is the incumbent telecommunications operator in Belgium. It provides a full range of telecommunications services, including wholesale and retail services, fixed and mobile telecommunications, voice and data services, as well as broadband internet access. Scarlet provides many of the same services.

After an extensive investigation, the Council concluded that the proposed concentration was likely to impede effective competition, particularly in the markets for broadband internet access and fixed telephony services. To obtain clearance of the transaction, the Parties agreed to the following commitments:

(1) divestiture of Scarlet's fibre optic network;

(2) Scarlet's customers for broadband internet access must be free, within a period of three months, to change operators without having to pay any penalties for the early termination of the contract;

7 Raad voor de Mededinging, beslissing nr. 2008-C/C-56 van 29 oktober 2008, verzoek tot instemming met transactie tussen Kinepolis Group NV en Multiscope Palace NV, 9 december 2008, p. 65497.

8 Conseil de la concurrence, décision n° 2008-C/C-57 du 31 octobre 2008, affaire CONC-C/C-08/0023 TECTEO-BETV/ACM, M.B., du 6 janvier 2009, p. 240.

9 Raad voor de Mededinging, beslissing nr. 2008-C/C-59 van 7 november 2008, zaak MEDE-C/C-08/0006: Belgacom NV/Scarlet NV, B.S., 17 december 2008, p. 66900.

(3) for a period of three years, Belgacom must continue to offer Scarlet's products to end-users under current conditions;

(4) commitments to ensure the maintenance of existing contracts between Scarlet and end-users and/or other telecommunications operators; and

Belgacom must apply the same basic rates throughout Belgium to residential customers for both broadband internet services as well as fixed telephony (including iTalk).

DENMARK

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

Horizontal Agreements/Restraints

The Danish Freight Transport Association Dansk Transport Og Logistik Exchanges Illegal Information With Its Members

On December 17, 2008, the Danish Competition Council found that DTL's members' illegal exchange of information constituted an infringement of Section 6 of the Danish Competition Act.[10] As the largest trade association for Danish transport companies moving freight by road, DTL gathers and evaluates relevant sales and other information, some of which it distributes exclusively to its members, while other such information is made available to the public on its website.

On March 13, 2008, the DCA raided DTL's premises. The stimulus for the raid was a video containing DTL's price calculation model for freight by road, which the company had published on its website. The video showed, *inter alia*, a pre-completed example of a price calculation model for road freight that resulted in companies earning a profit ratio of 15%. The DCA was able to show:

(1) a partially completed cost calculation program for road freight transport;

(2) two more fully completed examples (which included a profit ratio of 10% and 15% respectively) of cost calculating programs;

(3) cost forecasts for road freight transport;

(4) an electronic calculating program for fuel price increases; and

(5) recommendations to transportation companies for the regulation (or introduction) of a so-called "oil clause" in transport contracts.

The DCA concluded that the cost calculating program might be used to compose offers by reference to more or less coordinated prices, and that the calculation models published by DTL for members could foster coordination among members. The DTL was ordered to refrain from these types of information exchange, but the DCA took no steps to impose fines on DTL, or any of its fiduciaries, since, by the time the DCA issued its decision, DTL had already ceased most of its transgressive practices.

In earlier proceedings against DTL in 1998, the DCA found that DTL had engaged in anticompetitive information exchanges by reference to previously completed examples of cost-calculating models, including fixed-profit ratios and a cost forecasting system. This decision illustrates the DCA's determination to pursue information exchanges made via trade associations.

Vertical Agreements/Restraints

CEO Accepts The Largest Fine For Imposing Fixed Resale Prices On Wholesale Distributor

On December 11, 2008, the DCA published a press release noting that the Danish flour producer Valsemøllen A/S and its CEO had accepted fines for imposing fixed resale prices on the company's wholesale distributor Hedegård & Christensen Eftf. A/S /L.C. Lauritzen A/S. According to the DCA, the infringing behavior began in 2004. Valsemøllen A/S agreed to pay a fine of DKK 1 million (approximately €130,000); the CEO agreed to a fine of DKK 100,000 (approximately €13,000).

The infringement was discovered in the course of a general inquiry into the rise in food prices. The DCA carried out a dawn raid at the premises of Valsemøllen A/S in January 2008 (as part of this inquiry) during which it discovered evidence of retail price fixing. The case was transferred subsequently to the Public Prosecutor for Serious Economic Crime, who concluded that Valsemøllen A/S had, in fact, infringed Article 6 of the Danish Competition Act (the national provision similar to Article 81 of the EC Treaty) by entering into an agreement with a flour wholesaler that fixed the price list for bakers. Furthermore, the company's director was seen to be in breach personally of Article 6 of the Danish Competition Act for having allowed the company to commit infringements in his professional capacity, and for signing the infringing wholesale agreement.

Although the Danish courts have set a ceiling on personal fines of

10 The Danish Competition Council's decision of December 17, 2008 in Case No. 4/0120-0289-0080.

DKK 10,000, the DCA has, in the past, levied fines of up to DKK 25,000 DKK on individuals. With its fine of DKK 100,000, the DCA demonstrated not only its determination to fight price fixing but it confirmed also its determination to seek personal liability in cases involving severe antitrust infringements. As such, this fine exemplifies the likely consequences for antitrust culprits in the future.

Mergers And Acquisitions

Nordea Bank Denmark's Acquisition Of 9 Of Roskilde Bank's Branches Is Cleared

On September 29, 2008, Nordea Bank Denmark ("NBD") entered into a conditional agreement with "Bankaktieselskabet af August 24, 2008" ("Bankaktieselskabet") for the acquisition of sole control of nine of Roskilde Bank's ("Roskilde") 24 branches. On October 31, 2008, the DCA approved the acquisition.[11] NBD secured each of the branches' assets and liabilities save for loan and hybrid core capital, a ring-fenced savings fund, and some of the more problematic loans. The acquisition was cleared without conditions because the market share increment was between 0% and 1%, and because NBD did not acquire any of Roskilde's business partners.

Roskilde was the second small Danish bank to face a liquidity crisis in 2008. In July, Roskilde secured a bailout of DKK 750 million (€100 million) from the Danish central bank, Nationalbanken, and put itself up for sale, but received no purchase offers (in part due to its bigger-than-expected write-downs on real estate loans). Nationalbanken subsequently announced a further bailout worth DKK 4.5 billion (€600 million), under which the central bank and the association Det Private Beredsskab (established by the Danish Bankers' Association and 137 banks) formed a new bank, Bankaktieselskabet, to acquire Roskilde. That acquisition was approved by the DCA on September 1, 2008.

Policy And Procedure

Rejection Of Viasat's Appeal In The "Package-Case"

On November 20, 2008, the Commercial Court rejected an appeal by Viasat of an April 27, 2007 Danish Competition Appeals Tribunal decision, on the ground that the Tribunal had not made a final ruling in rejecting the complaint by Forenede Danske Antenneanlæg ("FDA").[12]

The FDA, an association of aerial facility providers, claimed that Viasat had infringed Sections 6 (restrictive practices) and 11 (abuse of dominance) of the DCA by requiring cable providers to offer Viasat's channels TV3 and TV3+ in the same packages as those offered to competing channels. The DCC found that Viasat's practices were not designed for the purpose of restricting competition, nor did they restrict competition. The DCC found also that Viasat had abused its dominant position.

The FDA appealed the case to the Tribunal, which referred it to the DCC, stating that Viasat's package requirement had as its object the restriction of competition. The Commercial Court rejected Viasat's appeal of the Tribunal's finding because the matter had been remanded only and was deemed not to have been final.

New Report Recommends Reformation Of Danish Merger Control

On December 16, 2008, the *ad hoc* committee for change of the Danish merger control rules published its report recommending that the DCA's jurisdiction be extended.[13]

The committee proposed new and lower filing thresholds. The current Danish merger control provisions apply to concentrations in which either:

(1) the combined aggregate turnover in Denmark of all the undertakings concerned is more than DKK 3.8 billion (approximately €510 million), and the aggregate turnover in Denmark of each of at least two of the undertakings concerned is more than DKK 300 million (€40 million); or

(2) the aggregate turnover in Denmark of at least one of the undertakings concerned is more than DKK 3.8 billion, and the aggregate worldwide turnover of at least one of the other undertakings concerned is more than DKK 3.8 billion.

The committee proposed to lower the filing thresholds for the first test to a combined aggregate Danish turnover of greater than DKK 900 million (€121 million) for all the undertakings concerned, and an aggregate turnover for at least two of the undertakings of more than DKK 100 million (€13 million). The second test remains unchanged. In addition, the Committee proposed the insertion of a new sub-provision to cover undertakings whose domestic turnover could not be analyzed by reference to country of origin. In these cases, the Committee proposed that the applicable turnover should be the market closest to Denmark.

11 The Danish Competition Authority's decision of October 31, 2008 in Case No. 4/0120-0401-0033.

12 The Danish Commercial Court's judgment of November 20, 2008 in Case No. U-0005-07 Viasat Broadcasting UK Ltd. v Konkurrencerådet (DCC).

13 "Rapport fra udvalget om ændring af fusionskontrolreglerne" - Report of December 16, 2008.

In addition, the Committee proposed to adopt simplified procedures for unproblematic concentrations based on the approach adopted by the European Commission. The Committee recommended also the introduction of new merger deadlines: Phase I will now be 25 working days, instead of the current four weeks, and Phase II will be 90 working days, instead of the current three months. The Committee also recommended the elaboration of pre-notification guidelines, as well as the extension of the DCA's jurisdiction for concentrations referred to it by the Commission. The DCA will thus be able to assess all such cases regardless of whether or not the turnover thresholds have been met.

It is likely that most (if not all) of the Committee's recommendations will be adopted, and the Danish merger control regime will undergo considerable change in the near future.

Sectoral Investigations

Pan-Nordic Inquiry Into Ihe Pharmacies And Pharmaceutical Sector

On October 9, 2008, the DCA published the pan-Nordic report on the Nordic pharmacy and pharmaceutical sector(s).[14] The report assesses the various approaches used by Nordic countries to regulate the pharmaceutical sector.

The DCA concluded that several of the fundamental characteristics of the Nordic markets for pharmaceuticals are consistent with those in other European countries, *e.g.*, that doctors rather than patients choose pharmaceuticals, and that hospital authorities generally pay most pharmaceutical expenses. Consequently, consumers neither directly choose nor pay for their pharmaceuticals, and the parties who do select and pay for pharmaceuticals don't actually use them. As such, the demand for prescription drugs is unaffected to a considerable extent by their end-use.

The report focuses primarily on pharmacies, and how to safeguard the supply of pharmaceuticals to end-users; it concludes that, while competition in the pharmaceutical sector is limited, and while the sector is subject to considerable price regulation, competition has played a vital role in the direction of competition between generic drug manufacturers, non-prescription drugs, competition at the retail level, and competition at the wholesale level.

FINLAND

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

Mergers And Acquisitions

Tv4/C Acquires Pay-Tv Provider C More Group

On November 27, 2008, the FCA conditionally approved the acquisition by TV4, a media and television company owned by the Swedish media group Bonnier, of C More Group, an independent media company providing pay-TV services to Canal+ channels in Finland, Sweden, Norway and Denmark.[15] This followed a second-phase investigation that was twice extended by the Finish Market Court. Bonnier also owns MTV Oy, a leading provider of free and pay television channels in Finland.

The FCA was concerned that the merger would result in TV4 further increasing its dominant position in the wholesale market for pay television services, in which the Parties' combined post-merger market shares would be approximately 60%. The following factors were identified as potentially restrictive of competition:

(1) MTV and C More are the largest operators in the pay-TV services market, and each is the other's primary competitor;

(2) the Parties control most significant broadcasting rights for sports events (which are generally auctioned for block periods and sell for very high prices) making any market entry difficult;

(3) the concentration would be better placed (than any other party) to succeed in future tenders following the merger since it not only has the necessary investments but also an extensive client base; and

(4) the Parties have a strong market position in supplying movies and TV series, with the greatest number of customers, the most broadcasting windows, the most channels and the majority of high-end (highly desired) content.

Due to the merger, several competing and complementary programs would fall into the hands of a single operator instead of two strong competitors, resulting in a reduction of viewers' choice, and enabling an increase in prices. Moreover, because MTV holds a strong position

14 Report from the Nordic Competition authorities No. 1/2008 of October 1, 2008 - Competition challenges in the pharmacy/pharmaceutical sector. The executive summary can be found at the following link: http://www.ks.dk/fileadmin/webmasterfiles/publikationer/konkurrence/2008/Executive_summary_pharmaceutical_sector_2008.pdf

15 Decision of the Finnish Competition Authority, TV4 AB, C More Group AB, Case n° 579/81/2008.

in the television advertising market, it would be able to promote its paid-for channels on its free channels, thereby strengthening the concentration's position in the market.

To alleviate these concerns, the parties committed to the implementation of certain conditions meant to separate the pay-TV services of MTV and C More, and secure the creation by supplying operators of new product packages by combining MTV pay channels and C More sports channels with their own products.

MTV also committed to allow access by supply operators to the Formula 1 pay-TV channel, and it agreed not to show live broadcasts of Formula 1 on C More channels or C More premium movies, or MTV channels. Furthermore, the parties agreed not to set its wholesale price for channel packages at levels lower than the wholesale price for individual channels. They also committed not to offer bundled discounts to operators ordering both MTV and C More channels. Finally, TV4 undertook to sell the Finnish hockey league broadcasting rights to a competitor, thereby enhancing the market's competitive pressure.

TV4 has appealed the FCA's decision to the Market Court.

FRANCE

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

Four Oil Companies Fined For Anticompetitive Practices During Tender Offer By Air France

On December 4, 2008, the Council issued a decision[16] fining four oil companies (Chevron-Texaco, Total, Exxon and Shell; the "Companies") for engaging in the fixing of aviation fuel prices and volumes during a tender offer by Air France on France's Réunion Island ("Réunion").[17] For the first time, the Council requested that the British Office of Fair Trading ("OFT") carry out an inspection in the United Kingdom on its behalf within the framework of the European Competition Network ("ECN").

Air France brought its original complaint on December 16, 2003 alleging anticompetitive practices during a tender offer for aviation fuels at Réunion airport. Air France claimed that the Companies' prices submitted in the first round of tendering (in September 2002) were significantly higher than those offered in a similar tender in 2001. Moreover, Air France was unable (as it had been in previous years) to negotiate oil prices because the Companies' individual offers constituted precisely Air France's required volume for the year. During the following rounds of tender, the Companies made no material changes to their initial offers, which meant a price increase of 30% between 2001 and 2002.

Dawn raids in Réunion and Paris failed to unearth inculpatory evidence, which, as the Council discovered, was located in the UK. The Council, pursuant to Article 22(1) of Regulation (EC) No 1/2003, sought the assistance of the OFT in inspecting three of the Companies' headquarters in the London area. A National Competition Authority may make use of this procedure only where the conduct involves a breach of Articles 81 or 82 of the EC Treaty – which the Parties argued was not the case, since the alleged conduct was limited to the territory of Réunion, and could not possibly have affected trade between Member States. The Council rejected that argument on the basis that the Companies' head offices were located in Europe, but outside France, and that trade between the Member States (and the interests of all European consumers) was affected in the markets for aviation fuels, and passenger air travel.

As to the merits of the case, in the absence of direct evidence sufficient to establish an infringement, the Council relied on the following significant circumstantial evidence: (i) documents that revealed discussions and contacts between the Companies prior to the submission of their offers, and (ii) the Companies' behavior resulting in the offering of increased prices during the tender process for the precise volumes that Air France required, guaranteeing their position as Air France's suppliers.

The Council imposed fines totaling €41 million (including €4.4 million on Total Outre Mer, €5.5 million on Total Réunion, €10 million on the Chevron Group, €10.5 million on the Shell Group, and €10.7 million on the ExxonMobil Group). Total Réunion was also fined an additional €1 million for repeating practices for which Total Réunion Comores (Total Réunion's predecessor) had already been fined on October 19, 1993.[18]

16 Decision n° 08-D-30 of December 4, 2008, available at http://www.conseil-concurrence.fr/pdf/avis/08d30.pdf

17 Réunion is one of France's overseas departments, situated east of Madagascar, in the Indian Ocean, about 200 km south west of Mauritius.

18 Decision n°93-D-42 of October 19, 1993 relating to certain practices implemented by Elf Antar France and Total Réunion Comores in the department of Réunion, see http://www.conseil-concurrence.fr/pdf/avis/93d42.pdf.

19 FCC, Decision 08-D-32, December 16, 2008, available at http://www.conseil-concurrence.fr/pdf/avis/08d32.pdf (appeal pending).

Competition Council Imposes Record Fine On Steel Manufacturer Cartel

On December 16, 2008, the Council imposed a €575 million fine on 11 steel manufacturers and a steel industry trade association for engaging in horizontal anticompetitive practices.[19] The fine is the largest ever imposed in France for a breach of the antitrust rules.

Following complaints by customers suspicious of similarities between the bids received from different steel manufacturers, the MEF conducted unannounced inspections at several steel manufacturers in May 2004. Two months later the case was referred to the Council for investigation. In October 2006, steel manufacturer Descours & Cabaud filed a leniency application for partial immunity seeking a fine reduction of between 10% and 30%.

The Council's investigation revealed regular meetings between competitors (at the national and regional level) to fix prices and allocate geographic territories and customers, all in violation of both Article L.420-1 of the French Commercial Code and Article 81 EC. Specifically, the alleged practices covered the entire French territory and affected between 70% and 90% of French steel sales. They were orchestrated at the highest management levels, and lasted from mid-1999 until mid-2004. The manufacturers also closely monitored each other's adherence to the terms of the cartel and engaged in retaliatory measures where necessary to prevent deviation or retraction. Because the affected products were used by a variety of companies across different industries, the Council considered the economic effects of the cartel to have been substantial.

In deciding the scale of its fines, the Council identified Arcelor, KDI and Descours & Cabaud as having primary influence on the cartel and increased the fines on those companies accordingly. The Council also considered whether recidivism should be deemed an aggravating factor, since KDI and Descours & Cabaud had previously been found guilty (in 1978) of fixing the price of steel tubes. Despite the similarity between the two anticompetitive practices, the Council decided that given the 20-year lapse in time since that infringement, the two companies could not be considered recidivist.

The Council notably allowed Arcelor, KDI, and the steel industry trade association to engage in settlement procedures under Article L.464-2 of the French Commercial Code. These procedures permit the Council to reduce its fines by up to 50% where the settling company (i) does not dispute the objections raised against it and (ii) provides substantial, credible and verifiable commitments to adapt its behavior in the future. In this case, for example, the Council reduced the trade association's fine by 17% after it committed to institute compliance and whistle-blowing programs to prevent any infringement going forward.

Despite the fact that Descours & Cabaud's leniency application was not submitted until two years after the dawn raid, the Council also granted the company (partial) immunity in light of the significant evidentiary value of the statements and documents that it had provided.

The record fine imposed in this case (which exceeds the €534 million imposed on mobile telephone operators in 2005) is consistent with the Council's determination to make cartels a priority. Even so, the Council acknowledged the impact of the economic crisis, and allowed companies encountering serious financial difficulties to request a payment schedule from the public accounting officer responsible for the collection of fines.

Vertical Agreements/Restraints

Suspension Of Orange's Iphone Exclusivity In France

On December 17, 2008, the Council adopted an interim decision finding that the exclusive agreements between Orange and Apple for the sale of iPhones in France restricted competition in the mobile telephony sector, with serious and immediate consequences for consumers.[20] Consequently, it announced that Orange could no longer serve as the exclusive distributor of the iPhone in France.

In September 2008, the Council received a complaint from Bouygues Télécom (a competing mobile phone operator), seeking an interim order preventing the implementation of Orange and Apple's exclusive agreement. When launching its product, Apple had awarded Orange the contract as exclusive wholesaler and network operator in France. Orange's network exclusivity was to be for five years, with Apple retaining the right to terminate the agreement after three years. In parallel, Apple implemented a selective distribution system pursuant to which authorized retailers undertook to purchase iPhones exclusively from Orange. Orange in turn entered into agreements with authorized retailers ensuring that iPhones would be sold only at authorized outlets, and with Orange services.

In line with recent precedent and its 2007 report on exclusivity[21], the Council considered "*the scope of the exclusivity, the duration, the existence of technical justifications and economic counterparts*". It found that Orange's exclusivity was likely to have an adverse impact

20 Decision n° 08-MC-01 of December 17, 2008, http://www.conseil-concurrence.fr/pdf/avis/08mc01.pdf

21 Council, Decision n° 08-D-10 of May 7, 2008, AFORST v/ France Télévisions and France Télécom, http://www.conseil-concurrence.fr/pdf/avis/08d10.pdf; Annual Report of the Competition Council for 2007, thematic study on exclusivity, http://www.conseil-concurrence.fr/doc/etudes_ra07.pdf.

on competition and that the agreement's term was both excessively long (when considering the uniquely dynamic nature of the mobile telephony sector) and extensive (as it embraced not only the highly desirable product itself, but all future models marketed before the agreement's closure).

Long-term exclusive agreements concerning popular items like the iPhone, the Council held, fostered interoperability issues, and further increased the switching costs for consumers seeking to change mobile operators. This, in turn, effected a reduction in competition on prices and network quality as well as infrastructure and customer services.

The fact that other operators recently concluded similar agreements with alternative manufacturers (*e.g.*, SFR with Blackberry) did not, in the Council's view, justify the Apple/Orange deal. On the contrary, it only confirmed the risk of cumulative effects associated with such exclusive agreements.

The Council assessed whether efficiencies might offset the potential anticompetitive effects of exclusive agreements in this sector. The parties argued that Orange was entitled to compensation for its investment, and explained that the agreement's exclusivity would yield lower prices and bigger discounts for consumers. The Council responded, however, that the specific investments made by Orange were disproportionately small when compared to the revenues expected under the agreement.

The Council concluded that the exclusivity granted to Orange under the agreement was likely to damage competition in the mobile telephony sector, in violation of European and French competition law. Noting that Orange had already achieved a non-trivial number of sales of iPhones and associated mobile services, and pending the final decision on the merits, the Council announced that Orange could no longer market the iPhone exclusively.

Mergers And Acquisitions

Fines Imposed Following Failure To Implement Commitments

On November 17, 2008, the Ministry for Economic and Financial Affairs fined broadcasters TF1 and AB €250,000 and €15,000 respectively for their failure to implement two of commitments submitted in 2004 for clearance of their joint acquisition of the free-to-air TV channel TMC.[22]

The MEF, in October 2004, authorized TF1 and AB to proceed with the acquisition of joint control over TMC subject to remedies.[23] In the light of TF1's dominant position, and to remove any competitive concerns the MEF might have with the transaction, the notifying parties undertook to (i) guarantee the independence of TMC's advertising division from TF1 and TF1 Publicité; (ii) refrain from tying the sale of advertising slots on TF1 and TMC's channels; and (iii) maintain AB as the central purchasing agent for television programs.

Following a complaint by a third party (suggesting that the parties' first undertaking had not been properly implemented) the MEF referred the case to the Council for investigation under Article L.430-8 IV of the French Commercial Code.

In its opinion of January 28, 2008, the Council found TF1 and AB to be in clear breach of their commitments. In particular, the Council's investigation revealed that:

(1) TF1 and AB exerted influence over the management of TMC's advertising department, since TF1 (including TF1 Publicité) and AB both took part in strategic committees that discussed the commercial strategy and conduct of TMC's advertising arm, and TF1 closely oversaw the recruitment of TMC's advertising staff; and

(2) several staff members were transferred to TMC's advertising department from TF1 while retaining the possibility of returning to work for the TF1 group at a later date, thereby not severing sufficiently the link between the teams responsible for advertising at both undertakings.

Having reached that conclusion, under Article L.430-8 IV of the French Commercial Code, the MEF could either (i) withdraw the clearance decision or (ii) order TF1 and AB to implement their commitments within a set timeframe (subject to penalties).

The MEF proceeded with the second approach, on the ground that withdrawing the clearance decision would necessitate a *de novo* review of the entire transaction. The parties thus undertook to (i) appoint a Director General of TMC's advertising department who would have the requisite authority to define and implement the operational management of the company; (ii) define and limit the possible involvement of the Director General in the strategic committees in which TF1 and AB participated; and (iii) establish a clear separation between TMC's advertising department and TMC, TF1, and AB. The MEF acknowledged that these commitments, when

22 Minister of the Economy, Decree of November 17, 2008, and Competition Council, Opinion 08-A-01, January 28, 2008.

23 Minister of the Economy, Decision of October 27, 2004.

implemented, would allow TMC's advertising department to be run independently from TMC and its shareholders.

The MEF required TF1 and AB to implement these measures within a month, subject thereafter to a daily penalty of €5,000. Given the particularly serious impact on competition resulting from the non-observance of the initial commitments, the MEF also imposed fines of €250,000 and €15,000 on TF1 and AB respectively.

This is the second time the MEF has imposed financial penalties on a company for failure to implement commitments in a merger case. On August 21, 2007, the MEF sanctioned Carrefour for failing to divest one of its retail stores as required following its acquisition of the discount retailer Sonnenglut.[24]

GERMANY

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

Horizontal Agreements/Restraints

Fco Criticizes Association Of Dairy Farmers For Calling A Milk Strike

In its decision of November 12, 2008, the FCO stated that actions by the Federal Dairy Farmers Association (Bundesverband Deutscher Milchviehhalter, ("BDM") constituted a boycott, in contravention of competition law.[25] The BDM had called on Germany's dairy farmers to demonstrate in front of creameries, and to refuse to supply milk to creameries in order to achieve a German-wide minimum price of 43 cents per kilogram. Many of BDM's members did as they were asked, and stopped delivering milk to creameries altogether; a number even blocked other producers from making their deliveries.

The FCO found the BDM liable under section 21(1) of the GWB for having invoked a boycott. The authority was not convinced by BDM's claim that it is exempt from the application of section 21(1) of the GWB because it was only defending its members' interests and acted much as would a trade union. Under German competition law, collective actions by trade unions are not illegal; because the BDM is a pressure group, however, its defense of its members' economic interests fell outside the ambit of acceptable conduct.

The call for a boycott was also held to be unjustified, given that the 43-cent price that BDM sought was an arbitrary ceiling (the calculation of which had exaggerated labor costs) and given that a German-wide minimum price for milk would have eliminated all competition between dairy farmers, creameries and retailers. Finally, the BDM could not rely on a defense of freedom of speech because it had pursued anticompetitive aims.

Majority Of Price Abuse Proceedings Against Gas Suppliers Draw To A Close

On December 1, 2008, the Federal Cartel Office announced that the majority of the proceedings begun in March 2009 against gas suppliers for alleged pricing abuses are approaching completion.[26] Of the 33 pending proceedings, 29 have resulted in companies making monetary commitments to customers totaling 127 million euros. Around half of this sum accounts for bonus payments and customer credits; the remaining amount will be passed on to customers either as a postponed price increase or a lowered price. The commitments concern net amounts (*i.e.*, benefits include taxes and charges) and 2008's substantially higher gas procurement costs have not been passed on to customers.

The investigations were directed against gas suppliers from across Germany and concentrated on price fixing in 2007 and 2008. One basis for conducting the proceedings was a provision newly introduced to Section 29 of the Gesetz gegen Wettbewerbsbeschränkungen (Act against Restrains of Competition, "ARC") aimed at the stricter supervision of abuse by energy companies. Applying the *comparable market* principle, the 2007 profits of the infringing companies were compared with those of less expensive gas suppliers. For 2008, the FCO based its findings on a comparison of the rates of the majority of customers (deducting the approved network charges, around 16% of the gross price, as well as taxes and concessionary fees, around 29% of the gross price). The profits investigated by the FCO accounted for around 55% of the price of the gas as it appeared in customer's bills.

Most of the infringing suppliers have protested against the findings, contending broadly that their own procurement costs have not been accounted for fully – something the FCO challenged by drawing comparisons with other utilities' providers. The FCO opted for commitments rather than fines since there were benefits flowing from the former that would benefit the consumer – particularly

24 Minister of the Economy, decision of August 21, 2007.

25 Bundeskartellamt, Beschluss v. 12.11.2008 – Bundesverband Deutscher Milchviehhalter.

26 See, *e.g.*, Bundeskartellamt, Beschluss v. 01.12.2008 – RheinEnergie; Bundeskartellamt, Beschluss v. 01.12.2008 – Stadtwerke Karlsruhe; Bundeskartellamt, Beschluss v. 01.12.2008 – MITGAS; Bundeskartellamt, Beschluss v. 01.12.2008 – Thüga; Bundeskartellamt, Beschluss v. 01.12.2008 – Energie SaarLorLux.

during the crucial winter heating period. One feature of the settlement includes that there should be no compensation of the financial concessions made in connection with future price measures.

Mergers And Acquisitions

German Supreme Court Confirms Prohibition Of The E.On/Eschwege Merger

On November 11, 2008, the German Supreme Court affirmed that the E.ON group remains prohibited from acquiring a 33% holding in Stadtwerke Eschwege.[27] This landmark decision confirms the FCO's policy of prohibiting mergers in public utilities, particularly where such mergers result in further vertical integration of companies in the electricity sector.

In the course of two federal studies of the German electricity markets, the FCO demonstrated that E.ON and RWE AG (Rheinisch-Westfälisches-Elektrizitätswerk), the two largest electricity companies supplying the German market, enjoyed an overwhelming advantage in the generation and sale of electricity. Over 60% of the electrical energy delivered to end-users in Germany is either generated directly or imported by E.ON and RWE.

The German Supreme Court concurred with the FCO that electricity markets in Germany continued to be controlled by a collectively dominant duopoly (E.ON and RWE), which foreclosed competitors from entering the market by pursuing the acquisition of stakes in public utilities. The German Supreme Court also drew attention to the low power transmission capacity of coupling points on Germany's borders. This meant that foreign electricity suppliers had a limited potential to exert competitive pressure in the German market.

If dominant upstream suppliers were able to safeguard sales by acquiring stakes in public utilities such as Eschwege, the wholesale market would become further restricted.

According to the FCO, the Supreme Court's decision represents a key step towards the creation and promotion of more competition on the wholesale and retail electricity markets. However, while such competition may benefit customers in principle, its true value will depend on the willingness of customers to switch suppliers.

FCO Imposes Fine On Mars For Violation Of Standstill Obligation

On December 15, 2008, the FCO fined the confectioner Mars a total of €4.5 million for its infringement of a standstill obligation in relation to Mars' acquisition of the U.S. animal food producer Nutro Products.[28] This was the first time a fine was imposed on a company for deliberately violating a standstill provision; it is the largest fine of its sort yet imposed by the FCO.

Mars produces pet food, confectionary, and other consumables. It is the largest cat and dog food supplier on the German market. Nutro Products also manufactured dog and cat food, and had distributed its products on the German market via wholesalers to specialized retailers. The company operated all its production facilities in the US and focused its sales primarily on the North American market.

In May 2007, Mars notified its acquisition of Nutro Products to the competition authorities in Germany, Austria and the US. After the US cleared the merger, Mars acquired the majority of Nutro's shares and assets. The shift in control over the acquired production facilities included facilities supplying German customers; only distribution rights remained under the control of companies affiliated with Nutro. Mars had first sought to acquire control over these distribution rights, but abandoned the venture after being made aware of the FCO's concerns in the dog food market.

In the view of the FCO, Mars's acquisition of Nutro would have strengthened the company's dominant position on the German market for dry dog food. The FCO also concluded that Mars had willfully ignored the relevant provisions of German cartel law in closing the transaction prior to consent from the FCO. For the purposes of determining its fine, the FCO took into account the fact that Mars had cooperated, and that Mars had sold its trademark rights for Nutro's products to an independent producer of pet food.

GREECE

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

27 Bundesgerichtshof, Beschluss v. 11.11.2008 – E.ON/Eschwege WuW/E DE-R 2451-2461 = WM 2008, 2383-2390.

28 Bundeskartellamt, Beschluss v. 15.12.2008 – Mars.

29 HCC, 421/V/08, Commission Investigation on possible infringements of law 703/77 by companies trading in oil products, November 20, 2008.

Horizontal Agreements/Restraints

HCC Imposes Significant Fines On Shell And BP For Engaging In Concerted Practice

On November 20, 2008, the Hellenic Competition Commission imposed fines totaling €49 million on Shell and BP for engaging in concerted practices in violation of Greek competition law.[29]

The HCC has been investigating the Greek fuel sector since 2003, culminating in the issuing of the November 2008 decision fining BP and Shell for concerted practices aimed at the indirect fixing of their final wholesale prices through a common discount policy.

In its decision, the HCC distinguished two relevant product markets: wholesale unleaded petrol, and wholesale diesel. It found that in 2003 four fuel companies held almost 68% of the market with EKO at 22%, BP at 20%, Shell at 18%, and AVINOIL at 8%. The HCC went on to consider that:

(1) the net wholesale and retail prices of unleaded fuel showed substantial divergence in the various prefectures of the Greece;

(2) certain prefectures showed systematically higher average prices compared to prefectures;

(3) in some prefectures with a high concentration ratio, the discounts granted by the four fuel companies were higher than those granted in prefectures with a lower concentration;

(4) no positive relationship was found to exist between discounts and sales;

(5) transportation costs could not account for the higher prices in some prefectures because prefectures with oil refineries near their borders were included among the medium-priced prefectures, but not among the least expensive ones;

(6) the discounts offered by the four companies in 2003 were generally lowest in those prefectures where pump prices were highest, and highest in those prefectures where pump prices were lowest;

(7) consequently, the differences in net wholesale prices could not be attributed to objective factors , but rather, to different discounts granted by wholesalers to retailers.

The HCC examined the discounting policies of BP and Shell, and found that both companies applied a common discount policy by dividing the Greek territory into "zones". The discounting applied in each zone was such that the resulting net wholesale prices levied by the two companies for unleaded petrol were equalized. The HCC examined the ratio between discounts granted by each company in each zone (consisting of a number of prefectures) and found that in some zones Shell was systematically granting discounts that were 50% higher than those granted by BP. In others, BP's discounts were 50% higher than discounts offered by Shell. This policy was designed self-evidently to effect the equalization of the market.

On November 20, 2008, the HCC imposed fines totaling €49 million on Shell and BP for engaging in concerted practices; the two companies demonstrated through their segmentation of the country that their mutual dependence was systematic. The HCC observed also that there was no transparency in the market concerning discounts offered by wholesalers to retailers because such discounts were not announced publicly in order to avoid comparisons and possible disputes within each network.

The Commission addressed the argument that BP and Shell (with their combined share of 38% of the Greek market) could not have conspired together while ignoring the competitive pressures brought to bear by the other 62% of the market. It held that in the Greek market only BP and Shell had internationally recognized brand names. This differentiated them from the other fuel companies in Greece because (according to the Commission's highly controversial reasoning) the decisive factor for the consumer when choosing BP and Shell was not the price, but the confidence attached to the brand.

For this reason, the prices of Shell and BP were systematically higher than those of the other trading companies. The HCC concluded that the only competitive threat for each of these companies was the other. This was confirmed by the convergence of their shares of the Greek market from 2000 onwards (the difference between BP and Shell was 7% in 2000, 2.5% in 2002, 0.5% in 2003, 1.5% in 2004, 1% in 2005 and 1% in 2006).

Finally, the HCC defended its analysis of the average rate of discounts granted by the companies per prefecture (so as to establish the existence of concerted practices) on the grounds that average price is a tool used frequently in economic analyzes of the oil sector by competition authorities worldwide. The HCC imposed a fine of €30.06 million on BP Hellas and €19.64 million on Shell Hellas for their concerted practices. The two companies were required also to pass on discounts to retailers separately and independently of each other; otherwise, they would face a daily fine of €10,000.

IRELAND

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

Amendments To The Competition Act 2002: Mergers Of Credit Institutions

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

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

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

New exemptions from Section 4 of the Competition Act, 2002.

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

Report on Media Mergers to be released shortly.

Under Statutory Instrument 122 of 2007 all concentrations in which two or more undertakings effect a media business in Ireland, and one or more of the undertakings involved carries on a media business elsewhere, will be subject to scrutiny under Part 3 of the Competition Act 2002. On March 30, 2008, the Minister for Enterprise, Trade & Employment announced the establishment of an advisory group, chaired by Mr. Paul Sreenan SC, to consider the modernization of the applicable rules.

The group presented recently its findings to the government, and it is believed to have advocated amendments to the Competition Act 2002 to allow for greater discretion for the Minister in the prohibition of such transactions, and also the introduction of regular media sector "health checks" by the Irish Competition Authority.

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

On October 3, 2008, the Irish Competition Authority approved the acquisition by Heineken NV of Beamish & Crawford Plc.[30] The merger was the first to be referred by the European Commission to the Irish Competition Authority for review. After a Phase II investigation, the Competition Authority found no competitive concerns in the ale, stout and lager markets – an unremarkable decision made unusual by the ICA's identification of distinct product markets for ale, stout and lager.

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/Restraints

Authority Recalculates Fines In Disinfectant Products Case Following Successful Appeal

On October 16, 2008, the Authority re-calculated the April 2006 fines it had imposed on Nuova Farmec S.r.l., B. Brown Milano S.p.A., Esoform S.p.A. and International Medical Services S.r.l. (the "Companies") following its finding that the Companies had engaged in a cartel on the Italian disinfectant and antiseptic product market between 1998 and 2001.

The Authority's October decision, which resulted in the imposition of significantly lower fines, followed February 29 and March 7, 2008 judgments of the Council of State upholding the Companies' appeal and finding that the violation had ended in May 2000. The Council also clarified that, when the Authority calculates fines in infringement

30 Case M/08/11.

decisions, it cannot take into account the fined companies' turnover resulting from intra-group captive sales – but may only include turnover from sales to third-parties.

The new fining decision applied a fine equal to 8% of Esoform, Nuova Farmec and IMS's turnover from the last complete fiscal year preceding the adoption of the 2006 decision. The Authority fined B. Brown an amount equal to 8.5% of its relevant turnover, taking into account the significance of its dimension, as well as the fact that it belonged to a multinational group.

Abuse Of Dominant Position

Aeroporti Di Roma Fined For Abuse Of Dominant Position At Rome's Fiumicino And Ciampino Airports

On October 23, 2008, the Authority imposed a fine of €1.7 million on Aeroporti di Roma S.p.A. ("AdR") for abusing its dominant position as the exclusive manager of Rome's Fiumicino and Ciampino Airports by engaging in excessive pricing.

The Authority concluded that AdR, in 2004 and 2005, had charged excessive fees to providers of re-fueling services at Fiumicino and Ciampino Airports. Under the Italian sector-specific regulation then in force, the fees for the use of jet fuel storage facilities and loading/unloading facilities must be set at "reasonable" levels, and may include only a realistic margin for the remuneration of investment capital. In the Authority's view, however, AdR had applied fees almost 50% higher than those effectively prescribed by the regulation, and it therefore considered these fees to be excessive within the meaning of Article 82 EC.

The Authority reached a similar conclusion with regard to the fees charged by AdR to independent freight handlers for the use of office space and the provision of cargo handling services at Fiumicino Airport. The Authority compared these fees to the fee levels charged by AdR to air-cargo companies providing in-house handling services, and noted that fees applied to independent freight handlers were 50% higher than those charged to in-house cargo handlers.

Moreover, the Authority found that, from June 2004 to July 2006, AdR further abused its dominant position at Fiumicino Airport by excluding its competitors from use of its own cargo terminal (Cargo City), and dissuading customers from using competing terminals (which in combination meant effectively that AdR's competitors were prevented from storing pallets, loading cargo onto planes, and processing export documentation at the airport). If cargo carriers wished to use Cargo City, they were required to use only AdR for all their cargo handling needs at that facility. If they wished to use a competing terminal, they were still required to purchase certain handling services from AdR (but at such inflated prices that it made it unattractive for customers to use the competing terminals in the first place).

THE NETHERLANDS

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

Mergers And Acquisitions

NMA Conditionally Approves KPN/Reggefiber JV

On December 19, 2008, following a Phase I investigation, the NMa conditionally approved a proposed joint venture between KPN, the largest telecommunications company in the Netherlands, and Reggefiber, a company specializing in fiber optics.[31] The proposed joint venture will install and operate fiber-optic local loops throughout the Netherlands. The NMa was concerned initially about the joint venture's potential restriction of third-party access to the fiber-optic network, and its likely impact on competitors on the downstream wholesale and retail markets for multi-media services. The Parties' proposed a remedy package to ensure downstream competitors' non-discriminatory access to the "local loop".

The local loop is the physical circuit between a customer's premises and the telecommunication operator's local switch. In the Netherlands, this loop traditionally took the form of a copper wire connection; as a former state monopoly, KPN has been the sole owner and operator of the copper wire network. Fiber-optic wires have only recently been introduced as alternatives to copper wires and Reggefiber has become the leader in this new sector, with an 80%-90% share of the national market.

The NMa first raised horizontal concerns about the joint venture's competitive effects on the market for unbundled access to the local loop, regardless of whether the relevant market was seen as including both unbundled access to copper wire and fiber-optic connections, or a separate market for fiber optics. In the combined market, the venture threatened to result in the elimination of the only alternative to KPN's unbundled access to the copper wire loop. In the separate market, given the limited availability of fiber optic connections, and the lack of parallel networks, the joint venture was considered likely to eliminate competition between Reggefiber (as the current market leader) and KPN (its most important future competitor in fiber optics).

31 Zaaknummer 6397, *KPN/Reggefiber*, NMa Decision of December 19, 2008, http://www.nmanet.nl/images/6397/BCM_tcm16-122206.pdf.

The NMa also raised a number of vertical concerns, including that the joint venture could exclude competitors downstream from getting access to the unbundled fiber optic loop. The Authority also noted that the joint venture might foster collusion between KPN and Eurofiber (a sister company of Reggefiber) in the neighboring market for trunk connections (the physical circuits between a telecommunication operator's local switch and the national network).

To address these concerns, and to prevent the need for a Phase II investigation, the Parties proposed a remedy package guaranteeing non-discriminatory and transparent third-party access to the joint venture's fiber optic local loop and local switches. The package also regulates the prices that the joint venture may charge for access to the loop, and allows third parties to petition the NMa to ensure their enforcement. The proposed remedies are consistent with guidelines issued by the Independent Post and Telecommunications Authority (Onafhankelijke Post en Telecommunicatie Autoriteit), the regulator charged with ensuring third-party access in the deregulated telecommunications industry (and with which the NMa cooperated closely when formulating its approach).

SPAIN

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

Supermercados Sabeco/Galerías Primero

On December 5, 2008, the Council of the National Competition Commission issued its Phase I clearance of the acquisition of Galerías Primero S.A. ("Primero") by Supermercados Sabeco S.A. ("Sabeco"), a subsidiary of the French group Auchan, subject to commitments.

The October 24, 2008 notification followed the second attempt by Sabeco to acquire Primero. Sabeco withdrew the first notification, on August 8, 2008, after the NCC stated that it would begin Phase II proceedings, in line with the Directorate of Investigation's resolution proposal. On October 22, 2008, the NCC granted the dismissal of Sabeco's initial filing.

The NCC concluded that a second-phase investigation would be necessary following the earlier notification due to its concerns that the transaction would create obstacles to effective competition in the market for retail distribution of consumer goods in Aragón.

The NCC found, in its clearance decision of December 5, 2008, that the relevant geographical scope of the transaction was that of local areas in which Primero's establishments overlapped with existing branches of Auchan – namely nine local areas, of which the most significant were Catalayud, Alcañiz, and Ejea de los Caballeros. Due to these overlaps, Auchan's position in the relevant markets would be increased in Aragón, becoming the market leader with a post-acquisition share of 39.2%. Auchan's chief competitor would be Carrefour S.A., with 14.4% of the market. The NCC thus considered the transaction was likely to substantially impede effective competition in these areas.

The Council of the NCC accepted, however, that the Parties' Phase I remedies (including the divestment of a number of Primero's branches in the areas of concern) were sufficient to alleviate its concerns. On this basis, it cleared the transaction, subject to commitments.

Policy And Procedure

Appeals Proceedings Against Directorate Of Investigation Decisions – Powers Of Inspection

On October 3, 2008, the NCC dismissed the appeals brought by two cosmetics companies and an association challenging the conduct of the NCC when carrying out "dawn raids". The appellants claimed the officials in charge had failed to comply with the limits established by the Directorate of Investigation ("DI")'s written authorization, and that the judicial injunction allowing the inspections was *ultra vires*.

On June 17 and June 19, 2008, inspectors from the DI conducted "dawn raids" at the premises of the National Perfumery and Cosmetics Association ("STANPA") and nine companies operating within the cosmetics sector. These inspections were launched as a result of an investigation concerning the existence of possible anticompetitive behavior arising from agreements and/or concerted practices among competitors with the object of fixing prices and reaching commercial policy agreements in Spain – both of which are prohibited by Article 1 of Law 15/2007 of the new Spanish Competition Act ("SCA").

During their inspections, officials from the DI collected documents, information, and other data evidencing the existence (and extent) of the alleged conduct. On July 1, 2008, STANPA, and two of the companies (L'Oréal and Colgate Palmolive), filed separate appeals challenging the DI's conduct. They argued that the officials did not comply with the limits set by the authorization allowing the judicial injunction. Specifically, the appellants and their workers were allegedly caused "*irreparable harm*" due to the DI's conduct.

In particular, the appellants questioned the effect of the powers of the DI (under Article 40 of the SCA) on the fundamental rights of the

companies (and employees) subject to investigation. The NCC ruled as follows on each of the allegations/questions:

(1) on whether the DI has the power to seize documents or information that have no relation to the object of the investigation:

(a) The appellants complained that officials had downloaded the contents of computers without an initial search limit. In some cases, 95% of information (mostly unrelated to the suspected infringements, and much of it protected by legal privilege) was copied. The appellants argued that this indiscriminate approach left the companies incapable of exercising their right of opposition, and concluded that the damage caused could not be repaired by the return of documentation. Moreover, because the documents seized were tainted, their evidential value was rendered null.

(b) On this allegation, the NCC found that the DI's conduct had not exceeded its investigative powers because the appellants' attorneys had been present and because none of the appellants had raised any objections when signing the minutes of the inspection. Moreover, the officials did not employ disproportionate methods of inspection (*e.g.*, the sealing of offices) by reference to EC case law (specifically *National Panasonic*[32]). The NCC stated that if the inspections were to be limited to a request for documents identified in advance (not possible with computer files) the necessary element of surprise would be lost.

(2) on whether the DI must respect the client-attorney legal privilege during its search:

(a) The appellants claimed that the DI seized documents protected by legal privilege, thereby breaching a fundamental element of defense.

(b) In its decision, and by reference to the *AKZO* EC case, the Council held that the appellants were required not only to assert the confidentiality of a document, but also to demonstrate reasonably the truth of any such assertion. They do not need to reveal the content of the document – only elements sufficient to prove that the document satisfies the justification of legal privilege. The Council stated further that the possession by the NCC of documents protected by privilege did not constitute in itself a breach of their legal protection and may only constitute a future breach if the information contained in them was disclosed or used for fraudulent purposes by the officials of the NCC – bound as they are by professional discretion.

(3) on whether the DI violated the appellants´ rights of defense by not allowing the appellants' external counsel to be present during the entire investigation:

(a) Some of the appellants also claimed that the DI inspectors had asked the appellants´ counsels to leave a room while the inspectors continued with the investigation.

(b) The Council rejected the appellants´ claim, noting that the external counsel of the company arrived on the premises 40 minutes after having been called.

(4) on whether the DI has to respect the right to privacy of the employees of the companies involved:

(a) L'Oréal claimed in its appeal that the right to privacy of some of its employees had been violated since some of the documents copied were clearly private (*e.g.*, pictures, CVs, or e-mails from their families).

(b) The Council observed that (in line with Spanish constitutional law) the company had no right to privacy and no legal standing to claim the protection of the privacy of its employees. As with all documents protected by legal privilege, the Council observed that the possession of private documents may constitute a future breach only if they are disclosed or used subsequently for fraudulent purposes.

The Council concluded that the revised SCA had increased the powers of inspection given to the NCC in line with Commission Regulation (EC) No 1/2003. The Council noted further that this increase in power was interlinked closely to two principles cited in the Preamble of the SCA, namely the guaranteeing of the economic operators' legal certainty, and the effectiveness of the fight against conduct hindering competition. The Council concluded that the DI must find a balance between both principles when exercising its powers.

SWEDEN

This section reviews developments concerning a new Competition Act in Sweden that came into force on November 1, 2008, and which will be enforced by the Swedish Competition Authority.

32 Case 136/79 *National Panasonic v. Commission* [1980] ECR 2033.

Horizontal Agreements/Restraints

Stockholm City Court Imposes Substantial Fines On Construction Cartel

In June 2007, Stockholm City Court found nine construction companies guilty of breaching competition rules that prohibited anticompetitive agreements (*per* former Article 6 of the Competition Act). The total amount of the fines amounted to SEK 460 million (€40 million) Individually, the fines were in the range from SEK 300,000 (€25 million) to SEK 170 million (€14.5 million). Six of the companies appealed the City Court's judgement, to which the Swedish Competition Authority responded by appealing three of these companies. The main proceedings in the Market Court began on November 18, 2008, and are expected to continue until mid-February 2009.

Policy And Procedure

New Competition Act Comes Into Force

The new Competition Act ("Act") came into force on November 1, 2008. The revisions aim to make the procedures more efficient, and to further harmonize Swedish competition rules with EC competition rules. The Act involves a comprehensive restructuring of the former legislation, with new chapters and sections, and more stringent measures to address infringements:

Antitrust Violations

(1) *Fines*; the Act now envisions a much clearer method to calculate administrative fines, chiefly meant to assist parties and courts in identifying particularly harmful infringements and to set fines by way of a deterrent. Under the new rules, the scale of a fine is set by establishing the sanction value of the infringement by reference to various factors, including the duration and gravity of the infringement, the nature of the infringement, the scope and importance of the market, and the actual and potential effects on the market caused by the infringement. The amount of the sanction value is further subject to adjustment, should there be extenuating or aggravating circumstances.

(2) *Leniency*; the provisions governing leniency and the reduction of fines generally have been revised to further harmonize the Swedish leniency rules with the European Competition Network's model program. Much as under the European leniency regime, only one infringing undertaking may now be subject to full leniency, on a first-come-first-served basis. As such, even if a party comes forward with revelations in the belief that it is doing so ahead of its infringing associates it will not be entitled to full leniency if another party has acted more swiftly. An undertaking that has forced another to participate in the infringement shall under no circumstances be entitled to full leniency.

(3) *Imposition of a fee due to infringements*; the Act entitles the SCA to order an undertaking to pay a fee for an infringement, where, for example, there is no clear factual background, and no attendant dispute. A prerequisite for this procedure is that an undertaking accepts to pay the levied fee in writing within the Authority's timeframe. Previously, the Authority has had to initiate proceedings before a court seeking to impose administrative fines – even in cases where an undertaking has confessed.

(4) *Interrupting the period of limitation*; the Act introduces a provision allowing for the interruption of the five-year limitation period if an undertaking, within five years of the infringement coming to an end, contributes to a decision to initiate the investigation of an infringement, or accepted an opportunity to comment on a summons application drafted by the Authority. In accordance with EC competition rules, however, there is an absolute period of limitation of ten years from the ceasing of the infringement.

(5) *Injunction from carrying on business*; a new sanction has been introduced under the new Competition Act for certain infringements of restrictive agreements under Chapter 2(1) of the Act (or Article 81 of the EC Treaty). Persons engaged in or contributing to an undertaking involved in a Swedish cartel may receive an injunction against the continuation of their business.

Mergers Controls

(1) *Notification thresholds*; notification thresholds have been revised and will relate solely to turnover in Sweden. Concentrations will have to be notified to the Authority if the parties' Swedish turnovers meet the following target thresholds (during the previous financial year):

 (a) aggregate turnover in Sweden in excess of SEK 1 billion (approximately €108 million); and

 (b) annual turnover in Sweden for each of at least two of the undertakings concerned in excess of SEK 200 million (approximately €22 million).

According to the Authority, the new thresholds promise to reduce the number of notifiable concentrations by 40%, while still capturing concentrations likely to be harmful to competition;

(2) *Time to file*; the Act codifies the established practice that a concentration may be notified when affected parties

demonstrate an intention to implement it, *i.e.*, by reference to a *letter* of intent, or something similarly indicative. The new Act also provides that a concentration shall be notified to the Authority prior to its implementation.

(3) *Review time*; the initial *review* period (Phase I) during which the Authority has to decide whether to approve a concentration or to begin an investigation under the new Act may be extended from 25 to 35 working days in cases where commitments are submitted by the undertakings concerned.

(4) *Substantive test*; the new Act includes a revised substantive test corresponding to the substantive test under the EC Merger Regulation equivalent to further harmonize competition law. *Hence*, a concentration shall be prohibited if it is liable to substantially impede effective competition, or its development in Sweden. The test is generally referred to as the "SIEC-test".

(5) *Ancillary restraints*; the last major revision allows for requests of the Authority to assess restrictions related directly and necessarily to a concentration, *i.e.*, ancillary restraints. It is *for* the parties to determine whether these restrictions are permissible in accordance with competition law.

SWITZERLAND

This section reviews competition law developments under the Federal Act of October 6, 1995 on Cartels and Other Restraints of Competition (the "Competition Act"), which is enforced by the Federal Competition Commission ("FCC"). Appeals against decisions of the FCC are heard by the Federal Administrative Tribunal.

Horizontal Agreements/Restraints

Wide-Reaching New Decision Of The Competition Commission Terminates Investigation Into Tariffs Imposed By Public Hospitals On Insurance Companies

On October 17, 2008, the FCC discontinued its investigation into the "tariff agreements" entered into by the public hospitals of the Canton of Luzern ("Luzern") and various companies providing supplementary health insurance. The FCC found that insurers may, under certain conditions, organize themselves into groups to form a countervailing power against a public hospital's dominant position.

In Switzerland, basic health insurance is compulsory for all residents. Supplementary insurance (*e.g.*, outpatient insurance) is optional, and may be purchased separately. On February 7, 2006, the FCC initiated an investigation into companies active in the private and semi-private insurance sectors that collectively negotiate health care service tariffs with Luzern's public hospitals. The principal concerns with these companies' activities were that the collective negotiations fostered price-fixing arrangements, and that public hospitals imposed tariffs for health care services.

Agreements between competitors are prohibited under the Competition Act of April 1, 2004 ("ACart") if they restrict competition significantly (Article 5(1)), and without the justification of economic efficiency (Article 5(2)). Horizontal agreements are also prohibited (Article 5(3)) if they eliminate competition. In withdrawing from its investigation the FCC held that collective bargaining among insurers amounted to a price-fixing arrangement, but that the existence of numerous competitors in the relevant market was sufficient to rebut the presumption of an infringement. The FCC held further that collective negotiations among insurers were not illegal pursuant to Article 5(1), since they could be justified on grounds of economic efficiency.

In its analysis, the FCC found that Luzern's public hospitals collectively held a dominant position in the cantonal markets for private and semi-private health cover. Indeed, the Luzern government had negotiated the terms of their agreement with the insurers on behalf of its hospitals. Furthermore, the insurers had been under a factual obligation to enter into an agreement with the public hospitals, because supplementary insurance offers could not have been attractive if they included any limitation of the choice of hospitals.

The FCC held that collective bargaining among health insurers was justified on grounds of economic efficiency (Article 5(2)), in that it helped the insurers to build a "countervailing power" which would enable them to extract price concessions from providers of healthcare services. It was unclear whether the insurers were allowed to organize themselves into groups with a view to negotiating tariffs with hospitals in the segment of supplemental health insurance. The ACart typically prohibits the formation of groups covering the entire market, while bilateral negotiations between individual hospitals and individual health insurers are permitted. All public hospitals were represented during the negotiation of the tariff agreements by Luzern itself (as the owner of the hospitals), and conditions were met to allow the health insurers to organize themselves into groups to form a countervailing power. The FCC specified, however, that such tactics must not be allowed across insurance markets, but only where it can be shown that competition in the downstream insurance market still works (*i.e.*, where there are no negative consequences for the insured).

33 Appeals Commission for competition matters, Decision of October 25, 2006, RPW/DPC 2006/4 698.

More generally, the FCC's decision contained a number of practically valuable *dicta*. For example, joint purchase agreements between competitors engage Article 5(3) and, hence, are deemed to eliminate competition. Referring to the EC Guidelines on the applicability of Article 81 of the Treaty to horizontal cooperation agreements, the FCC added that, for the purpose of assessing the effects on competition of a buyers' cartel, substitutability must be defined by reference to supply rather than demand. In other words, the choices available to suppliers are decisive in identifying the competitive constraints on purchasers.

Although the FCC found no abuse of a dominant position as a result of unfair pricing or price squeezing, it asserted expressly that public hospitals in Luzern have a dominant position in the relevant markets. In so doing, the FCC confirmed the judgment of the Appeals Commission for competition matters in "*Swisscom Directories AG*,"[33] according to which competition authorities in decisions may formally assert the existence of a dominant position although there is no evidence that the undertaking has abused its dominant position. Such an assertion has important consequences. Under Article 9(4), for example, a planned concentration must be notified whenever it appears that the FCC has already made a decision asserting the existence of a dominant position for that undertaking in Switzerland, and the concentration relates to the market in which the undertaking is dominant.

The FCC indicated finally that the ACart does not apply to collective bargaining among public hospitals, since these hospitals effectively form a single undertaking in the market. The FCC thus confirmed its view already expressed in a previous FCC decision dated September 8, 2006, that the ACart does not apply to internal relationships between Luzern's public hospitals. The fact that such relationships fall outside the ACart is inherent in the term "undertaking".

Abuse Of Dominant Position

Draft Decision Against Swisscom Alleges Abuse Of Dominant Position And Proposes Chf 237 Million Fine

On November 12, 2008, the Secretariat of the FCC issued a draft decision against Swisscom, alleging abuse of a dominant position in the area of ADSL services. The draft envisages sanctions in the amount of approximately CHF 237 million (approximately €160 million) as a result of allegedly overpriced ADSL setup services. According to the Secretariat, the investigation revealed that Swisscom abused its dominant position for broadband internet network capacity by means of a price or margin squeeze. The allegation is that the prices charged to consumers by its subsidiary, Bluewin, are so low, and the prices charged by Swisscom to ISPs for access to the network so high, that it is not possible for ISPs to remain in competition with Bluewin.

A Secretariat's draft decision is a procedural step in the investigation, in which the Secretariat communicates its preliminary view with respect to a possible infringement of Swiss competition laws. The draft is submitted to the parties concerned for comment. Both the draft decision and the parties' comments are then submitted to the FCC. Before concluding the investigation, the FCC may both conduct hearings with the parties to the investigation and instruct the Secretariat to take additional steps in the light of the investigation, or require that the reasoning on which the draft decision is based be amended. Any final decision of the FCC (including the assessment of fines) is subject to an appeal to the Federal Administrative Court.

Policy And Procedure

Swiss Supreme Court Acknowledges Limited Privilege For In-House Solicitors

On October 28, 2008, the Swiss Supreme Court ("SSC") extended the scope of legal professional privilege to communications between parties and their in-house solicitors in the context of Swiss competition law[34] by confirming the principle that internal communications involving in-house solicitors are protected from disclosure during competition investigations by the Federal Competition Commission. The privilege will extend to communications only that have not been revealed by a company's corporate body to other persons within the company, and that have been protected by a solicitor. That protection applies only to communications with in-house "solicitors" – a category deemed to exclude lawyers having yet to complete a bar exam. The SSC refused to extend the privilege to any correspondence or advice from external counsel that was kept on the company's premises.

The relevance of this extension of power is particularly relevant to one of the substantial amendments contained in the Competition Act of April 1, 2004 – namely the authority of the FCC to order house searches and seizures. Under this investigative power, the Secretariat of the FCC conducted its first dawn raids in 2006 and 2007 – thereby raising the issue of what protection (if any) should be extended to documents enjoying professional privilege. By reference to criminal precedents, the Secretariat has now excluded privileged documents from seizure, provided they are relevant to the investigation. The Secretariat also found that under Swiss law in-house lawyers are not subject to lawyers' professional secrecy.

34 Swiss Supreme Court, Judgment of October 28, 2008, 1B_101/2008, http://jumpcgi.bger.ch/cgi-bin/JumpCGI?id=28.10.2008_1B_101/2008.

The Court's findings also included a number of additional elements that will provide further comfort to companies active in Switzerland. During house searches, for example, the principle of proportionality must be respected. In issuing a search order, the Commission must be satisfied, *inter alia*, that there are reasonable grounds for believing that the premises to be searched contain documents relevant to the investigation. Companies whose premises are searched may request the sealing of seized documents or electronic data, if this material is privileged, or outside the scope of the investigation, in which case the Swiss Federal Criminal Court ("Bundesstrafgericht") will decide, upon request by the Commission, whether or not seized documents and data may be reviewed by the competition authorities. Any decision to leave a seal intact may be appealed before the Swiss Supreme Court.

UNITED KINGDOM

This section reviews developments under the Competition Act of 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/Restraints

Courts Rule Against Restitutionary Rewards In Antitrust Claims

On October 14, 2008, the Court of Appeals in *Devenish v. Sanofi-Aventis* confirmed the primacy of compensatory damages as the standard reward in cases involving private claims for damages in competition law cases.[35]

The case evolved from a series of follow-on damages claims before the English High Court flowing from the European Commission's 2001 Vitamins cartel decision.[36] Claims were brought by direct purchasers (animal feedstuff producers) and indirect purchasers (poultry producers) of vitamins to be incorporated into animal foodstuffs. The claimants sought either damages for their alleged losses, or restitution for the overcharging that resulted from the market-sharing and price-fixing agreements discovered by the European Commission.

The Court of Appeals considered the claimants to be entitled to compensation because the type of loss – an overcharge – was quantifiable. The evidence suggested that the loss had been passed on from direct purchasers to indirect purchasers – so preventing an award of compensatory damages to direct purchasers – which would make claims by indirect purchasers much less likely. The Court found, however, that there was no basis for a restitutionary award as the courts should not be "*in the business of transferring monetary gains from one undeserving recipient to another.*"

The Court further found that a claim for compensatory damages by direct purchasers required a proof of loss. In the event of on-sale to an indirect purchaser a direct purchaser would also face the additional hurdle of proving (in order to demonstrate its loss) that the overcharge had not been passed on.

The Court of Appeals held also that Community law did not require of English courts a restitutionary award as a remedy for any breach of competition law. Referring to the *Manfredi* judgment of the European Court of Justice,[37] the Court held that restitution was not required to ensure equivalence between domestic and Community remedies because, even if such awards were available in European antitrust context, they would be granted only in exceptional circumstances. These did not arise on the facts of the case.

The judgment is likely to be welcomed by defendants, since it will serve to limit liability in antitrust damages actions before the English courts. In denying restitution, and having determined that compensatory damages should be the applicable standard, the onus falls on claimants to evidence and quantify any losses resulting directly (and individually) from an antitrust infringement. Because indirect downstream purchasers will struggle to satisfy this evidentiary standard, the Court's judgment may yet stimulate further interest in bringing collective actions for damages.

Appeal Permitted Against Time Limitations In Private Damages Action

On December 9, 2008, the Court of Appeals granted BASF and others leave to appeal the CAT's ruling that the damages claim brought against them by BCL Old Co. Limited and others (the Claimants) remained live, and was not time-barred. The CAT had

35 *Devenish Nutrition Ltd. v. Sanofi-Aventis SA (France) & Others* [2008] EWCA Civ 1086, available at http://www.bailii.org/ew/cases/EWCA/Civ/2008/1086.html

36 Case No C.37.512 *Vitamins*, Commission decision of November 21, 2001.

37 Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi & Ors v. Lloyd Adriatico Assicurazioni SpA & Ors* [2006] ECR I-6619.

38 *BCL Old Co Limited and others v BASF SE and others* [2008] CAT 29, available at the CAT website.

39 Case No. C.37.512 *Vitamins*, Commission decision of November 21, 2001.

40 Case T-15/02 BASF *AG v. Commission* [2006] ECR-II 497.

refused BASF's application for leave to appeal in October 2008[38], but the Court of Appeals considered that BASF's argument that the claim was time-barred had a real prospect of success, and that further points raised by BASF merited further consideration.

The litigation flowed from an infringement of Article 81 EC by BASF. In its 2001 Vitamins decision,[39] the Commission found that BASF had been party to a cartel that fixed prices for different vitamin products, allocated sales quotas, and agreed the timing of price announcements and the implementation of price increases. As a result, substantial fines were imposed on BASF, which were reduced on appeal by the Court of First Instance.[40]

On March 13, 2008, a claim for damages under section 47A of the Competition Act 1998 was brought against BASF by the Claimants on the basis that (i) they had been indirect purchasers of relevant vitamin products, and (ii) they had suffered loss and damage as a result of the antitrust infringement identified by the Commission. The present appeal resulted from BASF's submission that this follow-on damages claim was invalid by reason of the lapse in time. The CAT Rules of Procedure (CAT Rules) provide that a claim for damages under section 47A must be brought within two years of the "relevant date." The CAT Rules define the relevant date as the later of: (i) the date on which the cause of action accrued; (ii) the date on which a right to bring an appeal expires; and (iii) the date of the final judgment in an appeal (Rule 31(2)).

By reference to the CAT rules, BASF contended that the "relevant date" should be construed as the expiry of the possibility of an appeal by BASF against the substantive findings of the Commission's infringement decision. In accordance with this reasoning, any claim made after January 2002 would be invalid. The Claimants counter-argued that BASF's appeal to the CFI, in which it contested the amount of the fine, served to extend the applicable time period for an appeal. The Claimants maintained that the calculation of the two-year limitation period should refer to the proceedings before the CFI. In its ruling of 25 September 2008, the CAT accepted the Claimants' arguments, and held that the "relevant date" fell on the expiry of the period during which an appeal against the judgment of the CFI could have been instituted in the ECJ. The Claimants' claim was valid, therefore.[41]

In its appeal of the CAT's ruling, BASF will likely argue that for the purpose of establishing the limitation period for follow-on damages actions, reference should be made only to appeals against the substantive findings of an infringement decision – and not to proceedings contesting the level of a fine. The Court of Appeals's judgment on this issue is of pressing relevance to the UK's burgeoning competition litigation. If the Court of Appeals endorses the CAT ruling, the exposure of infringing firms to damages actions will be increased significantly; such firms will need to balance carefully the merit of appealing Commission (fining) decisions against the risk of significantly extending the period in which follow-on claims may be brought in English courts. Should the Court of Appeals reject the CAT ruling, it will be imperative that future claimants begin litigation proceedings without delay.

Mergers And Acquisitions

CC Issues Revised Remedies Guidelines

On November 26, 2008, the CC issued new guidelines on merger remedies.[42] They provide welcome clarification in respect of the CC's acceptance of behavioral remedies in the following circumstances: (i) where divestiture is not feasible, or associated costs are disproportionate compared to a merger's likely anticompetitive effects; (ii) anticompetitive effects are expected to be of relatively short duration (*e.g.*, two to three years); or (iii) where behavioral rather than structural remedies are likely to preserve substantial customer benefits accruing from the contemplated merger.

The Guidelines identify two principle types of behavioral remedies: (i) "enabling measures", which address a "substantial lessening of competition" ("SLC") by removing obstacles to (or stimulating) competition (*e.g.*, access remedies and prohibitions on bundling or predation); and (ii) "controlling measures", which restrict the adverse impact of an SLC (*e.g.*, price caps, supply commitments and service level undertakings). Behavioral remedies should avoid the risk of default in cases where remedies require extensive compliance monitoring, and also the risk that any restriction of certain conduct (such as the imposition of high prices) may lead to adverse outcomes (such as lower quality products or services).

The new Guidelines also clarify the relevance of IP rights to the creation of optimal remedies. The CC notes, for example, its preference for the divestment of a business to include the transfer of any attached IP rights – as opposed to a standalone transfer involving the separation of a significant feature of the asset's value. This is subject to an acknowledgment that any reliance by a licensee on a licensor for technological updates or continuing specialist knowledge is likely to be considered ineffective.

41 *BCL Old Co Limited and others v BASF SE and Others [2008] CAT 24.*

42 "CC8 Merger Remedies: Competition Commission Guidelines"

Other factors relevant to the CC assessment of IP remedies include the extent to which a right is considered specialist (with specialized rights likely to prove less attractive commercially) and the rate of innovation predicted for a relevant market, with the duration of any remedy likely to be curtailed during periods of intense innovation. The Guidelines consider also the form that consideration may take in the purchase of IP rights, noting specifically that periodic payments (such as royalties or profit shares) risk distorting a party's competitive incentives. Further, and irrespective of the asset or the industry, the Guidelines establish a new criterion for determining the suitability of a purchaser, namely that interested parties' demonstrate by way of a business plan their "commitment to the relevant market". The CC will continue to cooperate with the OFT in its review of the merger assessment guidelines, with plans to produce joint substantive guidance for consultation in 2009.

Cc Prohibits Merger Following Extensive Remedies Discussions

On December 18, 2008, the Commission prohibited the acquisition by BOC Limited ("BOC") of the chlorine packaging and distribution business of Ineos Chlor Limited ("Ineos").[43] The CC concluded that the proposed merger would have resulted in a SLC in the UK's affected markets. The CC came to its conclusion notwithstanding the complex range of potential remedies. Ineos is vertically integrated across the supply chain – manufacturing, supplying, packaging and distributing chlorine products – but the CC's analysis focused instead on the distribution of packaged chlorine products, the only area of direct horizontal overlap between the parties.

The CC identified only four distributors of packaged chlorine in the UK: Ineos, BOC, Albion, and Air Products. The proposed merger would have increased market concentration substantially, and eliminated also the rivalry between BOC and its closest competitor, Ineos. Entry into, and expansion within, the relevant distribution markets was deemed unlikely, and the CC found that purchasers would not be able to discipline effectively the competitive conduct of a merged BOC/Ineos. Having concluded that the merger would dissipate competition in affected markets, the CC discussed possible remedies with the parties, extending the deadline for the production of its final report by some two months to accommodate negotiations.

The CC examined in detail the sale of a package of assets and contracts to a suitable purchaser, together with a chlorine supply agreement that would have required the provision of wholesale packaged chlorine (and mechanisms to regulate prices) on terms to be defined by the CC. These proposals were designed to create an independent competitor capable of replacing Ineos. However, following the submission of multiple divestment proposals, the CC's concerns remained unaddressed, particularly its fears for the impact of the proposed divestments on post-merger prices. The CC was not satisfied by the broader terms and overall functioning of the chlorine supply agreement, and it was alarmed particularly by the prospect of having (in principle) to regulate the operations of a market with a UK turnover of less than £10 million (€11 million).

Given the parties' inability to formulate a satisfactory package of remedies, the CC prohibited the merger – only the third such prohibition since the introduction of the current merger control regime in 2003.

43 "BOC Limited / Ineos Chlor Limited Final Report", available at the CC website.

NEW YORK

One Liberty Plaza
New York, NY 10006-1470
T: 1 212 225 2000
F: 1 212 225 3999

WASHINGTON

2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
T: 1 202 974 1500
F: 1 202 974 1999

PARIS

12, Rue de Tilsitt
75008 Paris, France
T: 33 1 40 74 68 00
F: 33 1 40 74 68 88

BRUSSELS

Rue de la Loi 57
1040 Brussels, Belgium
T: 32 2 287 2000
F: 32 2 231 1661

LONDON

City Place House
55 Basinghall Street
London EC2V 5EH, England
T: 44 20 7614 2200
F: 44 20 7600 1698

MOSCOW

Cleary Gottlieb Steen & Hamilton LLP
CGS&H Limited Liability Company
Paveletskaya Square 2/3
Moscow 115054, Russia
T: 7 495 660 8500
F: 7 495 660 8505

FRANKFURT

Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
T: 49 69 97103 0
F: 49 69 97103 199

COLOGNE

Theodor-Heuss-Ring 9
50668 Cologne, Germany
T: 49 221 80040 0
F: 49 221 80040 199

ROME

Piazza di Spagna 15
00187 Rome, Italy
T: 39 06 69 52 21
F: 39 06 69 20 06 65

MILAN

Via San Paolo 7
20121 Milan, Italy
T: 39 02 72 60 81
F: 39 02 86 98 44 40

HONG KONG

Bank of China Tower
One Garden Road
Hong Kong
T: 852 2521 4122
F: 852 2845 9026

BEIJING

Cleary Gottlieb Steen & Hamilton LLP
Twin Towers – West
12 B Jianguomen Wai Da Jie
Chaoyang District
Beijing 100022
T: 86 10 5920 1000
F: 86 10 5879 3902